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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, CHAIRMAN

WILLIAM A. MUNDELL

MIKE GLEASON

KRISTIN K. MAYES

BARRY WONG

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

The Arizona Corporation Commission Utilities Division ("Staff") hereby provides Notice of Filing of the Rejoinder Testimonies of Elijah Abinah (Redacted Version), Matthew Rowell and Armando Fimbres (Redacted Version). A Confidential version of Armando Fimbres' and Elijah Abinah's Rejoinder Testimony has also been provided under seal to the Commissioners, their Assistants, the assigned Administrative Law Judge and the parties that have signed the Protective Agreement in this case.

RESPECTFULLY SUBMITTED this 15th day of August, 2006.

Arizona Corporation Commission
DOCKETED

AUG 15 2006

DOCKETED BY NR

By

Maureen A. Scott

Maureen A. Scott, Senior Staff Counsel
Keith A. Layton, Staff Counsel
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007
(602) 542-3402

Original and 13 copies of the foregoing filed this 15th day of August, 2006, with:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

AZ CORP COMMISSION
DOCUMENT CONTROL

2006 AUG 15 P 12:44

RECEIVED

1 Copies of the foregoing mailed this
2 15th day of August, 2006, to:

3 Martin A. Aronson, Esq.
4 Morrill & Aronson
5 One East Camelback Road, Suite 340
6 Phoenix, Arizona 85012-1648
7 Counsel for Accipiter Communications, Inc.

8 Mark DiNunzio
9 Cox Arizona Telcom, LLC
10 1550 West Deer Valley Road
11 MS: DV3-16, Building C
12 Phoenix, Arizona 85027

13 Michael W. Patten, Esq.
14 Roshka DeWulf & Patten, P.L.C
15 One Arizona Center
16 400 East Van Buren Street, Suite 800
17 Phoenix, Arizona 85004
18 Counsel for Cox Arizona Telcom

19 Michael M. Grant, Esq.
20 Gallagher & Kennedy, PA
21 2575 East Camelback Road
22 Phoenix, Arizona 85016-9225
23 Attorneys for Shea and Vistancia
24 Communications

25
26
27
28


Abinah

BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner
BARRY WONG
Commissioner

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

REJOINDER

TESTIMONY

OF

ELIJAH ABINAH

ASSISTANT DIRECTOR

UTILITIES DIVISION

ARIZONA CORPORATION COMMISSION

[REDACTED]

AUGUST 15, 2006

**EXECUTIVE SUMMARY
COX ARIZONA TELCOM, L.L.C.
DOCKET NO. T-03471A-05-0064**

My Rejoinder Testimony responds to the Cox Rebuttal Testimonies of Ms. Christle, Ms. Trickey and Mr. Garrett. I respond to Cox witnesses suggestions that Cox did nothing wrong in agreeing to the private easement arrangement and the discriminatory application of the \$1 million license fee. I also respond to Cox arguments that it should not be fined for its conduct in this case.

1 **INTRODUCTION**

2 **Q. Please state your name, occupation, and business address.**

3 A. My name is Elijah Abinah. My business address is 1200 West Washington Street,
4 Phoenix, Arizona 85007.

5

6 **Q. Where are you employed and in what capacity?**

7 A. I am employed by the Utilities Division ("Staff") of the Arizona Corporation Commission
8 ("ACC" or "Commission") as the Assistant Director.

9

10 **Q. How long have you been employed with the Utilities Division?**

11 A. I have been employed with the Utilities Division since January 2003.

12

13 **Q. Are you the same Elijah O. Abinah who provided earlier testimony in this matter?**

14 A. Yes.

15

16 **Q. What is the purpose of your testimony?**

17 A. The purpose of my testimony is to address Cox Arizona Telcom, LLC ("Cox") Rebuttal
18 Testimony of Douglas Garrett on Page 23, lines 9 through Page 26, line 18.

19

20 **Q. As a telecommunications service provider ("TSP") operating in the State of Arizona,
21 is there an obligation on such entity, such as Cox, to familiarize itself with and
22 comply with Commission rules and regulations and federal statutes?**

23 A. Yes.

24

1 **Q. On Page 23, lines 11 through 17, Mr. Garrett claims that Staff has not identified a**
2 **single violation of Commission rules and orders that it finally identified. Do you**
3 **agree with that statement?**

4 A. No. Staff first identified likely infractions of statutes, Commission orders and rules in its
5 May 20, 2005 filing in this docket (AFF-29), Staff discussed the violation of Rule
6 506(E)(2)(b), Rule 1112 and Decision No. 6028, in its Rebuttal Testimony. Staff
7 discusses Cox's violating A.R.S. 40-203 and A.R.S. 40-321, in its Rejoinder Testimony.

8
9 **Q. Based on Staff's analysis, do you believe that Cox violated Commission rules and**
10 **order?**

11 A. Yes.

12
13 **Q. Please discuss the specific violations of statutes, rules and orders to which Staff is**
14 **referring.**

15 A. As a TSP, Cox has the obligation to comply with rules, and has the obligation not to
16 violate Commission rules and regulations either as an independent entity or in conjunction
17 with other entities. In this instance, Cox collaborated with Shea Sunbelt Pleasant Point,
18 LLC ("Shea") and Vistancia Communications, L.L.C., ("Vistancia") which resulted in an
19 effectively "exclusive" arrangement being put in place which in Staff's opinion violated
20 various Commission rules and regulations as well as Commission Decision No. 60285,
21 A.R.S. 40-203, and A.R.S. 40-321.

22
23 Cox at the very minimum, should have notified the developer that Rule 506 requires the
24 developer to provide right of way and easement to utilities at no cost, instead Cox actively
25 participated in setting up the scheme that led to establishing a private easement.

1 **Q. Were other certificated TSP's aware of the private easement arrangement?**

2 A. Yes. The developer discussed the idea with Qwest Corporation ("Qwest"). Qwest stated
3 in an email obtained by Staff through the discovery process that they believed that the idea
4 of establishing a private easement and imposing a licensing fee may have been in violation
5 of Commission rules. As a matter of fact, Qwest believed Rules 505(b)(3)(a) and
6 506(E)(2)(b) "give us some argument as to why the developer must give QC an easement
7 at no cost." See Exhibit 1.

8

9 Cox, by assisting in developing and participating in such a scheme (private easement) that
10 required other telecommunications companies to pay a fee in order to have access to the
11 easement at the minimum violated Rule 506(E)(2)(b), as well as other rules and statutes.

12

13 **Q. Were there any facts that should have put Cox on notice that it may have been**
14 **violating laws and rules of the Commission?**

15 A. Yes. Based on the response to a data request AFF-18, Mr. DiNunzio raised questions
16 about the scheme. See Exhibit 2. Cox had plenty of other indications that the
17 arrangement was problematic and possibly unlawful. One example is Accipiter's
18 appearance before the City of Peoria to express its views that the private easement was
19 anticompetitive. In addition, the attached email suggests that Cox and Shea knew what
20 they were doing was possibly unlawful and they were preparing for litigation. See Exhibit
21 3.

22

23 Moreover, as discussed below, Cox has a duty to independently ensure that its actions do
24 not violate Commission rules, regulations or orders. It cannot rely on third parties to do
25 interpret the Commission's regulations for them; and then argue that since the third party
26 was wrong they should not be held responsible.

1 **Q. Why do you believe that Cox violated Commission Decision No. 60285?**

2 A. In Decision No. 60285, the Commission granted Cox a Certificate of Convenience and
3 Necessity ("CC&N"). Cox was ordered to comply with Staff's recommendations as set
4 forth in Finding of Fact ("FOF") No. 18. Subpart (g) of FOF No. 18 states:

5
6 (g) in areas where Cox is the sole provider of local exchange service
7 facilities, Cox provide customers with access to alternative
8 providers of service pursuant to the provisions of A.A.C. R14-2-
9 1112 and any subsequent rules adopted by the Commission on
10 interconnection and unbundling;

11

12 Based on the scheme developed by Shea and Cox, Staff believes that Cox is in violation of
13 the order specifically FOF 18 (g). With the private easement scheme in place, which
14 required other carriers to pay \$1 million prior to having access to the development, Staff
15 believes a barrier to entry was created, which make it difficult if not impossible for other
16 carriers to provide service, which in effect prevents customer's access to alternative
17 providers.

18

19 **Q. Can you comment briefly on A.R.S. 40-203 and A.R.S. 40-321?**

20 A. As Staff's counsel will address in their brief, in addition to the other rules and regulations
21 identified by Staff in its Rebuttal Testimony and in AFF-29, Cox Telecom's execution of
22 the agreements including this discriminatory and anticompetitive scheme also resulted in a
23 violation of A.R.S. 40-203 and A.R.S. 40-321. A.R.S. 40-203 provides as follows:

24

25 When the commission finds that the rates, fares, tolls, rentals, charges or
26 classifications, or any of them, demanded or collected by any public
27 service corporation for any service, product or commodity, or in
28 connection therewith, or that the rules, regulations, practices or contracts,
29 are unjust, discriminatory or preferential, illegal or insufficient, the
30 commission shall determine and prescribe them by order, as provided in
31 this title.

32

1 A.R.S. 40-321 prohibits unreasonable and improper provision of service.

2
3 When the commission finds that the equipment, appliances, facilities or
4 service of any public service corporation, or the methods of manufacture,
5 distribution, transmission, storage or supply employed by it are unjust,
6 unreasonable, unsafe, improper, inadequate or insufficient, the
7 commission shall determine what is just, reasonable, safe, proper,
8 adequate or sufficient, and shall enforce its determination by order or
9 regulation.

10
11 **Q. What if the Judge finds violations of other Commission rules and orders? Should he**
12 **consider those in the fine amount?**

13 A. Yes, this proceeding is to determine whether the Settlement Agreement is in the public
14 interest. In making this determination, all of the facts and evidence must be considered.
15 There may be facts and evidence that the Judge believes results in other violations of
16 Commission rules or orders, which Staff did not discuss. The Commission should not be
17 precluded from addressing these violations as well simply because Staff did not raise them
18 in its testimony. Again, in this proceeding, it is necessary to consider all of the facts and
19 evidence to determine whether the Settlement Agreement standing alone is sufficient.

20
21 **Q. On Page 23, lines 18 and 19, Mr. Garrett claims that the MUE no longer exists so any**
22 **alleged violation based on the MUE can no longer manifest itself. Do you agree with**
23 **that statement?**

24 A. No. If Mr. Garrett's defense was accepted, then the Commission would only have
25 authority to penalize ongoing violations of laws affecting public service corporations
26 ("PSC"), or ongoing violations of Commission orders, rules or requirements. If the
27 Commission's authority could be limited this way, a PSC could continue illegal conduct
28 until the Commission became aware of the conduct, immediately discontinue it, and never
29 be sanctioned. The Commission's authority to penalize violations is set out in Arizona

1 Revised Statues, Title 40, Chapter 2, Article 9. It is my understanding that the statutes
2 unambiguously give the Commission authority to penalize violations that have occurred,
3 whether or not they are ongoing or have been discontinued. I also believe that any
4 contrary interpretation would violate the Commission's Constitutional authority to
5 regulate public service corporations pursuant to Article 15, § 3.
6

7 **Q. On Page 23, lines 21 through 23, Mr. Garrett states that “the two statues that Staff**
8 **relies upon for its finding authority, A.R.S. 40-424 and A.R.S. 40-425, apply to**
9 **violations of Commission orders, rules and requirement-not federal statues”. Do you**
10 **agree with that statement?**

11 A. No. First, as Cox is aware, the Commission can enforce many provisions of the 1996 Act.
12 The Commission does not need to issue an order saying that it has such authority. Staff
13 believes that when Cox violates such federal statutes, the Commission may fine Cox for
14 such violations. Second, Staff is relying upon A.R.S. 40-424 and A.R.S. 40-425 but other
15 fining provisions of A.R.S. Title 40, Chapter 2, Article 9 as well. The Commission has
16 the ability to fine for “unlawful” practices under Title 40, Chapter 2, Article 9. Such a
17 violation of a federal statute would, in my opinion, be an “unlawful” practice.
18

19 **Q. On Page 24, lines 3 through 6, Mr. Garrett claims that the time period used to**
20 **calculate the penalties are based on the duration of the City of Peoria’s official action**
21 **that granted the private easement. Do you agree with that statement?**

22 A. Yes. However, Staff evaluated several alternatives for calculating an appropriate penalty.
23 In my Rebuttal Testimony, I recommend one method and identified the range of amounts
24 within the Commission's discretion to access. However, the fine amount recommended
25 by Staff falls well within the other methods considered by Staff. Alternative methods
26 Staff considered are described below.

1 Moreover, Staff considered the appropriateness of the resulting amount of the penalty. In
2 so doing, Staff reviewed Company specific information as described below. In setting an
3 appropriate penalty amount, the Commission typically reviews such information.

4
5 Finally, Staff weighed aggravating and mitigating factors prior to making its ultimate
6 recommendation. The amount proposed by Staff fairly balances all of the facts and
7 circumstances presented in this case. In the end, Staff recommended a fine of \$2 million
8 even though it could have recommended a maximum fine that was much higher.

9
10 **Q. Can you please explain the first method discussed in your Rebuttal Testimony and**
11 **why Staff chose the period used in calculating the fine?**

12 A. Staff believes the issue of barriers to entry did not exist until the private easement was in
13 place. Once the private easement was implemented then it became difficult if not
14 impossible for any other telecommunication carriers to have access to the development.
15 So based on that fact, Staff believes the time period selected to determine the level of fines
16 under the first methodology I discussed in my Rebuttal Testimony is appropriate.

17
18 **Q. What other methods did Staff consider to calculate the amount of the fine?**

19 A. There are several other alternative methods considered by Staff which result in a similar or
20 much higher fine which also could be utilized by the Commission. For instance, another
21 means of calculating the fine would be to multiply the number of potential access lines
22 (approximately 14,000) by the maximum fine amount of \$5,000. Using that method, Cox
23 could be assessed a \$70 million fine.

24
25 Another method is to determine the revenues that Cox could have received as a monopoly
26 provider to the Vistancia development. Exhibit 4 shows that Cox expected revenues of

1 approximately \$39.48¹ per month for each connection. Telecom related revenues for the
2 entire development at build out could this have been \$552,720 a month or \$6.6 million a
3 year.

4
5 Still another method looks at the access lines in service up to the date Accipiter was
6 finally able to provide competitive service in the development. Using the maximum fine
7 amount times 1,120 access lines, the number of actual access lines in service within the
8 development as of February 14, 2006 would result in a fine of \$5.6 million. See Exhibit 4.

9
10 **Q. What Company specific information did Staff consider as a basis for determining the**
11 **reasonableness of its recommended \$2 million fine?**

12 **A.** First, as a general matter, Staff considered the considerable resources Cox had available
13 through its Arizona operations and its operations nationwide to evaluate the proposed
14 private easement arrangement. Next, Staff considered the Company's annual revenues in
15 Arizona, and its existing number of residential and business customers in Arizona. In this
16 case, Cox's operating revenues are approximately [REDACTED]. A \$2 million fine is

17 [REDACTED]
18
19 Finally, Staff considered the fact that Cox received a \$2 million capital contribution from
20 Shea which was never returned. According to discovery conducted by Staff, this was the
21 first time Cox required a capital contribution from a developer where it was to be the
22 preferred provider. Staff believes that Cox should not benefit at all from this arrangement,
23 and that it should "disgorge" itself of all monetary payments derived from the web of
24 agreements. Staff's proposed fine would in effect merely unwind the capital contribution

¹ Cox response to STF 4.3

1 paid to Cox by Shea and put Cox on equal footing with other carriers wanting to serve the
2 development.

3
4 **Q. What mitigating factors did Staff consider as a basis for reducing its fine?**

5 A. I described the mitigating factors that Staff considered at Page 14, lines 15 through 23 of
6 my Rebuttal Testimony.

7
8 **Q. What aggravating factors did Staff consider in deciding not to reduce the fine any
9 further than the \$2.0 Million?**

10 A. Although Staff found the mitigating factors significant, it ultimately determined that the
11 aggravating factors far outweighed them. Moreover, some of the aggravating factors are
12 factors Staff has never before encountered, and had the potential to be detrimental on an
13 industry wide basis. The aggravating factors discussed below are intended to be
14 illustrative, and not an exclusive list of factors.

15
16 Staff believes that the evidence in this case clearly establishes that Cox intended the anti-
17 competitive arrangement to be a model for future developments. Several emails attest to
18 the fact that the parties were aware that this may become a model. See Exhibit 5 attached.

19
20 Staff also found that Cox had notice that the scheme (private easement arrangement) may
21 be in violation of Commission rules and took steps to limit its potential liability for
22 damages. For example, in the CMA (or NELA or some other agreement), it received
23 indemnification from Shea. This indemnification provision appears to be unusual, when
24 compared to other preferred marketing agreements. See Exhibit 6.

25

1 Staff believes that Cox had sufficient and adequate notice that the arrangement was
2 possibly, if not probably, a restraint on competition. Additionally, Cox relied on the City
3 of Peoria's opinion that the arrangement was legal even though the City took what appears
4 to be the extremely unusual, if not unprecedented, step to have Shea indemnify it. Staff is
5 of this opinion, because the new PUE does not appear to contain a similar indemnity
6 provision. See Exhibit 7. In addition, during the City of Peoria's City Council meeting of
7 July 1, 2003, the City Attorney acknowledges the possibility of litigation. See Exhibit 8.

8
9 Finally, Cox appears to brush off its due diligence obligations pursuant to A.R.S. § 40-
10 203. The Company claims that they had the right to rely on legal opinions from outside
11 parties without any independent verification or research. The Company also had sufficient
12 notice, time, resources and opportunity to conduct due diligence.

13
14 **Q. On Page 25, lines 11 through 14, Mr. Garrett claims that Staff was aware of the**
15 **private easement as early as July 1, 2003, but apparently did not investigate it at that**
16 **time. Did you agree with that statement?**

17 **A.** No. The issue was first brought to Staff's attention in the fall of 2004 by Accipiter
18 Communications, Inc. ("Accipiter"). Staff met with Accipiter on two occasions,
19 November 12, 2004 and December 10, 2004. At the initial meeting, Staff's suggestion to
20 the Company was to have a dialogue with Cox to see if they could resolve the issue.
21 Based on the information provided to Staff by Accipiter, Staff's suggestion to Accipiter
22 was to proceed by sending a letter to Mr. Ernest Johnson and eventually file a complaint at
23 a later date. On December 10, 2004, Accipiter sent a letter to Staff, urging Staff to
24 "investigate the anti-competitive barriers that those companies have created and
25 implement a measure to restore a competitive environment." However, it should be
26 obvious to the Company, that its obligation to comply with telecommunications law and

1 Commission orders, rules or requirements, is completely independent of any action or lack
2 of action by Staff. Moreover, Staff has an open door policy and any utility can come in at
3 any time and discuss the legality of any operations that it may undertake.

4
5 **Q. On Page 25, line 22 through Page 26, lines 1 through 4, Mr. Garrett discusses the**
6 **appropriateness of the fine recommended by Staff, in addition, he attempted to**
7 **compare this fine with the fine imposed on Qwest in Decision No. 66949. Do you**
8 **agree with the conclusion?**

9 **A.** No. First, the \$2 million fine recommended by Staff was much less than the maximum.
10 As discussed in my rebuttal testimony, "Staff is recommending that Cox be fined a flat
11 amount of \$2 million under A.R.S. 40-424 rather than the maximum amount of
12 approximately \$4.2 million", because of mitigating factors.

13
14 I considered the fact that once the arrangement was made public, Cox
15 cooperated with the Commission in taking steps to rectify the problematic
16 aspects of the arrangement. Cox also made a number of important
17 concessions to Accipiter to attempt to bring this matter to conclusion. The
18 Staff is very appreciative of Cox's efforts and believes it is appropriate to
19 consider its cooperation as a mitigating factor when determining the
20 amount of fines in this case. Had Cox not cooperated and Staff had not
21 been presented with any mitigating factors, the fine proposed by Staff
22 would have been much higher, approximately \$4.2 million.

23
24 Second, the fine assessed on Qwest in Decision No. 66949 was approximately \$22 million
25 of which \$8.7 million was a cash payment and the others in-form of credit to CLEC's. In
26 addition, the \$8.7 million was a compromise. I believe the Staff witness in that case had
27 identified a much higher amount in pre-filed testimony.

1 **Q. On Page 26, line 6, Mr. Garrett claims this case involves a one time situation, and the**
2 **easement was proposed by the developer, what is your response?**

3 A. The arrangement would have hampered competition and had huge consequences in the
4 Arizona telecom market. Regardless of who initiated the scheme, Cox was an active
5 participant in developing and signing on to the agreements which allowed the anti-
6 competitive discriminatory arrangement to be effectuated. Although, this was the first
7 time such a scheme was implemented in Arizona, as discussed above Cox and Qwest
8 believed the arrangement could serve as a model for future developments.

9
10 Moreover, Cox as a telecommunications provider in Arizona should know Commission
11 rules and regulations, Cox should have been aware that the scheme proposed by the
12 developer, which Cox participated in was in violation of Rule 506(E)(2)(b) and other rules
13 and statutes identified by Staff, and should have refrained from participating or at the very
14 least objected to the schemes as Qwest did.

15
16 **Q. On Page 26, lines 15 through 17, Mr. Garrett claims that “Cox was not the instigator**
17 **of the private easement...”, “That factor should be taken in account, but apparently**
18 **was not”. Do you agree with that statement?**

19 A. No. The truth of the matter is that based on the information provided, Cox actively
20 participated in creating and developing the scheme to keep other carriers out of the
21 Vistancia development. Shea may have been the entity that came up with the idea for a
22 private easement but Cox actively participated in its implementation.

23
24 **Q. Does this conclude your rejoinder testimony?**

25 A. Yes, it does.

Ball, Gina

From: Middlebrooks, Matt [Matt.Middlebrooks@qwest.com]
Sent: Wednesday, August 27, 2003 8:34 AM
To: Crockett, Jeff
Cc: Curtright, Norm
Subject: FW: Peoria, AZ matter

Jeff: you might find this useful.

Please call if you want to discuss. Thanks.

Regards,

Matt Middlebrooks, Jr.
 (303) 672-1790

-----Original Message-----

From: Curtright, Norm
Sent: Wednesday, August 27, 2003 9:31 AM
To: Jones, Benjamin P; Adkins, Roy; Middlebrooks, Matt; Truitt, Christine
Cc: Quinn, Pat; Slater, Roger
Subject: RE: Peoria, AZ matter

Ben, thanks for digging this out. Matt, please send this to Jeff Crocket.

The AZ Commission rule Ben found states:

Rights-of-way and easements suitable to the utility must be furnished by the developer at no cost to the utility and in reasonable time to meet service requirements. No underground communication facilities shall be installed by a utility until the final grades have been established and furnished to the utility. In addition, the easement strips, alleys and streets must be graded to within six inches of final grade by the developer before the utility will commence construction. Such clearance and grading must be maintained by the developer during construction by the utility.

