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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
DOCUMENT CONTROL

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.

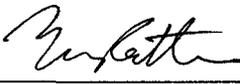
DOCKET NO. T-03471A-05-0064

NOTICE OF FILING

Pursuant to the February 13, 2006 Procedural Order, Cox Arizona Telcom, LLC ("Cox") hereby files its responses to Staff's 10th set of data requests in this docket.

RESPECTFULLY SUBMITTED this 26th day of April 2006.

COX ARIZONA TELCOM, LLC.

By 
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Original and 13 copies of the foregoing filed this 26th day of April 2006 with:

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1 Copy of the foregoing hand-delivered/mailed
2 this 26th day of April 2006 to:

3 Dwight Nodes, Esq.
4 Administrative Law Judge
5 Hearing Division
6 Arizona Corporation Commission
7 1200 West Washington Street
8 Phoenix, Arizona 85007

9 Maureen A. Scott, Esq.
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11 Arizona Corporation Commission
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13 Phoenix, Arizona 85007

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16 Arizona Corporation Commission
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By Mary Appolits

COX ARIZONA TELCOM, LLC
RESPONSES TO
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STF 10.2

Information sent to new homebuyers using Cox letterhead, see page CX00806, states "Cox Communications has been selected by Vistancia to provide you with the latest in communications services...Cox Communications can offer you our full-service communications package including Cox Digital Cable, Cox High Speed Internet and Cox Telephone service." Please explain why this information should not be intended to convey:

- a. Customers had no choice but to accept Cox for their communications services, including telephone service.
- b. Cox was an active participant in the determination of the selection made on behalf of customers.

RESPONSE:

Cox objects to this request on the grounds that it is vague and ambiguous, argumentative, incorrectly assumes that customers had no choice, and irrelevant. Notwithstanding such objections and without waiving same, Cox states that the letter referenced by the data request is the standard letter that Cox sends to residents in *all* developments where Cox is the preferred provider. The text of the letter used the standard letter template, adding in only the specific development name. Other than the use of the development name "Vistancia" and the insertion of the appropriate representative's name, the letter was not unique to the Vistancia development and has been used in other developments both prior to and subsequent to the commencement of service to Vistancia.

Moreover, Cox disagrees with the suggestion by Staff that consumers had no choice but to accept Cox for their communications services, including telecommunications. There is nothing in any of the information sent to new homebuyers that conveys that consumers did not have a choice in any of the communications services. Consumers have choices other than Cox for telecommunications services. VoIP providers such as Vonage and many wireless providers such as Sprint and Verizon are all alternatives. In addition, the use of the phrase "has been selected" does not mean other providers could not provide services. At most, Cox had been selected as the preferred provider in Vistancia.

Cox also disagrees with Staff's suggestion that Cox was an active participant in the determination of the selection made on behalf of customers. It is Cox's understanding that Shea wanted to assure voice, data and video services to Vistancia home buyers at the time of move in - which is typically one of the benefits of a preferred provider arrangement - and, presumably, that Shea was most comfortable relying on Cox to

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assure timely delivery of these services. Cox provides several services throughout the Vistancia community. Cox made a business decision to offer its services throughout the Vistancia development to any and all customers who choose Cox as a provider for their communications needs. Consumers are in no way obligated to utilize Cox Communications for any services.

RESPONDENT: Cox Legal
Mark DiNunzio
Director, Regulatory Affairs

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STF 10.3

Pages CX03583 - CX03586 contain "pending buyers" information.
Please explain:

- a. Was such information considered confidential by Vistancia?
- b. If so, by what authority did Cox have access to such confidential information?
- c. Did any other telecommunications providers have access to "pending buyers" information?

RESPONSE:

Cox objects to this request on the grounds that it is vague and ambiguous and irrelevant. Notwithstanding such objections and without waiving same, Cox states that:

- a. Cox does not know if Vistancia considered the information to be confidential, but Vistancia provided the information to Cox.
- b. Not applicable.
- c. Cox does not know if other telecommunications providers had access to the information.

RESPONDENT:

Cox Legal

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STF 10.4 Point (L) on the Vistancia Deal Point Sheet, CX03414 – CX03416, states “allow Cox to use technology displays as a model to advertise, demonstrate, promote and develop the Communication Services and to conduct third party tours (excluding tours for owners, agents and promoters of other master planned communities in Peoria or other applicable governmental authority and excluding other telecommunications services providers), including producing photographs, video tape, film or other media presentations relating to provision of Communication Services to the Property;” Please explain why the exclusion of other telecommunications providers:

- a. Should not be considered to be anti-competitive?
- b. Should not be considered intentional in design?

