ACCIPITER COMMUNICATIONS, INC.
Dba ZONA COMMUNICATIONS
2238 WEST LONE CACTUS DRIVE---SUITE 100
PHOENIX ARIZONA 85027
PHONE 928 501 5000; FAX 928 501 5050

RE: Voice, Video, and Broadband: The Changing Competitive Landscape and Its Impact on Consumers

Phillip K. Sotel, general counsel
pksotel@att.net; ph. [626] 799 7043; Pasadena CA

27 November 2007

U.S. Department of Justice
Antitrust Division
Attention: Ashley Becker
City Center Building, Suite 8000
1401 H Street, NW
Washington, DC 20530

Additional electronic submission to 2007TelecomSymposium@usdoj.gov

Ladies & Gentlemen:

Introduction.

1. Accipiter is now doing business as Zona Communications. Its operations are conducted entirely as an ILEC in a rural service area of about 1000 sq miles in the Arizona counties of Maricopa and Yavapai. For brevity it covers but 3 topics: 1] a description of the anti-competitive problems Zona encounters in its service area as a result of a CLEC with a state-wide CC&N which is an affiliate of a large cable television provider; 2] a description of the harm done to the consumers resulting from these anti-competitive problems; and 3] a discussion of regulatory solutions available in Arizona. These are followed by a conclusion. Our experience is totally Arizona-centric, but we have become aware of similar entry barriers to competition in other states affecting ILECs both large and small and their struggles to foster competition in master planned communities [MPCs.] Amongst the states Arizona through the Arizona Corporation Commission [ACC] may well be in the forefront of these efforts given its many efforts including the ACC--initiated 2004 generic docket on Preferred Carrier Agreements ["PPAs} [Docket No. T-00000K-04-0927]. The issues being examined are likely to be closely related to those examined in DOJ's 2007 Symposium.

2. The ACC has a long history of vigorously promoting competition. Zona was a beneficiary of its efforts in the 2005 complaint docket Zona filed against the Cox Cable TV's CLEC and the developer of the MPC of Vistancia. The ACC staff intervened as a party in support of Zona's complaint. This matter also came to the attention of the U S Department of Justice which recognized that the entry barrier paradigm established for Vistancia could quickly metastasize nationally to other MPCs. As a result the DOJ launched a CID. These regulatory efforts led to a same-year settlement between Cox & Zona of virtually all but these PPA-related issues. [Please note that the settlement related only to issues unique to the Vistancia development, not to the overarching issues raised by PPAs nor the ACC staff proposed $2,000,000.00 fine of the Cox CLEC which is still pending.] [ACC Docket No. T-03471A-05-0064.] The Arizona Republic covered these matters fully during 2005 and supported Zona's position in a lead editorial. [Copies of these articles are available upon request.]

3. For amplification of the points Zona is presenting hereunder, please refer to Zona's two comment briefs in the generic docket which were filed on 22 March and 17 July 2007. The link is www.cc.state.az.us; click the 'eDOCKET' icon at bottom of page; then select 'Docket Summary Report;' then select 'eDocket Reports' page. In the box 'select a report' click 'Docket Summary Report' and in the Docket Number box enter 'T-00000K-04-0927.' Each document can be viewed by clicking 'View Document' or printed by selecting 'PDF' and "Run Report.'

Topic 1. The Anti-Competitive Problems Encountered by Zona: a] Here are five of the salient factors: i] The preferred provider agreements [PPAs] that are of concern to Zona usually take the form of local exchange carrier ["LEC"] agreements that are designed to facilitate the installation of a sole provider for the initial telecommunications facilities within large new master-planned communities ("MPCs") in remote unserved areas. A CLEC quietly enters an unserved area under a secret and confidential agreement that all but guarantees that it will not have any competition for telecommunication services within the MPC. Although Zona is the ILEC, information about trenches being opened, CLEC conduit installed and trenches closed is often intentionally withheld from Zona; ii] In the most problematic PPA for telephone services, the MPC's developer subsidizes the LEC's facilities in return for the kind of benefit so vividly described in the testimony quoted in the next paragraph. In return for the equivalent of an 'equity' interest in the telecom revenue stream generated within a MPC as described in the two following paragraphs. The LEC subsequently pays the developer rebates derived from assigning a percentage of the subscriber revenues collected from ratepayers in the MPC. The rebates continue as a perennial encumbrance; they are not conditioned on mere repayment of a loan. The magnitude of the payments depends on the efficacy of the developer's efforts to keep competition out of the MPC. Through these PPAs, the LEC is paying others to do what at the very least would be inappropriate for the LEC to do itself, paying for protection from competition to the everlasting mutual benefit of both the preferred provider and the developer; iii] Furthermore as the CLEC is an affiliate of a cable TV company, a low cost, barebones cable TV package is provided under contract to the homeowners' association ["HOA"] while it is still under the control of the developer. This payment for the cable TV package then becomes a permanent part of the dues which must be paid by the each HOA member in perpetuity whether or not the cable TV service is wanted or used. Here one can see clearly how a monopoly in one service is bootstrapped into a monopoly in all three services--voice, cable TV & data; iv] The confidential nature surrounding PPAs adds to the destruction of competition by concealing from consumers and competitors the anti-competitive circumstances under which telecom services are provided; and v] PPAs often grant exclusive marketing rights integrated with the housing sales offices, another most effective way to discourage and exclude competition.

