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BEFORE THE ARIZONA CORPORATION C

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MARC SPITZER
Chairman
WILLIAM A. MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

Arizona Corporation Commission
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AZ CORP COMMISSION
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UTILITIES DIVISION STAFF, Complainant, vs. LIVEWIRENET OF ARIZONA, LLC n/k/a THE PHONE COMPANY MANAGEMENT GROUP, LLC; THE PHONE COMPANY OF ARIZONA JOINT VENTURE, d/b/a/ THE PHONE COMPANY OF ARIZONA; ON SYSTEMS TECHNOLOGY, LLC, and its principals, TIM WETHERALD, FRANK TRICAMO, DAVID STAFFORD, MARC DAVID SHINER and LEON SWICHKOW; THE PHONE COMPANY OF ARIZONA, LLP and its members Respondents.	Docket No. T-03889A-02-0796 T-04125A-02-0796
IN THE MATTER OF THE PHONE COMPANY OF ARIZONA JOINT VENTURE d/b/a/ THE PHONE COMPANY OF ARIZONA'S APPLICATION FOR CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS SERVICE AS A LOCAL AND LONG DISTANCE RESELLER AND ALTERNATIVE OPERATOR SERVICE.	Docket No. T-04125A-02-0577
IN THE MATTER OF THE APPLICATION OF THE PHONE COMPANY MANAGEMENT GROUP, LLC f/k/a LIVEWIRENET OF ARIZONA, LLC TO DISCONTINUE LOCAL EXCHANGE SERVICE.	Docket No. T-03889A-02-0578
IN THE MATTER OF THE APPLICATION OF THE PHONE COMPANY MANAGEMENT GROUP, LLC FOR CANCELLATION OF FACILITIES BASED AND RSOLD LOCAL EXCHANGE SERVICES.	Docket No. T-03889A-03-0152
IN THE MATTER OF THE APPLICATION OF THE PHONE COMPANY MANAGEMENT GROUP, LLC d/b/a/ THE PHONE COMPANY FOR THE CANCELLATION OF ITS CERTIFICATE OF CONVENIENCE AND NECESSITY.	Docket No. T-03889A-03-0202 **STAFF'S NOTICE OF FILING POST HEARING BRIEF**

The Staff of the Arizona Corporation Commission ("Staff") hereby files its Post Hearing Brief in the above referenced proceeding.

RESPECTFULLY SUBMITTED this 2nd day of April , 2004.

STAFF OF THE ARIZONA CORPORATION COMMISSION

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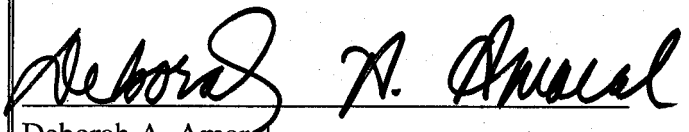

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COMMISSION STAFF'S POST-HEARING BRIEF

I. INTRODUCTION

This case raises many issues including some which unfortunately are becoming more common in an era of increased telephone competition. The case involves transfers of control of an LLC through the transfer of all of its membership interests in another entity without any Commission review or approval. This case is further complicated by the use of very similar names between the entities involved in the various transfers.

This case also involves a pattern of conduct by the principal of these companies and other companies before them of bankruptcies, harm to consumers through disruption of phone service, consent decrees, investigations at both the state and federal levels, non-payment of amounts owing to the underlying service provider, violation of state rules and orders and an evasion of the regulatory process in general through settlements, bankruptcies and sales of operations. In Arizona, the Company at issue has attempted to cancel its Certificate of Convenience and Necessity ("CC&N") and terminate this proceeding in order to evade any regulatory consequences for its actions.

The evidence demonstrates that the Mr. Wetherald and his companies in Arizona systematically violated Commission orders. In one instance, their failure to abide by Judge Dion's Procedural Order to send a notice to their customers about an impending service disconnection could have jeopardized the health and safety of approximately 4,500 customers.

The entities that are the subject of this Complaint allege that the Staff is on a "witch-hunt" and that it is inappropriate for the Staff to rely upon information obtained from other government agencies, the SEC, and Court documents unless the Staff has independently investigated and established every fact contained therein. While Staff acknowledges that some of these documents contain only allegations at this point in time, many contain established fact.

