

**ORIGINAL**



0000093696

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

Arizona Corporation Commission

DOCKETED

FEB 12 2009

2009 FEB 12 P 3:49

AZ CORP COMMISSION  
DOCKET CONTROL

DOCKETED BY

2 COMMISSIONERS

3 KRISTIN K. MAYES, Chairman  
4 GARY PIERCE  
5 PAUL NEWMAN  
6 SANDRA D. KENNEDY  
7 BOB STUMP

8 IN THE MATTER OF THE FORMAL  
9 COMPLAINT OF ACCIPITER  
10 COMMUNICATIONS, INC. AGAINST  
11 VISTANCIA, LLC, AND COX ARIZONA  
12 TELCOM, LLC.

DOCKET NO. T-03471A-05-0064

**PROCEDURAL ORDER**

9 **BY THE COMMISSION:**

10 On January 31, 2005, Accipiter Communications, Inc. ("Accipiter") filed with the Arizona  
11 Corporation Commission ("Commission") a formal complaint against Vistancia Communications,  
12 LLC and Shea Sunbelt Pleasant Point, LLC (both now known as Vistancia, LLC ("Vistancia")) and  
13 Cox Arizona Telcom, LLC ("Cox"). The complaint arose out of Vistancia's controlling  
14 telecommunications providers' access to the Vistancia development in Peoria, Arizona, through a  
15 private easement arrangement and assessment of an access fee. Accipiter alleged that Cox and  
16 Vistancia had created the private easement arrangement to unlawfully stifle competition.<sup>1</sup> Accipiter  
17 has entered into a Settlement Agreement with Vistancia and Cox. This docket remains open because  
18 the Commission's Utilities Division Staff ("Staff") continues to pursue the allegations against Cox.<sup>2</sup>

19 During the August 2006 hearing in this matter, Cox repeatedly asserted the attorney-client  
20 privilege as to communications between Linda Trickey, Cox's senior in-house counsel, and Cox  
21 employees regarding the private easement arrangement with Vistancia and the related access fee. On  
22 August 31, 2006, as the hearing had not yet concluded, the parties were directed to discuss additional  
23 hearing dates, the specific witnesses to be called, any objections to those witnesses, and a briefing  
24 schedule to address the attorney-client privilege issue.

25  
26 <sup>1</sup> Accipiter alleged that there was a scheme crafted by Vistancia and Cox to monopolize the telecommunications market  
27 within the Vistancia development by intentionally excluding competition and advancing the financial interests of  
28 Vistancia at the expense of customer choice. Accipiter also alleged that the Vistancia and Cox scheme supplanted the  
jurisdiction of the Commission.

<sup>2</sup> For additional procedural history, please see the Procedural Orders issued in this matter on March 27, 2008, and May  
23, 2008.

1 On February 2, 2007, Cox and Staff filed a Joint Motion requesting additional hearing dates in  
2 May 2007. Pursuant to a Procedural Order issued on February 6, 2007, the hearing was scheduled to  
3 reconvene on May 14, 2007, and the parties were ordered to brief the attorney-client privilege issue.  
4 Briefs were filed in February-April 2007.

5 When the hearing reconvened on May 14, 2007, argument was provided regarding the  
6 attorney-client privilege issue, and Cox and Staff agreed to have the hearing continued pending  
7 resolution of the attorney-client privilege issue.

8 On February 13, 2008, Staff filed a Motion for *In Camera* Inspection of Documents Claimed  
9 to Be Attorney-Client Privileged ("Motion"), which included a list of documents that Staff desired to  
10 have inspected *in camera* so that a ruling could be made on the issue. Cox responded to the Motion  
11 on March 18, 2008, stating that it believed *in camera* review was premature without a ruling on  
12 Staff's assertion that Cox had waived the attorney-client privilege, but that it would comply with an  
13 order for *in camera* review and requested three weeks to compile the documents.