b] In the Vistancia Complaint docket a Cox executive testified "what actually transpired" in a PPA negotiation. It is illuminating:

> The Commission must understand what actually transpired between the parties. The Vistancia development is somewhat remote from the then-existing communication services facilities. Naturally, the Developer wanted a variety of communications services available for its first homeowner and to every homeowner thereafter, even though the population would be insufficient in the beginning to support the cost of extending services to the entire community. As this Commission well knows, the Valley is undergoing amazing growth, and Cox has many options from which to choose when deciding where to invest its limited capital resources. Thus, it is not surprising that, when the Developer approached Cox to discuss communications services for this Vistancia development, Cox was simply unwilling, without some financial incentives, to make the enormous capital expenditures necessary to ensure that services were available to the first homeowner. Cox calculated what it believed would be an acceptable rate of return on its capital investment, as well as the costs of extending services to the development, and determined what capital contribution and other incentives from the Developer were necessary to make Cox's investment reasonable from a business standpoint. The Developer agreed to make this capital contribution and to provide certain marketing incentives. However, the Developer recognized that, at some point, Cox would more than recoup its capital contribution, and also wanted to recoup its capital investment, share in the benefits that Cox derived from having access to the Developer's property and be compensated for its marketing efforts on behalf of Cox. Thus, the parties agreed to a revenue-sharing arrangement whereby, once sufficiently high levels of penetration were achieved, the Developer could recoup some of its capital contribution and participate in the revenue derived from Cox's sale of communications services at the development. There was never the necessary intent to form or the attributes of a profit-and-loss-sharing joint venture.

Cox Arizona Telecom's Reply to Staff Response Regarding Accipiter Complaint (Public Version), Docket No. T-03471A-05-0064, docketed May 31, 2005.

Topic 2. The Harm to Consumers: There is no choice of services, providers, tariffs nor technologies. The following circumstances prevail: a] non-tariff covert terms are concealed from both consumers and potential competitors effectively suppressing competition in MPCs. What could be a greater hurdle to entry than unknown barriers to entry? Potential competitors know there are entry bars but not what they are; b] consumers are unaware that their telephone provider shares with the developer their ongoing monthly payments as an incentive to hinder consumer choice; c] the safeguards ordered by the ACC to prevent a CLEC from creating a monopoly in a previously unserved area are ignored and/or evaded; d] the concept of "public utility easement" is flouted under a false claim of protecting private property rights; and e] t he critical "first mover" marketing and sales advantage is bestowed on the preferred provider as part of a foundation for construction of a *de facto* monopoly resulting in a de facto cable TV monopoly also becoming a monopoly in voice and data as well. Competitors are easily warded off by being forced to start too far behind the entrenched first mover. AT&T has recently encountered these problems in Florida and petitioned the PUC to be relieved of its carrier of last resort obligations since it could not compete with a CLEC with an MPC monopoly. [Details are presented in our comment brief of 17 July in the generic docket.]

Topic 3. Regulatory Solutions Available in Arizona: Zona recognizes that PPA s are often necessary and has no wish to see them eliminated. To avoid the abuses, early and timely transparency is required and virtually cost-free; and incentive-based payments between LECs and developers should be eliminated. Fortunately in Arizona the ACC has the power to regulate PPAs. While we cannot speak address the regulatory powers in other states, our research led us to the anti-competitive efforts of North Carolina; but we learned from the N C regulators that their attempted solution was not effective. In our 22 March 2007 comment brief, we suggested to the ACC how the N C rules could be modified and adopted in Arizona with telling effect. The essence of the suggestions lies in a few simple informative steps which would harness the self-corrective forces inherent in open competitive markets; these forces would be brought bear against the more problematic aspects of PPAs: before a de facto monopoly could be built, the preferred provider would: a] inform the ACC; b] inform the consumers: and c] inform the potential competitors including the ILEC and holders of state-wide CLEC CC&Ns. This would mean the end of confidentiality provisions no matter how sensitive or embarrassing a preferred provider may consider that information to be. This also would mean the end of monopolies first/questions later. It would at least and at last allow competitors to have an equal opportunity to enter MPC markets and should allow consumers to have more than one choice. Earlier this year we were involved with a proposal for the National Conference of Commissioners on Uniform State Laws. In conjunction with this we prepared a brief memo on the anti-trust laws of several states for MPC/CLEC circumstances. It is available upon request. However all these efforts and ensuing frustrations lead to the conclusion that outside Arizona this is a national problem that needs to be solved promptly at a national level.

CONCLUSION: PPAs are both necessary and acceptable in MPCs, particularly in remote areas. They ensure the provision of timely telecom services in new developments lacking which the latter are unlikely to go forward. However when these PPAs are used to exclude competitors or as a methodology to bar entry into new markets by unnecessarily increasing the costs and/or uncertainties to other entrants whether through fees, delays in buildout or marketing/sales, captured HOA fees etc., they should be prohibited.

Patrick Sherrill

for Phillip K. Sotel, counsel to Zona Communications
Pasadena California