



BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

308

COMMISSIONERS

2007 MAR -9 P 4: 25

AZ CORP COMMISSION
DOCUMENT CONTROL

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE FORMAL
COMPLAINT OF ACCIPITER
COMMUNICATIONS, INC. AGAINST
VISTANCIA COMMUNICATIONS, LLC,
SHEA SUNBELT PLEASANT POINT, LLC
AND COX ARIZONA TELCOM, LLC

DOCKET NO. T-03471A-05-0064

**STAFF'S REPLY BRIEF REGARDING
ATTORNEY-CLIENT PRIVILEGE**

By Procedural Order dated February 6, 2007, Cox Arizona Telcom, LLC ("Cox") was ordered to submit a brief regarding the attorney-client privilege issue it has raised throughout this proceeding. Cox filed its brief on February 23, 2007. Staff was ordered to file a responsive brief on or before March 9, 2007. Following is Staff's responsive brief on this issue.

I. Introduction

Cox has utilized the attorney-client privilege extensively in this proceeding to shield emails, correspondence and perhaps other communications that are relevant and material to the issues raised from Staff's and the Commission's view. While Cox certainly has a right to raise the privilege and to expect that such communications will be kept confidential in most cases, there is an exception to the privilege when a party relies upon the advice of counsel as a defense to charges against it, and then turns around and claims the privilege to prevent disclosure of the advice relied upon. The Arizona Supreme Court has found that, "[a] litigant cannot with one hand wield the sword by asserting as a defense that, as the law requires, it made a reasonable investigation into the state of the law and in good faith drew conclusions from that investigation, and with the other hand raise the shield that using the attorney-client privilege to keep the jury from finding out what its employees actually did, learned, and gained from that investigation."¹

...

¹ *State Farm Mutual Automobile Insurance Company v. Lee*, 199 Ariz. 52, 60, 13 P.2d 1169, 1177 (2000).

1 In its brief on this matter, Cox claims that it is not relying upon a defense based upon advice
2 of counsel.² It claims that it “has not affirmatively done anything to raise an issue concerning legal
3 advice offered by Ms. Trickey to Cox’s business department about the developer’s private easement
4 arrangement.”³ Cox also claims that it does not meet the criteria relied upon by Arizona Courts to
5 determine whether fairness dictates that the privileged information be disclosed.⁴ Finally, Cox claims
6 that the facts in the *State Farms* case are distinguishable from the facts in this case, and the
7 Commission should not rely upon *State Farms* in this case to require disclosure.⁵

8 After reviewing the record on this issue, Staff believes that the Commission should require
9 Cox to disclose all relevant attorney-client privileged emails and communications material to the
10 issues raised in this case since it is clear that Cox has impliedly waived the attorney-client privilege
11 by its conduct and because it is relying upon advice of counsel as a defense.

12 **II. Attorney-Client Privilege and the *State Farms* Case**

13 The attorney-client privilege protects communications “for the purpose of fostering the
14 effectiveness of the professional services[.]”⁶ The Fourth Circuit Court of Appeals further described
15 the need for the privilege in the following passage from a 1997 opinion:

16 ...the privilege exists to protect not only the giving of professional
17 advice to those who can act on it but also the giving of information to
18 the lawyer to enable him to give sound and informed advice.⁷

19 The protection applies equally to communications between a corporate party and its in-house
20 counsel and to its communications with any retained outside counsel.⁸

21 The Arizona Court of Appeals discussed the importance of the privilege and the implied
22 waiver doctrine in the following passage from a 1988 decision:

23 Compelling privacy needs are served and confidential communications
24 promoted by the recognized areas of evidentiary privilege. Yet, by the
25 doctrine of implied waiver the law recognizes that the need for
26 privilege dissolves and the public’s evidentiary interest regains primacy

25 _____
26 ² Cox Br. at 2.

27 ³ *Id.* at 5.

28 ⁴ *Id.*

⁵ *Id.* at 5-6.

⁶ *Ulibarri v. Superior Court of the State of Arizona*, 184 Ariz. 382, 387, 909 P.2d 449, 454 (Az.App. 1995)

⁷ *In re Allen*, 106 F.3d 582, 601 (4th Cir. 1997)(applying *Upjohn Co. v. United States*).

