

ORIGINAL



0000035229

RECEIVED
BEFORE THE ARIZONA CORPORATION COMMISSION

25FD

1
2 COMMISSIONERS

2005 NOV 18 P 2:22

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

AZ CORP COMMISSION
DOCUMENT CONTROL

8 IN THE MATTER OF THE FORMAL
9 COMPLAINT OF ACCIPITER
10 COMMUNICATIONS, INC., AGAINST
11 VISTANCIA COMMUNICATIONS, L.L.C., SHEA
12 SUNBELT PLEASANT POINT, L.L.C., AND COX
13 ARIZONA TELECOM, LLC.

DOCKET NO. T-03471A-05-0064

PROCEDURAL ORDER

14 **BY THE COMMISSION:**

15 On January 31, 2005, Accipiter Communications, Inc. ("Accipiter") filed with the Arizona
16 Corporation Commission ("Commission") a formal complaint against Vistancia Communications,
17 L.L.C. ("Vistancia"), Shea Sunbelt Pleasant Point, L.L.C. ("Shea Sunbelt"), and Cox Arizona
18 Telcom, L.L.C. ("Cox").

19 On February 22, 2005, Cox filed a Motion to Dismiss stating that Accipiter's Complaint fails
20 to state claims upon which relief can be granted; seeks relief beyond the jurisdiction of the
21 Commission; and seeks relief without the joinder of indispensable parties.

22 On February 28, 2005, counsel for Vistancia and Shea Sunbelt filed a letter to the
23 Commission stating that Vistancia and Shea Sunbelt are not public service corporations and do not
24 hold Certificates of Convenience and Necessity from the Commission and therefore the Commission
25 has no jurisdiction over them.

26 On April 15, 2005, a Procedural Order was issued directing Staff to file by May 6, 2005, a
27 pleading in response to the legal arguments raised by Accipiter and the various responsive pleadings
28 filed by Cox and Accipiter. Staff was also directed to respond to the jurisdictional claims raised by
Vistancia and Shea.

By Procedural Order issued May 2, 2005, a Procedural Conference was scheduled for May 4,
2005 to discuss procedural matters including a Motion to Compel discovery filed by Staff. The
Procedural Conference was conducted as scheduled on May 4, 2005.

1 On May 20, 2005, Staff filed its Response to the jurisdictional claims raised by Cox,
2 Vistancia, and Shea.

3 On May 23, 2005, a letter was filed in the docket by Commissioner Marc Spitzer regarding
4 the effect of a Resolution approved by the City of Peoria.

5 On May 31, 2005, a Memorandum from the Commission's Chief Counsel was filed
6 responding to the "City of Peoria Issues."

7 On May 31, 2005, Cox filed a Reply to the Staff Response Regarding Accipiter Complaint.

8 Also on May 31, 2005, Accipiter filed a Response to Staff's Brief Regarding Cox's Motion to
9 Dismiss.

10 By Procedural Order issued June 2, 2005, oral arguments were scheduled for June 9, 2005 to
11 discuss the jurisdictional claims and legal arguments raised in the pleadings.

12 On June 6, 2005, Commissioner Spitzer filed a letter regarding a pending action in Federal
13 District Court alleging unfair competition under the 1996 Telecommunications Act.

14 On June 9, 2005, oral argument was conducted with respect to the jurisdictional issues raised
15 in various pleadings.

16 On June 9, 2005, Vistancia and Shea filed a letter indicating their intent to cancel the
17 easement arrangements approved by the City of Peoria and replace them with a public utility
18 easement.

19 On June 16, 2005, Vistancia and Shea filed a letter providing additional information to Staff
20 regarding the conversion of the private multi-use easement arrangements and public utility easements
21 discussed in the June 9, 2005 letter.

22 On June 16, 2005, Staff filed a Status Report on Settlement Negotiations indicating that
23 discussions between the parties had been productive, but additional time was needed to complete
24 negotiations.

25 Also on June 16, 2005, Accipiter filed a letter agreeing to continue to engage in settlement
26 discussions as long as such discussions appear to be fruitful. However, Accipiter reserved the right to
27 file an amended complaint.

28 On June 28, 2005, Commissioner Spitzer filed a letter in the docket raising concerns with the

1 concept of private easements and the offer of Vistancia and Shea to substitute those arrangements
2 with public utility easements, regardless of the outcome of a negotiated settlement.

3 Settlement discussions have continued over the past several months and, on October 27, 2005,
4 Staff filed a Request for a Procedural Conference to discuss an anticipated settlement agreement
5 between Accipiter and the respondents.

