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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

2007 APR 13 P 3:34

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AZ CORP COMMISSION
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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

Arizona Corporation Commission
DOCKETED

APR 13 2007

**STAFF'S RESPONSE TO COX'S REPLY BRIEF
REGARDING THE ATTORNEY-CLIENT PRIVILEGE**

DOCKETED BY

MR

I. Introduction.

Staff submits this response to Cox's March 21, 2007 Reply Brief on whether Cox, through its defense that its Business Unit relied upon their subjective understanding of the lawfulness of their actions (which included advice of counsel) in entering into the discriminatory private easement arrangement, has impliedly waived the attorney-client privilege with respect to the communications between the Cox Business Unit and Cox's in-house counsel which formed the basis for their understanding of the law. It is Staff's position that because Cox is relying upon the subjective beliefs and evaluation of its Business Unit employees (which included advice of counsel) that their conduct in entering the private easement arrangement was lawful, that Cox has impliedly waived the privilege as to those communications for purposes of resolving the issue of whether Cox should be fined for its active participation in this arrangement. Arizona Courts have found that a party such as Cox cannot on the one hand, rely upon such advice as a defense to allegations but then on the other hand, refuse to release relevant emails or other documents, based upon the attorney-client privilege, which would otherwise allow the other party or fact-finder to assess whether its defense is valid.

Further, Cox attempts to distance itself from the seminal Arizona case on implied waiver of the attorney-client privilege by asserting that it did not rely on its own counsel's advice, but rather that it relied instead on the advice offered by counsel for the other side of the transaction, and as such

1 the privilege remains intact. Staff believes that statements made by the Cox witnesses themselves
2 along with additional facts in the record, refute the somewhat incredulous position advanced by Cox
3 that it did not seek, obtain or rely upon advice from its own in-house counsel, but that it sought,
4 obtained and relied only on the other side's counsel, on what was a novel and unprecedented
5 arrangement in the provision of telecommunications services to master planned developments. Cox's
6 position in fact appears "ready-made" to defeat an argument that it has impliedly waived the attorney-
7 client privilege with respect to communications which go to the issue of whether its anti-competitive
8 conduct was knowing or intentional. The facts demonstrate that while Cox may have relied upon
9 Shea's legal advice, it also sought and relied upon the advice of its own in-house counsel, even if it
10 was merely an assessment by Cox's in-house counsel that Shea's advice was reasonable. By using its
11 understanding of the law to justify its conduct on the one hand, but then denying access to those
12 communications on the other hand, Cox is using the privilege as both a sword and shield in this case,
13 which Arizona Courts have found to be inherently unfair.

14 **II. Discussion.**

15 **A. Cox's Claims that it is Being Treated Unfairly Are Without Merit and Have No**
16 **Bearing On the Issue of Whether It has Impliedly Waived the Attorney-Client**
17 **Privilege**

18 It is clear from the remarks contained in its Brief, that Cox is unhappy with Staff's
19 decision to determine the extent of Cox's involvement and culpability in what can only be
20 characterized as a death-knell to competition in master-planned developments in Arizona.¹ The
21 potential for the anti-competitive scheme that was put in place in the large Vistancia master-planned
22 community to become a model for other master-planned developments in Arizona and nationwide
23 was most likely the reason that the United States Department of Justice quickly became involved and
24 commenced an investigation of its own. However, Cox would have the Commission ignore all of this
25 and turn a blind eye to Cox's conduct, because Cox faced with intense scrutiny by both federal and
26 state agencies, decided to dissolve the arrangement and settle with the small competitor that was
27 severely disadvantaged by Cox's actions.

28

¹ Cox Brief at p. 1.