⁸ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

1 once the privilege holder, the communicant, has abandoned privacy and
2 confidentiality through inconsistent conduct.⁹

3 As the above passage indicates, Arizona courts have found reliance on a privilege unfair when
4 used as both a sword and a shield.¹⁰ One of the seminal cases on the implied waiver of the attorney-
5 client privilege in Arizona is *State Farm Mutual Automobile Insurance Company v. Lee* where the
6 Arizona Supreme Court summarized the issue raised by the doctrine as follows, “whether having
7 alleged that its actions were objectively and subjectively reasonable and in good faith based on its
8 evaluation of the law-an evaluation that included advice of counsel, State Farm may then raise the
9 privilege as a bar to prevent discovery of the information in the possession of its employees and
10 managers when they made the subjective determination and concluded that the law permitted them to
11 reject Plaintiffs’ claims.”¹¹

12 Put another way, “[t]he attorney-client privilege is waived for any relevant communications if
13 the client asserts as to material issues in a proceeding that: (a) the client acted upon the advice of a
14 lawyer or that the advice was otherwise relevant to the legal significance of the client’s conduct.”¹²

15 While express reliance on the advice of counsel defense will constitute an implied waiver
16 under almost any test, the issue here and in *State Farms* is whether an assertion short of an express
17 advice-of-counsel defense waives the privilege.¹³

18 Arizona Courts adhere to the “fairness approach” in deciding the waiver issue.¹⁴ What is
19 known as the “Hearn” test, as articulated in *Hearn v. Rhay*, 58 F.R.D. 474 (E.D.Wa. 1975) has been
20 used by Arizona courts in interpreting the “fairness approach”.¹⁵ The *Hearn* test consists of the
21 following three criteria, all of which must be met to find an implied waiver of the attorney-client
22 privilege:

23 1) assertion of the privilege was a result of some affirmative act, such as filing suit [or
24 raising an affirmative defense], by the asserting party;

25 ⁹ *The Church of Jesus Christ of Latter-Day Saints v. Superior Court of the State of Arizona*, 159 Ariz. 24, 29, 764 P.2d
26 759, 763 (Az.App. 1988).

27 ¹⁰ *State Farm*, 199 Ariz. At 58, 13 P.3d at 1175.

28 ¹¹ *Id* at 57-58, 13 P.3d at 1174-75.

¹² *Twin City Fire Insurance Company v. Burke*, 204 Ariz. 251, 255, 63 P.3d 282, 286 (2003)(citing to the Restatement
 (Third) of the Law Governing Lawyers, Section 80(1)).

¹³ *State Farm*, 199 Ariz. At 58, 13 P.3d at 1175.

¹⁴ *Id.* at 56, 13 P.3d at 1173.

¹⁵ *Id.*

1 2) through this affirmative act, the asserting party put the protected information at issue
2 by making it relevant to the case, and;

3 3) application of the privilege would have denied the opposing party access to
4 information vital to his defense.¹⁶

5 “A waiver is to be predicated not only when the conduct indicates a plain intention to abandon
6 the privilege, but also when conduct (though not evincing that intention) places the claimant in such a
7 position, with reference to the evidence, that it would be unfair and inconsistent to permit the
8 retention of the privilege.”¹⁷

9 **III. Cox Has Impliedly Waived the Attorney-Client Privilege By its Conduct in this Case**

10 The primary issue in the case has to do with the creation of a private easement arrangement
11 between Cox and Shea which acted to keep competitors out of the Vistancia development unless they
12 paid a prohibitive license fee that the testimony establishes that Cox itself was not required to pay.

13 In response to discovery questions and questions at the hearing on this matter, Cox raised the
14 attorney-client privilege to prevent disclosure of emails, correspondence and perhaps other
15 communications relevant and material to this issue and others in this case.