Staff believes that LiveWireNet's (k/n/a Phone Company Management Group d/b/a The Phone Company) CC&N should be revoked by the Commission because it is no longer a fit and proper entity to provide telephone service in Arizona. It does not have the financial resources to provide service nor the technical capability to do so, and did not at the time Staff's Complaint and Amended Complaints were filed. It has acted in violation of Commission rules and orders. The Staff

also believes that other remedies by the Commission would be appropriate including the imposition of fines.

The Staff entered into a Stipulation of Dismissal with the general investors of the Joint Venture and two of the other named respondents, David Stafford Johnson and Frank Tricamo. Staff believes that the Stipulation of Dismissal with these individuals is in the public interest for the reasons therein stated and should be approved.

II. BACKGROUND

On October 18, 2002, the Utilities Division Staff filed a Complaint and Petition for relief against LiveWireNet of Arizona LLC n/k/a The Phone Company Management Group, LLC d/b/a The Phone Company, The Phone Company of Arizona Joint Venture d/b/a The Phone Company of Arizona, On Systems Technology, Inc., LLC, Tim Wetherald, Frank Tricamo and David Stafford Johnson and the Phone Company of Arizona, LLP. Staff filed the Complaint because of information received regarding investigations in other states involving On Systems Technology, Tim Wetherald and other companies owned and/or managed by On Systems and Mr. Wetherald as well as a significant increase in customer complaints over a short period of time and information that large amounts were outstanding to the underlying wholesale service provider, Qwest. This information raised serious concerns about the adequacy of service being provided by the Respondents to their Arizona customers, their compliance with provisions of Arizona law and their continued financial viability.

LiveWireNet received a CC&N from the Commission on February 16, 2001, to provide facilities-based and resold local exchange telecommunications services in the State of Arizona. Pursuant to Decision No. 63382, LiveWireNet was ordered to file a performance bond in the amount of $100,000 within 90 days of the effective date of the Decision. The Company filed and received several extensions of time to submit proof of a performance bond which was subsequently filed with the Commission on February 19, 2002.

On January 29, 2002, LiveWireNet sold its membership interest to On Systems Technology ("OST"), and as part of this same transaction purportedly transferred its CC&N to OST as well. On

January 29, 2002, LiveWireNet filed Articles of Amendment with the Arizona Corporation Commission changing its name to The Phone Company Management Group, LLC ("PCMG"). On January 30, 2002, Mr. Wetherald filed an initial tariff and price list for The Phone Company Management Group, LLC, d/b/a "The Phone Company."

On July 31, 2002, PCMG filed an Application to Discontinue Local Exchange Service in Arizona. PCMG's Application was docketed as No. T-03889A-02-0578. By letter dated October 9, 2002, and docketed with the Commission, PCMG withdrew its pending Application.

On July 31, 2002, The Phone Company of Arizona Joint Venture d/b/a The Phone Company of Arizona filed an Application for a Certificate of Convenience and Necessity to provide intrastate telecommunications service as a local and long distance reseller and alternative operator service provider. The Phone Company of Arizona's Application was docketed as No. T-04125A-02-0577. A letter seeking to voluntarily withdraw the Phone Company of Arizona's Application was docketed October 7, 2002, by counsel for OST, the general partner of the Phone Company of Arizona.

OST was retained by the Partnership to perform management services for the Partnership. The Phone Company of Arizona Joint Venture d/b/a The Phone Company of Arizona was subsequently dissolved.

On or about September 20, 2002, several of the General Partners of the Phone Company of Arizona met with Staff with concerns regarding OST, the management for the Company, and Mr. Tim Wetherald, one of the principles of OST. The partners stated that OST and Mr. Wetherald were taking actions without their approval. The partners also apprised Staff of investigations going on in several other states involving OST and Mr. Wetherald.

Staff was also subsequently apprised of OST's failure to pay the underlying wholesale providers for service in both Colorado and Arizona. Qwest informed Staff that it had stopped processing new Local Service Requests ("LSRs") for the Phone Company Management Group in Arizona, pursuant to its Interconnection Agreement, because of PCMG's failure to make payments for the underlying services provided by Qwest. Staff was also apprised that Qwest had given notice to the Company that nonpayment of the past due balance would lead to eventual service disconnection.