14 On March 27, 2008, a Procedural Order was issued requiring Cox, by April 21, 2008, to  
15 produce under seal for *in camera* inspection all of the documents identified by Staff in its Motion  
16 along with any additional documents that include communications between Ms. Trickey and any Cox  
17 employee or agent, or between Cox employees or Cox employees and agents, regarding the legality  
18 of the private easement arrangement and the related access fee and for which Cox asserts the  
19 attorney-client privilege. Cox was also directed to produce and file a complete list of the documents  
20 produced for *in camera* inspection, with prescribed information to be included for each document  
21 listed ("privilege log"). Staff was required to file any objections to Cox's assertions of privilege by  
22 May 12, 2008. By a Procedural Order issued on April 16, 2008, the deadlines were extended to May  
23 12 and June 2, 2008.

24 On May 12, 2008, Cox filed a privilege log and separately provided to the presiding  
25 Administrative Law Judge ("ALJ"), under seal, the allegedly privileged documents themselves.

26 On May 23, 2008, as a result of a telephonic procedural conference held that day, a  
27 Procedural Order was issued requiring Cox to file, by June 27, 2008, a revised privilege log meeting  
28 specified requirements. The Procedural Order also required Staff to file, by July 18, 2008, any

1 objections to Cox's assertions of privilege for any of the documents identified in the revised privilege  
2 log. By Procedural Orders issued on July 1 and August 12, 2008, the deadlines were extended to July  
3 18 and August 15, 2008.

4 On July 18, 2008, Cox filed a revised privilege log.

5 On August 15, 2008, Staff filed its objections to Cox's revised privilege log.

6 On September 4, 2008, Staff filed a Request for Procedural Schedule stating that Staff  
7 believed the hearing could be concluded within a week and proposing that hearing dates be scheduled  
8 in October 2008. Staff stated that this proceeding should be resolved expeditiously because of the  
9 nature of the issues raised in this complaint and in an unrelated complaint filed against Cox by Qwest  
10 Corporation. Cox filed a response on September 9, 2008, stating that it would be premature to  
11 resume the hearing until after an order is issued on the attorney-client privilege issues. Cox requested  
12 that a procedural conference be set approximately two weeks after such a ruling. Staff replied, on  
13 September 16, 2008, that it is prepared to have the hearing resume before the attorney-client privilege  
14 issue is resolved and without inquiring into issues alleged by Cox to be privileged attorney-client  
15 communication.

16 On December 15, 2008, Cox filed a Notice stating that it had discovered e-mails that had not  
17 previously been produced and was submitting a supplemental privilege log of the additional e-mails  
18 for which it asserts the attorney-client privilege. Cox stated that the e-mails themselves were being  
19 provided directly to the ALJ for *in camera* inspection.

20 Shortly after commencing the *in camera* review of the documents provided by Cox, it has  
21 become apparent that Cox and its counsel did not spend sufficient time reviewing the documents  
22 provided for *in camera* review to ensure that the assertion of attorney-client privilege as to each of  
23 the communications included in the documents has merit and to eliminate needless duplication of  
24 documents. In light of the extent to which the documents reviewed thus far and the communications  
25 within them are redundant and the extent to which communications within them do not appear to  
26 have as their purpose either the provision of legal advice or the obtaining of information in order to  
27 provide legal advice, it is not appropriate to devote further Commission resources to the review of  
28 those documents. Rather, it is appropriate to require Cox to file a new privilege log and a new set of

1 allegedly privileged documents after Cox and its counsel have thoroughly scrutinized the substance  
2 of each document and of each communication contained within each document to determine whether  
3 each communication meets the standard for attorney-client privilege in A.R.S. § 12-2234(B) and to  
4 ensure that no documents or communications are needlessly duplicated in the submission made to the  
5 Commission.

6 Cox is reminded that the attorney-client privilege is not so broad as to cover every  
7 communication occurring between an organizational client's employee and an attorney, paralegal, or  
8 legal administrative staff member and that it would not generally extend, for example, to  
9 communications regarding establishing work deadlines, providing an apology in the face of  
10 potentially wounded feelings, or expressing gratitude, among myriad other things. In addition, Cox is  
11 reminded that the attorney work-product privilege would not generally extend to e-mails requesting  
12 documents to be sent or to airbill receipts completed with third-party carriers.

