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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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COMMISSIONERS

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

Arizona Corporation Commission

DOCKETED

2008 MAY 23 P 1:43

AZ CORP COMMISSION
DOCKET CONTROL

MAY 23 2008

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

DOCKET NO. T-03471A-05-0064

PROCEDURAL ORDER

BY THE COMMISSION:

On January 31, 2005, Accipiter Communications, Inc. ("Accipiter") filed with the Arizona Corporation Commission ("Commission") a formal complaint against Vistancia Communications, LLC and Shea Sunbelt Pleasant Point, LLC, both of which are now known as Vistancia, LLC ("Vistancia"), and Cox Arizona Telcom, LLC ("Cox"). The complaint arose out of Vistancia's controlling telecommunications providers' access to the Vistancia development in Peoria, Arizona, through a private easement arrangement and assessment of an access fee. Accipiter alleged that Cox and Vistancia had created the private easement arrangement to unlawfully stifle competition.¹ This docket remains open because, although Accipiter has entered into a Settlement Agreement with Vistancia and Cox, the Commission's Utilities Division Staff ("Staff") has continued to pursue the allegations against Cox.

An evidentiary hearing was held in this matter on August 28-31, 2006, and on May 14, 2007. The issue of attorney-client privilege for communications between Linda Trickey, Cox's senior in-house counsel, and Cox employees regarding the private easement arrangement with Vistancia and the related access fee arose during the hearing, as did the issue of implied waiver of the privilege.² At Cox's request and with the consent of both Cox and Staff, the Administrative Law Judge ("ALJ") continued the hearing pending resolution of the attorney-client privilege issue and encouraged Cox

¹ Accipiter alleged that there was a scheme crafted by Vistancia and Cox to monopolize the telecommunications market within the Vistancia development by intentionally excluding competition and advancing the financial interests of Vistancia at the expense of customer choice. Accipiter also alleged that the Vistancia and Cox scheme supplanted the jurisdiction of the Commission.

² For additional procedural history, please see the March 27, 2008, Procedural Order in this matter.

1 and Staff, in the meantime, to continue settlement discussions. (Tr. at 908, line 15 through Tr. at 910,
2 line 5.)

3 On February 13, 2008, Staff filed a Motion for *In Camera* Inspection of Documents Claimed
4 To Be Attorney-Client Privileged. Staff included with its Motion a list of documents requested.

5 Cox filed its Response to Staff's Motion on March 18, 2008. In its Response, Cox stated that
6 it will comply if the ALJ orders an *in camera* review of the documents, although Cox asserted that its
7 compliance would not waive any rights now or in the future, including its position that it has not
8 waived the attorney-client privilege in this matter. Cox requested that, if *in camera* review is
9 ordered, Cox be afforded a three-week period to compile and submit the documents.

10 On March 27, 2008, a Procedural Order was issued requiring Cox, by April 21, 2008, to
11 produce, under seal, for *in camera* inspection by the ALJs, all of the documents identified by Staff in
12 its Motion along with any additional documents that include communications between Ms. Trickey
13 and any Cox employee or agent, or between Cox employees or Cox employees and agents, regarding
14 the legality of the private easement arrangement and the related access fee and for which Cox asserts
15 the attorney-client privilege. Cox was also ordered to produce, file with Docket Control, and supply
16 to Staff, by April 21, 2008, a complete list of the documents provided for *in camera* inspection that
17 provided prescribed information for each separate document ("document log"). Staff was ordered to
18 file any objections to Cox's assertion of privilege for any of the documents identified in the document
19 log by May 12, 2008.

20 On April 15, 2008, Cox requested an extension of the April 21, 2008, deadline for filing its
21 documents under seal and the document log. Cox specifically requested to have its deadline extended
22 from April 21, 2008, to May 12, 2008, and requested that the date for Staff's objections be extended
23 from May 12, 2008, to May 27, 2008. Cox requested the extension because of its counsel's schedule
24 and the volume of documents to be provided. On April 16, 2008, a Procedural Order was issued
25 extending Cox's deadline from April 21, 2008, to May 12, 2008, and extending Staff's deadline from
26 May 12, 2008, to June 12, 2008.