On October 4, 2002, Mr. Glaser (OST's attorney) filed a letter on behalf of The Phone Company of Arizona Joint Venture, d/b/a The Phone Company of Arizona stating that The Phone Company of Arizona LLP which held a 70% ownership in the Joint Venture (On Systems Technology held the other 30%) had failed to make its initial capital contribution of $619,000.00, and therefore, was deemed to have withdrawn from The Phone Company of Arizona. Mr. Glaser also stated that under the Joint Venture Agreement, the interests held by the Limited Partnership were deemed to be terminated and transferred, along with the capital account balance maintained on behalf of the Limited Partnership by the manager of The Phone Company to On Systems Technology. Thus, according to Mr. Glaser, On Systems now owned all of The Phone Company of Arizona.

On October 18, 2002, the Staff Complaint against LiveWireNet, PCMG, the Joint Venture d/b/a the Phone Company of Arizona, OST and its principles Tim Wetherald, Frank Tricamo and David Stafford Johnson, the LLP, was filed. The Complaint was docketed as Nos. T-03889A-02-0796 and T-04125A-02-0796. The Complaint raised concerns regarding the Phone Company of Arizona's status to provide telecommunications service in Arizona and whether it and/or PCMG was a fit and proper entity to provide telephone service in the state.

By letter dated December 30, 2002, Qwest notified The Phone Company Management Group that its service was subject to disconnection. Qwest had earlier sent several collection letters to the Company, beginning on July 2, 2002, regarding the outstanding amounts owed to Qwest, and that if resolution was not reached, the Company's service would be subject to disconnection. At the time, the Phone Company of Arizona was providing service to approximately 5,000 customers.

On February 25, 2003, ALJ Dion issued a Procedural Order that ordered PCMG to notify the customers of the Phone Company of Arizona of the possible termination or interruption of their service. On February 27, 2003, the Commission received a letter from counsel for PCMG stating that it would not be sending the notice to its customers, as ordered by the Commission. As a result, Staff was ordered on March 3, 2003 to notify the Company's customers of the impending service disconnection.

Staff sent the notice as directed by the Commission, and during this same time period, PCMG entered into an asset purchase agreement with USURF America ("USURF") to sell its customer base

to USURF. At the same time Staff sent out the notice directed by the Commission, USURF/PCMG sent out a notice to the customers stating that the customer's account would be transferred to USURF, but that the customer had 90 days in which to decide whether to select a new carrier. PCMG never received Commission approval for this transfer of assets.

Staff filed its testimony on March 28, 2003. Testimony was also filed by Travis Credle on behalf of the Arizona Phone Company LLP ("LLP") on or about March 28, 2003. No testimony was filed by any of the other respondents.

On June 2, 2003, Staff filed an Amended Complaint which, *inter alia*, included another Count addressing specific Commission rule and/or order violations by the Company.

Staff filed supplemental testimony on October 8, 2003. A Stipulation for Dismissal was filed by Staff, the LLP, Frank Tricamo and David Stafford Johnson on February 24, 2004. The evidentiary hearing on this matter was held on February 24-26, 2004. Following is Staff's Post-Hearing Brief.

II. DISCUSSION

A. LiveWireNet (n/k/a PCMG d/b/a The Phone Company), On Systems and Mr. Wetherald should be subject to fines and PCMG's CC&N Should Be Revoked By the Commission for Violation of Commission Orders and Rules (Counts 1 and 5 of the Amended Complaint)

Counts 1 and 5 of the Amended Staff Complaint contain evidence of various violations by the Company of Commission rules and orders. Staff believes that these violations are sufficiently egregious to justify revocation of LiveWireNet's (n/k/a PCMG d/b/a The Phone Company) CC&N and the imposition of fines.

A.R.S. Section 40-252 provides that:

> "The commission may at any time, upon notice to the corporation affected and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it."