16 Throughout this case, Cox has on one hand taken a position that its conduct was lawful and
17 reasonable, but on the other hand, refused to allow Staff or the Commission to view the information
18 relied upon based on the attorney-client privilege. In the words of the *State Farm* Court, having
19 alleged that its actions were objectively and subjectively reasonable and in good faith based on its
20 evaluation of the law-an evaluation that included advice of counsel, can Cox then raise the privilege
21 as a bar to prevent discovery of the information in the possession of its employees and managers
22 when they made the subjective determination and concluded that the law permitted them to enter into
23 the private easement and licensing arrangement.

24 Time after time in the course of this proceeding, Cox representatives have alleged that their
25 “actions were objectively and subjectively reasonable and in good faith” based upon on their
26

27 ...

28 ¹⁶ *Id.*

¹⁷ *Elia v. Pifer*, 194 Ariz. 74, 82, 977 P.2d 796, 804 (Az.App. 1998)

1 understanding of the law, an understanding that, given Cox's internal operating structure for matters
2 of this nature, necessarily included advice of counsel. For instance Trisha Christle states the
3 following in her Direct Testimony:

4 All throughout the time that we were negotiating the Agreements, I had
5 no knowledge or understanding that there was anything improper about
6 what Shea had structured. Even today, I do not really understand how
7 or why the Agreements could be found to prevent or limit Shea's right
8 to license other entities to provide services in Vistancia in competition
with Cox, because the Agreements are expressly non-exclusive as to
access to Vistancia. It is my belief that Cox did not intend to violate
the anti-trust laws when it entered into the Agreements.¹⁸

9 When the private easement and license fee arrangement was proposed by Shea, Cox Witness
10 Christle testified that she forwarded the new draft agreements to Cox's in-house counsel in Atlanta.

11 Cox's New Business Development Unit's reliance upon the reasonableness and lawfulness of
12 Cox's actions in going forward is also apparent in Trisha Christle's Rebuttal Testimony.

13 I referenced that Shea had 'some pretty creative ways to keep the
14 competition out' because Shea had explained that it wanted to impose
an access fee that could legally keep out the competition. (Fimbres
15 AFF-13) I understood that Shea wanted to sell access rights so that it
could recover the capital contribution, either by having a high
16 penetration of Cox's services for it to recover revenue sharing, or by
getting g access fees from other providers. I understood that Shea
would increase the capital contribution to Cox to include the access fee
17 so that Cox would have the net capital contribution required for it to
commit its capital to build out to Vistancia.Although Cox did not
18 ask Shea for the additional \$1 million capital contribution, Shea
understood that we would request the additional sum since Shea had
19 increased our costs by imposing a \$1 million access fee. Although I
understood that Shea could charge other communications providers an
20 access that might cause other not to provide services, Shea had
informed us that this was legal.¹⁹

21 Her reliance on the lawfulness of her actions is also apparent at page 12 of her Rebuttal
22 Testimony:

23 As I previously explained, my hand-written notes were simply
24 recording statements made to Cox by Shea about the fact that it knew
how legally to 'keep out the competition.' If this had been a conspiracy
25 between Shea and Cox like Mr. Fimbres suggests, then why would I
have recorded these statements? The fact is, Shea informed us that it
26 had a way legally to keep out the competition and insisted on the MUE
arrangement, which the City of Peoria approved. It is unfair and
27

28 ¹⁸ Christle Direct Test. at 4.

¹⁹ Christle Rebuttal Test. at 8.

1 incorrect of Mr. Fimbres to suggest that I negotiated a deal that I knew
2 was unlawful.²⁰

3 Moreover, that Ms. Christle relied upon advice rendered by Cox attorney Linda Trickey in
4 this matter is confirmed by the following passage from page 9 of Ms. Christle's Rebuttal Testimony:

5 "[a]s I recall, shortly after Linda was assigned to the project in the
6 Fall of 2002, all of my contacts with legal counsel relating to
7 Vistancia were with Linda."

8 Her reliance, and others making the decisions in Cox's New Business Development Unit,
9 upon in-house counsel's legal advice, in going forward with the anti-competitive arrangement is
10 confirmed by the following passage in her Rebuttal Testimony:

11 However, I do recall that Paul informed Howard Tigerman and Dan
12 Sjostrom about Shea's comments to give Cox \$5 million and Cox
13 would give Shea \$3 million. **As reflected in my notes, Howard said
14 that we should proceed with legal counsel oversight to ensure that
15 everything was proper. That is exactly what we did.**²¹ [Emphasis
16 added].