-----Original Message-----

From: Jones, Benjamin P
Sent: Tuesday, August 26, 2003 3:07 PM
To: Adkins, Roy; Curtright, Norm; Middlebrooks, Matt; Truitt, Christine
Subject: Peoria, AZ matter

Below are excerpts from the AZ Admin. Code. I think section 14-2-505(B)(3)(a) and 14-2-506(E)(2)(b) give us some argument as to why the developer must give QC an easement at no cost. Comments?

Ben Jones
 Senior Attorney
 Qwest Law Department
 1801 California Street, 49th Floor
 Denver, CO 80202
 303.672.2765
 Fax: 303.292.4666

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DiNunzio, Mark (CCI-Phoenix)

From: Arthurs, Tisha (CCI-Phoenix)
Sent: Wednesday, July 16, 2003 3:32 PM
To: DiNunzio, Mark (CCI-Phoenix), Kelley, Mary (CCI-Phoenix)
Subject: RE: Vistancia Contract

Mark,

The developer is the one who pushed with the City of Peoria for the private easements in a public community. The terms of the easements were set up for us. They paid us a \$3 million dollar capital contribution and wanted to insure that they would get at least some of that money back through the revenue share program. The revenue share terms are set high enough that they will really have to perform in order to recoup any of their capital contribution. If the RGU's were shared between multiple providers they would never reach the penetration expectations that we set for them. This sort of agreement has been successfully executed in another location (state). I can get you in touch with their guru if you want to dialog it further.

Best regards,
Tisha Arthurs
Cox Communications
Sr Account Executive
(623)322-7857

-----Original Message-----

From: DiNunzio, Mark (CCI-Phoenix)
Sent: Wednesday, July 16, 2003 3:07 PM
To: Kelley, Mary (CCI-Phoenix), Arthurs, Tisha (CCI-Phoenix)
Subject: Vistancia Contract

Did either of you have any problems with the way the developer negotiated use of the easements for Vistancia? My understanding is that Qwest and another carrier are fighting the way the developer wanted to negotiate the use of the easement. I know we are the preferred provider for this area but just wanted to know if we had a problem with this too or were able to accept it since we landed the contract. If we did have a problem with it, please let me know as it could set a precedent for other areas we may want to serve. Thanks.

Mark A. DiNunzio
Manager, Regulatory Affairs
Office - 623-322-8006
Fax - 623-322-8037
Cell - 602-741-3740
mark.dinunzio@cox.com

Exhibit 3

[REDACTED]

Exhibit 4

[REDACTED]

DiNunzio, Mark (CCI-Phoenix)

From: Arthurs, Tisha (CCI-Phoenix)
Sent: Wednesday, July 16, 2003 3:32 PM
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Sr Account Executive
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Mark A. DiNunzio
Manager, Regulatory Affairs
Office - 623-322-8006
Fax - 623-322-8037
Cell - 602-741-3740
mark.dinunzio@cox.com

Exhibit 5
Page 2 of 2

[REDACTED]

Exhibit 6

[REDACTED]

WHEN RECORDED RETURN TO:

EXHIBIT "1E"

Vistancia, LLC
6720 N. Scottsdale Road
Suite 160
Scottsdale, AZ 85253-4424
Attention: Curtis E. Smith

ROADWAY AND UTILITY EASEMENT

This Roadway and Utility Easement (the "Easement") is made and entered into as of the ____ day of _____, 2005, by and between VISTANCIA COMMUNICATIONS, L.L.C., an Arizona liability company (the "Access Entity") and VISTANCIA, LLC, a Delaware limited liability company (the "Master Developer").

RECITALS

A. WHEREAS, defined terms appear in this Easement with the first letter of each word in the term capitalized. Unless otherwise defined herein, defined terms shall have the meanings as set forth in Exhibit A attached hereto and incorporated herein.

B. WHEREAS, the Master Developer is the master developer of the planned community located within the City of Peoria, Arizona (the "City"), known as "Vistancia" (the "Project"). In connection with its development of the Project, as of the date hereof the Master Developer has caused to be recorded (or consented to the recordation of) those final subdivision plats, maps of private tract dedication, and maps of dedication as described in Exhibit B attached hereto and incorporated herein (the "Existing Plats and Maps").

C. WHEREAS, the Access Entity and the Master Developer have previously entered into that certain Common Services Easements and Restrictions, dated June 10, 2003, and recorded June 27, 2003, in Instrument No. 2003-0837106, official records of Maricopa County, Arizona (the "CSER"), which, among other things, gives the Access Entity the exclusive right to (1) identify and contract with Communication Service Providers to provide or otherwise make available Communication Services within all or a portion of the In Gross Easement Area, and (2) determine who may locate communication Facilities within Service Easement Areas. As of the date hereof, the In Gross Easement Area does not include any property located outside the boundaries of the property described in the Existing Plats and Maps, and no Service Easement Areas have been created outside the boundaries of the property described in the Existing Plats and Maps.

D. WHEREAS, certain areas have been designated on the Existing Plats and Maps as "Multi-Use Easement," "M.U.E." or "MUE" (all areas on the Existing Plats and Maps that have been designated as "Multi-Use Easement," "M.U.E." or "MUE" being hereinafter collectively referred to as the "MUE Areas").

E. WHEREAS, pursuant to the Existing Plats and Maps, public utility easements have been dedicated over the MUE Areas for all utilities *other than* Communication Services. The Existing Plats and Maps reserve to the Access Entity all easements and other rights with respect to Communication Services and facilities within the MUE Areas, and indicate that such easements and rights are to be granted in the sole and absolute discretion of the Access Entity, by one or more separate instruments recorded by the Access Entity in accordance with the CSER.

F. WHEREAS, in accordance with the CSER and as contemplated by the reservation in the Existing Plats and Maps described in **Recital E** above, the Access Entity now desires to grant a public utility easement for Communication Services over the MUE Areas, in accordance with and as hereinafter provided in this Easement. It is intended that the grant of such public utility easement for Communication Services will thereby convert the existing utility easements within the MUE Areas to full, conventional public utilities easements (PUEs), due to the fact that the Existing Plats and Maps already create public utility easements for all utilities other than Communication Services and this Easement will complete the previously missing grant of public utility easements for Communication Services.

G. WHEREAS, certain of the MUE Areas are located within Tracts contained on the Existing Plats and Maps that are located adjacent to collector and arterial streets (as opposed to local streets), which Tracts are described in **Exhibit C** attached hereto and incorporated herein (the "**Roadway Tracts**"). The Master Developer is the current owner of fee title to the Roadway Tracts, and now desires to grant to the City a roadway easement over the Roadway Tracts, in accordance with and as hereinafter provided in this Easement. Vistancia Maintenance Corporation (the entity to whom the Roadway Tracts will ultimately be conveyed, as set forth on the Existing Plats and Maps) has consented to the foregoing grant, as evidenced by its consent attached hereto and incorporated herein.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed as follows:

1. **Grant of Communication Services Easement.** The Access Entity hereby grants to the City, its successors and assigns, a permanent and perpetual utilities easement to access and enter upon, over, across, and under the surface of the MUE Areas for purposes of Communication Services and Facilities, and access, construction, maintenance, operation and replacement associated therewith (the "**Communication Services Easement**"), to have and to hold the said Communication Services Easement unto the City of Peoria, and unto its successors and assigns forever, together with the right (at the City of Peoria's discretion) to allow other utilities to utilize such Communication Services Easement. The Communication Services Easement shall be subject to the following:

- a. All Facilities shall be installed underground.
- b. Any construction within any MUE Area that is located within a Roadway Tract shall be subject to the City's approval and compliance with all applicable City requirements, including, but not limited to, the issuance prior to construction of applicable City permits for the construction and installation of facilities.

c. The Access Entity hereby covenants that it is lawfully seized and possessed of all rights necessary to grant the Communication Services Easement as set forth herein, and that it will warrant the title and quiet possession thereto against the lawful claim of all persons.

d. The Communication Services Easement includes the right to cut back and trim such portion of the branches and tops of trees now growing or that may hereafter grow upon the MUE Areas, as may extend over the MUE Areas, so as to prevent the same from interfering with the efficient use of the Communication Services Easement.

e. Anyone using any MUE Area under the foregoing grant of easement set forth in this **paragraph 1** shall repair and restore all improvements within the MUE Area damaged by such use. Notwithstanding the foregoing, the City shall not be responsible for replacing any landscaping or any improvement placed in the MUE Areas.

f. Since the Existing Plats and Maps dedicate public utility easements over the MUE Areas for all utilities other than Communication Services, and since this **paragraph 1** grants an easement to the public over the MUE Areas for Communication Services, it is the intent of the Access Entity and the Master Developer that this Easement and the Existing Plats and Maps, taken together, shall create public utility easements over the MUE Areas for all utilities on the terms contained therein.

2. **Grant of Roadway Easement.** The Master Developer hereby grants to the City, its successors and assigns, a permanent, perpetual and exclusive roadway easement to access and enter upon, over, across, and under the surface of the Roadway Tracts for purposes of access, construction, maintenance, operation and replacement of roadway improvements (the "**Roadway Easement**"). The Roadway Easement shall be subject to the following:

a. The Master Developer hereby covenants that it has lawfully seized and possessed of the Roadway Tracts, that it has good and lawful right to grant the Roadway Easement; and that it will warrant the title and quiet possession thereto against the lawful claim of all persons.

b. The Roadway Easement includes the right to cut back and trim such portion of the branches and tops of trees now growing or that may hereafter grow upon the Roadway Tracts, as may extend over the Roadway Tracts, so as to prevent the same from interfering with the efficient use of the Roadway Easement.

c. The City shall not be responsible for replacing any landscaping or any improvement placed in the Roadway Tracts by the Master Developer or its successors or assigns.

3. **Abandonment.** In the event the Communication Services Easement and/or the Roadway Easement herein granted shall be abandoned and permanently cease to be used for the purposes herein granted all rights herein granted shall cease and revert to the owner of the land upon which such Easement is located.

4. **Runs with the Land.** This Easement shall run with the land and shall be binding upon the Master Developer, the Access Entity, and their respective heirs, successors and assigns.

5. **Miscellaneous.** This Easement (a) may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument; and (b) shall be governed by and construed in accordance with the laws of the State of Arizona.

IN WITNESS WHEREOF, the undersigned parties have executed this Easement as of the date first set forth above.

ACCESS ENTITY:

VISTANCIA COMMUNICATIONS, L.L.C., an Arizona limited liability company

By: Shea Sunbelt Pleasant Point, LLC, a Delaware limited liability company, its Manager

By: Shea Homes Southwest, Inc., an Arizona corporation, its Member

By: _____
Its: _____

By: Sunbelt Pleasant Point Investors, L.L.C., an Arizona limited liability company, its Member

By: Sunbelt PP, LLLP, an Arizona limited liability limited partnership, its Manager

By: Sunbelt Holdings Management, Inc., an Arizona corporation, its General Partner

By: _____
Curtis E. Smith, its Chief Operating Officer

MASTER DEVELOPER:

VISTANCIA, LLC, a Delaware limited liability company

By: Shea Homes Southwest, Inc., an Arizona corporation, its Member

By: _____
Its: _____

By: Sunbelt Pleasant Point Investors, L.L.C., an Arizona limited liability company, its Member

By: Sunbelt PP, LLLP, an Arizona limited liability limited partnership, its Manager

By: Sunbelt Holdings Management, Inc., an Arizona corporation, its General Partner

By: _____
Curtis E. Smith, its Chief Operating Officer

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2005, by _____, the _____ of Shea Homes Southwest, Inc., an Arizona corporation, a Member in Shea Sunbelt Pleasant Point, LLC, a Delaware limited liability company, on behalf thereof.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2005, by Curtis E. Smith, the Chief Operating Officer of Sunbelt Holdings Management, Inc., an Arizona corporation, the General Partner in Sunbelt PP, LLLP, an Arizona limited liability limited partnership, the Manager of Sunbelt Pleasant Point Investors, L.L.C., an Arizona limited liability company, a Member in Shea Sunbelt Pleasant Point, LLC, a Delaware limited liability company, on behalf thereof.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2005, by Curtis E. Smith, the Chief Operating Officer of Sunbelt Holdings Management, Inc., an Arizona corporation, the General Partner in Sunbelt PP, LLLP, an Arizona limited liability limited partnership, the Manager of Sunbelt Pleasant Point Investors, L.L.C., an Arizona limited liability company, a Member in Shea Sunbelt Pleasant Point, LLC, a Delaware limited liability company, the Manager of Vistancia Communications, L.L.C., an Arizona limited liability company, on behalf thereof.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of _____, 2005, by _____, the _____ of Shea Homes Southwest, Inc., an Arizona corporation, a Member in Shea Sunbelt Pleasant Point, LLC, a Delaware limited liability company, the Manager of Vistancia Communications, L.L.C., an Arizona limited liability company, on behalf thereof.

Notary Public

My Commission Expires:

CITY ACCEPTANCE PAGE

The Mayor and Council accept the aforementioned dedicated Roadway and Utility Easement.

The City Clerk shall record the original of this Roadway and Utility Easement with the Maricopa County Recorder's office.

Accepted by the Mayor and Council of the City of Peoria, Arizona this _____ day of _____, 2005.

CITY OF PEORIA, ARIZONA, an Arizona
municipal corporation

John C. Keegan, Mayor

ATTEST:

Mary Jo Kief, City Clerk

VISTANCIA MAINTENANCE CORPORATION CONSENT

The undersigned hereby consents to the foregoing Roadway and Utility Easement.

VISTANCIA MAINTENANCE CORPORATION, an Arizona non-profit corporation

By: _____
Its: _____

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this ___ day of _____, 2005, by _____, the _____ of Vistancia Maintenance Corporation, an Arizona non-profit corporation, on behalf thereof.

Notary Public

My Commission Expires:

VILLAGE ASSOCIATION CONSENT

The undersigned hereby consents to the foregoing Roadway and Utility Easement.

VISTANCIA VILLAGE A COMMUNITY ASSOCIATION, an Arizona non-profit corporation

By: _____
Its: _____

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this ___ day of _____, 2005, by _____, the _____ of Vistancia Village A Community Association, an Arizona non-profit corporation, on behalf thereof.

Notary Public

My Commission Expires:

VILLAGE ASSOCIATION CONSENT

The undersigned hereby consents to the foregoing Roadway and Utility Easement.

TRILOGY AT VISTANCIA COMMUNITY ASSOCIATION, an Arizona non-profit corporation

By: _____
Its: _____

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this ___ day of _____, 2005, by _____, the _____ of Trilogy at Vistancia Community Association, an Arizona non-profit corporation, on behalf thereof.

Notary Public

My Commission Expires:

17805-1/1307019

EXHIBIT A

Definitions

Section 1.01 "Affiliate" shall mean and refer to with respect to any Person (i) any Person directly or indirectly controlling, controlled by or under common control with such Person; (ii) any Person owning, or controlling five percent (5%) or more of the voting securities or voting control of such Person; or, (iii) any Person who is an officer, director, manager, member, general partner, trustee or holder of five percent (5%) or more of the voting securities or voting control of any Person described in clauses (i) or (ii).

Section 1.02 "Association" shall mean and refer to each Village Association as defined in and formed pursuant to the Master Declaration and the applicable Village Declaration therefor.

Section 1.03 "Cable Television Services" shall mean and refer to the transmission to users of video programming or other programming services provided through any Facilities related to such services, together with such user interaction, if any, which is required for the selection or use of the video programming or other programming services.

Section 1.04 "Combined Easement Area" shall mean and refer to the In Gross Easement Area and the Service Easement Area, collectively.

Section 1.05 "Communication Service Provider" shall mean and refer to any third party provider of one or more Communication Services, which may include a combination of Persons, such that one (1) or more of the Communication Services are available within the Development.

Section 1.06 "Communication Services" shall mean and refer to any one or more of the following: Cable Television Services, Community Technology Services, E-commerce Transaction Services, Internet Bandwidth Access Services, Community Intranet Services, Telephone Services (local), Telephone Services (long distance), Video On Demand Services, Security Monitoring Services, any other cable or telephone services, any other communication services or utilities, together with the Facilities related to such services; provided, however, that the term or phrase "Communication Services" shall not include Excluded Devices.

Section 1.07 "Community Intranet Services" shall mean and refer to the private communications network within the Development that uses substantially the same or similar software that is utilized on the public Internet, but that is primarily for use within the Development.

Section 1.08 "Community Technology Services" shall mean and refer to the construction, sale, installation, leasing, licensing, modification, supplementation, maintenance, repair, reconstruction or removal of any device (including, without limitation, any hardware or software device) principally used by individual users for Communication Services.

Section 1.09 "Development" shall mean and refer to the real property described in Exhibit A of the CSER, together with the real property that has been annexed thereto pursuant to an "Exhibit A-Supplement" contained in any Supplement to Common Services Easements and

Restrictions that has been recorded as of the date hereof in accordance with Section 1.13 of Appendix A to the CSER. Although the term "Development" may be more broadly defined in the original CSER, the real property described above in this Section 1.09 constitutes all of the real property that has been included within the definition of "Development" under the CSER as of the date of this Easement.

Section 1.10 "Excluded Devices" shall mean and refer to any Community Intranet Services device, Security Monitoring Services device, or any other Communication Services device, which satisfies both of the following described characteristics:

- (a) The device is nonpermanent. By way of example and not limitation, any device which is affixed to real estate is a permanent device. A nonpermanent device must not, at any time, be affixed to real estate within the Combined Easement Area either by, for example and not limitation, submersion into the ground, screws, bolts, glue or wiring.
- (b) Use of the device must occur primarily outside of the In Gross Easement Area, with use within the In Gross Easement Area being incidental or sporadic.

For example, mobile cellular telephones, pagers, car alarms and portable computer peripherals, which are used primarily outside of the In Gross Easement Area, will generally constitute Excluded Devices. A satellite dish or other means of receiving the transfer of wireless technology used primarily in the In Gross Easement Area will be an Excluded Device only to the extent required by law to be permitted (*E.g.* Section 207 of the Telecommunications Act of 1996 and 47 C.F.R. 1.4000) or to the extent authorized by the Declarations. Wireless signals, of any nature, which are not received by any Owners, or on behalf of any Owners or at the request of any Owner(s), within the In Gross Easement Area, shall constitute Excluded Devices.

Section 1.11 "Facility" or "Facilities" shall mean and refer to the construction, installation, modification, alteration, supplementation, repair, reconstruction or replacement of any and all necessary or desirable hardware or equipment of any type used to provide or otherwise make available any Communication Services including, without limitation, cable, wire, fiber, main, pipe, boxes, conduit, manholes, transformers, pumps, amplifiers, dishes, antennae, microwave, satellite, pedestal, equipment enclosures, poles, wireless communication technology, or any other hardware or equipment of any type necessary or desirable to transfer or provide any Communication Services, including, without limitation, communication, video, data, e-commerce, Internet, community intranet, security systems, communication utility services, information systems, cable television, as well as any other Communication Services or uses for which such hardware or equipment may be used.

Section 1.12 "E-commerce Transaction Services" shall mean and refer to transactions conducted over the Internet or through Internet access, comprising the sale, lease, license, offer or delivery of property, goods, services or information, whether or not for consideration; provided, however, the term or phrase "E-commerce Transactions Services" shall not include Internet Bandwidth Access Services.

Section 1.13 "In Gross Easement Area" shall mean and refer to the real property described in Exhibit B of the CSER, together with the real property that has been annexed thereto pursuant to an "Exhibit B-Supplement" contained in any Supplement to Common Services Easements and Restrictions that has been recorded as of the date hereof in accordance with Section 1.18 of Appendix A to the CSER. Although the term "In Gross Easement Area" may be more broadly defined in the original CSER, the real property described above in this **Section 1.13** constitutes all of the real property that has been included within the definition of "In Gross Easement Area" under the CSER as of the date of this Easement.

Section 1.14 "Internet Bandwidth Access Services" shall mean and refer to any service that enables users to access content, information, electronic mail or other services offered over the internet, and may also include access to proprietary content, information and other services as part of a package of services offered to users and any Facilities related to such service; provided, however, that the term or phrase "Internet Bandwidth Access Services" shall not include E-commerce Transaction Services, Telephone Services (local) or Telephone Services (long distance).

Section 1.15 "Master Declaration" shall mean and refer to that certain Declaration of Covenants, Conditions and Restrictions for Vistancia, dated July 9, 2003, and recorded July 9, 2003, in Instrument No. 2003-0898772, Official Records of Maricopa County, Arizona, as amended from time to time, which, among other things, provides for the organization of Vistancia Maintenance Corporation.

Section 1.16 "Owner" shall mean the record owner, whether one or more Persons, of beneficial or equitable title (and legal title if the same has merged with the beneficial or equitable title) to the fee simple interest in a platted lot, a development parcel or any other land within the Development, or their lessees, tenants or any other successors in interest.

Section 1.17 "Owner Access Area" shall mean and refer to the area reasonably necessary for Communication Service Providers to establish Communication Services to an Owner's residential structure, building or other structure situated upon the Owner Improvement Area, which area shall commence at the Platted Easement Area and proceed as directly as reasonably practicable to the individual residential structure (or building or other structure, as applicable) and upon and within the residential structure (or building or other structure, as applicable) as contemplated by the design for the initial construction thereof, as thereafter modified from time to time.

Section 1.18 "Person" shall mean and refer to any individual, corporation, company, business trust, association, partnership, limited liability company, joint venture, governmental authority, or any other individual or entity, including subsidiaries, Affiliates, and controlled entities.

Section 1.19 "Plats" shall mean and refer collectively to all of the recorded subdivision plats and maps of dedication that subdivide the Development and/or dedicate or create streets, roadways or areas to be dedicated to public or private use, as each may be amended from time to time. The Existing Plats and Maps described in **Exhibit B** of this Easement constitute all of the Plats (as defined in this **Section 1.19**) that have been recorded as of the date of this Easement.

Section 1.20 "Platted Easement Area" shall mean and refer to all of the easement areas designated as "Multi-Use Easement," "M.U.E." or "MUE" on the Existing Plats and Maps.

Section 1.21 "Security Monitoring Services" shall mean and refer to the provision of systems, hardware, devices and wiring within the residences, commercial structures (if any) and the Development which enable the monitoring for security purposes of such residences, commercial structures (if any) and Development; provided, however, that the term or phrase "Security Monitoring Services" expressly contemplates that a Communication Service Provider may enter into a third party contract (e.g., a monitoring contract) with a security monitoring company.

Section 1.22 "Service Easement Area" shall mean and refer to each and all of the following areas, individually and collectively, as the context requires or as is permitted by law, *to wit*:

- (a) All of the Platted Easement Area.
- (b) All of the Owner Access Area.
- (c) Each street or roadway created by a Plat that is private (as opposed to public) in nature and is owned (or is to be owned, pursuant to the terms of such Plat) by Vistancia Maintenance Corporation, any Association, or any other homeowners' or property owners' association established pursuant to a Declaration.
- (d) Those portions of the tracts and other areas constituting common areas (however denominated) under any of the Declarations (other than the private streets and private roadways described in subsection (c) above, which shall be governed by that subsection rather than this subsection (d)), to the extent reasonably necessary for the establishment of Communication Services and Facilities to serve the Owners.