This includes an order granting a certificate of public convenience and necessity. *Ariz. Corp. Comm'n v. Tucson Ins. and Bonding Agency*, 3 Ariz. App. 458 , 415 P.2d 472 (1966). Certificates of

convenience and necessity can only be acquired from the Commission by an affirmative showing that issuance thereof would best serve the public interest, not by estoppel or laches, and the same principle applies where res judicata is urged as a ground for continuance of the certificate. *Davis v. Corp. Comm'n*, 96 Ariz. 215, 393 P.2d 909 (1964).

The Commission's authority to grant a certificate of convenience and necessity is controlled by the public interest, A.R.S. 40-282(C). There must be an affirmative showing that the public interest would be benefited before the Corporation Commission may exercise its power to rescind, alter or amend a certificate of convenience and necessity after it has once been granted. *Tucson Ins.*, 3 Ariz.App. at 463, 415 P.2d at 477. Evidence of willful failure to comply with regulations, terms, conditions or limitations of the certificate are also reasonable cause to revoke or alter.

Under Count 1, it is Staff's position that for some period of time one of the entities, the Phone Company of Arizona Joint Venture d/b/a The Phone Company of Arizona, was providing service without a CC&N. This issue is complicated by two factors. First, the initial transfer of "membership interests" occurred without Commission approval in this case. This was the transfer of "membership interests" from LiveWireNet, LLC to On Systems Technology, an entity managed by Mr. Tim Wetherald. A second transfer of "membership interests" was to occur between The Phone Company Management Group, LLC and The Phone Company of Arizona Joint Venture. In this instance, Mr. Wetherald did file an Application for a Certificate of Convenience and Necessity. That Application was subsequently withdrawn by Mr. Wetherald's counsel in October, 2002.

The second complicating factor was the use of similar names for the entities which have lead to much confusion in this case. The separate entities involved in the transfers had similar names and were doing business under similar d/b/a's as well. The Phone Company Management Group, LLC was doing business as the "Phone Company" and the Phone Company of Arizona Joint Venture was doing business as the "Phone Company of Arizona". In addition, the management companies used by Mr. Wetherald had almost identical names, On Systems Technology and On Systems LLC.

A.R.S. 40-285 governs the disposition of assets by public service corporations, and the acquisition of capital stock of public service corporations by other public service corporations. The relevant sub-parts of A.R.S. 40-285 are as follows:

"A. A public service corporation shall not sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, line, plant, or system necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor shall such corporation merge such system or any part thereof with any other public service corporation without first having secured from the commission an order authorizing it so to do. Every such disposition, encumbrance or merger made other than in accordance with the order of the commission authorizing it is void.

* * *

D. A public service corporation shall not purchase, acquire, take or hold any part of the capital stock of any other public service corporation organized or existing under the laws of this state without a permit from the commission."

Whether a transfer of all of the "membership interests" of an LLC requires Commission approval has not been expressly addressed by the Commission and is an issue of first impression. The transfer of "membership interests" in a limited liability company is arguably very similar to the transfer of stock of a public service corporation over which the Commission has no jurisdiction under A.R.S. 40-285(D). *See also*, A.R.S. 40-301; *Corp. Comm'n v. Consolidated Stage Co.*, 63 Ariz. 257, 161 P.2d 110 (1945). The limited liability form of business was created by virtue of a statutory scheme adopted in 1992 by the Arizona legislature, many years after the adoption of A.R.S. 40-285. One of the most important characteristics that a limited liability company and a corporation share is the continuation of the organized entity regardless of the owners. A.R.S. 29-731 provides for the ability to add limited liability company members after the formation of the entity and A.R.S. 29-732 provides for the transfer of the membership. Subsection A thereof states that the membership is personal property and its transfer does not dissolve the limited liability company.

A 1998 decision by Division 1 of the Court of Appeals of Arizona lends support to the notion that a transfer of "membership interests" is akin to a transfer of stock in a corporation. See *Nutek Information Sys., Inc. v. Ariz. Corp. Comm'n*, 194 Ariz. 104, 977 P.2d 826 (App. 1998). In that case, the Court affirmed the Commission' s finding that the memberships in an LLC being transferred were investment contracts or securities and thus regulated by the Securities Division. Id.