13 **IT IS THEREFORE ORDERED that Cox and its counsel shall thoroughly scrutinize the**  
14 **substance of each document and of each communication contained within each document**  
15 previously provided for *in camera* review to determine whether each communication meets the  
16 standard for attorney-client privilege in A.R.S. § 12-2234(B) and to ensure that no documents or  
17 communications are needlessly duplicated in the submission made to the Commission.

18 **IT IS FURTHER ORDERED** that after completing the scrutiny of the documents previously  
19 provided for *in camera* review, **Cox shall, by June 1, 2009, produce under seal, for *in camera***  
20 **review, only** those communications previously provided for *in camera* review for which Cox can in  
21 good faith assert that the standard for attorney-client privilege in A.R.S. § 12-2234(B) is met. Cox  
22 shall ensure that the documents newly provided for *in camera* inspection use the same Bates  
23 numbering system as used in Cox's prior submission and that the documents are provided in  
24 chronological order, from the earliest document to the latest document.

25 **IT IS FURTHER ORDERED** that **Cox shall, by June 1, 2009, provide to Staff and the ALJ**  
26 copies of those communications previously provided for *in camera* review for which Cox and its  
27 counsel have determined, through the thorough review ordered herein, that the assertion of privilege  
28 lacks merit. Cox shall ensure that the documents newly provided to Staff and the ALJ use the same

1 Bates numbering system used in Cox's prior submission and that the documents are provided in  
2 chronological order, from the earliest document to the latest document.

3 IT IS FURTHER ORDERED that Cox shall, by June 1, 2009, file with the Commission's  
4 Docket Control and provide to Staff a new privilege log that lists only those communications newly  
5 provided for *in camera* review as required under this Procedural Order; uses the same Bates  
6 numbering system as used in Cox's prior submission; includes at least the same categories of  
7 information previously provided for each communication; explains with specificity why the privilege  
8 should be recognized under A.R.S. § 12-2234(B); and lists the communications in chronological  
9 order, from the earliest document to the latest document.

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

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

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

18 DATED this 12<sup>th</sup> day of February, 2009.

19  
20  
21   
22 SARAH N. HARPRING  
23 ADMINISTRATIVE LAW JUDGE  
24  
25  
26  
27  
28

1 Copies of the foregoing mailed/delivered  
this 17th day of February, 2009, to:

2 William D. Cleaveland  
3 DAVIS MILES, PLLC  
4 P.O. Box 15070  
5 560 West Brown Road, Third Floor  
6 Mesa, AZ 85211  
7 Attorney for Accipiter Communications, Inc.

8 Michael M. Grant  
9 GALLAGHER & KENNEDY, P.A.  
10 2575 East Camelback Road  
11 Phoenix, AZ 85016-9225  
12 Attorney for Vistancia, LLC

13 Michael W. Patten  
14 ROSHKA DEWULF AND PATTEN, PLC  
15 400 East Van Buren Street, Suite 800  
16 Phoenix, AZ 85004-2262  
17 Attorney for Cox Arizona Telcom, LLC

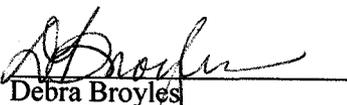
18 William J. Maledon  
19 Dawn L. Dauphine  
20 OSBORN MALEDON, P.A.  
21 2929 North Central Avenue, Suite 2100  
22 Phoenix, AZ 85012-2765  
23 Attorneys for Cox Arizona Telcom, LLC

24 Mark DiNunzio  
25 COX ARIZONA TELCOM, LLC  
26 1550 West Deer Valley Road  
27 MS: DV3-16, Building C  
28 Phoenix, AZ 85027-2121

Patrick Sherrill, President and CEO  
ACCIPITER COMMUNICATIONS, INC.  
2238 West Lone Cactus Drive, Suite 100  
Phoenix, AZ 85027-2641

Janice Alward, Chief Counsel  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

Ernest G. Johnson, Director  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

25  
26 By:   
27 Debra Broyles  
28 Secretary to Sarah N. Harpring