1 Cox complains that Staff is pursuing these issues “well beyond Cox’s significant settlement
2 with the Complainant.” Whether the settlement is “significant” enough is a matter for the
3 Commission to decide. Moreover, Cox loses sight of the fact that the Commission’s responsibility is
4 to protect the public interest and it has the authority to impose fines for violations of its rules, orders,
5 and laws which it is charged with enforcing. The Commission does not take this responsibility
6 lightly. Cox’s position in its Brief that “it was all Shea’s idea” and “we just did what we were told
7 was legal by the other side” is no excuse, and is not borne out by the facts of the case. While Cox
8 contends that the agreements were received from First Mile and Shea Sunbelt², and that “it wasn’t our
9 idea”, the evidence clearly establishes that Cox actively participated in revising the agreements and in
10 keeping certain agreements (that evidenced the discriminatory nature of the arrangement) from public
11 view.

12 Even more incredulous is Cox’s assertion that the MUE arrangement “was a condition of
13 doing business imposed by Shea-Sunbelt....”³ If violation of the law is a condition to entering into a
14 contract, does that truly legitimize one’s unlawful or anti-competitive conduct? Moreover, Cox’s
15 continued reliance on the City of Peoria’s approval of the private easement is misplaced.⁴ The City’s
16 approval is no defense to violation of anti-trust laws or violation of the Commission’s rules and
17 regulations, or to violation of the laws in general. Certainly, the US DOJ’s investigation into this
18 matter is proof of this fact.

19 Cox’s Brief is also misleading in its suggestion that Staff relies only upon the hand-written
20 notes of Cox personnel to demonstrate that Cox knowingly and intentionally engaged in anti-
21 competitive conduct.⁵ Nothing could be further from the truth. What Staff relies upon is clear from
22 the record that has been developed in this case. It relies upon the considerable discovery it has
23 conducted in this case, its review of the documents and agreements between Shea and Cox, its review
24 of information provided by Accipiter Communications, (the small competitor that was shut out of the
25

26
27 ² Cox Brief at p. 2.

³ Cox Brief at p. 2.

⁴ Cox Brief at p. 1.

28 ⁵ Cox Brief at pp. 2-3.

1 Vistancia market by the Shea Cox arrangement) and its review of extensive communications between
2 the parties.

3 In summary, Cox's unfairness allegations are without merit and totally irrelevant to the issue
4 of whether the Company has impliedly waived the attorney-client privilege through its reliance upon
5 the lawfulness of its conduct (which included advice of counsel) as a defense in this case.
6

7 **B. Contrary to Cox's Arguments, this Case Falls Squarely Within the Holding of**
8 ***State Farm.***

9 In its response to Cox's initial brief on this issue, Staff relied upon the *State Farm* decision, in
10 reaching its conclusion that Cox had impliedly waived the attorney client privilege in this case. One
11 of the chief issues in this proceeding is whether Cox knowingly and intentionally engaged in conduct
12 which it knew was unlawful or anti-competitive, in order to be the exclusive provider of
13 telecommunications service in the large, upscale Vistancia development.

14 In *State Farm*, a class of insureds contested State Farm's denial of certain stacking claims.
15 State Farm took the position that insureds who had more than one policy covering their several cars
16 could not apply the uninsured and underinsured motorist coverages of those multiple policies to a
17 single loss. The Plaintiffs alleged that State Farm acted unreasonably because its anti-stacking
18 language did not comply with Arizona statutes. After the suit was filed, a subsequent court decision
19 found that State Farm's policy language did not comply with the statutory conditions permitting
20 insurers to prohibit stacking. State Farm claimed that until that decision came down, it acted
21 reasonably in interpreting Arizona law. Plaintiffs disagreed and alleged breach of contract, fraud, bad
22 faith, consumer fraud and unlawful acts in violation of Arizona law. The Plaintiffs sought discovery
23 of files and other documents relating to State Farm's rejection of their underinsured and uninsured
24 motorist claims to prove their claims. State Farm objected to the discovery based upon the attorney-
25 client privilege. The Supreme Court found that State Farm had impliedly waived the attorney-client
26 privilege with respect to the bad faith and fraud counts due to its defense that its conduct was lawful
27 based upon its evaluation and understanding of the law (which included advice of counsel) . In
28 reaching this determination, the Supreme Court affirmed Arizona's reliance upon what is called the