On the other hand, an argument could b e made that the sale of membership interests is a sale of assets used and useful in the provision of utility service, an event requiring Commission approval under A.R.S. 40-285(A). (However, it may be a more difficult argument because of the similarities between "membership interests" and stock discussed above).

The concerns that arise with respect to allowing transfers of all of the membership interests of a limited liability company without Commission approval are readily apparent from the record in this case. It does seem that the Legislature recognized that there were increased risks involved with limited liability companies in that a change in membership is required to be filed with the Corporations Division if : "management is reserved to the members or is vested in managers and the transfer affects: 1) the managers or 2) twenty percent or more of the membership." A.R.S. Section 29-633(B). Both of these triggers occurred in this case without Commission notice. The record reflects that Mr. Wetherald and On Systems filed a Name Change with the Commission along with Articles of Amendment containing the change of name. It is Staff's position that the provisions of A.R.S. Section 29-633(B) strongly suggest that some form of Commission review and approval of these transactions was warranted.

The second transfer that occurred involved the transfer of the "membership interests" of The Phone Company Management Group LLC (f/n/a LiveWireNet) to a Joint Venture consisting of the Phone Company of Arizona LLP and On Systems Technology, LLC (whose principles consisted of Tim Wetherald, David Stafford Johnson and Frank Tricamo). Staff believes that this transaction required Commission approval under A.R.S. 40-285 and there was an application for a CC&N filed by Michael Glaser on behalf of the Joint Venture pending at the Commission at the time the Staff's Complaint was filed. As already indicated, that Application was later withdrawn by Mr. Glaser.

Further confusing the issue of which entity was actually providing service and whether the entity or entities obtained the necessary approvals from the Commission before providing service, was the use of similar names and d//b/a's by the various entities involved in this case. The Phone Company Management Group, LLC (f/n/a LiveWireNet) was doing business as "The Phone Company"; the Phone Company of Arizona Joint Venture, (which was never certificated by the Commission) was doing business as "The Phone Company of Arizona".

The evidence collected by Staff strongly suggests that at some point it was actually the Joint Venture that was providing service to customers. The service was being advertised under the Joint Venture's d/b/a, "The Phone Company of Arizona". Staff Ex. S-1 (Bostwick) p. 7. The bills to consumers contained this name as well. Staff Ex. S-1 (Bostwick), p. 7. Respondent Wetherald argues that because trade names of d/b/as are not required to be registered in Arizona, the Company could have done business under any designation without informing the Commission of same. Staff believes that this argument is a red herring. The fact that the Secretary of State does not require the registration of trade names does not mean that a public service corporation can operate under an assumed name in Arizona without informing the Commission of that fact. If companies were allowed to use any names without Commission knowledge this would undercut the Commission's ability to deal effectively with customer complaints and compliance issues.

In addition, the record indicates that Mr. Wetherald believed he was acting on behalf of the Joint Venture. Joint Venture funds were used in the operation's business. Mr. Wetherald later went to the investors of the LLP asking for additional capital contributions. Tr. (Stafford Johnson) at pp. 772-773.

Under Count V of the Complaint, Staff addressed the Company's violations of other Commission orders. Staff finds that the Company's conduct in some of these instances was particularly egregious.

A.A.C. R14-2-1106 provides that every telecommunications company obtaining a Certificate of Convenience and Necessity under this Article shall obtain certification subject to the following conditions:

> "1. The telecommunications company shall comply with all Commission rules, orders, and other requirements relevant to the provision of intrastate telecommunications service.
>
> 2. The telecommunications company shall maintain its accounts and records as required by the Commission.
>
> 3. The telecommunications company shall file with the Commission all financial and other reports that the Commission may require, and in a form and at such times as the Commission may designate.

4. The telecommunications company shall maintain on file with the Commission all current tariffs and rates, and any service standards that the Commission may require.

5. The telecommunications company shall cooperate with Commission investigations of customer complaints.

6. The telecommunications company shall participate in and contribute to a universal service fund, as required by the Commission.

7. Failure by a telecommunications company to comply with any of the above conditions may result in rescission of its Certificate of Convenience and Necessity."