RESPONSE: Cox objects to this request on the grounds that it is vague and ambiguous, argumentative, irrelevant, appears to misunderstand laws relating to competition and anti-trust, and seeks a legal discussion of anti-trust laws and anti-competitive behavior. Notwithstanding those objections and without waiving same, Cox states the referenced document contains proposed terms related to the negotiation of the preferred marketing arrangements. The actual terms of the exclusive marketing arrangement are set forth in the now-extinguished Co-Marketing Agreement.

Moreover, Part 5 of the referenced document (of which referenced Subpart L is a part) **addressed what the parties would do in “Support of any Grand Opening activities highlighting the Vistancia Community.”** See Part 5 on CX 03414. The referenced phrase is intended only to carve out certain tour obligations during Grand Opening activities and is not intended to be anticompetitive in any way. Nothing in the referenced language can be considered anti-competitive or “intentional in design.” Finally, Cox states that it did not intend to engage in anti-competitive conduct and believes that it did not engage in any anti-competitive conduct.

RESPONDENT: Cox Legal

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STF 10.5

Vistancia – Memo on Cox letterhead, see CX04771, includes in its Base Case Scenario “Penetration rates assumes that Cox will be the exclusive telephone provider with a corresponding telephone penetration starting at 70% and increasing over time to 90%.” Please explain why Cox’s assumption that penetration rates will increase over time to nearly 100% should not be illustrative of Cox’s belief that a monopoly and, therefore, anti-competitive situation would evolve in Vistancia?

RESPONSE:

Cox objects to this request on the grounds that it is vague and ambiguous, argumentative, irrelevant, appears to misunderstand laws relating to competition and anti-trust, and seeks a legal discussion of anti-trust laws and anti-competitive behavior. Notwithstanding those objections and without waiving same, the document referred to by this request was created early in the negotiation process and well prior to the Vistancia’s imposition of the private easement arrangement. The document reference is part of an internal financial analysis that simply sets forth a particular set of assumptions that may or may not arise from a preferred provider arrangement in order to understand a possible financial result of providing service. Such assumptions are not guarantees of what will result. Rather, the assumptions are reflective of a potential impact from the type of preferred provider agreement that had been previously approved by the Commission.

Moreover, the Commission has approved preferred provider arrangements that allowed Qwest to avoid compensating a developer for exclusive marketing arrangements under a preferred provider agreement if 100% penetration was not reached under one agreement (Civano) and 95% penetration was not reached in another (Anthem). See Decision No. 61626 and Qwest preferred provider agreements attached to the underlying applications (See Docket Nos. T-01051B-98-731, T-01051B-99-0057).

Finally, Cox states that it did not intend to engage in anti-competitive conduct and believes that it did not engage in any anti-competitive conduct.

RESPONDENT:

Cox Legal

COX ARIZONA TELCOM, LLC
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STF 10.6

Please provide the names of all the Cox in-house attorneys and outside attorneys hired by Cox who reviewed the "private easement" and "preferred provider" agreements.

RESPONSE:

Cox objects to this request on the grounds that it is vague and ambiguous and may be seeking confidential attorney-client communications. Notwithstanding those objections and without waiving same, Cox states that Kristen Duggan Weathersby, Jennifer Hightower, and Mark Padilla, all in-house counsel in Atlanta, had preliminary involvement in providing legal oversight in early Fall of 2002. Ms. Weathersby's role was limited to providing preliminary, general advice, and she did not review any of the draft agreements. Ms. Hightower's involvement was limited to reviewing an early draft of the Co-Marketing Agreement – a draft that did not include an MUE arrangement. Mr. Padilla's involvement was limited to involvement in the initial draft of the Master Property Access Agreement – a draft that did not include an MUE arrangement. However, in late September 2002, Linda Trickey joined Cox's legal department and shortly thereafter assumed responsibility for providing legal oversight for both the residential and commercial agreements. Ms. Trickey was the only Cox lawyer to review the revised agreements drafted by Shea that incorporated the MUE arrangement. No outside counsel was retained to review the Vistancia private easement or preferred provider agreements prior to their execution.

RESPONDENT:

Cox Legal

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STF 10.7

Please provide the name and title of the highest level(s) of management with Cox who reviewed the final "private easement" and "preferred provider" agreements.

RESPONSE:

Cox objects to this request on the grounds that it is vague and ambiguous as to what is meant by "reviewed" and when the "review" occurred and what agreements are being referenced. Notwithstanding that objection and without waiving same, Cox states that Howard Tigerman, Vice President of Business Operations, executed the Co-Marketing Agreement, the Property Access Agreement, the Amended and Restated Co-Marketing Agreement, and the Amended and Restated Property Access Agreement on behalf of CoxCom, Inc.

