

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Accipiter Communications, Inc.)
)
and)
)
Qwest Corporation)
)
Joint Petition for Waiver of the Definition of)
"Study Area" Contained in Part 36 of the)
Commission's Rules, Petition for Waiver of)
Section 69.3(e)(11) of the Commission's)
Rules)
)

CC Docket No. 96-45

FILED/ACCEPTED

FEB 28 2011

Federal Communications Commission
Office of the Secretary

TO: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Cox Communications, Inc. ("Cox") hereby opposes the Application for Review filed by Accipiter Communications, Inc. ("Accipiter") on October 1, 2010.¹ Accipiter's Application asks the Commission to reverse the Wireline Competition Bureau's ("Bureau") denial of Accipiter's 2006 petition for waiver of the Commission's study area rules.² Grant of the waiver would allow Accipiter to include a portion of the Vistancia development³ in its Arizona study area.

¹ Application for Review, Accipiter Communications, Inc., CC Docket No. 96-45 (filed Oct. 1, 2010) ("Application"). The Commission released a public notice seeking on the Application on January 28, 2011. See Wireline Competition Bureau Seeks Comment on the Accipiter Communications, Inc. Application for Review of a Decision to Deny a Waiver of the Commission's Study Area Boundary Freeze, *Public Notice*, 26 FCC Rcd 669 (Jan 28, 2011).

² *Id.*

³ Vistancia is a planned community in Peoria, Arizona, a rapidly growing suburb of Phoenix with a population of over 160,000. See Arizona Real Estate - Vistancia - Peoria AZ - Master plan Community, <http://www.vistancia.com/> (last visited Feb. 21, 2011); City of Peoria, Arizona, <http://www.peoriaaz.gov/> (last visited Feb. 21, 2011); U.S. Census Bureau, Peoria city, Arizona - Population Finder - American FactFinder,

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Cox did not participate in the initial proceeding on the waiver request. However, the Application attacks Cox directly and, in doing so, mischaracterizes the situation in Vistancia. Moreover, it is apparent that the Bureau's conclusion that there are "no circumstances of hardship or inequity that would warrant granting such a waiver" is correct.⁴ The public interest would not be served by the Application's grant, and Cox therefore respectfully requests that the Commission affirm the Bureau's decision and deny the Application.

I. Grant of the Waiver Would Not Serve the Public Interest

Accipiter argues at great length that grant of the waiver would serve the public interest. This is incorrect. All of Accipiter's arguments fall in one of three categories – (1) claims that the public interest is served by making it easier for Accipiter to operate; (2) assertions that are wholly irrelevant; and (3) threats that Accipiter will take actions that are not in the public interest if the Order is upheld. None of Accipiter's "public interest" arguments truly advances the public interest.

Accipiter claims that it sought a study area waiver so it could become part of the NECA pool.⁵ While participating in the NECA pool might be good for Accipiter, it is unclear how it is good for the public. Accipiter already is free to join the NECA pool for its existing ILEC service area.⁶ Further, NECA rates for access services would be higher than what Qwest is authorized to charge in Vistancia. Therefore, by joining the NECA pool for Vistancia, Accipiter would gain

<http://factfinder.census.gov/> (search "Get a Fact Sheet for your community..." for "Peoria, Arizona"; then follow "Population Finder" hyperlink).

⁴ Accipiter Communications, Inc. and Qwest Corporation, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36 of the Commission's Rules, Petition for Waiver of Section 69.3(e)(11) of the Commission's Rules, *Order*, 25 FCC Rcd 12663, 12667 (Wireline Competition Bureau 2010) ("Order").

⁵ Application at 16 ("participation in NECA's tariffs and pools for Accipiter's lines in the subject area was an additional basis for the request independent if [*sic*] the receipt of USF").

⁶ In fact, Accipiter already is a member of NECA. *See*

<https://prodnet.www.neca.org/Member/NECAMEMBER/MEMBERSEARCH.aspx> (search for Accipiter).

the ability to charge higher access rates than Cox charges today.⁷ Giving Accipiter the right to charge more in Vistancia is not in the public interest – it is in Accipiter’s interest.