A.A.C. 14-2-1106 goes on to state that the failure of a Company to comply with any one of these rules is grounds for recission of its CC&N.

The evidence in the record reflects that the Phone Company failed to comply with several Commission orders and rules, or in some instances, did so half-heartedly only after significant delay. The most significant of these violations involves the Company's failure to comply with Judge Dion's February 25, 2003 Procedural Order requiring it to give notice to its customers that their telephone service was subject to impending disconnection by Qwest. Because of the Company's failure to pay Qwest (the underlying wholesale service provider for its services), Qwest had issued a final disconnection notice. In a February 26, 2003, letter to the Commission, the Company alleged that the Commission did "not have legal authority" to require PCMG to send such a notice to its customers. As a result, the Staff had to obtain the Company's current customer list from Qwest and notify the Company's approximately 5,000 customers that their telephone service may be disconnected, and that they should contact an alternative provider for service. Without Staff and Commission intervention, the Company's unwillingness to provide this notice could have put the health and welfare of approximately 4,500 Arizona residents in jeopardy.

LiveWireNet (n/k/a Phone Company Management Group d/b/a The Phone Company) was also required to maintain a performance bond in the amount of $100,000.00 in Decision No. 63382. The bond lapsed on February 19, 2003, and no action was taken to renew the bond. Thus, the Company continued to provide service without a bond. The Commission's May 15, 2003 Procedural

Order required the Company to maintain the bonding requirement; however the Company did not comply. This is another instance where the Company acted in willful disregard of the Commission's orders.

The Company has a responsibility to provide information on a timely basis to the Staff and the Commission. Because of the Company's unwillingness to cooperate with Staff's investigation in this case, the Staff was forced to file several motions to compel. Despite a Commission order requiring the Company to provide the information, the Company either refused or provided the information months later which adversely affected the Staff's ability to do further discovery on the responses received. In his September 9, 2003 Procedural Order, the Judge instructed the Staff to obtain whatever information it could from the Securities and Exchange Commission because of the Company's refusal to comply with discovery requests. It was not until grant of the Company attorney's motion to withdraw was conditioned upon Staff's receipt of this information, that it was eventually provided, albeit in less than responsive form many times.

Additionally, Staff Witness Bostwick testified that the Company had failed to make the required contributions to the Arizona Universal Service Fund or the 911 Fund, two other requirements of the Commission's Order granting LiveWireNet a CC&N and of the Commission rules. Staff Ex. S-1 (Bostwick), p. 28.

Finally, at or about the time that the Staff was sending out the notice to the Company's customers regarding the impending service disconnection, the Company entered into an asset purchase agreement for sale of its operations to USURF America. Staff Ex. S-12. This transaction required Commission approval under A.R.S. 40-285(A). A separate notice was sent by the Company informing customers that their accounts would be transferred in 90 days to DMJ Communications, an entity that had been certificated by the Commission to do business in Arizona and which had entered into a management contract with USURF America to provide service to Phone Company customers, because USURF did not have a CC&N to provide service in Arizona. March 12, 2003 Notice from DMJ. The transfer of customers was effectuated without customer authorization in many cases (there were no Letters of Authorization ("LOAs") executed), before the 90 day period had expired and without Commission approval. Staff Ex. S-6. The Company did not inform the Commission of its

negotiations to sell its operations or the sale of its business, despite innumerable procedural conferences which were held to address the impending service disconnection of the Phone Company's customers. In addition, the Company's notice to customers was sent around the same time the Staff notice was sent which was confusing to customers.

The actions of the Company demonstrate a deliberate disregard at times for Commission processes and orders. Such willful violations of Commission orders and rules are grounds for revocation of the Company's CC&N.

B. LiveWireNet's (n/k/a PCMG d/b/a The Phone Company) CC&N Should Be Revoked By the Commission Because It is Not Financially Fit To Provide Telephone Service in Arizona (Court III of the Amended Complaint)

The conditions set forth for the denial of a certificate to any telecommunications company are set forth in A.A.C. R14-2-1106, sub-part A:

> "The Commission, after notice and hearing, may deny certification to any telecommunications company which:
>
> 1. Does not provide the information required by this Article;
> 2. Is not offering competitive services, as defined in this Article;
> 3. Does not possess adequate financial resources to provide the proposed services;
> 4. Does not possess adequate technical competency to provide the proposed services; or
> 5. Fails to provide a performance bond, if required."