RESPONDENT:

Cox Legal

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STF 10.8 Does Cox confirm that the Co-Marketing Agreement for Vistancia was entered into on April 8, 2003? If "no," please explain.

RESPONSE: Cox objects to this request on the grounds that it is vague and ambiguous as to what is meant by "entered into." Notwithstanding this objection and without waiving it, Cox states that the Co-Marketing Agreement was entered into effective April 8, 2003.

RESPONDENT: Cox Legal

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STF 10.9 Does Cox confirm the email dated May 27, 2003 from Lesa J. Storey, a founding partner and attorney at Storey & Burnham PLC, to, among others, Cox attorney Linda Trickey, see CX06578? If "no," please explain.

RESPONSE: Cox objects to this request on the grounds that it is vague and ambiguous. Notwithstanding this objection and without waiving same, Cox states that the May 27, 2003 email was received by Cox.

RESPONDENT: Linda Trickey, Cox Communications

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STF 10.10 Does Cox confirm that the Common Services Easements and Restrictions Agreement was entered into on June 10, 2003? If "no," please explain.

RESPONSE: Cox objects to this request on the grounds that it is vague and ambiguous as to what is meant by "entered into." Notwithstanding this objection and without waiving it, Cox states that Cox did not enter into the Common Service Easement and Restrictions Agreement

RESPONDENT: Cox Legal

COX ARIZONA TELCOM, LLC
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STF 10.11 Does Cox confirm that the Amended and Restated Co-Marketing Agreement for Vistancia was entered into on September 25, 2003? If "no," please explain.

RESPONSE: Cox objects to this request on the grounds that it is vague and ambiguous as to what is meant by "entered into." Notwithstanding this objection and without waiving it, Cox states that the Amended and Restated Co-Marketing Agreement for Vistancia was entered into effective September 25, 2003.

RESPONDENT: Cox Legal

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STF 10.12

An email, dated May 27, 2003, from Lesa J. Storey, a founding partner and attorney at Storey & Burnham PLC, see CX06578, states "We are delivering these documents to you because, under the terms of the Co-Marketing Agreement for Vistancia, Cox has the right to review and approve the CSER prior to recording it."

RESPONSE:

Cox objects to this request on the grounds that the request is vague and ambiguous and does not appear to require a response.

RESPONDENT:

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STF 10.13

Referring to the email dated May 27, 2003 by Lesa J. Storey, a founding partner and attorney at Storey & Burnham PLC, to, among others, Cox attorney Linda Trickey, see CX06578, please explain:

- a. Cox responses to STF 4.5 and 6.5 which state in part that the private easement arrangement was "imposed" on Cox when Cox appears to have had the "right to review and approve the CSER prior to recording it."
- b. Why Cox decided to amend the Co-Marketing Agreement signed on April 8, 2003?
- c. Why Cox waited until September 25, 2003 to enter into the Amended and Restated Co-Marketing Agreement?
- d. Which Cox in-house attorneys and outside attorneys hired by Cox reviewed one or more of the agreements.
- e. The name and title of the highest level of Cox management who reviewed one or more of the agreements.

RESPONSE:

Cox objects to this request on the grounds that it is vague and ambiguous, argumentative, and irrelevant. Notwithstanding such objections and without waiving same, Cox states as follows:

- a. As set forth in the testimony of Tisha Christle, in the Fall of 2002, Cox initially drafted standard preferred provider contracts and presented those contracts to Shea. However, Shea informed Cox in December 2002 that it would revise the draft preferred provider agreements that Cox had prepared in order to provide for the MUE arrangement that had been found to be legal elsewhere. Shea provided the draft CSER, which Shea indicated was one of the agreements necessary to effectuate the MUE arrangement. The MUE arrangement was used at Shea's insistence after assurances by Shea that the MUE arrangement had been found legal.
- b. Cox objects to this request to the extent that it implies that Cox made the decision to amend the Co-Marketing Agreement. Notwithstanding this objection and without waiving it, Cox states that, as set forth in the testimony of Tisha Christle and Linda Trickey, it was Shea that decided to amend the Co-Marketing Agreement, and Shea provided Cox with a draft of the amended agreement.
- c. Cox objects to this request to the extent that it implies that Cox made the decision to wait until September 25, 2003, to enter into the Amended and Restated Co-Marketing Agreement. Notwithstanding this

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objection and without waiving it, Cox responds as set forth in subparagraph b above.

d. Cox objects to this request as vague and ambiguous as to the meaning of "one or more of the agreements." Notwithstanding this objection and without waiving it, see Response to STF 10.6 above.

e. Cox objects to this request as vague and ambiguous as to the meaning of "one or more of the agreements" and as to the timing of the review. Notwithstanding this objection and without waiving it, Cox states that Howard Tigerman, Vice President of Business Operations, executed the Amended and Restated Co-Marketing Agreement and the Amended and Restated Property Access Agreement.