Accipiter also claims that while it “agreed to forego high cost support, local switching support and ICLS as a condition to grant of the petition,” it still could serve as the designated eligible telecommunications carrier (“ETC”) in Vistancia for low income and rural health care customers.⁸ First, although Cox is not an ETC today, it voluntarily provides Lifeline service without a subsidy. Thus, grant of the waiver would simply allow Accipiter to obtain universal service funding by providing a service that Cox already provides without such funding. Second, Vistancia is not a rural community – it is a fast-growing suburb of Phoenix.⁹ Thus, rural health care funding should not be available to any carrier in Vistancia, regardless of its status

Indeed, the Application reveals a belief that runs through many of Accipiter’s arguments: that it is unduly burdened by having to operate as a “partial ILEC/partial CLEC in the same location.”¹⁰ Actually, there is nothing unprecedented about having different classifications in different service areas, and many other telecommunications service providers operate as both an ILEC and a CLEC. Accipiter does not explain why such a model is so burdensome. Moreover, to the extent, if any, that Accipiter is inconvenienced because it must account differently for its ILEC and CLEC areas under Arizona law, Accipiter can ask the Arizona Corporation Commission to waive those requirements, whether or not its Application is granted. Finally, Accipiter’s suggestion that the “imposition of these burdens” would fall “ultimately on consumers” is a threat, plain and simple.¹¹ Neither the hypothetical burden placed in “partial

⁷ Cox’s interstate access rates in Arizona mirror Qwest’s rates.

⁸ Application at 22.

⁹ See *supra* 3.

¹⁰ Application at 20 (“The burdens on Accipiter will continue indefinitely if the Order is not reversed, because of the difficulties of operating as a partial ILEC/partial CLEC in the same location”).

¹¹ Application at 12.

ILEC/partial CLEC” service providers nor threats to impose the costs of these hypothetical burdens on the residents of Vistancia provides reason to grant the Application.

Further, whatever burden Accipiter faces as a “partial ILEC/partial CLEC” does not prevent it from serving Vistancia. Accipiter already provides both telephone and fiber-to-the-home broadband service to the residents of Vistancia.¹² Nevertheless, Accipiter contends that grant of the waiver will allow it to provide competitive telecommunications services to Vistancia.¹³ This is, of course, nonsensical; grant of the Application cannot allow Accipiter to provide a service it already provides without the waiver.

Ironically, even while claiming that the waiver will allow it to provide service, Accipiter also claims that it may be forced to withdraw from the area if the waiver is not granted.¹⁴ This is unlikely. Offering fiber-to-the-home service requires large capital investments — investments that Accipiter already has made. There is no reason to think that Accipiter will abandon these investments and withdraw from Vistancia simply because the Commission will not grant its Application. Indeed, if Accipiter does abandon Vistancia because it does not get its way in this proceeding, Accipiter should not be permitted to back the costs of its abandoned capital investments into its access rates for any areas it continues to serve.

If anything prevents Accipiter from successfully serving Vistancia as a CLEC, it is Accipiter itself. Accipiter’s settlement agreement with Cox granted Accipiter access to conduit, space for facilities, resale rights and \$1 million that Accipiter could use to construct and operate

¹² See Zona Communications » Vistancia, <http://www.zonacommunications.com/zona-communities/vistancia> (last visited Feb. 21, 2011) (describing available services in Vistancia); Zona Communications » Internet, <http://www.zonacommunications.com/residential/internet> (last visited Feb. 21, 2011) (listing Vistancia as a community in which fiber to the home high speed Internet is available).

¹³ Application at 2 (“Accipiter, without USF support, will provide wireline broadband and telecommunications services in competition with the established carrier to the benefit of subscribers, consistent with the goals of the National Broadband Plan”).

¹⁴ Application 3 (“Without the waiver, Accipiter will be required to give serious consideration to withdrawing from [Vistancia]”; 26 (claiming the Order has create a “substantial incentive to withdraw” from Vistancia).

its facilities.¹⁵ These considerations were more than sufficient to allow Accipiter to begin serving Vistancia as a CLEC, as demonstrated by the service Accipiter already provides today. Any decision not to run wire or serve any portions of Vistancia was Accipiter's alone.

Furthermore, the settlement undermines Accipiter's entire line of argument regarding the Commission's "considerable effort to remove obstacles to competition resulting from exclusive contracts in multiple tenant environments ("MTEs")."¹⁶ First, Accipiter's MTE argument makes little sense, because Vistancia is a community of single-family homes, with no MTEs. Second, as mentioned above, the settlement granted Accipiter conduit access, resale rights, space for facilities and financial compensation.¹⁷ Accipiter faced no barriers to deployment in Vistancia; to the contrary, because of the settlement, Accipiter gained all of the access it would need.