A.A.C. R14-2-1106(A)(3) applies to this matter. The Applicant's inadequate financial resources to continue to provide the telephone service in the State was addressed in Count III of Staff's Amended Complaint. At the time Staff filed its Complaint (and currently), the Phone Company was not paying the obligations it owed to the underlying wholesale service providers, Qwest and Sprint. Qwest had been providing resale services to the Phone Company Management Group, LLC since April 18, 2002. Qwest provided those services through March 21, 2003 when it disconnected the Company, due to the outstanding amounts owed by the Company.

At the time the initial Staff Complaint was filed, the Company's outstanding obligation to Qwest alone was over $500,000.00. Staff Ex. S-1 (Bostwick) at p. 24. At the time Staff filed its Amended Complaint, the outstanding obligation had grown to $850,000.00. Staff Ex. S-1 (Bostwick)

at p. 24. According to Staff Witness Bostwick, the Company was in arrears with Sprint as well, which it owed $105, 167.84. Staff Ex. S-1 (Bostwick) at p. 23. The Company received several letters from Qwest on July 2, 2002, July 18, 2002, July 31, 2002, August 22, 2002, and September 3, 2002 informing it that unless it paid the outstanding balance, its service would be subject to disconnection by Qwest. Staff Ex. S-1 (Bostwick) at p. 21. The Company sent no formal response to Qwest until it finally received a letter from Qwest informing it that its underlying wholesale service (to its approximately 5,000 customers) was about to be disconnected. This letter was sent by Qwest on December 31, 2002. Staff Ex. S-1 (Bostwick) at p. 21. In an apparent effort to block the disconnection, the Company belatedly sent a letter to Qwest attempting to dispute the amounts owing.

As early as September 18, 2002, Qwest, pursuant to the provisions of its interconnection agreement, had already stopped processing new Local Service Requests ("LSRs") submitted by the Company which was already beginning to adversely affect customer's service. Staff Ex. S-1 (Bostwick) at p. 21. By the time service was disconnected by Qwest, the Company owed Qwest over $1.5 million. Staff Ex. S-1 (Bostwick) at p. 24.

A similar scenario was being played out in Colorado where Mr. Wetherald through On Systems also managed Mile High Telecom. That entity owned Qwest outstanding amounts totaling approximately $4.9 million. Staff Ex. S-1 (Bostwick) at p. 26.

Staff counsel's cross-examination of both Mr. Frank Tricamo and Mr. David Stafford Johnson, former principles of On Systems Technology, revealed that the Company was under-funded and that by the time the Staff Complaint was filed and that much of the LLP partners' investment was held by Telecom Advisory Services. Tr. (Stafford Johnson) at pp. 783-784.

In addition, both witnesses further revealed that Mr. Wetherald, who was not an accountant by trade, was in charge of the bank accounts of the Company as well as the preparation of its financial statements. Tr. (Tricamo) at pp. 721-725; Tr. (Stafford Johnson) at p. 770. While he did employ some qualified people, they played a minimal role in actual preparation of the Company's financial statements and merely assisted Mr. Wetherald sporadically rather than having a central role in the Company's finances. Tr. (Tricamo) at pp. 721-722.

The Company has since ceased active operations in Arizona, and Mr. Wetherald claims that it has virtually no assets.

C. LiveWireNet's (n/k/a PCMG d/b/a The Phone Company) CC&N Should Be Revoked By the Commission Because It is Not Technically Capable of Providing Telephone Service in Arizona (Count IV of the Amended Complaint)

One of the other conditions for the denial of a certificate to any telecommunications company is set forth in A.A.C. R14-2-1106, sub-part A(4): The Applicant "does not possess adequate technical competency to provide the proposed services."