17 She also confirms on that same page of her Rebuttal Testimony that she and two in-house Cox
18 attorneys were the Cox employees primarily involved in the negotiations.

19 Ms. Trickey, on the other hand, states throughout her Direct and Rebuttal testimonies that she
20 relied upon representations from Shea that the arrangement was legal, and that given Shea's
21 representations she believed it was appropriate to go forward with the arrangement.²² She also
22 presented herself as a new Cox attorney at the time with little experience on matters of this nature.²³
23 She was even contacted by Shea's attorney at one point regarding their desire to use "Cox's outside
24 legal counsel to defend against any potential suit" by a competitor and inquired whether Cox would
25 allow the representation.²⁴ In light of these representations and as a new employee, it seems likely
26 that she would have had discussions with other attorneys and non-attorneys in her Division regarding
27 the feasibility of going forward with the arrangement.

28 ...

...

²⁰ Christle Rebuttal Test. at 12.

²¹ *Id.* at 14.

²² Trickey Direct Test. at, *inter alia*, 6, 7, 8. See also, Trickey Rebuttal Test. at, *inter alia*, 2, 3, 4, 6, 7, 8.

²³ Trickey Direct Test. at 6; Trickey Rebuttal Test. at 9.

²⁴ Trickey Direct Test. at 10.

1 In fact, that she had discussions with other Cox employees below the Director level regarding
2 the arrangement, is confirmed in her Rebuttal Testimony at page 2:

3 I reviewed draft agreements provided by Shea and agreed to the MUE
4 arrangement only after receiving assurances ...that the MUE
5 arrangement was legal. ... **I communicated about the Vistancia
6 matter primarily with Tisha Christle, a senior account executive,
and had no contemporaneous discussions about the matter with
any Cox employee above the level of Director.**²⁵ [Emphasis added].

7 In addition, at the hearing on this matter, Staff counsel asked Cox witnesses innumerable
8 questions involving emails or conversations which purportedly would shed light on why the Cox
9 witness the actions complained of in this case, and invariably the witness relied upon their
10 understanding that the arrangement was legal. With respect to the communications with in-house
11 counsel underlying those beliefs, Cox invariably asserted the attorney-client privilege.

12
13 “Q. (JUDGE NODES): And you didn’t express any concerns to anyone else within
14 the company, either in the legal department or elsewhere, as to whether this
15 arrangement that was being proposed may be anti-competitive in nature and perhaps
raise issues related to state rules and regulations and/or federal regulations under the
Telecom Act?

16 A. MR PATTEN: Your Honor—

17
18 A. THE WITNESS: I would like to be able to answer that, but I think that that might
19 cause me to violate the attorney-client privilege. And Cox has a policy of not
waiving the attorney-client privilege.”²⁶

20 This is but one of many examples. At hearing, Cox even asserted the privilege in response
21 to questions about whether a particular witness had conversations with their attorneys at certain
22 times.

23
24 “Q. (MS. SCOTT): At the October 8th meeting when they made a comment about
keeping competition out, did that raise any red flags to you?

25 A. (MS. CHRISTLE): No, because we had been assured that it was legal.

26 Q. Okay.

27 A. That they knew of a way to legally keep out the competition.

28 ²⁵ Trickey Rebuttal Test. at 2.

²⁶ Tr. Vol. I, at pp. 229-230.

1 Q. Do you recall, and this may be an area that involves the attorney/client
2 privilege, do you recall if you went to Linda Trickey at that point and asked
her about?

3 A. (MR. PATTEN): Your Honor, I would caution the witness that that would
4 require attorney/client communications being divulged, and Ms. Christle
certainly is not able to waive that privilege.

5 Q. (ACALJ NODES): Well, I guess we are back to this same position. So I will
6 just reiterate what I said yesterday. I am not sure that that privilege necessarily
7 applies in this particular circumstance. But you are not even going to allow the
witness to answer whether she contacted legal counsel regarding this?