II. The Application Makes False and Misleading Statements About Cox

As shown above, Accipiter provides no basis to overturn the Bureau's decision to deny the study area waiver request. In addition, Accipiter makes a number of false and misleading statements about Cox and Cox's operations in Vistancia. While these claims have no bearing on the public interest analysis required in this proceeding, Cox believes that it is useful for the Commission to have an accurate understanding of the market in Vistancia.

First, Accipiter claims that the Arizona Corporation Commission "levied a fine of \$2 million on Cox." This did not happen. The Arizona Corporation Commission did not levy a \$2 million fine on Cox – a few members of its staff suggested such a fine nearly five years ago.¹⁸

¹⁵ Settlement Agreement between Accipiter Communications, Inc; CoxCom, Inc.; Cox Arizona Telecom, LLC; Vistancia LLC; and Vistancia Communications, LLC, 4-17 (Nov. 3, 2005).

¹⁶ Application at 25.

¹⁷ Settlement at 4-17.

¹⁸ Arizona Corporation Commission Utilities Division Staff Testimony, Executive Summary, Cox Arizona Telcom, L.L.C., Docket No. T-03471A-05-0064 (June 15, 2006).

The Arizona Corporation Commission never acted on the proposal and, as nearly five years have passed since the proposal was made, almost certainly never will.

Second, Accipiter proclaims that the result of the Bureau's denial of its waiver request is to reward Cox with an "effective unregulated monopoly" in Vistancia. Accipiter's own filing demonstrates that this is not true. Accipiter already serves portions of Vistancia, thereby competing with Cox. Moreover, through the settlement, Accipiter was granted rights to resell Cox's service and use Cox conduit. Accipiter has not used the conduit and has not purchased any services for resale since March, 2010. At the same time, Cox is subject to both federal and state regulation. Indeed, Cox must be the only "unregulated monopoly" that is subject to both regulation and competition.

Finally, Accipiter protests that it had to expend "substantial time and resources" in filing complaints with the Arizona Corporation Commission and Department of Justice and suggests that Cox has somehow benefited from Accipiter's situation.¹⁹ Nothing could be further from the truth. Accipiter has been more than compensated for its litigiousness. As described above, Accipiter received a \$1 million payment along with access to conduit, resale rights, and space for facilities as a result of its complaints.²⁰ Cox's success is a result of capital investments and hard work, not of excluding any competitor from the market. Indeed, if Accipiter had expended more effort to construct facilities and to compete in Vistancia, rather than seeking unnecessary subsidies and benefits, it might have more success in the marketplace.

¹⁹ Application at 25.

²⁰ Settlement at 4-17.

III. Conclusion

For these reasons, the Commission should affirm the Bureau's decision and deny the Application.

Respectfully submitted,

By



J.G. Harrington
Barath R. Chari

Counsel for Cox Communications, Inc.

Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036-6802
(202) 776-2000

February 28, 2011

CERTIFICATE OF SERVICE

I, Cynthia Porter, hereby certify that on this 28th day of February 2011, I caused a copy of the foregoing "Opposition to Application for Review" to be served via first-class mail, postage prepaid, upon the following:

David Cosson
2154 Wisconsin Ave NW
Washington, DC 20007

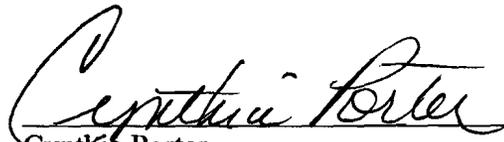
Accipiter Communications, Inc.
d/b/a Zona Communications
2238 West Lone Cactus Drive, Suite 100
Phoenix, AZ 85027

Gary Seigel
Telecommunications Access Policy Division
Wireline Competition Bureau
445 12th Street SW, Room 5-C408
Washington, D.C. 20554
gary.seigel@fcc.gov

Charles Tyler
Telecommunications Access Policy Division
Wireline Competition Bureau
445 12th Street SW, Room 5-A452
Washington, D.C. 20554
charles.tyler@fcc.gov

Sharon E. Gillett
Chief, Wireline Competition Bureau
445 12th Street SW
Washington, DC 20554
sharon.gillett@fcc.gov

Best Copy and Printing, Inc.
445 12th Street SW, Room CY-B402
Washington, DC 20554


Cynthia Porter