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ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

Arizona Corporation Commission  
**DOCKETED**  
AUG - 4 2009

DOCKETED BY

Re: *Preferred Carrier Arrangements and Other Potentially Anti-Competitive Practices (Docket No. T-00000K-04-0927)*

Dear Chairman and Commissioners:

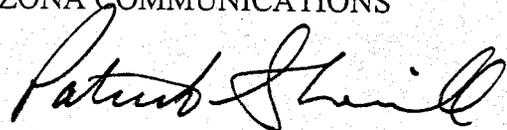
In January 2005 Accipiter Communications, Inc. dba Zona Communications ("Zona" or the "Company") filed a formal complaint with the Arizona Corporation Commission against Cox Arizona Telcom, LLC ("Cox") whereby Zona successfully challenged an anti-competitive arrangement at the Vistancia master-planned development in Peoria which had effectively barred access to the development by telecommunications competitors of Cox including the incumbent local exchange carrier Zona. (Zona and Cox settled this complaint in 2005.) Zona has also actively participated in the generic docket captioned *In the Matter of the Investigation into Preferred Carrier Arrangements and Other Potentially Anti-Competitive Practices Involving Service to Residential or Business Developments* (the "PCA Generic Docket") from the opening of that docket in December 2004. Zona has been—and continues to be—directly and materially impacted by anticompetitive preferred provider agreements ("PPAs") and schemes in Arizona's master planned communities ("MPCs.") Thus Zona has a keen interest in the PCA Generic Docket and the ultimate adoption of rules to ameliorate the anti-competitive impacts of PPAs. However it appears that the PCA Generic Docket has lost momentum. For this reason Zona requests the assistance of the Commissioners in helping move the docket forward. Zona would also submit the following points for consideration by the Commission.

- *"Homeowners must pay for this service, even if they do not want or use it."* This language comes directly out of the public subdivision report for Sun City Festival, an MPC served by Cox. Homeowners in Sun City Festival are legally but involuntarily liable for Cox telecommunications services. This is effectively a de facto neo-monopolization of communications services which might fairly be described as a "telecramdown." Monopolies are being reestablished in Arizona MPC by MPC through the misuse of the homeowners' association ("HOA.") as our attached two page memorandum shows.

- Public policy, federal law, Arizona law and the Commission's rules and policies squarely promote competition, but in Arizona's MPCs competition is vanishing. Under an MPC's PPA homeowners are presubscribed for services from a sole provider even before lots are platted. To create an excuse to avoid scrutiny, the provider pre-subscribes all residences for unregulated services which immediately freezes out competition for regulated services. As "**homeowners must pay for this service, even if they do not want or use it,**" little room is left for wireline competition. The PPA compels the HOA to add the telecramdown fees to its monthly dues in perpetuity. Anything less than full payment of HOA dues results in a lien on the property and a cloud on title.
- The harm from these constructs is of wide concern. In Sun City Festival HOA enforced subscriptions are impressed into the recorded CC&R's and the subdivision public report which may not be read by buyers. On 14 June the Arizona Republic reported Pinal County's San Tan Heights PPA required the HOA to collect and pay subscriptions for service to vacant lots; this nearly broke the HOA. (Copies of article available.) We also understand that similar terms were in place in Corte Bella until the residents somehow managed to terminate that aspect of the PPA.
- The Commission recognized the enormity of the barriers-to-entry problems when the outrage in Vistancia—limiting the city's public utility easement ("PUE") to only one telecom carrier—came to its attention in 2004. The Commission promptly initiated the PCA Generic Docket on competition. The U. S. Department of Justice's Anti-Trust Division also took heed and investigated. The Commission staff joined in attacking the barriers to competition and has recommended a still pending \$2,000,000 fine of Cox for its anti-competitive conduct.
- Zona has done what it can to move the Generic PCA Docket forward. Our efforts include motions suggesting a fair solution distilled from other states' attempts to preserve competition. We have been able to disinter portions of secret agreements excerpted in public records in regard to the Festival Ranch master planned development which includes Sun City Festival. We have accumulated anecdotal evidence. However we have reached our limits as we do not hold investigative powers. We face walls of secrecy. Developers and HOAa are afraid or unwilling to voluntarily divulge information. There are no tariffs to reveal underlying economics or how plant and equipment for unregulated services is being used to monopolize regulated services. Thus we now seek the Commission's help to reinvigorate the PCA Generic Docket and through public hearings shine a bright light on the anti-competitive effect of PPAs and develop a state-wide remedy. The dramatic homebuilding downturn today offers the Commission a unique opportunity to take measured corrective action while not enduring the immediate pressures of hyperactive development.