8 A. (MR. PATTEN): No. That would disclose communications, particularly the way
the question was phrased by Ms. Scott.

9 Q. (ACALJ NODES): She can't – well, how about how it was phrased by me, did
10 she contact legal counsel regarding this issue, did she?

11 A. (MR. PATTEN): Yes, that would, that would.²⁷

12 The Supreme Court in *State Farms* expressly noted that the privilege does not extend to this
13 type of information.²⁸ It also noted that assertion of the privilege in response to such questions may
14 be an indication that the attorney's advice was indeed sought.²⁹

15 Because the witnesses stated throughout the proceeding that their actions were based upon a
16 certain understanding of the law and that they did not do anything wrong or illegal based upon this
17 understanding, this case is almost identical to the situation presented in the *State Farms* case. Like
18 the facts in that case, Cox is relying upon the privilege as both a sword and a shield. Moreover, the
19 communications at issue between Cox and its lawyers have been placed directly at issue by the
20 Company's continued representation that they did nothing illegal and that they had been assured that
what they were doing was permissible under the law.

21 As the Supreme Court in *State Farms* stated:

22 Having asserted that its actions were reasonable because of what it
23 knew about the applicable law, State Farm has put in issue the
24 information it obtained from counsel. This conclusion, and the implied
waiver that flows from it, is consistent with *Ulibarri*, *Elia*, *Throop*, and

25 ²⁷ Tr. at 539.

26 ²⁸ *State Farms* at 199 Ariz. At 66, 13 P.3d at 1183. (See *Ulibarri*, 184 Ariz. at 385, 909 P.2d at 452 (“[T]he fact that a
27 client has consulted an attorney, the identify of the client, and the dates and number of visits to the attorney are normally
outside the scope and purpose of the privilege.”)(quoting *Granger v. Wisner*, 134 Ariz. 377, 380, 656 P.2d 1238, 1241
28 (1982). Plaintiffs are free to elicit this information and perhaps to force State Farm's witnesses to claim the privilege
while the jury is present.... This may put State Farm in the difficult position of admitting that it sought its attorneys'
advice.....

²⁹ *Id.*

1 *Cuffe*, the Arizona cases discussed ante at paras. 18 to 21. It is also
2 consistent with the restatement requirement that the “client”-meaning
3 the party claiming the privilege-must have asserted that the advice from
4 counsel ‘was otherwise relevant to the legal significance of the client’s
5 conduct.’ Restatement Section 80(1)(a). In basing its defense on what
6 its agents knew of the law, State Farm made the advice of its lawyers
7 “relevant to the legal significance of [its] conduct.”³⁰

8 As discussed above, the Company witnesses even acknowledge at times that there were
9 conversations between Cox attorneys and other Cox personnel involved in the Vistancia deal on the
10 issues underlying the Complaint and facts complained of in this proceeding.

11 It is not relevant, as Cox appears to believe, that Ms. Trickey relied upon the advice of the
12 attorney for the other side in its negotiations regarding the private easement arrangement. What is
13 important is that there was reliance by Cox personnel, particularly in the New Business Development
14 Unit, upon the legal advice of Ms. Trickey regarding the whole private easement and licensing fee
15 arrangement. Nor are Ms. Trickey’s representations that she “did no independent research” or that
16 she relied upon the Developer’s attorney’s interpretation of the law of significance. The significant
17 point under *State Farms* is that Cox personnel consulted with Ms. Trickey about the legal issues
18 raised in this case and Ms. Trickey gave them legal advice that resulted in their going forward with
19 the private easement and licensing fee arrangement believing it to comport with the law in all
20 respects.