Section 1.23 "Telephone Services (local)" shall mean and refer to service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or comparable service provided through a system of switches, transmission equipment or any other Facilities (or any combination thereof) by which a user can originate and terminate a telecommunications service.

Section 1.24 "Telephone Services (long distance)" shall mean and refer to telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with users for exchange service and any Facilities related to such services.

Section 1.25 "Village Declaration" shall mean and refer to each Village Declaration as defined in and recorded pursuant to the Master Declaration, each as amended from time to time.

Section 1.26 "Vistancia Maintenance Corporation" shall mean and refer to Vistancia Maintenance Corporation, an Arizona non-profit corporation (which is the Arizona non-profit corporation to be organized pursuant to the Master Declaration), its successors and assigns.

EXHIBIT B

Existing Plats and Maps

All of the following, as amended or corrected pursuant to any recorded Certificate of Correction or other recorded instrument of correction or amendment:

Title	Recording Information (Official Records of Maricopa County)
Final Plat of Vistancia Village A Parcel A1	Book 719 of Maps, page 31
Final Plat of Vistancia Village A Parcel A7	Book 719 of Maps, page 33
Final Plat for Vistancia Village A Parcel A8	Book 719 of Maps, page 30
Final Plat of Vistancia Village A Parcel A9	Book 718 of Maps, page 46
Final Plat of Vistancia Village A Parcel A10A	Book 655 of Maps, page 33
Final Plat of Vistancia Village A Parcel A10B	Book 657 of Maps, page 34
Final Plat of Vistancia Village A Parcel A12	Book 655 of Maps, page 32
Final Plat of Vistancia Village A Parcel A13	Book 655 of Maps, page 31
Final Plat of Vistancia Village A Parcel A14	Book 661 of Maps, page 25
Final Plat for Vistancia Village A Parcel A15	Book 719 of Maps, page 27
Final Plat of Vistancia Village A Parcel A19	Book 656 of Maps, page 39
Final Plat of Vistancia Village A Parcel A20	Book 656 of Maps, page 3
Final Plat of Vistancia Village A Parcel A30	Book 647 of Maps, page 41
Resubdivision of Lots 1, 2 and 3 of Vistancia Village A Parcel A30	Book 731 of Maps, page 8
Final Plat of Vistancia Village A Parcel A32	Book 655 of Maps, page 34
Final Plat of Vistancia Village A Parcel A33	Book 655 of Maps, page 29
Final Plat of Vistancia Village A Parcel A36	Book 655 of Maps, page 30
Final Plat of Vistancia Village A Parcel A37	Book 662 of Maps, page 26
Final Plat of Vistancia Village A Parcel A38	Book 719 of Maps, page 19
Final Plat for Vistancia Village A Parcel G4	Book 719 of Maps, page 29
Final Plat of Vistancia Village A Parcel G5	Book 718 of Maps, page 48
Final Plat of Vistancia Village A Parcel G10	Book 719 of Maps, page 50

Title	Recording Information (Official Records of Maricopa County)
Final Plat of Vistancia Village A Parcel G11	Book 720 of Maps, page 1
Final Plat of Vistancia Village B Parcel B2	Book 767 of Maps, page 49
Final Plat of Vistancia Village B Parcel B8	Book 768 of Maps, page 27
Final Plat of Vistancia Village B Parcel B10	Book 767 of Maps, page 48
Final Plat for Sunset Ridge at Trilogy at Vistancia Parcels C15, C16, C17, C18 and C19	Book 655 of Maps, page 35
Final Plat for Desert Sky at Trilogy at Vistancia Parcel C21	Book 647 of Maps, page 30
Final Plat for Trilogy at Vistancia Parcel C28	Book 750 of Maps, page 34
Final Plat for Trilogy at Vistancia Parcel C30-Phase 1	Book 728 of Maps, page 42
Final Plat for Trilogy at Vistancia Parcel C30-Phase 2	Book 728 of Maps, page 43
Final Plat for Desert Sky at Trilogy at Vistancia Parcel C31	Book 664 of Maps, page 1
Final Plat for Trilogy at Vistancia Parcel C33	Book 707 of Maps, page 39
Final Plat for Trilogy at Vistancia Parcel C34	Book 706 of Maps, page 21
Map of Dedication for Vistancia – Phase 1A	Book 647 of Maps, page 31
Map of Dedication El Mirage Road, Ridgeline Road, & Westward Skies Drive	Book 719 of Maps, page 34
Map of Dedication Vistancia Boulevard, Lone Mountain Road, Creosote Drive & Westland Road	Book 721 of Maps, page 11
Map of Dedication Vistancia Boulevard & Sunrise Point	Book 718 of Maps, page 47
Map of Private Tract Dedication for Trilogy Boulevard at Vistancia	Book 664 of Maps, page 7
Map of Dedication for Lone Mountain Road	Book 744 of Maps, page 25
Final Plat of Blackstone at Vistancia Parcel F-7A	Book 777 of Maps, page 16
Final Plat of Blackstone at Vistancia Parcel F-7B	Book 780 of Maps, page 1
Map of Private Tract Dedication for Blackstone Drive and Sunrise Point	Book 768 of Maps, page 42
Final Plat for Trilogy at Vistancia Parcel C22	Book 776 of Maps, page 18

**[UPDATE THIS SCHEDULE PRIOR TO RECORDING,
TO INCLUDE ALL PLATS AND MODs RECORDED AFTER 10/20/2005]**

EXHIBIT C

Roadway Tracts

All Tracts on the Existing Plats and Maps which are designated on the Existing Plats and Maps as containing a Dry Utility Corridor (DUC) within and MUE Area and all Tracts on the Existing Plats and Maps that are located contiguous to Jomax Road, El Mirage Road, Vistancia Boulevard, Town Center, Sunrise Point, Sunset Point, Whispering Ridge Road, Ridgeline Road, Westward Skies Drive, Westland Drive, or Blackstone Drive, including, but not limited to, the following Tracts:

Plat/Map¹	Roadway Tracts
Final Plat for Trilogy at Vistancia Parcel C34, recorded in Book 706, Page 21, Official Records of Maricopa County, Arizona	Tracts H and I
Map of Dedication for Vistancia – Phase 1A, recorded in Book 647 of Maps, Page 31, Official Records of Maricopa County, Arizona	Tracts D, E, G, H, I, J, T, U, V, W, X, Y, Z, AA, EE, GG, HH, II, and LL
Map of Dedication El Mirage Road, Ridgeline Road, & Westward Skies Drive, recorded in Book 719 of Maps, Page 34, Official Records of Maricopa County, Arizona	Tracts A, B, C, D, E, F and G
Map of Dedication Vistancia Boulevard, Lone Mountain Road, Creosote Drive & Westland Road, recorded in Book 721 of Maps, Page 11, Official Records of Maricopa County, Arizona	Tracts A, B, C, D, E, F, G, H, J, K, L, M and N
Map of Dedication Vistancia Boulevard & Sunrise Point, recorded in Book 718 of Maps, Page 47, Official Records of Maricopa County, Arizona	Tracts A, B, C, D, E, F, G, H, I and J
Map of Dedication Blackstone Drive & Sunrise Point, recorded in Book 768 of Maps, Page 42, Official Records of Maricopa County, Arizona	Tracts A, B, C, D, E, F, H, I and J
Map of Dedication for Lone Mountain Road, recorded in Book 744 of Maps, Page 25, Official Records of Maricopa County, Arizona	Tracts A through L, inclusive, and Tracts N through V, inclusive
Map of Private Tract Dedication for Blackstone Drive and Sunrise Point, recorded in Book 768 of Maps, Page 42, Official Records of Maricopa County, Arizona	Tracts B, C, D, E, F, G, H, I, J, K, L, and M

¹ All references any Final Plat or Map of Dedication in the chart above shall include all corrections or amendments thereto as set forth in any recorded Certificate of Correction or other recorded instrument of correction or amendment

**[UPDATE THIS SCHEDULE PRIOR TO RECORDING,
TO INCLUDE ALL PLATS AND MODs RECORDED AFTER 9/7/2005]**

CITY OF PEORIA, ARIZONA
PINE ROOM
July 1, 2003

A **Special Meeting** of the City Council of the City of Peoria, Arizona was convened at 8401 W. Monroe Street in open and public session at 4:03 p.m.

Members Present: Mayor John Keegan, Vice Mayor Bob Barrett; Councilmembers Ken Forgia, Patricia Dennis, Vicki Hunt, Ella Makula, and Carlo Leone

Members Absent: None

Other Municipal Officials Present: Terrence Ellis, City Manager; Meredith Flinn, Deputy City Manager; Prisila Ferreira, Deputy City Manager; Steve Burg, Senior Deputy City Attorney; Donna Griffith, Deputy City Clerk; Grady Miller, Debra Stark; Stephen Bontrager, Neil Mann, Dave Moody, Bob McKibben, J.P. de la Montaigne, Greg Eckman, and John Wenderski

Audience: Approximately 40

Note: The order in which items appear in the minutes is not necessarily the order in which they were discussed in the meeting.

***CONSENT AGENDA:** *All items listed with an asterisk (*) are considered to be routine by the City Council, and were enacted by one motion. There was no separate discussion of these items during this meeting.*

Mayor Keegan asked if any Councilmember wished to have an item removed from the Consent Agenda. Councilman Forgia asked that Consent Item # CC-223-3C be removed for discussion. A motion was made by Councilwoman Dennis to approve the Consent Agenda Items as submitted with the exception of 223-3C. The motion was seconded by Councilman Leone and, upon roll call vote, carried unanimously.

***202-3C Code Amend, Ch. 25, Water, Sewers and Sewage Disposal**

ORDINANCE NO. 03-156

Amending and repealing Chapter 25, Section 25-32 of the City Code previously entitled "Water; Emergency Declaration; Ratification; Restrictions; Public Notice" and now bearing a title of "City of Peoria Drought Contingency Plan Management Procedure" for the purpose of providing for the adoption of the City of Peoria Drought Contingency Plan Management Procedure and providing for separability and an effective date

V50P131

Special City Council Meeting
July 1, 2003 – 4:00 p.m.

In response to questions from Council, Staff explained that in easements dedicated to the City the City controls what the City provides. In this case the City does not provide telecommunications, therefore, there is no need for control of that particular easement.

Jeff Crocket, representing Inceptor Communications, explained that his company provides service to the area around the Vistancia development. He explained that his company will need access to this easement in order to provide service. Mr. Crocket also advised Council that the Vistancia developer is requiring a \$1 million fee for access to the easement. Mr. Crocket also proposed that the City Attorney, the Vistancia attorney, and representatives from Inceptor sit down together and address the concerns expressed. Mr. Crocket also explained that papers had been filed with the Corporation Commission to expand their boundaries and that the paperwork was moving forward.

Kurt Smith, developer for Vistancia, agreed that the process is different and is the result of trying to provide for customers. The first phase of the project, which encompasses approximately one-third of the property, is serviced by Qwest. Mr. Smith explained that he has requested that Qwest and Inceptor resolve their disputes over the boundaries for service. Mr. Smith also explained that they have offered license agreements to both Inceptor and Cox.

Staff explained that the intent of the Indemnity Agreement was that the City would not be involved in any disputes made by the telecommunication companies.

Councilman Forgia moved to approve the Multi-Use Easements and Indemnity Agreement for the Vistancia Master Planned Community, located North of Jomax Road and West of the Agua Fria River. (LCON06603) The motion was seconded by Councilwoman Makula and, upon roll call vote, carried unanimously.

***225-3C Dedication, Utility Easement, 79th Av & Hearn Rd**

Approved the dedication of a public sewer and storm drain utility easement for West Valley Ranch subdivision located south of Hearn Road and west of 79th Avenue.

***226-3C Map of Private Tract Dedication, Trilogy Boulevard/Vistancia Phase 1a, Jomax Rd & the Agua Fria River**

Approved the map of private tract dedication for Trilogy Boulevard –Vistancia Phase 1a, located north of Jomax Road west of the Agua Fria River.

Special City Council Meeting
July 1, 2003 – 4:00 p.m.

***220-3C Budget Transfer, City Attorney's Office, Hearing Costs**

Authorized the transfer of \$65,000 from the General Fund Contingency Account to City Attorney Administrative Hearing Costs.

***221-3C 2003-2004 Sister City Business Plan**

Approved the 2003-2004 Sister City Business Plan between the City of Peoria and the Borough of Ards, Northern Ireland.

***222-3C Fund Transfer, Vistancia Community Facilities District, Jomax Water Reclamation Facility Oversizing**

Authorized an expense in the amount of \$1,600,000 from the Wastewater Expansion Fund and \$1,600,000 from the Water Expansion Fund for the City's portion of the Jomax Water Reclamation Facility oversizing.

***223-3C Industrial Development Authority, Revenue Bond Issuance, Arizona Baptist Retirement Centers, Inc. Project**

RESOLUTION NO. 03-92

Approving the issuance and sale refunding revenue bond by
the Industrial Development Author. / the City of Peoria, Arizona,
at the request of Arizona Baptist Retirement Centers, Inc., an
Arizona nonprofit corporation

224-3C Easements & Indemnity Agreement, Vistancia Master Planned Community, Jomax Rd & the Agua Fria River

Staff explained that at the last Council meeting Council was presented with the "backbone" system for the Vistancia development. This agreement and easements allows eight to ten additional feet beyond the dedicated easements for installation of such items as transformers, street lights, etc. This will also allow the developer access for easements strictly for telecommunications.

Key items in the Indemnity Agreement include a portion of easement where the developer retains rights on telecommunications.

rowell

BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner
BARRY WONG
Commissioner

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

REJOINDER

TESTIMONY

OF

MATTHEW ROWELL

CHIEF ECONOMIST

UTILITIES DIVISION

ARIZONA CORPORATION COMMISSION

AUGUST 15, 2006

TABLE OF CONTENTS

	<u>Page</u>
Executive Summary	1
I. Introduction.....	2
II. Response to Tisha Christle’s Rebuttal Testimony	2
III. Response to Lindy Trickey’s Rebuttal Testimony.....	3
VI. Response to Douglas Garrett’s Rebuttal Testimony	5

1

2 **Executive Summary**

3

4 **This testimony provides responses to the Rebuttal Testimonies of Cox witnesses Tisha**
5 **Christle, Lindy Trickey and Douglas Garrett. Staff is not persuaded by these witnesses'**
6 **arguments and Staff continues to support the positions taken in its June 15, 2006 Rebuttal**
7 **Testimony.**

1 **I. Introduction**

2 **Q. Please state your name and business address for the record.**

3 A. My name is Matthew Rowell. My business address is: Arizona Corporation Commission,
4 1200 W. Washington St., Phoenix, Arizona 85007.

5

6 **Q. Are you the same Matthew Rowell who provided Rebuttal Testimony in this docket**
7 **on June 15, 2006?**

8 A. Yes.

9

10 **Q. What is the purpose of your testimony?**

11 A. My testimony responds to the Rebuttal Testimonies of Cox witnesses Tisha Christle,
12 Linda Trickey, and Douglas Garrett.

13

14 **II. Response to Tisha Christle's Rebuttal Testimony**

15 **Q. Please discuss the portions of Ms. Christle's Rebuttal Testimony that pertain to your**
16 **Rebuttal Testimony.**

17 A. Ms. Christle's only addresses my Rebuttal Testimony specifically at one place in her
18 Rebuttal testimony. On page 15 the question starting at line 20 mischaracterizes my
19 Rebuttal Testimony. Here Ms. Christle claims that my Rebuttal Testimony indicated that
20 Cox did not "actually make the license fee payments." Staff has never contended that Cox
21 did not actually make these payments. Rather, Staff's point has been that the payments to
22 Shea were offset by the increased capital contributions (which were not associated with
23 any increased capital investment.) After the arrangement between Cox and Shea was
24 essentially finalized, it was altered such that Cox would "pay" \$1,000,000 in license fees

1 to Shea and Shea would increase its payments to Cox by \$1,000,000. So, effectively, Cox
2 incurred no real cost as a result of the license fees.¹

3
4 **III. Response to Lindy Trickey's Rebuttal Testimony**

5 **Q. Please discuss the portions of Ms. Trickey's Rebuttal Testimony that pertain to your**
6 **Rebuttal Testimony.**

7 A. At page 12 lines 12 thru 19 Ms. Trickey makes the same point (and mischaracterizes my
8 testimony in the same way) as Ms. Christle does in her Rebuttal Testimony (discussed in
9 the above Q &A.) Ms. Trickey goes on to state that "...it is my understanding that Cox
10 had informed Shea that it would not build out to remote Vistancia unless it made a certain
11 return on its investment, which required Shea to give additional capital contribution to
12 match the access fee that it decided to charge." Here Ms. Trickey states that Cox
13 informed Shea that they would need an additional \$1 million in capital contributions to
14 cover the \$1 million license fee. This is consistent with Cox's response to Staff Data
15 Request 5.2 where it is stated that Cox made it clear to Shea that the substance of their
16 agreement could not change as a result of the addition of the Licensee Fees. (See Exhibit
17 1) That Cox communicated this to Shea is evidence that Cox was an active participant in
18 the arrangement with Shea, Cox did not just passively accept the arrangement that Shea
19 proposed.

20
21 Ms. Trickey goes on to state that "I see no reason today why Shea could not have done the
22 same thing for other wire-line carriers, if it chose. ...(Shea) could have allowed other
23 wire-line carriers to have access to its then-existing private easements without charging an
24 access fee."² It is not clear to me exactly what Ms. Trickey means when she says that
25 Shea could "have done the same thing" for other carriers, however; she seems to be

¹ See page 17 of my Rebuttal Testimony for more on this point.

² Rebuttal Testimony of Linda Trickey page 12 lines 23 thru 27.

1 implying that Shea could have offered to refund the license fee of another carrier through
2 a fee for capital contributions as they did with Cox. It is true that Shea *could have* done
3 that, but it seems highly unlikely that they *would have* done that. This is for two reasons.
4 First, the NELA that Shea presented to Accipiter after Accipiter first approached Shea
5 contained the \$1,000,000 in license fees but there was no offer by Shea to off set them.
6 (See Exhibit 2.) Second, logically it just wouldn't make sense, why would Shea go
7 through the trouble and expense of establishing the license fees if its intention was to
8 refund them?

9
10 **Q. At page 13 lines 12 and 13 Ms. Trickey characterizes Staff's conclusion that the**
11 **Cox/Shea arrangement was anti-competitive as a "legal conclusion." Do you agree**
12 **that this is a "legal conclusion?"**

13 A. No. My testimony about the anti-competitive nature of the arrangement is based on my
14 expertise and training as an economist. The operation of competitive markets and
15 allegedly anti-competitive behavior is a common subject in the economics literature. My
16 conclusion that the arrangement between Cox and Shea was anticompetitive is based on
17 my assessment of the facts presented in this case along with my experience and training as
18 an economist. My conclusion that the arrangement was anti-competitive does not rely on
19 the interpretation of any statutes, rules or orders.

20
21 **Q. At page 13 lines 7 thru 11 Ms. Trickey argues that the private easement was obtained**
22 **by Shea without any involvement from Cox and that Cox "had to execute certain**
23 **documents to obtain access to the easement." Do you agree with Ms. Trickey's**
24 **characterization?**

25 A. No. Cox was aware of Shea's plans for a private easement several months before Shea
26 took the idea to the City of Peoria and, as stated above, Cox was not simply a passive

1 observer. In fact, Cox made sure to point out to Shea that they expected the license fees to
2 be offset by increases in Shea's capital contribution. Further, Cox gave its approval of the
3 CSER agreement between Shea and Vistancia prior to the city of Peoria's vote on the
4 easement. Additionally, Cox participated in revising the agreements that made up the
5 arrangement between it and Shea. The contracts that make up the arrangement between
6 Cox and Shea are so interwoven that it is impossible to untangle them. A more accurate
7 statement would be that the private easement arrangement could not have been executed
8 without Cox's cooperation in amending its CMA by shifting key elements to the NELA.
9 As I stated in my Rebuttal Testimony, the facts presented in this case support the
10 conclusion that Cox understood the anti-competitive nature of the arrangement and went
11 along with it anyway.

12
13 **VI. Response to Douglas Garrett's Rebuttal Testimony**

14 **Q. Please provide general comments on Mr. Garrett's rebuttal testimony.**

15 A. Mr. Garrett focuses on the parts of my Rebuttal Testimony that deal with the implications
16 of Cox's actions regarding the Federal Telecommunications Act, the Arizona
17 Administrative Code, and various Commission orders (pages 20 thru 25 of my Rebuttal
18 Testimony.) I would first like to provide some background regarding that portion of my
19 Rebuttal Testimony. That testimony was designed to give Cox notice of certain
20 infractions alleged by Staff.³ Staff did not file the original complaint, thus, it was
21 necessary for Staff to provide notice of its allegations through testimony. My role in
22 putting that testimony together was to review and evaluate the available facts and consult
23 with the Commission's Legal Division regarding those facts and the applicable legal
24 standards. Neither my Rebuttal Testimony nor this Rejoinder Testimony are meant to

³ Staff notes here that the infractions alleged by Staff are separate and distinct from the infractions alleged in Accipiter's complaint.

1 contain legal arguments; such arguments should be and will be reserved for the Legal
2 Briefs filed in this case.

3
4 Mr. Garrett's Rebuttal Testimony arguably deviates into legal argument in certain places
5 (e.g., on page 8 Mr. Garrett questions the Commission's jurisdiction concerning Section
6 253 of the Federal Telecom Act.) Neither Mr. Garrett nor I are attorneys. In order to
7 spare the Commission the spectacle of two non-attorneys arguing legal points, my
8 Rejoinder Testimony that follows will focus on rebutting certain factual assertions and
9 misrepresentations in Mr. Garrett's Rebuttal Testimony. I would like to point out
10 however, that Staff addressed the Commission's Orders and regulations it believed were
11 violated as early as its May 20, 2005 filing: Staff Response Regarding Accipiter
12 Complaint, Cox Telecom Motion to Dismiss, and Vistancia Communications, LLC and
13 Shea Sunbelt LLC Jurisdictional Allegations.

14
15 **Q. At page 9 line 9 thru page 10 line 4 Mr. Garrett discusses the July 2003 letter sent by**
16 **the City of Peoria's Deputy City Attorney to Accipiter's attorney. Are there any**
17 **relevant facts that Staff would like to point out regarding that letter?**

18 **A.** Yes. Staff believes it is relevant and interesting that, in spite of the claims made in the
19 July 2003 letter, the City of Peoria had indemnification language added to the MUE&I it
20 approved on July 1, 2003. Staff believes it is unusual for a government body to seek to
21 indemnify itself against the possible repercussions of the arrangements that it approves.