Sincerely,

ZONA COMMUNICATIONS



Patrick Sherrill, President/CEO

## MEMORANDUM

**TO:** File: Zona Communications / Accipiter (11275-001)  
**DATE:** July 16, 2009  
**FROM:** William D. Cleaveland  
**RE:** **Single Source Cable Services Mandated at Festival Ranch**

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This Memorandum describes our current understanding of the preferred provider agreement ("PPA") between Cox Communications and the developer of the Sun City Festival Master Planned Community.

This PPA centers on one or more bulk rate service agreements ("BRSA"). The BRSA imposes Cox telecommunications services on each and every homeowner. The unearthed documents are clear that payment for at least the core of these compelled Cox services is collected from each homeowner through mandatory homeowners' association ("HOA") dues. The documents clearly impose liability on every homeowner for these mandatory assessments effectively in perpetuity regardless of whether the homeowner wants Cox's services.

Despite the furtiveness which Cox and the developer apparently regard as necessary for these tariff-like arrangements, a painstaking search through public records revealed some but certainly not all of the terms. The attached appendix briefly summarizes what could be found in the Arizona Department of Real Estate Subdivision Public Reports and the files of the Maricopa County Recorder's Office. The developer-created HOA is used as part of the scheme to create formidable barriers to entry for any telecom supplier other than Cox Communications and its related entities, i.e., the provider "preferred" by the developer and not necessarily the consumers. Even the company with COLR responsibilities is effectively barred.

### **A. Festival Ranch: A Huge Master Planned Community.**

Festival Ranch is a master planned community ("MPC") that is currently under construction. It covers more than ten thousand acres located within the municipal limits of the Town of Buckeye, Maricopa County, Arizona. It is an age-restricted community in what was previously a rural area northwest of the of the greater Phoenix metropolitan area. The MPC is irregularly shaped and spans roughly 11 miles north to south and 6 miles east to west.

Sun City Festival is a portion of Festival Ranch and includes 8,600 residential dwelling units, commercial, light industrial, school and parks/open space uses. Phase 1 of the development includes 3,400 acres of Sun City Festival. Parcel 1B of Sun City Festival is currently under construction with 408 lots being offered for sale to the public.

### **B. Public Disclosure of Cox's PPA Terms.**

Cox contends that its PPAs with developers contain confidential and proprietary information and therefore typically refuses publicly to disclose the terms of such

agreements. Fortuitously with regard to Festival Ranch the developer described many of the significant terms of the Cox PPA buried in the boilerplate of obscure public records; these include the Subdivision Public Report maintained on file with the Arizona Department of Real Estate and the covenants, conditions, and restrictions ("CC&Rs") recorded in the official records of the Maricopa County Recorder's Office. Excerpts of these two documents are included in the appendix with some of the key provisions highlighted.

**C. Forced Payments to Cox Mandated Through the HOA.**

"Cox communications will supply telecommunications service, including, but not limited to, cable television, local and long distance telephony, high-speed data transmission, and any additional communications services to the Subdivision. Telecommunications service fees will be charged by the Association (as herein defined) and billed to the homeowner with their monthly association assessments. Homeowners must pay for this service, even if they do not want or use it."

*Subdivision Public Report*, at pages 17 – 18.

Eventually a board of homeowners will take over responsibility for the HOA from the developer, but under the CC&Rs this turnover of control is not required until the builders have sold 100% of the lots and all certificates of occupancy are issued. Even after control of the HOA is turned over to the homeowners, the HOA board cannot renegotiate the Cox agreements without Cox's consent. The pay-whether-you-use-or-not provisions expressly and conveniently do not apply to lots still owned by the developer or builders.

A failure to pay these charges inevitably leads to the draconian remedies that apply to a failure to pay any other HOA dues or assessments: interest, late charges and all costs including attorneys' fees; also the debt becomes the personal obligation of the owner regardless of who may be occupying the home; and if unpaid these telecommunications charges are secured by a lien against these homes. Cox is not only the beneficiary of this scheme of forced subscribers and mandatory collections, it also gains the invaluable first mover advantage which further wards off competition.

**D. More Agreements Likely In Cox's PPA At Festival Ranch.**

We doubt that the BRSA as disclosed in the public documents would be the only contracts that Cox has in play at Festival Ranch. We have found in other developments that Cox often enters into a "Co-Marketing Agreement" and a "Property Access Agreement" with developers. These agreements are referred to as Cox's CMA and PAA and typically provide for marketing cooperation between the developer and Cox. They require Cox to pay cash kickbacks to the developer. Kickbacks rise with market penetration which in turn depends on how effectively competition is excluded. With such a secure lock placed on a giant MPC like Festival Ranch it would not be surprising to find a similar kickback scheme in place behind these agreements for forced HOA payments.