1 *Hearn* test⁶, a three part “fairness” test which must be met before a finding of implied waiver can be
2 found. That test is as follows:

- 3
- 4 (1) assertion of the privilege was a result of some affirmative act, such as
5 filing suit (or raising an affirmative defense), by the asserting party;
 - 6 (2) through this affirmative act, the asserting party put the protected
7 information at issue by making it relevant to the case; and
 - 8 (3) application of the privilege would have denied the opposing party
9 access to information vital to his defense.

10 In *State Farm*, the Supreme Court found that test was met when the following facts were
11 present:

12 “The party that would assert the privilege has not waived it unless it has
13 asserted some claim or defense such as the reasonableness of its evaluation of
14 the law, which necessarily includes the information received from counsel. In
15 that situation, the party claiming the privilege has interjected the issue of
16 advice of counsel into the litigation to the extent that recognition of the
17 privilege would deny the opposing party access to proof without which it
18 would be impossible for the factfinder to fairly determine the very issue raised
19 by that party. **We believe such a point is reached when, as in the present
20 case, the party asserting the privilege claims its conduct was proper and
21 permitted by law and based in whole or in part on its evaluation of the
22 state of the law. In that situation, the party’s knowledge about the law is
23 vital, and the advice of counsel is highly relevant to the legal significance
24 of the client’s conduct.**” (Emphasis added).

25 Like the facts in *State Farm*, here Cox is asserting that its conduct was proper and permitted
26 by law based in part on its evaluation of the state of the law (which included advice of its counsel and
27 Shea’s counsel). Is it fair to allow Cox to rely upon its subjective understanding of the law
28 (including advice of counsel) to defend against claims, but then to deny (because of the attorney-
client privilege) Staff or the Commission access to information which would show what it’s
understanding of the law actually was at the time. The Supreme Court of Arizona likened this to
using the attorney-client privilege as both a sword and shield, finding that it was inherently unfair to
allow a party to use the privilege in this manner.⁷ In other words, it is inappropriate for Cox to claim

⁶ *Hearn v. Rhay*, 68 F.R.D. 574 (E.D.Wash. 1975).

⁷ *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169 (2000)(“State Farm”).

1 that what it did was legal based upon it's evaluation of the law (which included advice of counsel),
2 but then deny access to emails with its counsel which would either confirm or refute its position.

3 Cox's primary argument is that *State Farm* does not apply because it relied not upon its own
4 counsel's advice, but on the advice of counsel for the other side of the transaction. But Cox's
5 position is not borne out by the facts of the case or the testimony of its own witnesses. While Cox
6 states in its Brief that Staff can't point to any citation in the record where Ms. Trickey or Ms. Christle
7 actually alleged that their evaluation included advice of counsel; this is not entirely true.

8 Business Unit employee Ms. Trisha Christle, expressly acknowledged that she was instructed
9 by her boss to do everything with legal's oversight.

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 would
13 give Shea \$3 million. As reflected in my notes, **Howard said that we
14 should proceed with legal counsel oversight to ensure everything was
15 proper. That is exactly what we did.**"⁸ (Emphasis added).

16 It is doubtful that when Mr. Tigerman was referring to proceeding "with legal counsel's
17 oversight" that he was making reference to Shea's attorneys, rather Cox's attorneys. Yet, this is
18 apparently what Cox wants the Commission to believe. In Staff's opinion this comes as close to an
19 express admission as is possible. Even if it were true that no Cox witness expressly admitted
20 reliance upon its own counsel's advice, it would make no difference with respect to the ultimate issue
21 of whether Cox impliedly waived the attorney-client privilege, as the following passage from *State
22 Farm* makes clear.