22

1 **Q. At page 10 lines 6 thru 18 Mr. Garrett compares the arrangement between Shea and**
2 **Cox with the situation of a property owner at an office building or MDU requiring**
3 **payments for easements from carriers before they can access another carriers**
4 **conduit on the property. Please comment.**

5 A. There are significant differences between the example Mr. Garrett cites and the facts of
6 this case. First, in the example Mr. Garrett cites the actual owner of a property maintains
7 an easement for the property. Under the terms of the arrangement between Cox and Shea
8 the easement would not have been controlled by the actual property owners (i.e., home
9 owners and property owners within the Vistancia development.) Rather, the easement
10 would have been controlled by the developer (specifically, Vistancia Communications)
11 long after the property in question was sold to its eventual owners. Second, Mr. Garrett's
12 example involves a property owner acting independently of any telecom carrier in setting
13 up the easement. As I have explained in both this and my Rebuttal Testimony, Cox was
14 involved in developing the arrangement between it and Shea. The arrangement was not
15 developed and implemented independently by a "property owner." Prior to the signing of
16 the revised CMA, Tisha Christle of Cox seems to recognize that the Vistancia
17 development is distinct from Mr. Garrett's property owner example when she refers to
18 Vistancia as a "public community" in her July 16, 2003 email. (See Exhibit 3.)

19
20 Mr. Garrett's analogy is further compromised by the fact that it was Vistancia
21 Communications, not Shea, that had the rights to the MUE. Under the arrangement Shea
22 retained all property rights that a developer normally has but Vistancia Communications
23 held the right to the MUE. Staff is not aware of any previous cases of property owners
24 splitting up their property rights in this fashion.

25

1 **Q. At page 10 lines 20 thru 25 Mr. Garrett asserts that your Rebuttal Testimony is**
2 **contradictory and the Cox Shea arrangement was not discriminatory because “all**
3 **carriers would have had to pay the access fee before gaining access.” Please**
4 **comment.**

5 A. Here Mr. Garrett seems to imply that Staff is alleging that Cox discriminated among
6 carriers other than itself. This is not the point of Staff’s allegations. Rather, Staff believes
7 that the Cox/Shea arrangement was discriminatory because it discriminated against *all*
8 *carriers other than Cox*. That is, the arrangement required all carriers other than Cox to
9 pay \$1,000,000 in license fees but it insured that Cox would not incur the cost of such
10 license fees. The discrimination in question was not among carriers other than Cox, it was
11 between Cox and all of the other carriers. As I am sure our Attorneys will discuss in their
12 briefs, pursuant to A.R.S. 40-203 practices or contracts of a public service corporation that
13 are unjust, discriminatory or preferential, illegal or insufficient are illegal and subject to
14 prescription by the Commission.

15
16 **Q. At page 11 lines 2 and 3 Mr. Garrett claims that Section 224 of the Federal Telecom**
17 **Act does not apply to ILECs, such as Accipiter. Please comment.**

18 A. This is a legal issue best reserved for the legal Briefs.

19
20 **Q. At page 11 lines 9 thru 12 Mr. Garrett quotes the Co-Marketing and Property Access**
21 **Agreement between Cox and Vistancia. Please comment.**

22 A. Here Mr. Garrett cites language indicating that Cox will provide telecom service within
23 Vistancia “Subject to legal and regulatory requirements.” Staff does not believe that this
24 language is relevant to the issues in this case for at least two reasons. First, the term “legal
25 requirements” could be construed to include the contracts that make up the arrangement
26 between Cox and Shea. Second, regardless of whether Cox had the ability under the Co-

1 Marketing and Property Access Agreements to operate in a non-discriminatory manner, it
2 is apparent that Cox took no action to eliminate the discriminatory aspects of the
3 arrangement between Cox and Shea, namely, the MUE. Additionally, the language Mr.
4 Garrett quotes could be construed to pertain only to Cox's ongoing delivery of service to
5 its customers and thus it would not implicate the barriers to entry established prior to
6 Cox's provision of service.

7
8 **Q. At page 11 lines 21 thru 25 Mr. Garrett asserts that Accipiter could have served the**
9 **Vistancia development by obtaining resale service from Cox. Please comment.**

10 A. Whether Cox has an obligation to provide resale service to Accipiter is a legal issue best
11 reserved for legal briefs. However, it is apparent that Cox has no obligation to provide
12 resale service at any particular rates. A review of the settlement agreement between Cox,
13 Accipiter and Vistancia shows quite clearly that Cox has no such obligation. In section
14 III(3) of the Settlement Agreement Cox agrees to provide resale service at a specified
15 wholesale discount only in certain sections of the Vistancia development. In other areas
16 of the development the rates for (and the availability of) resale service are not delineated
17 within the Settlement Agreement. That this provision is included in the Settlement
18 Agreement indicates that Cox's willingness to provide resale service at specified
19 wholesale discounts was a concession *not an obligation*. Cox witness Ivan Johnson
20 testifies to this explicitly at page 12 line 16 of his Direct Testimony: "Under the 1996
21 Telecommunications Act, Cox *does not* have an obligation to provide resale service to
22 other providers at a discount."(Emphasis added.) Without a wholesale discount, the
23 availability of resale service is essentially meaningless. Further, even if Cox was willing
24 to provide Accipiter with resale service at a discount (absent the Settlement Agreement)
25 the anti-competitive aspects of the arrangement between Cox and Shea would still be
26 present. Restricting a carrier to using resale puts severe limits on the types of services that

1 carrier can offer. Were Accipiter limited to reselling Cox's telecom service, it would have
2 no ability to provide bundled services that include video and broadband internet access.
3 Thus, the availability of resale from Cox does not address the discriminatory nature of the
4 arrangement between Cox and Shea.

5
6 **Q. At page 12 lines 14 thru 23 Mr. Garrett discusses the applicability of A.A.C. R14-2-
7 506(E)(2)(b). Please discuss.**

8 A. Here Mr. Garrett discusses the interpretation and applicability of A.A.C. R14-2-
9 506(E)(2)(b) which are legal issues that are best reserved for legal briefs.

10
11 **Q. On page 12 line 25 thru page 15 line 13 Mr. Garrett discusses the applicability of
12 A.A.C. R14-2-1112. Please comment.**

13 A. Mr. Garrett's arguments here are all legal in nature and a response to them is best reserved
14 for legal briefs.

15
16 **Q. On page 17 line 18 thru page 18 line 11 Mr. Garrett discusses Commission Decision
17 No. 61626. Please comment.**

18 A. Here Mr. Garrett mischaracterizes my Rebuttal Testimony and then argues against that
19 mischaracterization. Mr. Garrett states that my Rebuttal Testimony indicated that the two
20 preferred provider agreements approved by the Commission in Decision No. 61626 are
21 not substantially different than the *preferred marketing agreement* between Cox and Shea.
22 My Rebuttal Testimony actually states that the entire arrangement between Cox and Shea
23 is substantially different than the preferred provider agreements approved in that decision.
24 Staff has never cited the preferred marketing agreement in isolation as a source of the
25 issues in this case. Because of this mischaracterization very little weight should be
26 afforded to this portion of Mr. Garrett's testimony.

1 **Q. At page 18 lines 20 thru 27 Mr. Garrett discusses the timing of Staff's allegations in**
2 **this matter. Please discuss.**

3 A. It is not clear to me exactly what Mr. Garrett is getting at here. He seems to be arguing
4 that Cox could not have willfully violated any rules, statutes, or orders without first having
5 read Staff's testimony in this case. Cox, like all companies, has an obligation to comply
6 with all applicable rules, statutes and orders. That obligation does not depend on when or
7 if Staff (or any other party) files testimony. Further, Cox has been aware of the procedural
8 schedule and process in this case for some time. The procedural schedule and process was
9 first discussed in a memo filed by Staff on December 19, 2005. The procedural schedule
10 and process was laid out in a Procedural Order dated February 6, 2006.

11
12 **Q. At page 19 lines 9 thru 17 Mr. Garrett discusses "actual facts" that he claims**
13 **demonstrate that Cox did not willfully or intentionally violate any "orders, rules or**
14 **requirements." Please comment.**

15 A. Here Mr. Garrett provides four "facts" to support his claim. I will address each in turn.
16 First, Mr. Garrett states that "the situation at Vistancia had elements that appeared to be
17 consistent with previous Commission decisions addressing: (i) preferred provider
18 agreements and (ii) the Commissions respect (for) private property rights." As I stated
19 above and in my Rebuttal Testimony, the arrangement between Cox and Shea was
20 significantly different than any preferred provider agreement the Commission has dealt
21 with in the past. Also, as I stated above the private property rights issues in this case are
22 significantly different than those discussed elsewhere in Mr. Garrett's testimony. (It is not
23 clear exactly what private property rights issues Mr. Garrett is referring to here; I can only
24 assume he is referring to the same issues discussed at page 10 of his Rebuttal Testimony.)
25 Second, Mr. Garrett states that "the private easement was a property right created by the
26 public act of the City of Peoria – and no court has overturned the grant of that property

1 right.” While this statement is true, the City of Peoria did in fact approve the private
2 easement at the request of Shea. However, Staff struggles to determine its relevance. Cox
3 has an independent obligation to comply with all relevant rules, statutes and orders
4 regardless of what the City of Peoria might do. Further, as discussed above the City of
5 Peoria only approved the private easement after language specifically indemnifying it was
6 added. Third, Mr. Garrett states that “the construction charges assessed by Cox on the
7 Vistancia developer were consistent with a Commission-approved tariff.” This statement
8 is incorrect. Staff is not aware of any Commission-approved tariff that allows
9 construction charges to be arbitrarily increased in order to offset discriminatory access
10 fees. Finally, Mr. Garrett states that “Cox had a non-exclusive license agreement - it did
11 not have an exclusive right to serve Vistancia.” I argued in my Rebuttal Testimony that
12 the arrangement between Cox and Shea, while not exclusive on its face, *effectively*
13 excluded other wireline carriers from serving the Vistancia development. In its Rebuttal
14 Testimony Cox has submitted no evidence or argument that indicates that the arrangement
15 between Cox and Shea was not effectively exclusionary.

16
17 **Q. At page 20 lines 5 thru 14 Mr. Garrett quotes a letter from Accipiter to the US**
18 **Department of Justice. Please comment.**

19 **A.** Here Mr. Garrett attempts to use the language in this letter to support the contention that it
20 was not clear what Commission rules, orders or requirements were implicated by the
21 arrangement between Cox and Accipiter. Approximately one month after this letter was
22 filed Accipiter filed a complaint with this Commission alleging several violations of
23 Commission rules, orders or requirements. So irrespective of Accipiter’s statements in the
24 cited letter it is apparent that their thinking on this matter evolved very quickly.
25 Additionally, the fact that Accipiter felt compelled to take the extraordinary step of
26 contacting the United States Department Of Justice and that the DOJ commenced an

1 investigation is further evidence of the discriminatory and exclusionary nature of the
2 arrangement between Cox and Shea.

3
4 **Q. At page 22 lines 14 through 25 Mr. Garrett discusses concerns he has regarding**
5 **Staff's "apparent view" regarding the interaction between private property owners**
6 **and telecom carriers. Please comment.**

7 A. Here Mr. Garrett completely mischaracterizes Staff's position and therefore this portion of
8 his Rebuttal Testimony should be afforded little if any weight. Specifically, Mr. Garrett
9 states that it is Staff's "apparent view that it is illegal for a carrier to provide service to a
10 property where the property owner: (i) refuses to allow other carriers to serve or (ii)
11 discriminates against other carriers(.)" This is not Staff's view and nowhere in its
12 testimony or other filings has Staff expressed such a view. The facts of this case do not
13 lead us to believe that this is simply a case of a property owner (i) refusing to allow other
14 carriers to serve or (ii) discriminating against other carriers. Rather, this is a case where
15 Cox and Shea jointly implemented an arrangement that was effectively exclusionary and
16 discriminatory.

17
18 **Q. Please summarize your testimony.**

19 A. Staff is not persuaded by the rebuttal testimony submitted by Cox. Staff continues to
20 believe that the arrangement between Cox and Shea was inherently anti-competitive.
21 Further, that arrangement contained discriminatory provisions that distinguish it from
22 existing and typical preferred provider agreements. Staff continues to believe that Cox's
23 involvement in the arrangement constitutes violation of 47 U.S.C. 224, A.A.C. R14-2-506,
24 R14-2-1112 and Commission Decision No. 60285. Also the arrangement interfered with
25 Accipiter's obligations under 47 U.S.C. 214. Finally, as Staff's Attorneys will discuss in
26 their briefs, A.R.S. 40-203 provides that contracts of a public service corporation that are

1 unjust, discriminatory or preferential, illegal or insufficient are illegal and subject to
2 prescription by the Commission. A.R.S. 40-321 prohibits service arrangements by a
3 utility that are unjust, unreasonable or improper.

4

5 **Q. Does this conclude your testimony?**

6 **A. Yes, it does.**

List of Exhibits

Exhibit 1: Cox's response to Staff data request 5.2

Exhibit 2: A copy of the NELA offered to Accipiter by Vistancia.

Exhibit 3: July 16, 2003 email of Tisha Arthurs, provided by Cox in response to Accipiter Data Request. Bates No. C00002

**ARIZONA CORPORATION COMMISSION
STAFF'S FIFTH SET OF DATA REQUEST TO
COX ARIZONA TELCOM, LLC
Docket No.: T-03471A-05-0064
January 20, 2006**

AFF 5.2 This expands on or clarifies STF 4.8. "Related to the data response on page C01853, "Paul and I met with Sunbelt Holdings today and they are giving us some pretty creative ways to keep the competition out." Please explain the creative ways that Shea and Cox discussed to keep the competition out." To what specific competitors is the statement on page C01853 referencing?

RESPONSE: **CONFIDENTIAL** See Cox' response to data request 4.6. This request incorrectly assumes that "Shea and Cox discussed" creative ways to keep competition out. As explained in detail in response to Data Request 4.6, the Cox representative who made these notes was merely paraphrasing what was said by representatives of the developer. The Cox representatives did not "discuss" those issues with the developer, but rather just listened to the developer's position and assertions. At the time these comments were made by the developer, Cox and the developer had already negotiated the essential terms of their agreement – which was a standard preferred provider arrangement with revenue sharing for the developer at certain levels of customer penetration and an agreement by the developer to pay \$2 million toward the capital costs of construction. The Cox representative who made these notes understood that the developer was interested in limiting the number of telecommunications service providers who would provide service in Vistancia because the developer thought that would increase the potential revenue share for the developer. The private easement that the developer indicated that it would be obtaining from the City of Peoria was what the Cox representative understood was the "creative way" that the developer was hoping to use to limit the number of service providers at Vistancia, but Cox viewed these statements by the developer to be unilateral objectives of the developer over which Cox had no control. Because Cox had no prior familiarity with private easements and because Cox was assured by the developer that, if granted by the City of Peoria, such a private easement was perfectly legal and gave the developer the right to control access to its property, Cox did not question what the developer was doing. Instead, Cox simply made it clear to the developer that whatever the developer did it could not change the substance of the agreements that had already been reached between Cox and the developer, and the developer assured Cox that the substance of those negotiated agreements would not change. Cox does not recall any specific competitors being mentioned by the developer when these comments were made by the developer.

RESPONDENT: Tisha Arthurs Christle, Cox Communications Arizona

WHEN RECORDED RETURN TO:

Shea Sunbelt Pleasant Point, LLC
 6720 N. Scottsdale Road
 Suite 160
 Scottsdale, AZ 85253-4424
 Attention: Curtis E. Smith

NON-EXCLUSIVE LICENSE AGREEMENT

"Effective Date": _____, 2004

"Licensor": Corporate/Company Name: Vistancia Communications, L.L.C., an Arizona limited liability company

State of Organization: Arizona

Address: 6720 North Scottsdale Road
 Suite 160
 Scottsdale, Arizona 85253-4424

THIS NON-EXCLUSIVE LICENSE AGREEMENT (this "License") is made and entered into on the Effective Date by and between Licensor and Accipiter Communications Incorporated, a Nevada corporation, _____, Arizona 85____ (the "Licensee"). Capitalized terms not otherwise defined in this License shall have the meanings ascribed to them in the Appendix A attached to that certain Common Services Easements and Restrictions dated June 10, 2003 and recorded on June 27, 2003, in Instrument No. 2003-0837106, official records of Maricopa County, Arizona (such Common Services Easements and Restrictions, as amended from time to time, being hereinafter referred to as the "CSER"), which Appendix A is hereby incorporated herein by reference. The terms or phrases "Effective Date", and "Licensor" shall have the meanings ascribed to them above.

ARTICLE I - RECITALS

Section 1.01 WHEREAS, Licensor is the "Grantee" under the CSER, and has not encumbered, alienated or otherwise transferred or diminished its rights thereunder, except as set forth on Schedule 1.01 attached hereto.

Section 1.02 WHEREAS, in consideration of the License Fee (as hereinafter defined) payable by Licensee to Licensor, Licensor desires to grant Licensee, its grantees, successors and permitted assigns an irrevocable license for the perpetual use of the Service Easement and Reserved Rights conveyed to Licensor in the CSER, subject to the terms and limitations of this License.

Section 1.03 WHEREAS, Licensor, Vistancia, LLC, a Delaware limited liability company ("Master Developer"), and the City of Peoria, Arizona, an Arizona chartered municipal corporation (the "City") have entered into that certain Multi-Use Easements and Indemnity recorded on July 23, 2003, in Instrument No. 2003-0975499, official records of Maricopa County, Arizona (the "MUEI"), which requires that Master Developer and Licensor impose certain obligations on, and secure certain agreements of, Licensee as hereinafter provided.

Section 1.04 WHEREAS, in accordance with the CSER, Licensor desires to authorize Licensee to install, own and maintain certain Facilities within the Service Easement Area.

Section 1.05 WHEREAS, Licensee wishes to accept from Licensor the license as set forth below, subject to the terms and limitations of this License (including, but not limited to, Licensee's obligation to pay the License Fee as hereinafter provided); and, in addition, Licensee wishes to undertake certain obligations that are for the benefit of and are enforceable by the City, as set forth in Article V below.

Section 1.06 WHEREAS, this License is a private right of contract and a grant of an irrevocable private license between Licensor and Licensee, and is not a grant of a public easement.

THIS INDENTURE WITNESSETH, that in consideration of ten dollars (\$10.00), the mutual covenants contained in this License, and other good and valuable consideration, the receipt and sufficiency of which are by this License acknowledged, the Parties to this License agree as follows:

ARTICLE II - LICENSE

Section 2.01 **Premises and Use.** Licensor hereby declares, creates, transfers, assigns, grants and conveys unto Licensee, its grantees, successors and permitted assigns, the perpetual and non-exclusive right, privilege and license (a) upon, under and across the Service Easement Area, to construct, lay, install, own, operate, lease, license, franchise, alienate, assign, modify, alter, supplement, inspect, maintain, repair, reconstruct, replace, remove, relocate, expand, or otherwise service any and all necessary or desirable Facilities of any type used to provide or make available Internet Bandwidth Access Services, Telephone Services (local) and Telephone Services (long distance) within the Development, (b) upon, under and across the Service Easement Area, to excavate and perform any necessary or desirable work upon and under the surface of the Service Easement Area as and when required to make available such Internet Bandwidth Access Services, Telephone Services (local) and Telephone Services (long distance) or service the Facilities therefor, (c) upon, under and across the Service Easement Area, to create and provide ingress and egress to and from the Service Easement Area in connection with the exercise of any rights granted hereunder, and (d) to use the Licensor's Reserved Rights in connection with the rights granted hereunder; provided, however, such license shall be subject to and limited by the limitations and restrictions set forth in the CSER. Licensee expressly acknowledges and represents that, to the extent this License is inconsistent with, contrary to, or otherwise limited or circumscribed by the CSER, then the terms and conditions of the CSER shall control and be binding upon Licensee, its grantees, successors and assigns, without recourse against Licensor.

Section 2.02 **Term.** This License shall be irrevocable and shall continue perpetually (the "Term").

Section 2.03 **Assignment and Sublicensing.** The rights and obligations granted to the Licensee hereunder may be assigned, sold, transferred, sublicensed, encumbered or disposed of in any way, manner or extent (collectively "Transfers") at any time to any Affiliate of the Licensee (collectively "Affiliate Transfers"). Any Transfer to a Person that is not an Affiliate of the Licensee shall be subject to the prior consent of the Licensor, which consent shall not be unreasonably withheld. Any attempted or purported assignment, sale, transfer,

sublicense, encumbrance or disposal in violation of this Section 2.03 shall be a breach of this License and shall also be null and void and of no force or effect.

Section 2.04 Use of Easement. This License shall be for the private, personal, exclusive and perpetual use and benefit of Licensee and its grantees, licensees, lessees, franchisees, successors and permitted assigns who have been identified by and contracted with the Licensee to own, install, repair, relocate, expand, or otherwise service the Facilities in the Service Easement Area.

Section 2.05 Title and Authority. Licensor represents, with the knowledge that Licensee shall rely upon such representation, that: (a) Licensor is the "Grantee" under the CSER, (b) Licensor has not transferred, encumbered or otherwise diminished its rights under the CSER, except as set forth on Schedule 1.01, and (c) the individual executing this License on behalf of the Licensor has the authority to so execute this License.

Section 2.06 Chain of Title. This License is conveyed to the Licensee, its grantees, successors and permitted assigns, to have and to hold, so long as the rights, privileges and interests (licenses and easements) herein granted shall be used for the express purposes and upon the terms and conditions specified herein, but shall be subject to all liens, encumbrances, restrictions and prior easements of record including, without limitation, the CSER. Licensor and Licensee hereby covenant and agree that the license granted hereby, together with all the covenants contained herein, shall "run with the land," shall be reflected on and run with the title and any interests in the Development and the Combined Easement Area and shall be binding upon all grantees, successors and permitted assigns of each of the respective Parties hereto.

ARTICLE III - LICENSE FEE AND SERVICE STANDARDS

Section 3.01 License Fee. In consideration of the license granted hereunder, Licensee agrees to pay to Licensor a fee (the "License Fee") calculated in accordance with Schedule 3.01 attached hereto, which License Fee shall be payable in accordance with the terms of said Schedule 3.01.

Section 3.02 Service Standards. All Internet Bandwidth Access Services, Telephone Services (local) and Telephone Services (long distance) provided by Licensee within the Development shall be of a quality greater than or equal to the quality of such Internet Bandwidth Access Services, Telephone Services (local) and Telephone Services (long distance) as are being offered within the Development by COXCOM, Inc., a Delaware corporation d/b/a Cox Communications Phoenix (or its successors or Affiliates).