## APPENDIX

### Excerpts From The Subdivision Public Report and CC&Rs.

The following excerpts are the complete text of the "Telephone" section from the Subdivision Public Report and Sections 4.8 and 10.6 from the CC&Rs with some of the key language highlighted:

The Arizona Department of Real Estate Subdivision Public Report for Sun City Festival - Parcel B1, Registration No. DMOS-OS1122, by Pulte Home Corporation, at pages 17 & 18, dated February 7, 2006 provides as follows:

**Telephone:** Cox Communications ("Cox"), 20401 North 29<sup>th</sup> Avenue, Phoenix, Arizona 85027, telephone number: (623) 328-3204, will supply telephone service to the Subdivision. Subdivider will complete the telephone facilities within the Subdivision on or before August 30, 2006. All costs to complete facilities from lot line to dwelling are included in the purchase price.

As of the date of this Public Report, Subdivider has entered into an agreement with Cox to provide homeowners a discounted fee for monthly service. Cox Communications will supply telecommunications service, including, but not limited to, cable television, local and long distance telephony, high-speed data transmission, and any additional communications services to this Subdivision. Telecommunications service fees will be charged by the Association (as hereinafter defined) and billed to the homeowner with their monthly association assessments. Homeowners must pay for this service, even if they do not want or use it. Purchasers are advised to review Section 4.8 of the CC&R (as hereinafter defined) to understand their obligations with respect to the bulk service agreement with Cox Communications. Purchasers will be required to pay an installation fee of \$24.95, plus tax, and basic service available for \$10.37, plus tax. Additional telephone features available for additional charge. Deposit may be required dependent on credit history. Please note the amount of the fees is in the control of the service provider and, therefore, can change.

Appendix (continued).

The Declaration of Covenants, Conditions, and Restrictions for Sun City Festival, by Pulte Home Corporation as "Declarant," §§ 4.8 & 10.6, at pages 18 & 40, a copy of which is recorded as Instrument No. 2005-1720347 in the official records of the Maricopa County Recorders' Office, recorded on November 14, 2005, provides a follows:

**4.8 Bulk Rate Service Agreements.** In furtherance of the provisions of Section 4.8, Declarant has entered or may enter into one or more agreements (the "Cox Agreement") with CoxCom, Inc., a Delaware corporation, d/b/a Cox Communications Phoenix ("Cox"), to provide to all Lots basic cable television service at a bulk rate. The Cox Agreement and any future telecommunications agreements for the Properties are referred to herein as the "Telecommunications Agreements" and Cox and any future providers of telecommunications service are referred to herein as the "Telecommunications Provider." Each Owner acknowledges, understands, and agrees:

The Declarant Parties and the Association make no representations, warranties, or guarantees of the provision or availability of service or any particular program or channel to be provided by the basic cable television service, and the Declarant Parties and the Association shall have no responsibility or liability if any particular service is unavailable or if any program is interrupted, discontinued, or substituted.

Declarant and the Association reserve the right to subject the Properties to easement agreements related to the Telecommunications Agreements, as may be necessary for the Telecommunications Provider for the purpose of installing, relocating, reinstalling, maintaining, repairing, upgrading, operating, and removing the facilities reasonably necessary to provide the telecommunications services.

Following assignment of the Telecommunication Agreements by Declarant to the Association, the Board, acting on behalf of the Association, shall have the right, power, and authority (but not the obligation) to amend, supplement, and modify the Telecommunications Agreements to the extent permitted thereunder, by law or with the approval of the Telecommunications Provider for such term(s), at such rate(s), and on such other terms and conditions as the Board deems appropriate and to enter into any other bulk service agreements with one or more bulk providers for such term(s), at such rate(s) and on such other terms and conditions as the Board deems appropriate, all with the primary goal of providing to Owners within the Property, or within one or more portions thereof, cable television, community satellite television, or other electronic entertainment, information, or communication services (a) which might not otherwise be generally available to such Owners, (b) at rates or charges lower than might otherwise generally be charged to the general public for the same or similar services, (c) otherwise on terms and conditions which the Board believes to be in the interests of Owners generally, or (d) any combination of the foregoing.