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

28 ⁸ Christle Rebuttal Test. at 12.

1 Similarly, Cox argues that “*State Farm* held only that waiver occurs when ‘a party assert[s]
2 that it acted after investigating the law and reaching a well-founded belief that the law permitted the
3 action it took.’”⁹ Cox argues that its actions were much different in this case than *State Farm*
4 because “it did not conduct an independent investigation of the law but, instead, relied on assurances
5 from a third-party.”¹⁰ But the proximity in timing between significant events and redacted emails
6 (based upon the attorney-client privilege) undercuts Cox’s suggestion that it did not obtain any legal
7 advice from its own in-house attorneys on the exclusive easement arrangement. Exhibit A attached
8 shows the timeline of significant events with respect to the private easement arrangement and the
9 close proximity of redacted attorney-client privileged emails. In addition as already discussed, Ms.
10 Christle’s testimony comes as close to an express admission of reliance on in-house counsel’s advice
11 as one can get.

12 Further, even if Cox’s Business Unit has not expressly stated that it sought and obtained the
13 advice of its in-house legal department, it has claimed the attorney-client privilege in reference to
14 questions regarding the timing of certain conversations and emails between Cox’s Business Unit and
15 Cox’s in-house counsel which speaks volumes. The *State Farm* Court stated that such information
16 regarding the communications fell outside the privilege and the litigant’s claiming the privilege when
17 questioned about such meetings may actually suggest or demonstrate that such advice was indeed
18 sought.

19
20 ...[E]ven assuming the privilege applies, it would not protect the fact that the
21 claims managers consulted counsel on the stacking issues. See *Ulibarri*, 184
22 Ariz. at 385, 909 P.2d at 452 (“[T]he fact that a client has consulted an
23 attorney, the identity of the client, and the dates and number of visits to the
24 attorney are normally outside the scope and purpose of the privilege.”)
25 (quoting *Granger v. Wisner*, 134 Ariz. 377, 380, 656 P.2d 1238, 1241 (1981)).
26 Plaintiffs are free to elicit this information and perhaps to force *State Farm*’s
27 witnesses to claim the privilege while the jury is present [Cite Omitted]. This
28 may put *State Farm* in the difficult position of admitting that it sought its
attorneys’ advice on stacking, then attempted to prevent the factfinder from
knowing whether it ignored, followed, or disagreed with that advice. The
pragmatic difficulties of the matter are obvious.”

⁹ Cox Brief at 3.

¹⁰ Cox Brief at 3.

1 In sum, Cox's express disavowals of reliance upon its counsel's advice are not enough to
2 prevent a finding of waiver. *State Farm* was very clear that Cox does not have to claim reliance on
3 its attorney's advice, in order to impliedly waive the attorney-client privilege.

4 "But as our cases have shown, a litigant's affirmative disavowal of express reliance on
5 the privileged communication is not enough to prevent a finding of waiver. Thus,
6 the advice received from counsel as part of its investigation and evaluation is not only
7 relevant but, on an issue such as this, inextricably intertwined with the court's truth-
8 seeking functions. A litigant cannot assert a defense based on the contention that it
9 acted reasonably because of what it did to educate itself about the law, when its
10 investigation of and knowledge about the law included information it obtained from its
11 lawyer, and then use the privilege to preclude the other party from ascertain what it
12 actually learned and knew."¹¹

13 Next, Cox argues that affirmative assertion of good faith or reasonable conduct does not
14 waive the privilege, and that is all that occurred in this case. Staff disagrees. Cox went much further
15 than asserting good faith or reasonable conduct. Cox alleges and relies upon its belief at the time it
16 entered into the arrangement that the arrangement was legal based upon the information available to
17 it and the information and advice obtained from others, which necessarily included its own attorneys.
18 The following passage from *State Farm* is noteworthy:

19 "But the present case has one more factor-State Farm claims its actions were
20 the result of its reasonable and good-faith belief that its conduct was permitted
21 by law and its subjective belief based on its claims agents' investigation into
22 and evaluation of the law. It turns out that the investigation and evaluation
23 included information and advice received from a number of lawyers. It is the
24 last element, combined with the others, that impliedly waives the privilege."¹²

25 It is Staff's position that Cox was an active participant in the private easement arrangement
26 and that the anti-competitive nature of the arrangement should have been and probably was apparent
27 to Cox at the time it entered into the arrangement. This issue is directly relevant to the level of fines
28 that Staff is proposing in this case. Cox, in its defense, argues that it was not an active participant,
and believed the arrangement to be legal based upon the advice of counsel, which the facts establish
included Shea's counsel and Cox's counsel (even though it is apparently alleged by Cox that it placed
no reliance upon its conversations with its own counsel).

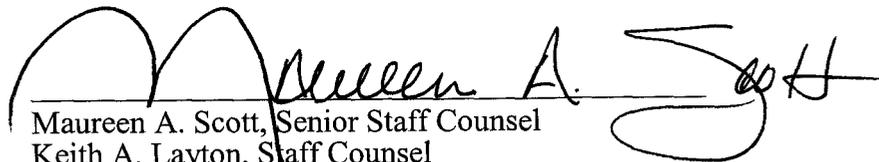
¹¹ *State Farm* at p. 60.

¹² *State Farm* at 66.

1 **III. Conclusion**

2 In sum, Cox has impliedly waived the attorney-privilege in this case by its reliance upon the
3 lawfulness of its actions (which included advice of counsel) with respect to communications that go
4 to the issue of whether Cox knowingly and intentionally engaged in an anti-competitive arrangement
5 in contravention of federal and/or state law through its participation in the discriminatory private
6 easement arrangement. The Commission should order Cox to release all redacted attorney-client
7 privileged emails which go to the issue of Cox's Business Unit's understanding of the lawfulness of
8 its actions in entering into the private easement arrangement at the Vistancia master-planned
9 development.

10 RESPECTFULLY submitted this 13th day of April, 2007.

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12 

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18 of the foregoing were filed this
13th day of April, 2007 with:

19 Docket Control
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Phoenix, Arizona 85007

21 Copy of the foregoing mailed this
22 13h day of April, 2007 to:

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EXHIBIT "A"

Timeline of Cox Attorney-Client Privilege Redactions

**Dates of Emails and
Number of Pages
With Redactions**

Date of Key Events

	10/08/02	Meeting between Shea and Cox at which several service options were discussed. At the meeting keeping out competition and exclusive access rights were discussed. (Christle Direct, p. 9).
	10/08/02	C01773 - Email, "guarantee to keep out the competition"; "purchase the knowledge, what is it worth to us"
10/22/02	Dec. 2002	Shea informs Cox that it wants to revise the agreements to incorporate multi-use easement from the City of Peoria for communications services only. (Christle Direct, p. 10.)
71	Dec. 2002	Christle directed to proceed with Legal's oversight to ensure that everything was proper. (Christle Rebuttal, p. 13.)
12/09/02	12/29/02	C01733, Email from Shea to Cox with First Mile documents
1/08/03	Early 2003	In-House Counsel Trickey learns that new documents are going to be negotiated. Reviews and revises new agreements. (Direct, p. 3, 10).
36	2/13/03	C01769, Shea/Sunbelt meeting with Cox, discussion included - "Sunbelt gives us \$5 Million and we give them back \$3 Million to keep out the competition"

3/18/03

- 2/18/03 C01853, "pretty creative ways to keep out the competition"
- 2/24/03 C01261 – Handwritten note "\$3M...to build barrier for ...provider access"
- March 2003 "most favored nation" provision subject to revision . Cox did not want; Shea explained the provision meant "Same as competition!". (Trickey Direct, p. 7).