ARTICLE IV - INDEMNIFICATION AND RIGHT TO DEFEND

Section 4.01 Indemnification. Licensee agrees to indemnify, defend and hold harmless the Licensor and its successors and assigns, including, without limitation, the Grantor under the CSER, the Owners, the Association, and their successors in interest (collectively, the "Indemnitees") from and against any and all losses, claims, damages and liabilities, joint or several (including reasonable investigation fees, attorneys' fees, accountant's fees, expert witness fees and other related expenses incurred in connection with any third party action, suit or proceeding or any third party claim asserted), to which the Indemnitees may become subject as a result of any failure by Licensee to satisfy its obligations under this License and/or any applicable law, regulation or governmental requirement; provided, however, that Licensee shall not be required to indemnify, defend or hold harmless any Indemnitee from that Indemnitee's own negligence, or any act or omission which is wrongful on any Indemnitee's part.

Section 4.02 Right to Defend. Licensee has the right of notice and to defend any controversy or claim arising out of or relating to this License or the CSER, any alleged breach, any question as to the validity of its terms or conditions or legal effect, the construction of their terms or conditions or legal effect, and the

interpretation of the rights and duties of the Parties under this License or the CSER; provided, however, that Licensee's right to defend with respect to the CSER shall be non-exclusive and shall be held in common with Licensor and any other Person to whom Licensor grants such rights and/or may hold such rights pursuant to contract or applicable law. The Licensor and its grantees, successors and assigns, shall notify Licensee of any claim, suit, administrative proceeding (including regulatory proceeding), or any other action or threatened action which may, either presently or at a future date, give rise to Licensee's duty to indemnify or Licensee's right to defend, which notice shall be in writing and provided to Licensee within seven (7) business days from the date that Licensor or the Licensor's successors in interest, becomes aware of such claim, suit or proceeding, or potential claim, suit or proceeding.

ARTICLE V - AGREEMENTS BENEFITING THE CITY

Section 5.01 Payment of Franchise Fees. Licensee shall pay to the City the franchise fees that would be payable by Licensee pursuant to the terms of the existing or future franchise agreement (if any) between the City and Licensee, as if the City (as opposed to Licensor and/or Master Developer) were the grantor of the license and rights granted under this License to provide Internet Bandwidth Access Services, Telephone Services (local) and Telephone Services (long distance) and/or to install Facilities within the Service Easement Area. The City shall be an intended third party beneficiary entitled to enforce the provisions of this Section 5.01 (including, but not limited to, the obligations of Licensee hereunder).

Section 5.02 Acknowledgment of City Rights and Waiver of Claims. Licensee hereby acknowledges the existence of the City's right, as set forth in Section 4.03 of the MUEI, to convert the MUEs (as such term is defined in the MUEI) to public utility easements. Licensee hereby waives all losses, claims, damages, liabilities or actions against the City in connection with or arising from any exercise by the City of its rights under Section 4.03 of the MUEI. The City shall be an intended third party beneficiary entitled to enforce the provisions of this Section 5.02 (including, but not limited to, the obligations of Licensee hereunder).

Section 5.03 Agreement to be Bound by Peoria City Code. Licensee hereby agrees and warrants that any construction, maintenance, or other actions by the Licensee in the MUEs will be done and repaired as if the MUEs were held in fee by the City with no reserved rights held by the Access Entity or the Master Developer. The City shall be an intended third party beneficiary entitled to enforce the provisions of this Section 5.03 (including, but not limited to, the obligations of Licensee hereunder).

ARTICLE VI - NOTICES

Section 6.01 Form and Delivery. Any and all notices, demands or other communications required or desired to be given hereunder by either party shall be in writing. A notice will be validly given or made to another party if (i) if served personally, (ii) deposited in the United State mail, certified or registered, postage prepaid, (iii) transmitted by telegraph, telecopy or other electronic written transmission device, or (iv) if sent by overnight courier service

Section 6.02 Receipt of Notice. If any notice, demand or other communication is served personally (methods (i) and (iv) of Section 6.01, above), service will be conclusively deemed made at the time of such personal service. If such notice, demand or other communication is given by mail (method (ii) of Section 6.01, above), service will be conclusively deemed given three (3) business days after the deposit thereof in the United State mail. If such notice, demand or other communication is given by electronic transmission (method (iii) of Section 6.01 above), service will be conclusively deemed made at the time of confirmation of delivery.

Section 6.03 Delivery Information. The information for notice to the Licensor and Licensee is set forth above (at the beginning of this Agreement and introductory paragraph, respectively).

Section 6.04 Change of Address. Any party may change its address to another address (or facsimile number to another facsimile number), to another address within the continental United States, by giving notice in the aforementioned manner to the other Party.

IN WITNESS WHEREOF, the Parties have executed this License as of the date first above written.

LICENSOR

LICENSEE

VISTANCIA COMMUNICATIONS, L.L.C., an Arizona limited liability company

ACCIPITER COMMUNICATIONS INCORPORATED, a Nevada corporation

By: Vistancia, LLC, a Delaware limited liability company, its Manager

By: _____
Its: _____

By: Shea Homes Southwest, Inc., an Arizona corporation, its Member

By: _____
Its: _____

By: Sunbelt Pleasant Point Investors, L.L.C., an Arizona limited liability company, its Member

By: Sunbelt PP, LLLP, an Arizona limited liability limited partnership, its Manager

By: Sunbelt Holdings Management, Inc., an Arizona corporation, its General Partner

By: _____
Curtis E. Smith, its Chief Operating Officer

Schedules: 1.01 Other Easements or Licenses
3.01 License Fees

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2004, by _____, the _____ of Accipiter Communications Incorporated, a Nevada corporation, on behalf thereof.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2004, by Curtis E. Smith, the Chief Operating Officer of Sunbelt Holdings Management, Inc., an Arizona corporation, the General Partner in Sunbelt PP, LLLP, an Arizona limited liability limited partnership, the Manager of Sunbelt Pleasant Point Investors, L.L.C., an Arizona limited liability company, a Member in Vistancia, LLC, a Delaware limited liability company, the Manager of Vistancia Communications, L.L.C., an Arizona limited liability company, on behalf thereof.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
)ss
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2004, by _____, the _____ of Shea Homes Southwest, Inc., an Arizona corporation, a Member in Vistancia, LLC, a Delaware limited liability company, the Manager of Vistancia Communications, L.L.C., an Arizona limited liability company, on behalf thereof.

Notary Public

My Commission Expires:

SCHEDULE 1.01

Other Easements or Licenses

Assignment of Common Services Easements and Restrictions executed by Vistancia Communications, L.L.C., an Arizona limited liability company and Residential Funding Corporation, a Delaware corporation, dated June 27, 2003.

Multi-Use Easements and Indemnity executed by Vistancia Communications, L.L.C., an Arizona limited liability company, Shea Sunbelt Pleasant Point, LLC, a Delaware limited liability company, and the City of Peoria, Arizona, an Arizona chartered municipal corporation, recorded on July 23, 2003, in Instrument No. 2003-0975499, official records of Maricopa County, Arizona.

Non-Exclusive License Agreement executed by Vistancia Communications, L.L.C., an Arizona limited liability company and Coxcom, Inc, a Delaware corporation d/b/a Cox Communications Phoenix, dated December 31, 2003, and recorded on March 2, 2004, in Instrument No. 2004-0212876, official records of Maricopa County, Arizona.

Non-Exclusive License Agreement executed by Vistancia Communications, L.L.C., an Arizona limited liability company and Coxcom, Inc, a Delaware corporation d/b/a Cox Communications Phoenix, dated December 31, 2003, and recorded on March 2, 2004, in Instrument No. 2004-0212877, official records of Maricopa County, Arizona.

Amended and Restated Declaration of Covenants, Conditions, Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for Vistancia Village A, recorded on July 31, 2003, in Instrument No. 2003-1025411, official records of Maricopa County, Arizona.

Declaration of Covenants, Conditions and Restrictions for Trilogy Village at Vistancia, recorded on January 28, 2004, in Instrument No. 2004-0082577, as amended by a First Amendment thereto recorded on March 16, 2004, in Instrument No. 2004-0267881, official records of Maricopa County, Arizona.

Declaration of Covenants, Conditions, and Restrictions for Vistancia, recorded on July 9, 2003, in Instrument No. 2003-0898772, official records of Maricopa County, Arizona.

Map of Dedication for Vistancia - Phase 1A, recorded in Book 647 of Maps, page 31, official records of Maricopa County, Arizona.

Final Plat for Desert Sky at Trilogy at Vistancia Parcel C21, recorded in Book 647 of Maps, page 30, official records of Maricopa County, Arizona.

Final Plat for Sunset Ridge at Trilogy at Vistancia Parcels C15, C16, C17, C18, and C19, recorded in Book 655 of Maps, page 35, official records of Maricopa County, Arizona.

Final Plat for Desert Bloom at Trilogy at Vistancia Parcel C31, recorded in Book 664 of Maps, page 1, official records of Maricopa County, Arizona.

Final Plat for Trilogy at Vistancia Parcel C33, recorded in Book ____ of Maps, page ____, official records of Maricopa County, Arizona.

Final Plat for Trilogy at Vistancia Parcel C34, recorded in Book ___ of Maps, page ___, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A30, recorded in Book 647 of Maps, page 41, official records of Maricopa County, Arizona, and Certificate of Correction recorded October 10, 2003 as Instrument No. 2003-1423458, official records of Maricopa County, Arizona, and Certificate of Correction recorded December 9, 2003 as Instrument No. 2003-1668089, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A10A, recorded in Book 655 of Maps, page 33, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A12, recorded in Book 655 of Maps, page 32, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A13, recorded in Book 655 of Maps, page 31, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A14, recorded in Book 661 of Maps, page 25, official records of Maricopa County, Arizona, and Certificate of Correction recorded January 2, 2004 as Instrument No. 2004-0000466, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A19, recorded in Book 656 of Maps, page 39, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A20, recorded in Book 656 of Maps, page 3, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A32, recorded in Book 655 of Maps, page 34, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A33, recorded in Book 655 of Maps, page 29, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A36, recorded in Book 655 of Maps, page 30, official records of Maricopa County, Arizona.

Final Plat for Vistancia Village A Parcel A37, recorded in Book 662 of Maps, page 26, official records of Maricopa County, Arizona.

**[UPDATE THIS SCHEDULE PRIOR TO RECORDING,
TO REFERENCE ALL DOCUMENTS THEN RECORDED]**

SCHEDULE 3.01

License Fee

Single Family Residential and Multi-Family Residential: The License Fee shall be paid and calculated as follows, in connection with each SRF (as hereinafter defined) and each MFU (as hereinafter defined):

Licensee shall pay Licensor the sum of Five Hundred Thousand and No/100 Dollars (\$500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Village A portion of the Development (as hereinafter defined) is connected to any Internet Bandwidth Access Services, Telephone Services (local) or Telephone Services (long distance) provided by Licensee.

Licensee shall pay Licensor the sum of Five Hundred Thousand and No/100 Dollars (\$500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Trilogy portion of the Development (as hereinafter defined) is connected to any Internet Bandwidth Access Services, Telephone Services (local) or Telephone Services (long distance) provided by Licensee.

Licensee shall pay Licensor a percent of gross revenue, according to the following scale, received by Licensee for Internet Bandwidth Access Services, Telephone Services (local) and/or Telephone Services (long distance) provided by Licensee within the Development. Such revenue shall be paid on the incremental sales above 75% penetration. The penetration rate shall be calculated by dividing active customers by total homes (i.e., total SFRs and MFUs) passed. Penetration shall be calculated monthly and paid quarterly (as provided under the "General" heading below). The term "revenue" shall not include revenue received for long distance, installation fees, equipment fees whether purchased or rented, taxes, assessments, and license fees.

Penetration	Payout
75%-79%	15%
80%-85%	16%
86%-90%	17%
90%-95%	18%
96%-100%	20%

The License Fee shall be paid individually per product achieving 75% penetration. Each product must stand on its own merit in order to qualify for payment of the License Fee.

As used herein, the term "SFR" means a single family detached or attached residence within the Development that is developed for sale, including a condominium or townhouse.

As used herein, the term "MFU" means residential buildings within the Development containing multiple family dwelling units for purchase, lease or rent whether detached or attached.

As used herein, the term "Village A portion of the Development" means the "Subject Property" as defined and described in that certain Amended and Restated Declaration of Covenants, Conditions,

Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for Vistancia Village A, dated July 31, 2003 and recorded July 31, 2003, in Instrument No. 2003-1025411, official records of Maricopa County, Arizona, as from time to time supplemented or amended.

As used herein, the term "Trilogy portion of the Development" means the "Project" as defined and described in that certain Declaration of Covenants, Conditions and Restrictions for Trilogy Village at Vistancia, dated January 26, 2004 and recorded January 28, 2004, in Instrument No. 2004-0082577, official records of Maricopa County, Arizona, as amended by a First Amendment thereto recorded on March 16, 2004, in Instrument No. 2004-0267881, official records of Maricopa County, Arizona, as from time to time thereafter further supplemented or amended.

Non-Residential: The License Fee shall be paid and calculated as follows, in connection with each Building (as hereinafter defined):

Licensee shall pay Licensor a License Fee according to the following scale based on the Applicable License Fee percentage (determined pursuant to the chart below according to the Penetration Percentage (as hereinafter defined) within each Building) multiplied by the Monthly Recurring Revenue (as hereinafter defined) for that Building. The License Fee shall be calculated (and paid by Licensee, if owed pursuant to the provisions hereof) separately for each Building within the Development that is constructed on land conveyed by Licensor to an Owner, which building is rented or occupied by an Owner, tenant or other occupant that subscribes to any Internet Bandwidth Access Services, Telephone Services (local) and/or Telephone Services (long distance) provided by Licensee (each such Building being hereinafter referred to as a "Qualifying Building"). As used herein, the term "Penetration Percentage" shall mean, with respect to each Qualifying Building, the percentage amount calculated by dividing the total square footage of the Qualifying Building that is rented or occupied by Owner(s), tenant(s) or other occupant(s) subscribing to Internet Bandwidth Access Services, Telephone Services (local) and/or Telephone Services (long distance) provided by Licensee, divided by the total rentable square footage of that Qualifying Building. For example, if a Qualifying Building contains 100,000 total rentable square feet and has Owners, tenants and other occupants subscribing to Internet Bandwidth Access Services, Telephone Services (local) and/or Telephone Services (long distance) provided by Licensee occupy 85,000 square feet, then the Penetration Percentage would be equal to 85% and Licensor would receive a License Fee equal to 3% of Monthly Recurring Revenue with respect to that Qualifying Building.

<u>Penetration Percentage</u>	<u>Applicable License Fee</u>
0% - 74%	0% of MRC
75% - 85%	3% of MRC
86% - 95 %	4% of MRC
96% - 100%	5% of MRC

Once the Penetration Percentage attributed to a particular Qualifying Building increases to a level that would produce a higher License Fee under the above chart, then Licensor shall be entitled to the higher License Fee, which shall apply to all Monthly Recurring Revenue attributable to that Qualifying Building. If the Penetration Percentage decreases then Licensor shall be paid the Applicable License Fee, if any, corresponding to the decreased Penetration Percentage.

As used herein, the term "Monthly Recurring Revenue" shall mean all revenues received by Licensee in connection with for the Internet Bandwidth Access Services, Telephone Services (local) and/or Telephone Services (long distance) provided by Licensee through the Facilities located within the Development to the Buildings only, but excluding, or deducting from such revenues if the same were included therein, installation and construction fees, taxes, promotional or bundling discounts, equipment, revenue from residential dwellings (such as apartments, condos, and single family homes, which shall be governed by the provisions under the heading "Single Family Residential and Multi-Family Residential" above), revenue from governmental entities, interest charges, bad debts, franchise fees or other governmental charges, surcharges, telecom fund charges, 911 fees, or other governmental authorized assessments (however described) and network access charges. In addition, the provision of Internet Bandwidth Access Services, Telephone Services (local) and/or Telephone Services (long distance) to state and federal governmental entities and the City of Peoria shall be excluded from the "Monthly Recurring Revenue" hereunder.

As used herein, the term "Building" means a building or other structure within the Development that is used for commercial (including, but not limited to, office and retail), office, employment center, and/or industrial purposes in accordance with applicable zoning and recorded deed restrictions. The term "Building" does not include any apartment building, multifamily residential building, or other building or structure occupied as a residence (which shall be governed by the provisions under the heading "Single Family Residential and Multi-Family Residential" above). If a building or other structure within the Development is used for both a commercial, office, employment center, and/or industrial purpose that would qualify it as a "Building" pursuant to the foregoing definition, and for another purpose that would not qualify it as a "Building" pursuant to the foregoing definition, then such building or other structure shall be deemed a "Building" hereunder only with respect to that portion thereof that is used for such commercial, office, employment center, and/or industrial purpose(s).

General: All payments of the License Fees hereunder shall be payable to Licensor without demand at the address set forth in this License, or to such other address as Licensor may designate. Payments of License Fees shall be made during the Term of this License on a quarterly basis, within ninety (90) days from the end of the prior quarter. If Licensee fails to make payments as required herein, Licensor shall be entitled to interest at the rate of 1% per month until paid.

Within one year following Licensor's receipt of any payment of License Fees, Licensor shall have right to audit the books and records of Licensee regarding the value of consumer subscriptions to Internet Bandwidth Access Services, Telephone Services (local) and/or Telephone Services (long distance) for the period covered by such payment of License Fees to verify the amount of License Fees due. All audits shall be conducted during normal business hours and upon reasonable prior written notice to the party being audited. All audits shall be conducted at the office in Arizona where the party being audited maintains the records to be audited. No records shall be removed from such offices by the auditor. Unless required by law or court order or as evidence in any dispute resolution proceedings, the auditing party shall not disclose any non-public information obtained in course of the audit. If as a result of an audit it is determined that any amount owing has been underpaid by more than 5%, the audited party shall reimburse the auditing party for the reasonable cost of the audit.

DiNunzio, Mark (CCI-Phoenix)

From: Arthurs, Tisha (CCI-Phoenix)
Sent: Wednesday, July 16, 2003 3:32 PM
To: DiNunzio, Mark (CCI-Phoenix), Kelley, Mary (CCI-Phoenix)
Subject: RE Vistancia Contract

Mark,

The developer is the one who pushed with the City of Peoria for the private easements in a public community. The terms of the easements were set up for us. They paid us a \$3 million dollar capital contribution and wanted to insure that they would get at least some of that money back through the revenue share program. The revenue share terms are set high enough that they will really have to perform in order to recoup any of their capital contribution. If the RGU's were shared between multiple providers they would never reach the penetration expectations that we set for them. This sort of agreement has been successfully executed in another location (state). I can get you in touch with their guru if you want to dialog it further.

Best regards,
Tisha Arthurs
Cox Communications
Sr Account Executive
(623)322-7857

-----Original Message-----

From: DiNunzio, Mark (CCI-Phoenix)
Sent: Wednesday, July 16, 2003 3:07 PM
To: Kelley, Mary (CCI-Phoenix), Arthurs, Tisha (CCI-Phoenix)
Subject: Vistancia Contract

Did either of you have any problems with the way the developer negotiated use of the easements for Vistancia? My understanding is that Qwest and another carrier are fighting the way the developer wanted to negotiate the use of the easement. I know we are the preferred provider for this area but just wanted to know if we had a problem with this too or were able to accept it since we landed the contract. If we did have a problem with it, please let me know as it could set a precedent for other areas we may want to serve. Thanks.

Mark A. DiNunzio
Manager, Regulatory Affairs
Office - 623-322-8006
Fax - 623-322-8037
Cell - 602-741-3740
mark.dinunzio@cox.com

fimbers

BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner
BARRY WONG
Commissioner

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

REDACTED

REJOINDER

TESTIMONY

OF

ARMANDO FIMBRES

PUBLIC UTILITIES ANALYST V

UTILITIES DIVISION

ARIZONA CORPORATION COMMISSION

AUGUST 15, 2006

TABLE OF CONTENTS

Page

EXECUTIVE SUMMARY i

I. INTRODUCTION..... 1

II. STAFF’S RESPONSE TO MS. CHRISTLE’S REBUTTAL TESTIMONY..... 4

III. STAFF’S RESPONSE TO MS. TRICKEY’S REBUTTAL TESTIMONY 10

IV. STAFF’S RESPONSE TO MR. GARRETT’S REBUTTAL TESTIMONY..... 20

EXHIBITS

AFF-31 [REDACTED]

AFF-32 [REDACTED]

AFF-33 [REDACTED]

AFF-34 [REDACTED]

AFF-35 [REDACTED]

AFF-36 Comparison of CMA, Exhibit G and NELA, Schedule 3.01

AFF-37 [REDACTED]

AFF-38 ACI0005 to ACI0016 -- Qwest email to Accipiter

AFF-39 [REDACTED]

EXECUTIVE SUMMARY
ACCIPITER FORMAL COMPLAINT AGAINST
COX ARIZONA TELCOM, L.L.C.
Docket No. T-03471A-05-0064

Staff's Rejoinder Testimony responds to the Rebuttal Testimony submitted by Ms. Tisha Christle, Ms. Linda Trickey, and Mr. Douglas Garrett, on behalf of Cox on July 26, 2006.

1 **I. INTRODUCTION**

2 **Q. Please state your name, occupation, and business address.**

3 A. My name is Armando Fimbres. I am a Public Utilities Analyst V employed by the
4 Arizona Corporation Commission ("ACC" or "Commission") in the Utilities Division
5 ("Staff"). My business address is 1200 West Washington Street, Phoenix, Arizona 85007.
6

7 **Q. Are you the same Armando Fimbres who submitted Rebuttal Testimony in this
8 matter on behalf of Staff on June 15, 2006?**

9 A. Yes.
10

11 **Q. What is the scope of your Rejoinder Testimony?**

12 A. Staff's testimony will respond to the rebuttal testimony submitted by Mr. Douglas Garrett,
13 Ms. Linda Trickey, and Ms. Tisha Christle on behalf of Cox on July 26, 2006.
14

15 I will first respond to Ms. Christle's testimony regarding the purpose of the private
16 easement, Cox's knowledge regarding private easement arrangements, the \$1 Million
17 capital contribution and the role of Cox in implementing the whole arrangement between
18 the parties.
19

20 I will next respond to Ms. Trickey's Rebuttal Testimony regarding the nature of Staff's
21 testimony being based on speculation and conjecture, Cox's right to review and approve
22 the relevant agreements, and the contracts entered into by Shea and Cox.
23

24 Finally, I will respond to Mr. Garrett's Rebuttal Testimony regarding Qwest, the capital
25 contribution Shea paid to Cox, and the adverse impact of the arrangement on competition.
26

1 However, to the degree that Staff does not address a point made by Cox in its Rebuttal
2 Testimonies, this should not be taken as agreement with Cox's position.

3
4 **Q. Is its Staff's position that this arrangement had an adverse impact on competition in**
5 **Vistancia?**

6 A. Yes. Staff believes from information provided by Cox that Vistancia home buyers desired
7 competitive alternatives to Cox telecommunications services. In the voluminous
8 information provided by Cox to the Department of Justice ("DOJ"), Staff discovered
9 approximately 146 individual Cox Service Interest Forms that appear to have been
10 provided by early home buyers in Vistancia to communicate service interests to Cox.

