



0000157795

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

Arizona Corporation Commission

DOCKETED

2014 NOV -5 A 11: 40

NOV 05 2014

COMMISSIONERS

BOB STUMP, CHAIRMAN
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

DOCKETED BY

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

ORIGINAL

COX ARIZONA TELCOM, LLC'S MOTION TO DISMISS

Cox Arizona Telcom, LLC ("Cox") moves to dismiss the complaint filed by Accipiter Communications, Inc. (now Zona Communications) ("Accipiter").

A. Overview.

This docket involved a unique private easement arrangement that was proposed by developers and approved by the City of Peoria in 2003 for the Vistancia planned community in the far northwest part of the Phoenix metropolitan area. As a result of this private easement and related easement access agreements that Cox entered into with the developers, Accipiter filed the complaint in this docket raising concerns about the legality of the private easements and Accipiter's ability to serve Vistancia. The complaint was filed in January of 2005 - over nine years ago - and Cox settled the complaint with Accipiter in December of 2005. There has been no activity in this docket since June 1, 2009.

Cox believes it is appropriate to dismiss the complaint and close this docket for numerous reasons, including:

- Cox and Accipiter have settled their dispute and Accipiter has requested to withdraw from the docket;
- The private easement arrangement was extinguished by the City of Peoria and

1 Accipiter is currently providing service in Vistancia;

- 2 • The passage of time has proven that the private easement concept was a one-time
3 occurrence. Indeed, the provision of service to planned developments has changed.
4 For example, Cox is no longer entering into preferred provider marketing
5 agreements, which had been fairly common practice for larger carriers, such as
6 CenturyLink and Cox, in the early 2000s;
- 7 • The passage of time also has created challenges in conducting any further hearings
8 in the matter due to the availability of witnesses (or lack thereof) and the impact of
9 time on witness recall; and
- 10 • The unnecessary expenditure of limited resources on an issue that is no longer
11 relevant to the telecommunications market.

12 These reasons are discussed in more detail below.

13 **B. Settlement with Accipiter.**

14 Within a few months after the complaint was filed – and with the encouragement of the
15 Commission and Staff – Cox, Accipiter and the Vistancia developers engaged in settlement
16 discussions. Staff provided input to the initial stages of the discussions. Accipiter, Cox and the
17 developers ultimately agreed to a settlement which Cox believes addressed many of the concerns
18 raised by Staff at the time. The settlement was docketed with the Commission on December 14,
19 2005 and provided, among other things:

- 20 1. The private easement would be converted by the City of Peoria to public utility
21 easements at the Vistancia development.
- 22 2. Cox would provide to Accipiter a settlement payment of \$250,000 as well as conduit
23 valued at \$480,000 to ensure Accipiter's access to the Vistancia development.
- 24 3. The Cox/Vistancia preferred provider marketing would be cancelled.
- 25 4. Cox agreed that it would never participate in a private easement arrangement
26 anywhere in Arizona that was similar to the easement arrangement created by the
27 Vistancia developer.

1 5. The Vistancia developers also provided land to Accipiter for installation of
2 underground vaults for necessary facilities and a settlement payment of \$750,000 to
3 Accipiter.

4 As a result of the settlement, Accipiter filed a Notice of Withdrawal with Prejudice. Moreover,
5 although the Commission never formally approved the Settlement Agreement, all of its terms have
6 been met by the parties to the Settlement Agreement.

7 The settlement has allowed Accipiter to serve the entire Vistancia development.
8 Customers have had a choice of wireline providers since 2005 and Cox understands that Accipiter
9 is currently serving customers in the development, some of whom are being served through the
10 conduit provided by Cox.

11 **C. The Private Easement has proven to be a One-Time Occurrence.**

12 One of Staff's concerns was that the private easement arrangement may become prevalent
13 in new planned communities. However, the passage of time has proven that has not happened.
14 Certainly, Cox agreed never to participate in such an arrangement in the settlement, but Cox is
15 unaware of any other similar private easement arrangements ever being proposed or approved in
16 Arizona.

17 Moreover, the passage of time has changed the nature of telecommunications service to
18 planned developments. For example, Cox no longer enters into preferred marketing arrangements
19 with developers. These arrangements had been popular for large, often remote, developments
20 such as Anthem.

21 **D. The Passage of Time has created Challenges for Continuing the Docket.**

22 The complaint in this docket was filed in January of 2005 and was based on actions that
23 took place in 2002 and 2003. Prefiled testimony was filed in mid-2006 and several days of
24 hearing took place that fall. Only a few witnesses testified and many more were anticipated to
25 testify. However, given the passage of time, many of the anticipated witnesses for the various
26 parties may no longer be available due to a variety of reasons, such as retirement, moving out of
27 state, etc. It is uncertain whether necessary witnesses will still be available to testify. Moreover,

1 given the passage of time, there is also a concern about the ability to recall events that took place
2 more than a decade ago.

3 **E. Continuing the Docket Would Unnecessarily Utilize Limited Resources.**

4 Should this docket move forward at this time, significant resources would be required.
5 The use of such resources seems questionable, particularly since the passage of time has
6 confirmed that the private easement concept is dead and the telecommunications industry has
7 changed significantly. In order to proceed here, the legal issues over attorney-client privilege
8 would first need to be resolved. Once those issues are final, Cox submits the proceeding would
9 effectively have to start from scratch. It has been over seven years since the initial days of
10 hearing. Witnesses and attorneys would need to review voluminous materials to prepare for
11 hearing. New witnesses may need to be identified - to replace those no longer available. And the
12 hearing process may be challenging due to the memories of those involved back in 2002.

13 Given that the initial complainant in this docket has settled the case, has had its issues
14 satisfactorily resolved and has requested to withdraw, Cox submits that it simply does not make
15 sense to continue this docket more than ten years after the actions that gave raise to that now-
16 settled complaint. Time has proven that the concerns arising from the developer's private
17 easement experiment have not come to pass. Cox believes that resources are better spent on more
18 pressing and more current issues.

19 **F. Conclusion.**

20 Cox requests that the Commission dismiss the complaint filed by Accipiter and close this
21 docket.
22
23
24
25
26
27

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

RESPECTFULLY SUBMITTED this 5th day of November, 2014.

COX ARIZONA TELCOM, LLC.

By 
Michael W. Patten
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

Attorneys for Cox Arizona Telcom, LLC

Original and 13 copies of the foregoing
filed this 5th day of November 2014 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered/mailed
this 5th day of November 2014 to:

Sarah Harpring
Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Maureen A. Scott
Chief Counsel, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Steve Olea
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

ROSHKA DEWULF & PATTEN, PLC

ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

William D. Cleaveland
David Miles, PLLC
560 West Brown Road, Third Floor
Mesa, Arizona 85211

Michael M. Grant
Gallagher & Kennedy
2575 East Camelback Road
Phoenix, Arizona 85016

By *Jacqueline Howard*