\* \* \*

**10.6 Telecommunications Assessments.**

(a) For so long as any Telecommunications Agreements remain in effect, the service fee payable to the Telecommunications Provider for basic cable television service to each Lot shall be charged to each Lot as provided herein (a "Telecommunications Assessment") and paid to the Telecommunications Provider by the Association. Each Owner other than Declarant, by becoming the Owner of a Lot, is deemed to covenant and agree to pay all Telecommunication Assessments levied or charged against such Owner and Lot by the Board pursuant to this Section and all such Telecommunication Assessments with interest, late charges and all costs, including, but not limited to, reasonable attorneys' fees, incurred by the Association in collecting or attempting to collect delinquent amounts. shall be secured by the lien for assessments established by this Declaration, and also shall be the personal obligation of each Person who was an Owner of the Lot at the time such amount became due (which personal obligation for delinquent amounts shall not pass to the successors in title of the Owner unless expressly assumed by them unless title is transferred to one or more such successors for purposes of avoiding payment of such amounts or other Assessments or is transferred to a Person controlling, controlled by or under common control with the Owner transferring title). No Owner of a Lot covered by the Telecommunications Agreements (other than Declarant) shall be entitled to avoid or withhold payment of amounts charged by the Board to such Owner or such Owner's Lot under this Section, whether on the basis that such Owner does not use, accept or otherwise benefit from the services provided under the Telecommunications Agreements, service disruptions or otherwise. However, the Board shall have the right, at its option, to exempt from payment of such amounts any Lot upon which no Dwelling Unit or other building has been completed.

(b) Each Owner shall be entitled to subscribe to additional services as may be provided by the Telecommunications Provider from time to time separate and apart from the basic cable television service, and each such additional service shall be administered and billed through separate agreements between such Owner and the Telecommunications Provider. The Declarant Parties and the Association shall have no responsibility or liability with respect to such additional services, and such amounts shall not be included in the Telecommunications Assessment.



July 29, 2009

- I. *The following are references to our three sets of comments filed in the generic docket on Preferred Carrier Arrangements*
  - a. Initial Comments Of Accipiter Communications Regarding Preferred Provider Agreements And Request For Procedural Conference, In the Matter of the Investigation into Preferred Carrier Arrangements and Other Potentially Anti-competitive Practices involving Service to Residential or Business Developments, ACC Docket No. T-00000K-04-0927, filed March 22, 2007.
  - b. Accipiter Communications' Supplemental Comments Regarding Preferred Provider Agreements, ACC Docket No. T-00000K-04-0927, filed July 17, 2007.
  - c. Accipiter Communications' Second Supplemental Comments Regarding Preferred Provider Agreements And Proposed Rule, ACC Docket No. T-00000K-04-0927, filed April 11, 2008.
  
- II. *This is a condensed summary of our three filings:*
  - a. In our Initial Comments we explained Zona's concerns and experience with preferred provider agreements and discussed efforts of other states to address PPAs.
  - b. In our first Supplemental Comments we discussed the secrecy surrounding PPAs and the Commission's power to address them.
  - c. In our Second Supplemental Comments we proposed specific rules fashioned to address the more troubling aspects of PPAs without creating a burdensome new regulatory scheme.

# Community-run HOA fights to save services

[3 comments](#) by **J. Craig Anderson** - Jun. 14, 2009 11:21 PM  
The Arizona Republic

A northern Pinal County community homeowners association says it has made significant strides toward financial health after being on the verge of bankruptcy in December.

San Tan Heights, a 3,000-home development along Hunt Highway southeast of Queen Creek, has struggled to maintain community services and prevent neighborhood deterioration after a series of setbacks including the bankruptcy of master developer Miller Holdings and foreclosure of home-builder-owned land inside the subdivision.

The community's resident-controlled HOA board, which took control in August after holding homeowner elections, told residents at a December meeting that the HOA was facing a \$1.2 million deficit and would be insolvent by the end of 2009 if it did not assess an additional, one-time fee of \$750 per household.

However, residents rejected the fee overwhelmingly in a special vote held in December.

At a follow-up meeting Thursday night, HOA board treasurer Rich LaPorta told a group of about 50 residents that the association's anticipated shortfall has been reduced to just \$160,000 by canceling expensive contracts and cutting back some services.

"We've made great strides, and we're looking to improve even more," said Joyce Massey, a San Tan Heights homeowner who attended the meeting Thursday and was involved in organizing the August HOA elections.

LaPorta said the board reduced expenses by \$450,000 by hiring a new landscaping service and cutting back on its responsibilities. The resident-controlled board also convinced Cox Communications to tear up a long-term contract that had forced the HOA to pay the cost of cable services to vacant lots.

LaPorta said the community also has benefited from foreclosures on land previously held by now-bankrupt home builders, because the lenders that took possession of the properties have resumed HOA dues payments.

In December, some residents had expressed concern about overgrown weeds on vacant lots, which they said were a fire hazard in addition to being ugly. Massey said they have since organized resident cleanup crews, and with landowners' permission have removed weeds from some of the sites.

She said Pinal County Sheriff Paul Babeu and District 2 Supervisor Bryan Martyn, both elected in November, have helped facilitate the cleanup activities.

**Reach the reporter at 602-444-8681.**