11
12 Some forms, such as [REDACTED] (Exhibit AFF-31), clearly express that customers have
13 used Cox services in the past and appear to be eager to receive Cox services in their home
14 – "We want all three services (TV, Phone, Internet) at our new home". Most important to
15 this proceeding, however, is that some home buyers appear uncommitted. For example,
16 the home buyers on [REDACTED] and [REDACTED] (Exhibits AFF-32 and AFF-33) indicated that
17 they had used some form of Cox service at their present address but did not "check" that
18 they had any interest in receiving information on Cox digital telephone service. Home
19 buyer [REDACTED] (Exhibit AFF-34) is an example of a customer who indicated no present
20 experience with Cox service and did not request additional information on Cox
21 telecommunications service. More noteworthy is the notation on [REDACTED] (Exhibit AFF-
22 35). This customer appears to have indicated no present experience "with emphasis" and
23 did not want any information on Cox TV, Telecommunications or Internet services.

24
25 It is possible that just within these 5 customer examples, 4 were interested in competitive
26 telecommunications alternatives to Cox.

1 **Q. Are there other reasons to believe Vistancia home buyers would have been interested**
2 **in competitive alternatives to Cox telecommunications services?**

3 A. Staff discovered that of the approximate 146 Cox Service Interest Forms sent to the DOJ¹,
4 47 home buyers indicated no present experience with Cox services of any sort. More
5 interesting is that 87 of the approximate 146 home buyers did not indicate any interest in
6 receiving additional information on Cox telecommunications services. Thus, it is possible
7 that 30% to 60% of Vistancia home buyers, as illustrated by this small sample of home
8 buyers, were not committed to Cox telecommunications services. If so, those customers
9 had no wireline telecommunications alternatives in the Vistancia development because of
10 the private easement arrangement.

11
12 **Q. Cox contends at page 8 of Ms. Christle's Rebuttal Testimony and page 1 of Ms.**
13 **Trickey's Rebuttal Testimony that it received no benefit from the private easement**
14 **arrangement?**

15 A. Staff strongly disagrees. Staff still believes the preferred provider arrangement, which
16 provided marketing access to customers not available to any other provider, was
17 enhanced, supplemented and benefited through a private easement arrangement that
18 limited physical access to any other provider. Admittedly, preferred provider
19 arrangements which are under review in Docket T-00000K-04-0927 in Arizona have
20 resulted in a scenario where either Qwest or Cox has ended up serving a development.
21 However, in these cases other carriers were not precluded from entering and serving the
22 development as well. Here the effect of the private easement and web of other agreements
23 was to lock-out other telephone providers from the start. In the Vistancia development,
24 Accipiter, the ILEC designated by the Commission to serve this territory, wanted to

¹ Files provided to Staff were labeled [REDACTED]

1 provide service but was locked-out because of the private easement arrangement from
2 doing so.

3
4 **II. STAFF'S RESPONSE TO MS. CHRISTLE'S REBUTTAL TESTIMONY**

5 **Q. How does Ms. Christle respond to Staff's testimony regarding the availability of**
6 **VoIP and Wireless competitive alternatives in Vistancia?**

7 A. Ms. Christle states² that she "...did not give a lot of thought to wireless and VoIP
8 competition when I (she) was working on the Vistancia matter, because I did not make
9 decisions about whether to build out to the remote location or whether to ask for a capital
10 contribution."

11
12 Ms. Christle also stated that Dan Sjostrom considered the risk of competing with VoIP in
13 determining the need for a \$2 Million capital contribution. Staff believes this testimony is
14 similar to the Company's claim that the \$1 Million access fee was a capital contribution.
15 Capital contributions are for building infrastructure. The Company's argument that
16 capital contributions may be adjusted to compensate for business risk and to offset access
17 fees is simply disingenuous. Staff believes that Ms. Christle's testimony demonstrates the
18 Company's cavalier attitude about its participation in implementing the private easement.

19
20 **Q. Does this mean that the scope of the private easement arrangement was not intended**
21 **to exclude all providers?**

22 A. No. It is probable that the scope of the various agreements was broad enough that a
23 provider attempting to offer even Fixed Wireless³ service within Vistancia would have
24 had to first pay the \$1Million license fee. VoIP and traditional Wireless were not viable

² Rebuttal Testimony of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 3, line 7.

³ Accipiter, Decision 67574, page 7, lines 22-26; Accipiter Complaint, T-03471A-05-0064, page 15, lines 10-16; CSER, Appendix A, Section, 1.16.

1 alternatives to traditional wireline service at the time. Additionally any restrictions on the
2 use of VoIP or traditional Wireless services would be extremely difficult, if not
3 impossible, to enforce.
4

5 **Q. Ms. Christle takes exception to Staff stating that Cox was less than candid in the**
6 **identification of Indiana as the state in which the private easement arrangement had**
7 **been used previously. How does Staff respond?**

8 A. According to the emails in Staff's possession, Cox was given at least two opportunities⁴ to
9 follow-up with the Indiana law firm utilized by Shea to discuss the private easement
10 arrangement. Ms. Trickey's testimony indicates that these were apparently "missed"
11 opportunities for Cox since Cox chose not to follow-up with the Indiana law firm. Cox
12 had an obligation under A.R.S. §40-203 to gain an independent understanding of the
13 private easement arrangement for use with telecommunications services, and it failed.
14

15 Staff believed that Cox was being less than candid on this point because on its data
16 responses to Staff it consistently stated "Indiana or Illinois" but never indicated any action
17 on their part in determining even which state the private easement arrangement had been
18 previously used. Again, in their Direct Testimony the Cox witnesses simply refer to
19 "other parts of the country". Staff actually discovered, through careful study of the
20 discovery information provided by Cox, that the state was Indiana.

⁴ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006Exhibit AFF-28, 1 of 3; Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006Exhibit AFF-30.

1 **Q. How do you respond to Ms. Christle's statements beginning on page 5 of her**
2 **testimony regarding the reasons Qwest agreed to transfer its service territory which**
3 **served a portion of the Vistancia development to Accipiter?**

4 A. Here, Ms. Christle suggests that Staff believes that the only reason Qwest transferred its
5 service areas in Vistancia to Accipiter was the private easement arrangement. That is
6 incorrect. Staff contends that the private easement arrangement was a major reason,
7 perhaps the final major reason, that Qwest decided to transfer its Vistancia service areas to
8 Cox. Attached is an email⁵ (Exhibit AFF-38) from a Qwest representative to Accipiter,
9 dated August 27, 2003, setting forth some of the concerns regarding the possibility of the
10 private easement arrangement running afoul of certain Commission rules. The timeline in
11 Exhibit AFF-1 highlights that Qwest formally filed its acceptance of the Accipiter
12 application after Qwest became fully aware of the private easement arrangement being
13 placed into effect by Cox and its partners.

14
15 In addition, although Qwest has in the past sold rural exchanges and transferred a small
16 number of areas on the periphery of exchanges when such areas could have been more
17 economically served by another ILEC, Staff cannot find one instance in which Qwest
18 transferred its service areas within a master planned development, especially one served
19 by Cox as a preferred provider. There are many master planned developments within
20 Qwest's service area in which Cox is the preferred provider but Staff cannot recall any
21 instance in which Qwest impacted its future competitive position as Qwest did in
22 Vistancia.

⁵ Provided by Accipiter in response to STF 2.3.

1 **Q. Doesn't Ms. Christle go on to state that Qwest voluntarily transferred service areas**
2 **in Vistancia to Accipiter?**

3 A. Yes. On page 6, Ms. Christle states "Qwest voluntarily relinquished its ILEC status to
4 Accipiter." The available information suggests to Staff that Qwest transferred its
5 Vistancia service area reluctantly. There are four reasons for Staff's conclusion: (1)
6 Accipiter requested the service area transfer in an application with the Commission on
7 August 22, 2002, (2) Qwest filed an objection 7 days later on August 29, 2002, (3) Qwest
8 agreed to the transfer on December 22, 2003 after Cox revised all its agreements with
9 Shea and helped put into place the private easement arrangement, and (4) the resolution of
10 the application took 28 months, ending on February 15, 2005. The available information
11 suggests to Staff that Qwest transferred its Vistancia service areas reluctantly.

12

13 **Q. At page 7, Ms. Christle alleges that Staff's Rebuttal Testimony states the MUE**
14 **arrangement was "devised by Vistancia and Cox." Is that true?**

15 A. No. This is a mischaracterization of my Rebuttal Testimony. What I stated in my
16 Rebuttal Testimony was "the most striking condition within the documents, that were
17 devised by Vistancia and Cox, as alleged by Accipiter, and together create the private
18 easement and associated terms and conditions, is a license fee that equals \$1 Million
19 dollars." Ms. Christle's testimony takes what I said out of context.

20

21 **Q. At page 8, Ms. Christle discusses her understanding of the additional \$1 million**
22 **capital contribution from Shea. Does Staff have a response?**

23 A. Ms. Christle's states the following in her Rebuttal:

24

25 "I understood that Shea would increase the capital contribution to Cox to include
26 the access fee so that Cox would have the net capital contribution required for it to

1 commit its capital to build out to Vistancia. Shea later informed us that the access
2 fee was \$1 million and that it would give Cox a \$3 million capital contribution.
3 Although Cox did not ask Shea for the additional \$1 million capital contribution,
4 Shea understood that we would request the additional sum since Shea had
5 increased our costs by imposing a \$1 million access fee. Although I understood
6 that Shea could charge other communications providers an access fee that might
7 cause others not to provide services, Shea had informed us that this was legal. “

8
9 This essentially supports Staff’s position that Cox did not incur the cost of the license fee
10 that was to be charged to other carriers. It also supports Staff’s position that Cox
11 recognized the license fee would be an entry barrier for other carriers and was being
12 imposed in a discriminatory manner.

13
14 **Q. Was the capital contribution by itself unique in this case?**

15 A. Yes. At various times, Cox has indicated that need for capital contribution dollars from
16 Shea were related to construction expenses unique to Vistancia. The remote location is
17 one example offered by Cox that is unique to Vistancia. Ms. Trickey admits that it was an
18 unusual practice⁶ for Cox to request a capital contribution, however. Exhibit AFF-39
19 contains an email sent by Paul Drake to many of the key Cox participants that supports
20 Ms. Trickey’s statement. That email states “...let’s not lose site of something we are
21 doing here that we have never done with another developer and that is requesting a capital
22 contribution of \$2 million dollars right up front...”

⁶ Rebuttal Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 6.

1 **Q. What is Staff's understanding of this arrangement?**

2 A. The whole arrangement, but most particularly the \$1 Million license fee, was unique.
3 However, defining a license fee as a construction cost, whether capitalized or not, is
4 incorrect, in Staff's opinion, and appears contrived to carryout the parties' scheme and
5 makes payment of the \$1 Million license fee illusory. The \$1 Million license fee was
6 originally part of the "Marketing Compensation Schedule", from Cox to Shea, in Exhibit
7 G of the CMA. Under the private easement arrangement, the \$1 Million license fee,
8 originally part of a marketing compensation schedule, became redefined as construction
9 costs allowing a complete offset by Shea so Cox incurred no real cost.

10

11 **Q. In Staff's opinion, how important does it appear to have been to Shea to recoup its**
12 **capital contribution?**

13 A. Exhibit AFF-30 contains an email from Ms. Christle to Mr. DiNunzio that states in part
14 "...They paid us a \$3 million capital contribution and wanted to insure that they would get
15 at least some of that money back through the revenue share program...". Paul Drake also
16 stated in an email (Exhibit AFF-39) to other Cox representatives: "Shea is in agreement to
17 the idea of a capital contribution but in doing so I am sure they are trying to see a way of
18 recouping the advance, no differently than we would." Thus it was very important to Shea
19 to get back the upfront payment. Under the private easement arrangement, and other web
20 of agreements Shea and Cox were both insulated and not at risk. The arrangement
21 ensured Cox would have enough penetration so revenue sharing would kick-in to Shea's
22 benefit. The capital contribution given to Cox also insulated Cox from risk.

1 **Q. How do you respond to Ms. Christle's claim on page 9 of her Rebuttal Testimony**
2 **that Cox did not know of the private easement arrangement on September 30, 2003?**

3 A. After reviewing the series of emails, Staff agrees with her. With that clarification, Exhibit
4 AFF-19, dated October 8, 2002, appears to Staff to open the subject of the private
5 easement arrangement. This was only one week later. The exhibit contains handwritten
6 notes taken by Ms. Christle at a meeting with Shea. The notes state in part "Shea can
7 guarantee to keep out the competition. Cox can purchase the knowledge. What is it worth
8 to us."

9
10 **Q. Ms. Christle expresses frustration with the listing of various incriminating emails**
11 **and handwritten notes on pages 20 – 21 of Staff's testimony. How does Staff**
12 **respond?**

13 A. Ms. Christle states that in the emails and handwritten notes referenced, she was only
14 recording what Shea said. Despite two pages of discussion in Staff's Rebuttal Testimony,
15 consisting of 9 examples that reference 9 exhibits, Ms. Christle did not offer any new
16 explanation in her Rebuttal Testimony. Staff does not believe that silence in the face of
17 anti-competitive behavior by business partners is an adequate response. Cox's position
18 that it relied solely on the legal assurances of Shea and the City of Peoria are disconcerting
19 and in Staff's opinion not a valid defense for Cox's conduct. Staff believes that Cox had a
20 duty under A.R.S. §40-203 to investigate contractual arrangements rather than passively
21 accept anti-competitive contracts.

22
23 **III. STAFF'S RESPONSE TO MS. TRICKEY'S REBUTTAL TESTIMONY**

24 **Q. What is Staff's general observation regarding Ms. Trickey's Rebuttal Testimony?**

25 A. Ms. Trickey continues to argue that the private easement arrangement was imposed on
26 Cox.

1 **Q. How does Staff respond to Ms. Trickey's statement that Cox believed that its review**
2 **and approval of the private easement arrangement was "mostly a courtesy"?**

3 A. Communications between companies regarding official documents, and especially
4 communications involving attorneys on behalf of major corporations, are based on clear,
5 precise language. Communications on a matter of this importance between Shea and Cox
6 must have been based on clear language, not beliefs. As Ms. Storey says in her email⁷,
7 "...We are delivering these documents to you because, under the terms of the Co-
8 Marketing Agreement for Vistancia, Cox has the right to review and approve the CSER
9 prior to recording it..." Ms. Storey appears to be reciting contract language in her email
10 that Staff has confirmed⁸ in the CMA – "The form of the CSER and the Non-Exclusive
11 License shall be subject to review and approval by Cox prior to recordation thereof..."

12
13 Email exchanges between Ms. Storey and Ms. Trickey⁹ "...If Curt hasn't contacted you
14 about that yet, I can walk you through it when we speak on Wednesday..." (Ms. Storey to
15 Ms. Trickey), "...I wanted to spend some time with you to make sure I have a comfort
16 level as to where we are..." (Ms. Trickey to Ms. Storey) further support that Cox was an
17 active participant. This indicates that Cox's involvement rose to a level much higher than
18 passive acceptance or forced resignation.

19
20 **Q. How does Staff respond to Ms. Trickey's statement that Staff's testimony is based on**
21 **unfounded speculation and conjecture?**

22 A. Staff does not agree. Staff's position is based upon written documents, email exchanges
23 between the parties, the testimony of Cox and statements by Accipiter's representatives.

⁷ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006, Exhibit AFF-17

⁸ CMA, April 8, 2003, paragraph E.

⁹ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006, Exhibit AFF-37.

1 The facts in Staff's Rebuttal Testimony are numerous. Here is a brief summary of some
2 of the information upon which Staff relied:

- 3 (1) 30 exhibits consisting of 68 pages.
- 4 (2) 17 data requests to Cox consisting of 234 questions, many with multiple parts.
- 5 (3) The underlying contracts that make up the private easement arrangement.
- 6 (4) Staff analysis of Cox data responses that disclosed numerous details regarding the
7 Cox employees¹⁰ participating in the Vistancia development:
- 8 a. 56 total Cox employees
- 9 b. 32 Cox management employees
- 10 c. 5 Cox in-house attorneys
- 11 d. 7 Cox upper-management executives.
- 12 (5) Staff analysis that disclosed the financial impacts of the private easement
13 arrangement:
- 14 a. started at \$2M (from Vistancia to Cox) with \$0 License Fee (from Cox to
15 Vistancia)
- 16 b. shifted, at least in discussion form, to \$5M (from Vistancia to Cox) with \$3
17 License Fee (from Cox to Vistancia)
- 18 c. ended at \$3M (from Vistancia to Cox) with \$1 License Fee (from Cox to
19 Vistancia).
- 20 (6) Staff analysis of Cox discovery information that disclosed an email¹¹ from Ms.
21 Storey stating "...Cox has the right to review and approve the CSER prior to
22 recording it..."
- 23 (7) Staff's rigorous confirmation of supporting details:

¹⁰ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006, Exhibit AFF-21 and other.

¹¹ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006, Exhibit AFF-17.

- 1 a. Did Qwest really request \$15M¹² in capital dollars? (Cox notes¹³ actually state
2 \$3M - \$5M.)
3 b. Was Ms. Lesa Storey really Shea's in-house counsel¹⁴? (Cox admits in
4 response to Staff's data request STF 13.18 that Ms. Storey was outside counsel
5 for Shea.)
6 c. Where are Cox's telecommunications switches? (Confirmed by Cox in
7 response to Staff data requests STF 11.21 and 15.1.)
8 d. Are there any Cox developments more remote from Cox's telecommunications
9 switches than Vistancia? (Confirmed by Staff analysis)
10 (8) Review and analysis of the underlying Accipiter complaint¹⁵.
11 (9) Review and analysis of Cox's testimony.
12 (10) Discussions with Accipiter regarding their complaint.

13

14 These examples help illustrate that Staff, was very careful to place even small bits of
15 information in the proper context, did not make unfounded assumptions about Cox's role
16 in this matter. Staff conducted extensive research and reached conclusions founded on
17 evidence and often connected by multiple data points. Finally, Staff has reviewed and
18 analyzed over 15,000 pages of information provided by Cox and Accipiter since this
19 matter was initiated on January 31, 2005.

¹² Direct Testimony of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, page 3.

¹³ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006, Exhibit AFF-6.

¹⁴ Direct Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, April 5, 2006, page 3.

¹⁵ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006, Exhibit AFF-29.

1 **Q. At page 3, Ms. Trickey explains that “Shea wanted the MUE contracts as a means of**
2 **controlling service provider access at its property similar to what takes place every**
3 **day with respect to apartment complexes and other multiple dwelling units.” Does**
4 **that make sense?**

5 A. Comparing a private easement arrangement in a multi-dwelling unit (“MDU”)
6 environment with a large master planned development does not make sense. The words
7 “at its property” are the root of the issue. An MDU owner quite literally owns the entire
8 environment. The ownership of the Vistancia development has actually been in transition
9 from Shea to the approximate 14,000 homebuyers who will eventually reside in Vistancia
10 from the point that Shea set the development rules legally in place. Building anti-
11 competitive barriers to telecommunications providers for mass markets is fundamentally
12 different from the example of a property owner in an MDU environment controlling
13 access to its property.

14
15 **Q. At pages 3 and 4, Ms. Trickey states “The contracts that the Cox signed were**
16 **expressly “not exclusive” and did allow access by other telecommunications**
17 **providers.” How does Staff respond?**

18 A. Cox argues that it “signed” contracts that were expressly non-exclusive and takes no
19 ownership of its participation in approving other documents. Staff sees little distinction
20 between the words “signing” and “approving”, as apparently Cox does. Staff contends
21 that Cox’s active participation in the implementation of a private easement arrangement
22 was anti-competitive.

23
24 **Q. What about Ms. Trickey’s specific point regarding “non-exclusive contracts”?**

25 A. Just calling an agreement non-exclusive, such as the Non-Exclusive License Agreement or
26 NELA, does not make it non-exclusive. Staff contends the terms and conditions of the

1 NELA combined with the manner in which the NELA evolved have the effect of an
2 exclusive arrangement. Most telecommunications providers would not realistically be
3 able to make a \$1 Million up-front payment when Cox had a Preferred Provider
4 Arrangement (“PPA”) that would have made competition very difficult and recovery of
5 the \$1 Million upfront payment very risky. This is especially true of a company with the
6 annual revenues of Accipiter, as described earlier. Even a company with the recognized
7 resources of Qwest was not willing to partake in such an arrangement and instead
8 transferred its Vistancia service area to Accipiter. This payment would have been even
9 more difficult for a CLEC who wanted to serve a niche market in Vistancia.

10

11 The \$1Million license fee and the revenue sharing terms were first placed into the Co-
12 Marketing Agreement, or CMA, in Exhibit G by Cox and Shea. When the NELA was
13 developed, Exhibit G was removed from the CMA and placed in the NELA as Schedule
14 3.01.

15

16 **Q. That sounds as though the terms which Cox had accepted were then placed on other**
17 **providers. Isn’t that fair?**

18 A. The shifting of terms from the CMA to the NELA sounds fair but was unfair in its design.
19 The CMA was first changed in anticipation of the NELA being developed. The NELA
20 was only implemented after the CMA was revised. The changes that both documents
21 underwent are outlined below:

22

23 Note: Vistancia and Shea, affiliated companies,
24 are considered one in the illustration below.

25

26

27

28

29

	<u>CMA</u>	<u>NELA</u>
1/17/03		Did Not Exist
\$2M (from Vistancia to Cox)		
2/18/03		Did Not Exist

1	\$5M (from Vistancia to Cox)	
2	with \$3M plus Revenue Sharing	
3	(from Cox to Vistancia)	
4		
5	4/8/03	Did Not Exist
6	\$3M (from Vistancia to Cox)	
7	with \$1M plus Revenue Sharing	
8	(from Cox to Vistancia)	
9		
10	9/25/03	12/31/03
11	\$3M (from Vistancia to Cox)	\$1M plus Revenue Sharing
12		(from Cox and Other Carriers
13		to Vistancia)
14		

15 What the private easement agreement does is effectively unravel a formula (Total =
16 Capital Contribution - License Fee - Revenue Sharing) supported with extensive analysis¹⁶
17 that made financial sense for Cox and imposes only the negative portions on other
18 providers. The outline below illustrates the difference for Cox versus all other providers.

19 For Cox:
20 Total = \$3 Million - \$1Million - Revenue Sharing
21 For Other Providers:
22 Total = - \$1 Million - Revenue Sharing
23

24 Cox was \$2 Million positive before it began to deliver telecommunications services. All
25 providers, other than Cox, who had chosen to accept the private easement arrangement
26 would have been \$1 Million negative before they began to deliver telecommunications
27 services.

¹⁶ Discovery information provided by Cox continues several confidential financial scenarios developed by Cox.

1 **Q. At page 4, Ms. Trickey states “Mr. Fimbres (Staff) seems to believe that Cox is**
2 **misrepresenting that it was Shea, not Cox, that wanted the MUE arrangement.”**
3 **How does Staff respond?**

4 A. Staff does not believe that Ms. Trickey’s contention that Cox did not want the MUE is
5 supported by the facts in this case. In fact, the facts imply otherwise. If Cox did not want
6 the MUE, Cox did not have to enter into the arrangement with Shea.