RESPONDENT: Cox Legal

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STF 10.14

Page CX05963, written on Cox letterhead, contains a handwritten note that states "Shea has a third party entity that has way to lockout legally any other access rights." Please explain:

- a. The name and title of the individual who authored the handwritten note.
- b. The name of the third party entity referenced in the hand written note.
- c. Why the handwritten note should not be considered anti-competitive?
- d. If Cox ever conveyed to the author of the note, Cox's official position against anti-competitive behavior? If so, please provide any available supporting documentation.

RESPONSE:

Cox objects to this request on the grounds that it is vague and ambiguous, argumentative, incorrectly assumes that customers had no choice, and irrelevant. Notwithstanding such objections and without waiving same, Cox states as follows:

- a. As set forth in the testimony of Tisha Christle, the handwritten notes on CX05963 are believed to have been authored by Dan Sjostrom, then Senior Financial Analyst.
- b. Cox objects to the request on the ground that it calls for speculation and seeks information as to what another party meant. Notwithstanding this objection and without waiving it, Cox now believes that Shea was referencing Vistancia Communications, the access entity under the MUE.
- c. Cox objects to this request on the ground that it is argumentative, appears to misunderstand laws relating to competition and anti-trust, and seeks a legal discussion of anti-trust laws and anti-competitive behavior. Notwithstanding this objection and without waiving it, Cox states, as set forth in the testimony of Tisha Christle, Dan Sjostrom was merely documenting what Shea representatives stated at a meeting in the Fall of 2002. The note itself confirms that the arrangement imposed by Shea was represented to have been found to be "legal[.]".
- d. Cox objects to this request as vague and ambiguous and irrelevant. Notwithstanding this objection and without waiving it, Cox further states that Dan Sjostrom was the financial analyst who determined the amount of capital contribution that would be required from Shea and was tasked only with providing financial information. He had no role in drafting, reviewing, or approving the contract terms. It is completely irrelevant what, if any, information Cox provided to Dan Sjostrom about anti-

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competitive behavior.

RESPONDENT: Cox Legal

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STF 10.15

Page CX09005 contains a memorandum, dated March 24, 2003, from Lesa J. Storey, a founding partner and attorney at Storey & Burnham PLC, to, among others, Cox attorney Linda Trickey. The memorandum states in part:

“Curt indicated that a concern had been raised by Cox regarding its obligations under the “most favored nations” provision that appears in Section 6(d) of the Property Access Agreement and Section S(a)(iv) of the Co-Marketing Agreement. That provision is not intended to impose any material obligation on Cox; instead, it imposes obligations on the Master Developer (Shea Sunbelt Pleasant Point. LLC) and on the Access Entity (Vistancia Communications, L.L.C.), by requiring them not to enter into agreements with other communication service providers (i.e., providers other than Cox) on terms that are more favorable than those given to Cox.”

Please explain:

- a. The nature of Cox's concern related to the “most favored nations” clause. Please provide any supporting documentation.
- b. Cox's actions related to that concern. Please provide any supporting documentation.
- c. Why Cox seeking or imposing a restriction on Vistancia regarding other telecommunications providers should not be considered anti-competitive.

RESPONSE:

Cox objects to the extent that the request calls for privileged communications. Notwithstanding this objection and without waiving it, Cox responds as follows:

- a. As set forth in the testimony of Linda Trickey and any attachments thereto, Ms. Trickey generally recalls that she did not understand the “most favored nations” provision and asked for clarification from Lesa Storey. The “most favored nations” provision was unclear as to what, if any, obligations were intended to be imposed on Cox.
- b. As set forth in the testimony of Linda Trickey and any attachments thereto, Ms. Trickey asked for and received clarification from Ms. Storey.
- c. Cox objects to this request because it incorrectly assumes that Cox sought or imposed any restrictions on Vistancia regarding other telecommunications providers and because it is argumentative, appears to misunderstand laws relating to competition and anti-trust, and seeks a

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legal discussion of anti-trust laws and anti-competitive behavior. Notwithstanding this objection and without waiving it, Cox states that Cox did not seek or impose a restriction on Vistancia regarding other telecommunications providers, that it did not intend to engage in anti-competitive conduct and that it believes it did not engage in any anti-competitive conduct.

RESPONDENT: Cox Legal