6 By Procedural Order issued November 1, 2005, a procedural conference was scheduled for
7 November 17, 2005.

8 On November 8, 2005, Accipiter filed a Notice of Withdrawal with Prejudice. Accipiter
9 indicated that the request to withdraw the complaint was based on its settlement agreement with the
10 respondents (but not Staff).

11 On November 16, 2005, counsel for Vistancia¹, Michael Grant, filed a letter stating that he
12 would participate in the public comment portion of the November 17, 2005 procedural conference to
13 answer questions, subject to reservation of Vistancia's claim that such participation not be considered
14 an appearance in the docket and that his participation not be considered a waiver of Vistancia's claim
15 that it is not subject to the Commission's jurisdiction.

16 The November 17, 2005 procedural conference was held as scheduled. During the procedural
17 conference, Accipiter and the respondents argued that the Complaint should be dismissed, with
18 prejudice, as requested in Accipiter's November 8, 2005 filing. The respondents contend that the
19 settlement agreement should remain confidential, although Cox handed out a document entitled
20 "Summary of Key Settlement Agreement Terms."

21 Staff, on the other hand, proposed, among other things, that: the docket should remain open to
22 address policy issues raised by the Complaint; the settlement agreement should be made public; and a
23 hearing should be held to determine the reasonableness of the settlement.

24 IT IS THEREFORE ORDERED that Staff shall file, by no later than December 19, 2005, a
25 Memorandum or Staff Report setting forth, at a minimum: the procedure proposed by Staff for
26 handling a docket where the Complainant no longer wishes to pursue its Complaint due to settlement
27

28 ¹ According to Mr. Grant's letter, Shea Sunbelt Pleasant Point, LLC, is now known as Vistancia, LLC.

1 of its claims; whether Staff should be substituted as the Complainant and, if so, the allegations that it
2 wishes to pursue against the respondents; alternatively, whether Staff should initiate an Order to
3 Show Cause proceeding based on Staff's allegations; whether the settlement agreement between
4 Accipiter and the respondents should be made public and a hearing should be held to address whether
5 the agreement is in the public interest prior to dismissal of the Complaint; whether this docket should
6 be consolidated with the pending generic docket on preferred carrier arrangements (Docket No.
7 00000K-04-0927); and any other proposals for processing this docket in accordance with due process
8 considerations and the public interest.

9 IT IS FURTHER ORDERED that Accipiter, Cox, and Vistancia shall file Responses to
10 Staff's proposals, by no later than January 9, 2006.

11 IT IS FURTHER ORDERED that nothing in this Procedural Order should be considered an
12 indication as to the Commission's view of whether the settlement agreement should be considered
13 proprietary or regarding the need for a hearing to determine whether the agreement is in the public
14 interest.

15 IT IS FURTHER ORDERED that the Administrative Law Judge may rescind, alter, amend,
16 or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at
17 hearing.

18 Dated this 18th day of November, 2005

19
20 

21 DWIGHT D. NODES
22 ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE

23 Copies of the foregoing mailed/delivered
this 18 day of November, 2005 to:

24 Martin A. Aronson
25 William D. Cleaveland
26 MORRILL & ARONSON, P.L.C.
27 One East Camelback Road, Ste. 340
28 Phoenix, AZ 85012
Attorneys for Accipiter Communications, Inc.

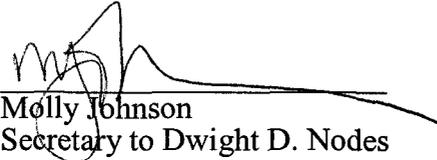
1 Michael M. Grant
2 GALLAGHER & KENNEDY, P.A.
3 2575 East Camelback Road
4 Phoenix, AZ 85016-9225
5 Attorneys for Vistancia Communications, L.L.C.
6 and Shea Sunbelt Pleasant Point, L.L.C.

7 Michael W. Patten
8 ROSHKA, DeWULF & PATTEN, PLC
9 400 E. Van Buren, Ste. 800
10 Phoenix, AZ 85004-2262
11 Attorneys for Cox Arizona Telcom, L.L.C.

12 Mark DiNunzio
13 Cox Arizona Telcom, L.L.C.
14 1550 W. Deer Valley Rd.
15 MS:DV3-16, Bldg. C
16 Phoenix, AZ 85027

17 Christopher Kempley, Chief Counsel
18 Legal Division
19 ARIZONA CORPORATION COMMISSION
20 1200 West Washington Street
21 Phoenix, AZ 85007

22 Ernest G. Johnson, Director
23 Utilities Division
24 ARIZONA CORPORATION COMMISSION
25 1200 West Washington
26 Phoenix, AZ 85007

27 By: 
28 Molly Johnson
Secretary to Dwight D. Nodes