7
8 **Q. How does Staff respond to Ms. Trickey’s statement at page 5 “...Cox had an absolute**
9 **right to negotiate a preferred provider agreement for Vistancia, and there is nothing**
10 **unlawful about such an arrangement...”?**

11 A. Cox confuses the issue in this matter. This case does not only concern the preferred
12 provider arrangement that Cox signed with Shea. This case involves the private easement
13 arrangement and the web of related agreements that together made the private easement
14 arrangement anti-competitive and discriminatory.

15
16 **Q. How does Staff respond to Ms. Trickey’s comments beginning at page 5 regarding**
17 **Staff’s belief that Cox was an “active participant”?**

18 A. Staff notes that nowhere in Ms. Trickey’s comments does Cox contend that Cox “did not
19 approve” the private easement arrangement. It is and continues to be Staff’s position that
20 Cox had the right of approval and did so.

21
22 **Q. How does Staff respond to Ms. Trickey’s comments at page 7 pertaining to**
23 **attachment LT-29 that includes a comment “CSER: Not that critical”?**

24 A. In her Rebuttal Testimony, Ms Trickey attempts to downplay the significance of the
25 CSER by relying upon the handwritten note from Mary Kelley of Cox that contains a
26 supposed recording of a conversation with Curt Smith and contains the comment “CSER:

1 Not That Critical". However, in coming to its conclusions about the CSER, Staff relied
2 upon much more than offered by Ms. Trickey in her Rebuttal Testimony.

3
4 Cox appears to be stating that Staff should accept:

- 5 (1) a handwritten,
6 (2) barely legible,
7 (3) contextually unclear statement (see LT-29),
8 (4) authored by a former Cox employee (Ms. Kelley),
9 (5) dated March 26, 2003

10 Over

- 11 (1) a typed email (see AFF-17),
12 (2) authored by an experienced real estate attorney (Ms. Storey),
13 (3) sent to 3 Cox employees (one of whom is Ms. Kelley)
14 (4) and 2 Shea employees,
15 (5) with at least 3 file attachments,
16 (6) that links to paragraph E of the April 8, 2003 CMA
17 (7) dated May 27, 2003.

18 To put this in proper context, which is more reliable? Staff has considered all of this
19 evidence but believes the typed email is more reliable.

20
21 **Q. What is Staff's reaction to the comments offered by Cox witnesses regarding the**
22 **private easement arrangement?**

23 A. This topic is treated with the same consistent themes by Cox – Shea devised¹⁷ the MUE...,
24 Shea proposed¹⁸ the MUE..., Shea wanted¹⁹ the MUE..., Shea pushed²⁰ for the MUE...,

¹⁷ Rebuttal Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 4.

¹⁸ Rebuttal Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 5.

1 Shea insisted²¹ upon the MUE..., Shea drafted²² the MUE..., Shea represented²³ the MUE
2 as lawful... Cox continues to insist that the private easement arrangement was forced
3 upon it and that Cox had no ability to object.
4

5 **Q. Does Staff still not agree with Cox?**

6 A. No. Staff believes that Cox has an independent duty under A.R.S. §40-203 to evaluate
7 proposed contracts and determine if they create anti-competitive effects. The private
8 easement arrangement became effective because more than one party approved or signed
9 corresponding documents. Cox became one of the parties when it approved the CSER and
10 agreed to participate in the revision of its preferred provider arrangement leading to the
11 NELA.
12

13 **Q. Please restate Staff's position pertaining to the private easement arrangement?**

14 A. Cox's position continues to skirt the issue that it had the right of approval for the private
15 easement arrangement. Based on the email from Ms. Storey²⁴, Staff believes that Cox had
16 the right of approval concerning the CSER which encapsulated the private easement
17 arrangement that was then woven into all the other documents in which Cox was a party.
18 Cox does not offer any convincing evidence to the contrary. Ms. Trickey's Rebuttal

¹⁹ Rebuttal Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 6; Rebuttal Testimony of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 2.

²⁰ Rebuttal Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 4.

²¹ Rebuttal Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 2; Rebuttal Testimony of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 2.

²² Rebuttal Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 2; Rebuttal Testimony of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 2.

²³ Rebuttal Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 4.

²⁴ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006, Exhibit AFF-17.

1 Testimony²⁵ states that Cox believed the right of approval was “mostly a courtesy”. Based
2 upon my analysis, Staff does not agree.

3
4 **IV. STAFF’S RESPONSE TO MR. GARRETT’S REBUTTAL TESTIMONY**

5 **Q. What is Staff’s general observation regarding Ms. Garrett’s Rebuttal Testimony?**

6 A. Mr. Garrett’s testimony focuses primarily on policy issues addressed by Staff Witnesses
7 Abinah and Rowell. I have just a few comments concerning Mr. Garrett’s testimony
8 regarding Qwest and the impact on competition of the various agreements.

9
10 **Q. Were Cox’s comments pertaining to Qwest a surprise to Staff?**

11 A. In some ways, yes. Staff included information pertaining to Qwest in Staff’s June 15,
12 2006 Rebuttal Testimony to add situational context to many important events related to
13 the Vistancia agreements. Cox continues to maintain that Cox’s acceptance of the private
14 easement arrangement does not constitute active participation in the private easement
15 arrangement. The surprise now is that Cox fails to acknowledge the full consequences of
16 the private easement arrangement in Vistancia. Also surprising were comments that
17 Qwest may have been injured, a possibility opened by Mr. Garrett²⁶. This is not an issue
18 identified in Staff’s June 15, 2006 testimony. Cox does not appreciate how its actions
19 impacted customers who may have desired service either from Qwest or from CLECs who
20 would have been able to resell Qwest’s facilities in accordance with the 1996 Telecom
21 Act. Staff should not have to remind Cox that CLECs are allowed to utilize the
22 unbundled facilities of Qwest or resell Qwest services. Staff was careful to address the
23 linkage between Qwest and the CLECs in its June 15, 2006 Rebuttal Testimony, a point to

²⁵ Rebuttal Testimony of Linda Trickey, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 6.

²⁶ Rebuttal Testimony of Douglas Garrett On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 24, line 16.

1 which Cox did not respond. If Cox wishes to discuss potential injury to Qwest, then a
2 similar discussion should involve the CLECs. The points are inseparable.

3
4 **Q. Does this settlement address the long term anti-competitive impacts on Vistancia**
5 **customers?**

6 A. No. Regardless of the settlement involving Accipiter and Cox, customers have been
7 effectively blocked from ordering services from Qwest and the CLECs as competitive
8 alternatives by the private easement arrangement. Per the 1996 Telecom Act, Accipiter
9 does not have the obligation to allow CLECs discounted resale access to Accipiter's
10 network.

11
12 **Q. Mr. Garrett alleges that your testimony regarding Qwest's motives in agreeing to**
13 **transfer its service territory to Accipiter is based on speculation and conjecture.**

14 **How do you respond?**

15 A. That is simply untrue. My conclusions in this regard were based upon an extensive
16 analysis of emails and correspondence between the parties produced in discovery;
17 statements by Accipiter; review of filings in the Accipiter CC&N docket and my general
18 knowledge of Qwest and preferred provider agreements. I relied on my expertise
19 developed over 30 years in the telecommunications industry in interpreting the evidence
20 before me.

21
22 Staff continues to believe that Qwest was a primary concern of Cox with respect to
23 serving Vistancia in the initial stages because Cox wanted to serve the development.
24 Even after Cox became aware Accipiter was going to take over Qwest's service area
25 within Vistancia, Cox was not concerned because they believed Accipiter would not have

1 the capability to bundle services²⁷. Accipiter became a large legal concern to Cox,
2 however, after the private easement arrangement was presented to the City of Peoria and
3 Accipiter began raising concerns about it. Indeed, Accipiter's actions put Cox on notice
4 that the legality of the private easement arrangement would be challenged.
5

6 **Q. What do the Cox witnesses, including Mr. Garrett, state with respect to the ability of**
7 **Qwest and Cox to serve a remote location such as Vistancia?**

8 A. Staff understood the Cox witnesses to mean that the cost of serving Vistancia would be
9 higher because of the need to interconnect the Vistancia facilities with other facilities used
10 by Cox or Qwest. The cost related to the "remote location" of the Vistancia development
11 was discussed by Staff in its June 15, 2006 Rebuttal Testimony²⁸ and is illustrated in the
12 corresponding Exhibits AFF-3 and AFF-5. As discussed earlier by Staff, the remoteness
13 of Vistancia to Qwest's switching facilities is undoubtedly less than that of Cox. The
14 Vistancia service area transferred by Qwest to Accipiter was already within the Beardsley
15 wire center. Carefully comparing Exhibits AFF-3 and AFF-5 illustrates in simple terms
16 that Qwest had any number of switching options available to it that were less costly, as a
17 function of distance, than available to Cox.
18

19 Exhibit AFF-5 by itself makes clear, however, that Cox's concern about the cost related to
20 distance, or the remote location, were not driving factors since Rancho Sahuarita was at
21 least five times further in distance, from its customer service area to its
22 telecommunications switching facilities. If remoteness were so critical to cost, Cox would
23 surely have installed a telecommunications switch closer to Rancho Sahuarita or perhaps
24 one closer to Vistancia.

²⁷ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006, Exhibit AFF-19.

²⁸ Rebuttal Testimony Of Armando Fimbres, On Behalf Of Staff, T-03471A-05-0064, June 15, 2006, page 22, lines 9-10.

1 **Q. Do you agree with Mr. Garrett that Staff is wrong with respect to Qwest versus**
2 **Cox's costs to serve a remote location such as Vistancia?**

3 A. I disagree with Mr. Garrett for the following reasons. He describes the "distance" costs to
4 serve Rancho Sahuarita, south of Tucson, as incremental "...already had substantial
5 network facilities (and related capacity) running within a half-mile of Rancho Sahuarita
6 ..."²⁹, while intimating that the "distance" costs to serve Vistancia were not incremental
7 "...Cox had to run facilities that distance to be able to serve the development..."³⁰ Cox
8 knows, of course, that if the costs to serve Vistancia, or any community, were not viewed
9 in some form of long-term shared or incremental basis, the cost to serve the first
10 community would always be fully-loaded, or bear 100% of the costs, while all subsequent
11 communities would presumably be served at virtually zero cost, such as suggested by Mr.
12 Garrett in his example. Mr. Garrett even hints at cost averaging that is used among
13 projects that share facilities when he states "...there were no other developments that were
14 going to be served off that run for quite sometime"³¹ in discussing the Vistancia costs.

15
16 **Q. Doesn't Mr. Garrett's statement about other developments not being served "for**
17 **quite sometime" support his point?**

18 A. Only in the most simple terms. If no other development ever appeared, then the
19 "distance" expenses would have to be absorbed fully by Vistancia. "Quite sometime"
20 could mean 1 year, 2 years, Cox does not explain. Even so, additional developments
21 would have shared the interconnection facilities at some point. Vistancia would not have
22 borne 100% of the "distance" expenses forever. Effective network planning would not
23 have permitted such utilization. Given the continuing growth in the Phoenix metropolitan

²⁹ Rebuttal Testimony of Douglas Garrett, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 5, line 5.

³⁰ Rebuttal Testimony of Douglas Garrett, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 5, line 8.

³¹ Rebuttal Testimony of Douglas Garrett, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 5, line 9.

1 area, the possibility that additional projects would not be interconnected to Vistancia
2 facilities at some point in the future seems low. The bottom-line point is that Qwest's
3 "distance" expenses for Vistancia could not have been higher than Cox's and, therefore,
4 could not have been the driving factor for Qwest deciding to not serve Vistancia. The
5 explanation put forth by Cox³² is that Qwest's costs to serve the "remote" Vistancia
6 location were too high and suggested as a key reason that Qwest decided not to serve
7 Vistancia.

8
9 **Q. Why do you disagree with Mr. Garrett's comparison of the switching costs to Cox of**
10 **servicing Vistancia compared to those of Qwest?**

11 A. On page 5 of his testimony, Mr. Garrett states "...I would like to note that Cox's switch
12 deployment is not similar to Qwest's historic end-office/wire center configuration." That
13 statement fully supports the points illustrated by Exhibits AFF-3 and AFF-5. Qwest has
14 many switching centers much closer to Vistancia, approximately 30 as counted in AFF-3,
15 than any of Cox's switches, general location shown on AFF-5. This point again supports
16 Staff's belief that the "remote location" could not have been any greater a cost factor for
17 Qwest than for Cox. If anything, the "remote location" should have been a greater cost
18 concern for Cox than for Qwest.

19
20 **Q. Mr. Garret and Ms. Trickey continue to insist that the arrangement was non-**
21 **exclusive and thus not anti-competitive. How do you respond?**

22 A. When speaking about the private easement arrangement, Ms. Trickey states on page 3
23 "The contracts that the Cox signed were expressly "not exclusive"". Mr. Garrett states on
24 page 3 "...Cox signed an exclusive marketing agreement with the Vistancia developers..."

³² Rebuttal Testimony of Douglas Garrett, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 3; Rebuttal Testimony of Tisha Christle, On Behalf Of Cox Arizona Telcom, L.L.C., T-03471A-05-0064, July 26, 2006, page 4.

1 when speaking about the preferred provider agreement. Part of the tension that exists in
2 this matter is linked to the direct association between the financial terms in Schedule 3.01
3 of the NELA, described as non-exclusive, and Exhibit G of the CMA, described as
4 exclusive. Staff contends that these terms were designed to operate together for Cox.
5 However, any other carrier would not have access to the financial terms of the CMA that
6 offset the license fees in the NELA.

7
8 The \$1Million license fee was first included in Exhibit G of the exclusive CMA and
9 counterbalanced with an increase of \$1Million in paragraph D of the exclusive CMA.
10 When the Exhibit G of the exclusive CMA was shifted to Schedule 3.01 of the non-
11 exclusive NELA, paragraph D of the exclusive CMA remained unchanged.

12
13 **Q. The “Marketing Compensation Schedule”, Exhibit G in the CMA, was renamed**
14 **“License Fees”, Schedule 3.01 of the NELA. Does that highlight any issues?**

15 **A.** Yes. By simply shifting financial terms that were part of the CMA, an exclusive
16 marketing agreement, to the NELA, Shea, with the participation of Cox, imposed the
17 terms intended exclusively for Cox within the CMA on other providers without the
18 balancing financial terms of paragraph D in the CMA. The financial terms of Paragraph D
19 and Exhibit G, together, may have been appropriate for Cox within the CMA. However,
20 when the “marketing compensation schedule” by itself is separated into the NELA as
21 “license fees”, the terms are not appropriate for any provider other than Cox. As
22 illustrated on Exhibit AFF-36, despite the different titles, the terms are the same in the
23 Marketing Compensation Schedule, Exhibit G of the CMA, and the License Fees,
24 Schedule 3.01 of the NELA. Even though the NELA contained no marketing, the same
25 terms were moved into the NELA, just renamed as license fees.

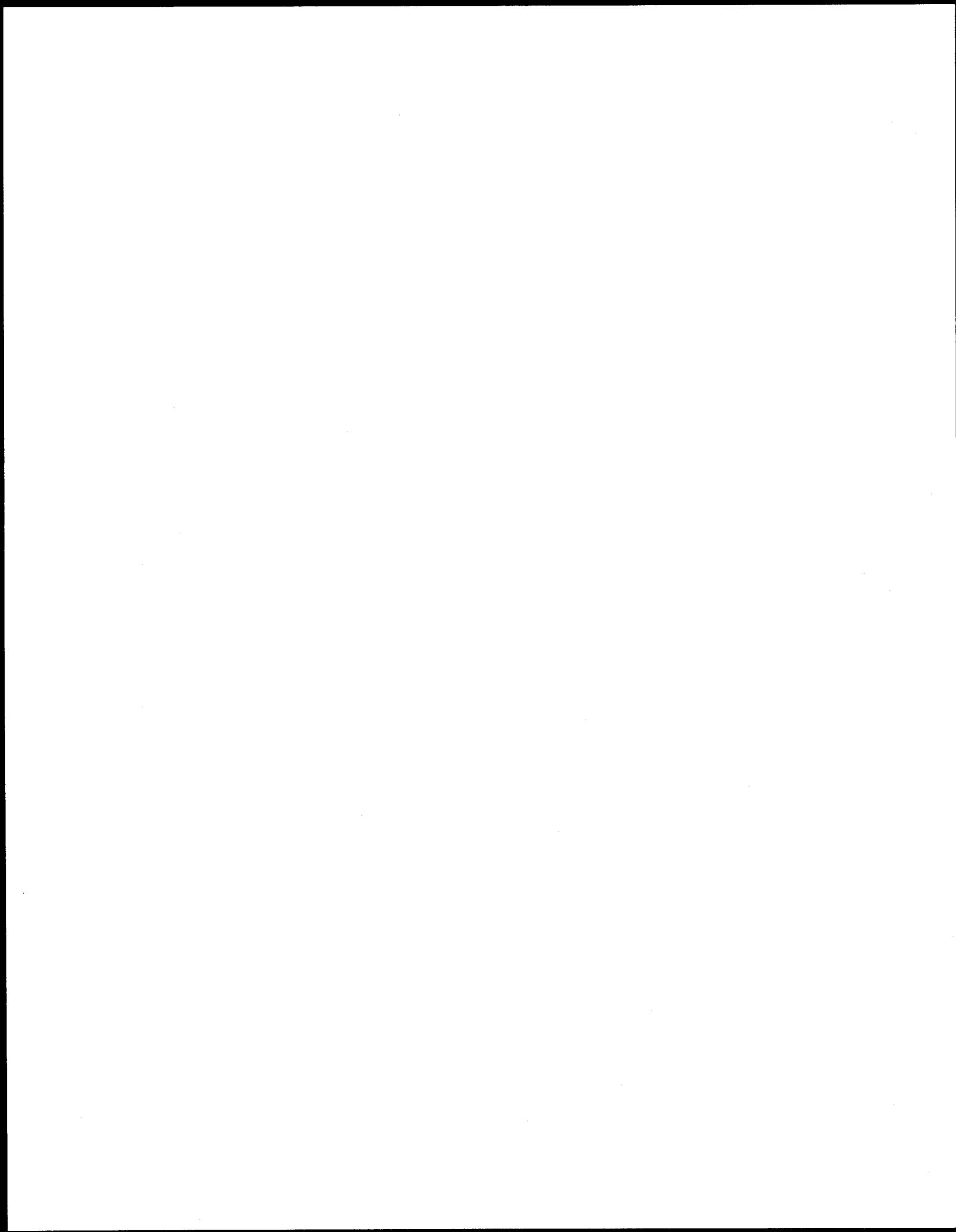
1 **Q. What is the summary point regarding the issue of “non-exclusive” versus**
2 **“exclusive”?**

3 A. Some of the financial terms that were later shifted to the NELA did not disturb the
4 exclusive nature of those terms for Cox since paragraph D in the exclusive CMA remained
5 unchanged. Staff contends the license fee of \$1M, eventually placed in the NELA, was
6 designed to convert what looked on its face to be a non-exclusive arrangement into what
7 in practice was really an exclusive arrangement.

8
9 **Q. Does this conclude your Testimony?**

10 A. Yes, it does.

11



REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

Co-Marketing Agreement, April 8, 2003

EXHIBIT C
Marketing Compensation Schedule

Cox will pay Master Developer the sum of Five Hundred Thousand and No/100 Dollars (\$500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Village A portion of the Development is connected to any Communication Service provided by Cox.

Cox will pay Master Developer the sum of Five Hundred Thousand and No/100 Dollars (\$500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Trilogy portion of the Development is connected to any Communication Service provided by Cox.

Cox will pay Master Developer a percent of revenue, according to the following scale, for its marketing of Cox's products and services. The revenue will be paid on the incremental sales above 75% penetration. The penetration rate will be calculated by dividing active customers by total homes passed. Penetration will be calculated monthly and paid quarterly 90 days after the close of the quarter. This scale applies to Cable Television Service, Telephone Service (excluding long distance), and Internet Access Service. It is exclusive of fees assessed for pay-per-view movies, long distance, installation fees, equipment fees whether purchased or rented, television guides, taxes, assessments, and license fees.

Penetration	Payout
75%-79%	15%
80%-85%	16%
86%-90%	17%
90%-95%	18%
96%-100%	20%

Non-Exclusive License Agreement, December 31, 2003

SCHEDULE 3.01
License Fees

The License Fee shall be paid and calculated as follows:

Licensee shall pay Licensor the sum of Five Hundred Thousand and No/100 Dollars (\$500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Village A portion of the Development is connected to any Communication Service provided by Licensee.

Licensee shall pay Licensor the sum of Five Hundred Thousand and No/100 Dollars (\$500,000.00) on or before ten (10) days after the date on which the first SFR or MFU within the Trilogy portion of the Development is connected to any Communication Service provided by Licensee.

Licensee shall pay Licensor a percent of revenue, according to the following scale, received by Licensee hereinafter provided. The revenue will be paid on the incremental sales above 75% penetration. The penetration rate shall be calculated by dividing active customers by total homes (i.e., total SFRs and MFUs) passed. Penetration shall be calculated monthly and paid quarterly 90 days after the close of the quarter. This scale applies to Cable Television Service, Local Telephone Service (excluding long distance), and Internet Access Service. It is exclusive of fees assessed for pay-per-view movies, long distance, installation fees, equipment fees whether purchased or rented, television guides, taxes, assessments, and license fees.

Penetration	Payout
75%-79%	15%
80%-85%	16%
86%-90%	17%
90%-95%	18%
96%-100%	20%

REDACTED

Ball, Gina

From: Middlebrooks, Matt [Matt.Middlebrooks@qwest.com]
Sent: Wednesday, August 27, 2003 8:34 AM
To: Crockett, Jeff
Cc: Curtright, Norm
Subject: FW: Peoria, AZ matter

Jeff: you might find this useful.

Please call if you want to discuss. Thanks.

Regards,

Matt Middlebrooks, Jr.
(303) 672-1790

-----Original Message-----

From: Curtright, Norm
Sent: Wednesday, August 27, 2003 9:31 AM
To: Jones, Benjamin P; Adkins, Roy; Middlebrooks, Matt; Truitt, Christine
Cc: Quinn, Pat; Slater, Roger
Subject: RE: Peoria, AZ matter

Ben, thanks for digging this out. Matt, please send this to Jeff Crocket.

The AZ Commission rule Ben found states:

Rights-of-way and easements suitable to the utility must be furnished by the developer at no cost to the utility and in reasonable time to meet service requirements. No underground communication facilities shall be installed by a utility until the final grades have been established and furnished to the utility. In addition, the easement strips, alleys and streets must be graded to within six inches of final grade by the developer before the utility will commence construction. Such clearance and grading must be maintained by the developer during construction by the utility.