27 On May 12, 2008, Cox filed its document log with Docket Control and provided the
28 documents identified on the document log to the ALJ for *in camera* review.

1 On May 23, 2008, at the request of Staff, a telephonic procedural conference was held in this
2 matter, at which Cox and Staff both appeared through counsel.³ Staff requested the procedural
3 conference to obtain clarification of the requirement for Staff to file any objections to Cox's assertion
4 of privilege for any of the documents identified in the document log, as Staff did not believe that it
5 had sufficient information to determine whether objections were appropriate. The ALJ requested that
6 Cox explain how its document log complied with the March 27, 2008, Procedural Order's
7 requirements for the log to include, for each document, the purpose for which the document was
8 created and the basis for asserting a privilege as to the document. Cox asserted its belief that the
9 purpose for creating the document and the basis for asserting the privilege are implicit in the
10 document log because of the description of the document, the identity of the individuals involved in
11 the communication, and the privilege asserted. The ALJ determined that the document log did not
12 comply with the Procedural Order and that it placed Staff at a disadvantage because the information
13 was not expressly included. The ALJ directed Cox to file a revised document log expressly including
14 those two items of information. Staff also expressed concern that the document numbers provided on
15 the document log do not correspond to the document numbers in Staff's list⁴, thereby making it very
16 difficult for Staff to cross-reference the two. Cox explained that Cox had indicated whether each
17 document was on Staff's list, but agreed that it would be possible to also include a reference to the
18 document numbers from Staff's list. Staff also requested to have the document log provided in an
19 electronic format such as an Excel file. Cox explained that, due to the possible presence of metadata
20 within the electronic version of the file, Cox would not be comfortable providing the document log in
21 an electronic format.⁵ Staff stated that it could scan the information if the gridlines and shading were
22 removed. Cox agreed to remove the gridlines and shading when creating the revised document log
23 and to provide Staff with the cleanest possible hard copy form so that Staff can scan the information.
24 It was agreed that Cox would file the revised version of its document log by June 27, 2008, and that
25 Staff would file any objections thereto by July 18, 2008. Cox was instructed to file a request for an

26 ³ Although Staff had contacted counsel for Accipiter and Vistancia regarding the procedural conference, they opted not to
27 participate.

28 ⁴ Staff's list was Exhibit A to the March 27, 2008, Procedural Order.

⁵ Cox explained that the document log had not been created by scratch with only the information shown and thus might
include embedded privileged information.

1 extension if it determines that this deadline is too soon.

2 IT IS THEREFORE ORDERED that Cox shall, by June 27, 2008, file a revised version of
3 its document log that includes, for each document listed thereon, in addition to the information
4 included in the original version of the document log, (1) the purpose for which the document was
5 created; (2) the basis for the assertion of privilege; and (3) if the document was included on Staff's
6 list, a reference to the document number on Staff's list. In addition, Cox shall ensure that the revised
7 document log does not include any shading or gridlines and shall provide Staff with the cleanest
8 possible hard copy of the revised document log.

9 IT IS FURTHER ORDERED that Staff shall, by July 18, 2008, file any objections to Cox's
10 assertion of privilege for any of the documents identified in the revised document log. In its filing,
11 Staff shall identify by distinct document number each document to which an objection applies.

12 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules
13 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission
14 *pro hac vice*.

15 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113—Unauthorized
16 Communications) applies to this proceeding and shall remain in effect until the Commission's
17 Decision in this matter is final and non-appealable.

18 IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive
19 any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

20 DATED this 23^d day of May 2008.

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SARAH N. HARPRING
ADMINISTRATIVE LAW JUDGE

1 Copies of the foregoing mailed/delivered
this 23rd day of May 2008, to:

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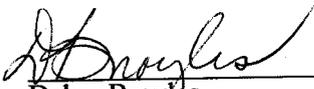
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