21 In attempting to distance itself from the *State Farms* case, Cox puts itself in the same Catch-
22 22 as State Farm did, as evidenced from the following passage from the Court’s decision:

23 The Martone dissent argues that State Farm has not said the lawyers’
24 advice was relevant to the legal significance of its conduct. Dissent at
25 ¶ 48. True, but such an assertion is the functional equivalent of an
26 express advice-of-counsel defense. Most sophisticated litigants will
27 know better than to dig that hole for themselves. We do not read the
28 restatement to require such a magical admission, nor to require that the
29 court accept as dispositive the client’s assertion that it did not rely on
30 the advice it received. Dissent at ¶ 51. If it asserted that it had relied,
31 of course, that would, again, be equivalent to an express advice-of-
32 counsel defense.³¹

33 In addition, a disavowal of reliance fares no better. The Court appropriately found that a
34 litigant’s affirmative disavowal of express reliance on the privileged communications is not enough

35
36
37
38 ³⁰ *Id.* at 63-64, 13 P.3d at 1180-81.

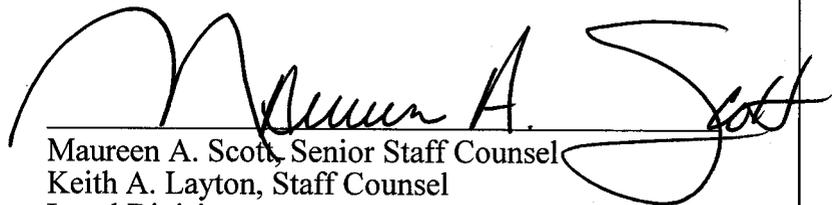
39 ³¹ *Id.* at 64, 13 P.3d at 1181.

1 to prevent a finding of waiver.³² Thus, the Commission should not be misled by Cox's continued
2 assertion that it relied not upon its own attorney's advice, but advice given by the attorneys for Shea.
3 It was Cox's counsel's advice that Cox's personnel from New Business Development relied upon
4 when determining to go ahead with the arrangement. If all Ms. Trickey actually did was to rely upon
5 the legal representations of Shea's counsel, then why is Cox refusing to release the internal
6 communications which would supposedly verify this fact.

7 Finally, Cox also argues that the facts of this case do not meet the three-prong *Hearn* test,
8 endorsed and utilized by the *State Farm* Court.³³ To the contrary, Staff believes that the facts of this
9 case do meet the *Hearn* test. Cox has through its defense, affirmatively put the privileged materials
10 at issue. Without knowing what the advice of Cox's counsel was at the time, the Commission is
11 deprived of information that goes to Cox's state of mind, intent and level of active involvement in
12 going ahead with the anticompetitive arrangement.

13 In summary, Staff believes that Cox through its actions in this case has impliedly waived the
14 attorney-client privilege with respect to communications between it and its attorneys regarding the
15 anticompetitive arrangement at the Vistancia development. As such, the Commission should require
16 Cox to release all relevant, heretofore confidential materials where it has asserted the privilege as a
17 bar to disclosure.

18 RESPECTFULLY SUBMITTED this 9th day of March, 2007.
19

20
21 

22 Maureen A. Scott, Senior Staff Counsel
23 Keith A. Layton, Staff Counsel
24 Legal Division
25 Arizona Corporation Commission
26 1200 West Washington Street
27 Phoenix, Arizona 85007
28 Telephone: (602) 542-3402

28 ³² *Id.* at 60, 13 P.3d at 1177.

³³ Cox Br. at 5.

1 Original and thirteen (13) copies
2 of the foregoing filed this 9th
3 day of March, 2007 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, Arizona 85007

5 Copies of the foregoing mailed this
6 9th day of March, 2007 to:

7 William D. Cleaveland
8 Davis Miles, PLLC
9 560 West Brown Road, Third Floor
10 Post Office Box 15070
11 Mesa, Arizona 85211-3070
12 Counsel for Accipiter Communications, Inc.

11 Mark DiNunzio
12 Cox Arizona Telcom, LLC
13 1550 West Deer Valley Road
14 MS: DV3-16, Building C
15 Phoenix, Arizona 85027

14 Charles V. Gowder, President
15 Accipiter Communications, Inc.
16 2238 Lone Cactus Drive, Suite 100
17 Phoenix, Arizona 85027

17 Michael W. Patten, Esq.
18 Roshka DeWulf & Patten, P.L.C
19 One Arizona Center
20 400 East Van Buren Street, Suite 800
21 Phoenix, Arizona 85004
22 Counsel for Cox Arizona Telcom

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

25
26 

27
28