-----Original Message-----

From: Jones, Benjamin P
Sent: Tuesday, August 26, 2003 3:07 PM
To: Adkins, Roy; Curtright, Norm; Middlebrooks, Matt; Truitt, Christine
Subject: Peoria, AZ matter

Below are excerpts from the AZ Admin. Code. I think section 14-2-505(B)(3)(a) and 14-2-506(E)(2)(b) give us some argument as to why the developer must give QC an easement at no cost. Comments?

Ben Jones
Senior Attorney
Qwest Law Department
1801 California Street, 49th Floor
Denver, CO 80202
303.672.2765
Fax: 303.292.4666

The information in this email is confidential and may be legally privileged. If you are not the intended recipient, your access is unauthorized, and any disclosure, copying, distribution or any action taken or not taken in reliance on it, is prohibited and may be unlawful.

-----Original Message-----

From: LexisNexis Print Delivery [mailto:lexisnexis@prod.lexisnexis.com]

Sent: Tuesday, August 26, 2003 3:04 PM

To: benjamin.jones@qwest.com

Subject: LexisNexis(TM) Email Request (1822:0:11500699)

1 of 6 DOCUMENTS

ARIZONA ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH SUPP. 03-2, JUNE 30, 2003 ***

TITLE 14. PUBLIC SERVICE CORPORATIONS; CORPORATIONS AND ASSOCIATIONS;
SECURITIES REGULATION

CHAPTER 2. CORPORATION COMMISSION: FIXED UTILITIES

ARTICLE 5. TELEPHONE UTILITIES

A.A.C. § R14-2-501 (2003)

R14-2-501. Definitions

In this Article, unless the context otherwise requires, the following definitions shall apply:

1. "Advance in aid of construction". Funds provided to the utility by the applicant under the terms of a construction agreement, which may be refundable.
2. "Applicant". A person or agency requesting the utility to supply telephone service.
3. "Application". A request to the utility for telephone service, as distinguished from an inquiry as to the availability or charges for such service.
4. "Arizona Corporation Commission". The regulatory authority of the state of Arizona having jurisdiction over public service corporations operating in Arizona.
5. "Basic exchange service". Service provided to business or residential customers at a flat or measured rate which affords access to the telecommunications network.
6. "Billing period". The time interval between the issuance of two consecutive bills for utility service.
7. "Central office". The switching equipment and operating arrangements which provide exchange and long distance service to the public and interconnection of customer telecommunication services.
8. "Contribution in aid of construction". Funds provided to the utility by the applicant under the terms of a construction agreement or construction tariff which are not refundable.
9. "Customer". The person or entity in whose name service is rendered, as evidenced by the signature on the application or contract for that service, or by the receipt and/or payment of bills regularly issued in his name regardless of the identity of the actual user of the service.
10. "Day". Calendar day.
11. "Line extension". The lines and equipment necessary to provide service to additional customers.

ACI 0006

12. "Person". Any individual, partnership, corporation, governmental agency, or other organization operating as a single entity.

13. "Service access point". A demarcation point where facilities owned, leased, or under license by a customer connect to the utility provided access line.

14. "Premises". All of the real property and apparatus employed in a single enterprise on an integral parcel of land undivided by public streets, alleys or railways.

15. "Residential subdivision development". Any tract of land which has been divided into four or more contiguous lots with an average size of one acre or less for use for the construction of residential buildings or permanent mobile homes for either single or multiple occupancy.

16. "Rules". The regulations set forth in the tariffs which apply to the provision of telephone service.

17. "Service area". The territory in which the utility has been granted a Certificate of Convenience and Necessity and is authorized by the Commission to provide telephone service.

18. "Service charge". The charge as specified in the utility's tariffs which covers the cost of establishing moving, changing or reconnecting service or equipment.

19. "Access line". A communications facility that connects service from a common distribution source to the service access point.

20. "Tariffs". The documents filed with the Commission which list the utility services and products offered by the utility and which set forth the terms and conditions and a schedule of the rates and charges for those services and products.

21. "Terminal equipment". The equipment through which communication services are furnished.

22. "Temporary service". Service to premises or enterprises which are temporary in character, or where it is known in advance that the service will be of limited duration. Service which, in the opinion of the utility, is for operations of a speculative character is also considered temporary service.

23. "Toll service". Service between stations in different exchange areas for which a long distance charge is applicable.

24. "Utility". The company providing telephone service to the public in compliance with state law.

Chapter Authority: Article XV, § 3, Constitution of Arizona and A.R.S. § 40-202 et seq.

Historical Note: Adopted effective March 2, 1982 (Supp. 82-2).

2 of 6 DOCUMENTS

ARIZONA ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH SUPP. 03-2, JUNE 30, 2003 ***

TITLE 14. PUBLIC SERVICE CORPORATIONS; CORPORATIONS AND ASSOCIATIONS;
SECURITIES REGULATION

CHAPTER 2. CORPORATION COMMISSION: FIXED UTILITIES

ACI 0007

ARTICLE 5. TELEPHONE UTILITIES

A.A.C. § R14-2-502 (2003)

R14-2-502. Certificate of Convenience and Necessity for telephone utilities; additions/extensions; abandonments

A. Application for new Certificate of Convenience and Necessity

1. Six copies of each application for a new Certificate of Convenience and Necessity shall be submitted in a form prescribed by the Commission and shall include, at a minimum, the following information:

a. The proper name and correct address of the proposed utility company and its owner if a sole proprietorship, each partner if a partnership, or the President and Secretary if a corporation.

b. A copy of the Articles of Partnership or Articles of Incorporation for the applicant and/or Bylaws if the utility is a non-profit organization, or association.

c. The rates proposed to be charged for the service that will be rendered.

d. A financial statement setting forth the financial condition of the applicant.

e. Maps of the proposed service area and/or a description of the area proposed to be served.

f. Appropriate city, county and/or state agency approvals, where appropriate.

g. The actual number of customers within the service area as of the time of filing and the estimated number of customers to be served for each of the first five years of operation.

h. Such other information as the Commission by order or the staff of the Utilities Division by written directive may request.

2. Once the applicant has satisfied the information requirements of this regulation, as well as any additional information required by the staff of the Commission's Utilities Division, the Commission shall, as expeditiously reasonably practicable, schedule hearings to consider such application.

B. Additions/extensions to existing Certificates of Convenience and Necessity. Each utility which extends utility service to a person not located within its certificated service area, but located in a non-certificated area contiguous to its certificated service area, shall, notify the Commission of such service extension.

Chapter Authority: Article XV, § 3, Constitution of Arizona and A.R.S. § 40-202 et seq.

Historical Note: Adopted effective March 2, 1982 (Supp. 82-2). Amended to correct subsection numbering (Supp. 99-4).

3 of 6 DOCUMENTS

ARIZONA ADMINISTRATIVE CODE

ACI 0008

*** THIS DOCUMENT IS CURRENT THROUGH SUPP. 03-2, JUNE 30, 2003 ***

TITLE 14. PUBLIC SERVICE CORPORATIONS; CORPORATIONS AND ASSOCIATIONS;
SECURITIES REGULATION

CHAPTER 2. CORPORATION COMMISSION: FIXED UTILITIES

ARTICLE 5. TELEPHONE UTILITIES

A.A.C. § R14-2-503 (2003)

R14-2-503. Establishment of service

A. Information from new applicants

1. A utility may obtain the following minimum information from each new applicant for service:

- a. Name or names of applicant(s).
- b. Service address or location and telephone number
- c. Billing address, if different than service address.
- d. Address and telephone number where service was provided previously.
- e. Date applicant will be ready for service.
- f. Indication of whether premises have been supplied with telephone utility service previously.
- g. Class of service to be provided.
- h. Indication of whether applicant is owner or tenant of or agent for the premises.

2. A utility may require a new applicant for service to appear at the utility's designated place of business to produce proof of identity and sign the utility's application form.

3. Where service is requested by two or more individuals the utility shall have the right to collect the full amount owed to the utility from any one of the applicants.

B. Deposits

1. A utility shall not require a deposit from a new applicant for residential service if the applicant is able to meet any of the following requirements:

- a. The applicant has had continuous telephone service of a comparable nature with the utility at another service location within the past two years and was not delinquent in payment more than once during the last 12 consecutive months or disconnected for nonpayment.
- b. The applicant can produce a letter regarding credit or verification from a telephone utility where service of a comparable nature was last received which states:
 - i. Applicant had a timely payment history at time of service discontinuation.
 - ii. Applicant has no outstanding liability from prior service.
- c. In lieu of a deposit, a new applicant may provide a Letter of Guarantee from an existing customer with service who is acceptable to the utility or a surety bond as security for the utility. The utility shall review and release an existing customer as a guarantor for the new applicant after 12 consecutive months if no obligations are delinquent and has maintained a timely payment history.

ACI 0009

2. The utility shall issue a nonnegotiable receipt to the applicant for the deposit. The inability of the customer to produce such a receipt shall in no way impair his right to receive a refund of the deposit which is reflected on the utility's records.

3. Deposits shall be interest bearing; the interest rate and method of calculation shall be filed with and approved by the Commission in a tariff proceeding.

4. Each utility shall file a deposit refund policy with the Commission, subject to Commission review and approval during a tariff proceeding. However, each utility's refund policy shall include provisions for residential deposits and accrued interest to be refunded after 12 months of service if the customer has not been delinquent in the payment of utility bills or applied to the closing bill upon discontinuance of service.

5. A utility may require a residential customer to establish a deposit if the customer becomes delinquent in the payment of two or more bills within a 12-consecutive-month period or has been disconnected for service during the last 12 months.

6. The amount of a deposit required by the utility shall be determined according to the following terms:

a. Residential customer deposits shall not exceed 2 times that customer's estimated average monthly bill or the average monthly bill for the customer class for that customer which ever is greater.

b. Nonresidential customer deposits shall not exceed 2 1/2 times that customer's estimated maximum monthly bill.

7. The utility may review the customer's usage after service has been connected and adjust the deposit amount based upon the customer's actual usage.

C. Grounds for refusal of service. A utility may refuse to establish service if any of the following conditions exist:

1. The applicant has an outstanding amount due for similar utility services and the applicant is unwilling to make acceptable arrangements with the utility for payment.

2. A condition exists which in the utility's judgment is unsafe or hazardous to the applicant, the general population, or the utility's personnel or facilities.

3. Refusal by the applicant to provide the utility with a deposit when the customer has failed to meet the credit criteria for waiver of deposit requirements.

4. Customer is known to be in violation of the utility's tariffs filed with the Commission.

5. Failure of the customer to furnish such funds, suitable facilities, and/or rights-of-way necessary to serve the customer and which have been specified by the utility as a condition for providing service.

6. Applicant falsifies his or her identity for the purpose of obtaining service.

D. Service establishments, re-establishments or reconnection charge

ACI 0010

1. Each utility may make a charge as approved by the Commission for the establishment, reestablishment, or reconnection of utility services.

2. Should service be established during a period other than regular working hours at the customer's request, the customer may be required to

pay an after-hour charge for the service connection.

3. For the purpose of this rule, service establishments are where the customer's and utility's facilities are ready and acceptable.

E. Temporary service

1. Applicants for temporary service may be required to pay the utility, in advance of service establishment, the funds provided under the terms of a construction agreement or the cost of installing and removing the facilities necessary for furnishing the desired service.

2. Where the duration of service is to be less than one month, the applicant may also be required to advance a sum of money equal to the estimated bill for service.

3. If at any time the character of a temporary customer's operations changes so that in the opinion of the utility the customer is classified as permanent, the terms of the utility's construction agreement or tariff shall apply.

Chapter Authority: Article XV, § 3, Constitution of Arizona and A.R.S. § 40-202 et seq.

Historical Note: Adopted effective March 2, 1982 (Supp. 82-2). Amended to correct subsection numbering (Supp. 99-4).

4 of 6 DOCUMENTS

ARIZONA ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH SUPP. 03-2, JUNE 30, 2003 ***

TITLE 14. PUBLIC SERVICE CORPORATIONS; CORPORATIONS AND ASSOCIATIONS;
SECURITIES REGULATION

CHAPTER 2. CORPORATION COMMISSION: FIXED UTILITIES

ARTICLE 5. TELEPHONE UTILITIES

A.A.C. § R14-2-504 (2003)

R14-2-504. Minimum customer information requirements

A. Information for residential customers

1. Each utility shall make available upon customer request not later than 60 days from the date of request a concise summary of the rate schedule applied for by such customer. The summary shall include the following:

a. The charges for basic service and incremental ancillary services requested by the applicant.

2. In addition, a utility shall make available upon customer request not later than 60 days from date of service commencement a concise summary of the utility's tariffs or the Commission's rules and regulations concerning:

- a. Deposits
- b. Terminations of service
- c. Billing and collection
- d. Complaint handling.

ACI 0011

B.. Information required due to changes in tariffs

1. Each utility shall transmit to affected customers by the most economic means available a concise summary of any change in the utility's tariffs affecting those customers.

2. This information shall be transmitted to the affected customer within 60 days of the effective date of the change.

Chapter Authority: Article XV, § 3, Constitution of Arizona and A.R.S. § 40-202 et seq.

Historical Note: Adopted effective March 2, 1982 (Supp. 82-2).

5 of 6 DOCUMENTS

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CHAPTER 2. CORPORATION COMMISSION: FIXED UTILITIES

ARTICLE 5. TELEPHONE UTILITIES

A.A.C. § R14-2-505 (2003)

R14-2-505. Service connections and establishments

A. Priority and timing of service establishments

1. After an applicant has complied with the utility's application, construction agreement, or tariff, deposit requirements and has been accepted for service by the utility, the utility shall schedule that customer for service connection and/or establishment.

2. Service establishments shall be scheduled for completion within 10 working days of the date the customer has been accepted for service, except in those instances when the customer requests service establishment beyond the 10 working day limitation.

3. The maximum interval of 10 working days applies to single line residence and business installations only. Multiline services and any special equipment configurations shall be installed within a reasonable time-frame based on availability of necessary equipment.

4. When a utility has made arrangements to meet with a customer for service establishment purposes and the utility or the customer cannot make the appointment during the prearranged time, the utility shall reschedule the establishment to the satisfaction of both parties.

5. Unless another time-frame is mutually acceptable to the utility and the customer, each utility shall schedule service establishment appointments within a maximum range of four hours during normal working hours.

6. For the purposes of this rule, service establishments are where the utility's and customer's facilities are available and the utility needs only to connect the service.

B. Access line connection

1. Provision of services beyond service access point

ACI 0012

a. Facilities beyond the service access point may be provided by either the utility or the customer. Where the facilities are provided by the customer the installation shall be in accordance with the utility's specifications.

b. The cost of all new construction of inside customer premise wiring shall be the responsibility of the customer.

2. Company provided facilities

a. The utility shall provide all facilities up to the service access point.

b. A customer requesting an underground service connection in an area served by overhead facilities shall pay for the difference between the cost of an overhead service connection and the actual cost of the underground connection as a nonrefundable contribution. The customer may elect to provide the underground trenching on private property as an offsetting portion of the additional cost of the underground facilities.

c. In those instances where the utility is supplying the customer's terminal equipment, the utility may provide any inside wiring beyond the point of access in accordance with approved tariffs filed with the Commission.

3. Easements and rights-of-way

a. Each customer shall grant adequate easement and right-of-way satisfactory to the utility to ensure that customer's proper service connection. Failure on the part of the customer to grant adequate easement and right-of-way shall be grounds for the utility to refuse service.

b. When a utility discovers that a customer or his agent is performing work or has constructed facilities adjacent to or within an easement or right-of-way and such work, construction or facility poses a hazard or is in violation of federal, state or local laws, ordinances, statutes, rules or regulations, or significantly interferes with the utility's access to equipment, the utility shall notify the customer or his agent and shall take whatever actions are necessary to eliminate the hazard, obstruction or violation at the customer's expense.

Chapter Authority: Article XV, § 3, Constitution of Arizona and A.R.S. § 40-202 et seq.

Historical Note: Adopted effective March 2, 1982 (Supp. 82-2).

6 of 6 DOCUMENTS

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SECURITIES REGULATION

CHAPTER 2. CORPORATION COMMISSION: FIXED UTILITIES

ARTICLE 5. TELEPHONE UTILITIES

A.A.C. § R14-2-506 (2003)

R14-2-506. Construction Agreements

A. General requirements

1. Each utility shall file for Commission approval a tariff which

ACI 0013

incorporates the provisions of this rule and specifically defines the conditions governing construction agreements. Subsections (A), (B), (C), and (D) of this Section do not apply to tariffs providing for construction charges fixed by zone.

2. Upon request by an applicant for service, the utility shall provide, without charge, a preliminary sketch and rough estimates of the cost of installation to be paid by said applicant.

3. Any applicant for service requesting the utility to prepare detailed plans, specifications, or cost estimates may be required to deposit with the utility an amount equal to the estimated cost of preparation. The utility shall, upon request, make available within 90 days after receipt of the deposit referred to above, such plans, specifications, or cost estimates of the proposed construction. Where the applicant authorizes the utility to proceed with construction of the extension, the deposit shall be credited to the cost; otherwise the deposit shall be nonrefundable. If the extension is to include oversizing of facilities to be done at the utility's expense, appropriate details shall be set forth in the plans, specifications and cost estimates.

4. Where the utility requires an applicant to advance funds for construction, the utility shall furnish the applicant with a copy of the agreement or tariff of the appropriate utility prior to the applicant's acceptance.

5. All construction agreements requiring payment by the applicant shall be signed by each party.

6. In the event the utility's actual cost of construction is less than the amount advanced by the customer under a construction agreement, the utility shall make a refund to the applicant within 120 days of service commencement.

7. The provisions of this rule apply only to those applicants who in the utility's judgment will be permanent customers of the utility. Applications for temporary service shall be governed by the Commission's rules concerning temporary service applications.

B. Minimum written agreement requirements

1. Each construction agreement shall, at a minimum, include the following information:

- a. Name and address of applicant or applicants
- b. Proposed service address or location
- c. Description of requested service
- d. Description and sketch of the requested construction
- e. A cost estimate to include materials, labor, and other costs as necessary
- f. Payment terms
- g. A concise explanation of any refunding provisions, if applicable
- h. Utility's estimated start date and completion date for construction
- i. A summary of the results of the economic feasibility analysis performed by the utility to determine the amount of advance required from the applicant for the proposed construction.

2. Each applicant shall be provided with a copy of the construction

ACI 0014

agreement.

C. Construction requirements. Each construction tariff shall include the following provisions:

1. A maximum footage and/or equipment allowance to be provided by the utility at no charge. The maximum footage and/or equipment allowance may be differentiated by customer class.

2. An economic feasibility analysis for construction which exceed the maximum footage and/or equipment allowance. Such economic feasibility analysis shall consider the incremental revenues and costs associated with the construction. In those instances where the requested construction does not meet the economic feasibility criteria established by the utility, the utility may require the customer to provide funds to the utility, which will make the construction economically feasible. The methodology employed by the utility in determining economic feasibility shall be applied uniformly and consistently to each applicant requiring a construction.

3. The timing and methodology by which the utility will refund any advances in aid of construction as additional customers are served off the construction project. The customer may request an annual survey to determine if additional customers have been connected to and are using service from the project. In no case shall the amount of the refund exceed the amount originally advanced.

4. All advances in aid of construction shall be noninterest bearing.

5. If after five years from the utility's receipt of the advance, the advance has not been totally refunded, the advance shall be considered a contribution in aid of construction and shall no longer be refundable.

D. Residential subdivision development and permanent mobile home parks. Each utility shall submit as a part of its construction tariff provisions for residential subdivision developments and permanent mobile home parks.

E. Underground extension of communication lines

1. Extension of communication lines necessary to furnish permanent communication service to new residential buildings or mobile homes within a new or undeveloped subdivision and to residential development in which facilities for communication service have not been constructed for which applications are made by a developer shall be installed underground in accordance with the provisions set forth in this regulation and in accordance with applicable tariffs on file with this Commission except where it is not feasible from an engineering, operational or economic standpoint.

2. Rights-of-way and easements

ACI 0015

a. The utility shall construct or cause to be constructed and shall own, operate and maintain all underground communication feeder, distribution and service lines along public streets, roads and highways and on public lands and private property which the utility has the legal right to occupy.

b. Rights-of-way and easements suitable to the utility must be furnished by the developer at no cost to the utility and in reasonable time to meet service requirements. No underground communication facilities shall be installed by a utility until the final grades have been established and furnished to the utility. In addition, the easement strips, alleys and streets must be graded to within six inches of final grade by the developer before the utility will commence construction. Such clearance and grading must be maintained by the developer during construction by the utility.

c. If, subsequent to construction, the clearance or grade is changed in such a way as to require relocation of the underground facilities, the

cost of such relocation shall be borne by the developer or subsequent owners.

3. Installation of underground communication lines within subdivision and multiple occupancy residential developments:

a. The developer shall provide the trenching backfill (including any imported backfill required), compaction, repaving, and any earthwork required to install the underground communication system all in accordance with the reasonable specifications and schedules of other utilities in the same area when feasible. At its option, if the utility's cost therefore is equal to or less than that which the developer would otherwise have to bear, the utility may elect at the developer's expense to perform the activities necessary to fulfill the developer's responsibility hereunder.

b. Each utility shall promptly inspect the trenching provided by the developer and allow for phased inspection of trenching. In all cases, the utility shall make every effort to expedite the inspection of developer provided trenching.

c. The utility shall install or cause to be installed underground communication lines and related equipment in accordance with the applicable provisions of the 1997 edition (and no future editions) of ANSI C2 (National Electrical Safety Code) with sufficient capacity and suitable materials which shall assure adequate and reasonable communication service in the foreseeable future.

d. When developer is required to provide a trench for other underground utilities and services, the utility shall use such common trench as long as the utility's design layout, easement specification, routing and scheduling requirements can be met, unless otherwise agreed upon by utility and developer in writing or as otherwise established by the Commission.

4. Special conditions

a. When the application of any of the provisions of the regulation appears to either party not to be feasible from an engineering, operational or economic standpoint, the utility or the developer may refer the matter to the Commission for a determination as to whether an exception to the underground policy expressed within the provisions of this regulation is warranted. Interested third parties may present their views to the Commission in conjunction with such referrals.

b. Notwithstanding any provision of this regulation to the contrary, no utility shall construct overhead communication lines in any new subdivision or new multiple occupancy residential development to which this regulation is applicable and which is contiguous to another subdivision or multiple occupancy residential development in which service is furnished underground without the approval of the Commission after a public hearing.

F. Nonapplicability. Any underground communication distribution system requiring more than normal communication service is not covered by this regulation and shall be constructed pursuant to the effective rules and regulations of the affected utility as approved by the Commission.

G. Ownership of facilities. Any facilities installed hereunder shall be the sole property of the utility.

Chapter Authority: Article XV, § 3, Constitution of Arizona and A.R.S. § 40-202 et seq.

Historical Note: Adopted effective March 2, 1982 (Supp. 82-2). Amended by exempt rulemaking at 5 A.A.R. 2054, effective June 4, 1999 (Supp. 99-2). Amended to correct subsection numbering (Supp. 99-4).

REDACTED