Count IV of Staff's Amended Complaint addressed what Staff believed to be evidence of that the Company no longer possessed the technical competency to provide telephone service in Arizona. In making this allegation, Staff considered several factors. First, Staff found it compelling that there was a sudden increase in customer complaints that the customer could not reach the company or that service was being disconnected. While Mr. Wetherald attempted to show at the hearing that the number of complaints was not out of line with other providers, his numbers could not all be verified by Staff. More importantly, Staff's reliance was not only on the customer complaints, but the complaints taken together with all of the information received regarding the Company.

Second, the Company's inability to audit the Qwest bills in a timely fashion and make at least partial payment to Qwest for the undisputed amounts, was also evidence to Staff that the Company lacked adequate resources or technical expertise to manage its accounts payable. See also, Tr. (Tricamo) at p. 730.

In addition, the Company also had apparent difficulty in keeping up with Local Service Request activity. When asked for its customer list so that Staff could mail the notices of disconnection to its customers, the Company ultimately provided a list with approximately 2, 900 names on it. Qwest provided a list to Staff with almost 4,500 names on it. Staff Ex. S-1 (Bostwick), p. 29.

When cross-examined on this point at the hearing, Mr. Frank Tricamo revealed that Mr. Wetherald had begun taking over most facets of the business by that point in time. Tr. (Tricamo) at pp. 722-723. Apparently, Mr. Tricamo, who had set up most of the internal controls and policies,

was being squeezed out of active management of the business, an event that was beginning to produce some adverse effects in the Company's operations. Tr. (Tricamo) at p. 722.

In addition, cross-examination by Staff counsel of both Mr. Frank Tricamo and Mr. David Stafford Johnson further revealed that Mr. Wetherald, who was not an accountant by trade, was solely responsible for all Company bank accounts and preparation of the Company's financial statements. Tr. (Tricamo) at pp. 723-725; Tr. (Stafford Johnson) at p. 770. Staff had considerable difficulty obtaining any financial statements from the Company. Staff Ex. S-1 (Bostwick) p. 27. Eventually Staff received a cryptic balance sheet and income statement from the Company. However, Staff was unable to verify any of the information contained therein.

D. LiveWireNet (n/k/a PCMG d/b/a The Phone Company) On Systems Technology and Mr. Tim Wetherald Are Not Fit and Proper Entities to Provide Telephone Service in Arizona

Under Arizona law, the Commission may issue a CC&N only if it finds that the applicant is "fit and proper" person or entity. In this regard, the Commission has authority to examine all factors and to exercise some discretion in issuing CC&Ns.

Staff introduced considerable evidence in this case indicating that LiveWireNet (n/k/a PCMG d/b/a The Phone Company), On Systems and Mr. Tim Wetherald were not fit and proper entities to provide telephone service in Arizona. In Staff's opinion, each investigation or bankruptcy, taken alone, may not suffice to demonstrate the overall fitness of these entities to provide telephone service in Arizona. But, when the totality of the circumstances are considered, the overall fitness of these entities is subject to serious question, leading Staff to conclude that they are not fit and proper entities to be providing telephone service in Arizona.

Among the evidence obtained by Staff was the initiation of several investigations by other State commissions against Mr. Wetherald, or companies which Mr Wetherald managed, for failing to comply with Commission rules. Staff learned that there were investigations going on or which had gone on in Colorado, Iowa, and Minnesota concerning Mr. Wetherald and/or the companies he managed. Staff Ex. S-1 (Bostwick), pps. 15-16; See also Staff Late-Filed Exhibit dated April 2,

2004.[1] Staff obtained further evidence that Mr. Wetherald's telephone company ventures had been the subject of yet other investigations by the Attorney Generals of the States of Oregon and Washington which had resulted in the entry of consent decrees against Mr. Wetherald. Staff Ex. S-1 (Bostwick), p. 16; See also Staff Late-Filed Exhibit dated April 2, 2004.

The press release accompanying the Washington Attorney General's Consent Decree indicated that several of the companies owned or operated by Mr. Wetherald had filed for protection under the bankruptcy laws and that consumer harm and disruption of service occurred. This was noted by the Iowa Utilities in the course of their investigation of Mr. Wetherald:

> " The press release accompanying the consent decree indicates that Mr. Wetherald had taken three different corporations into bankruptcy in the preceding 5 years; that his actions left 2,500 individuals and businesses without reliable long distance service; and that this was all accomplished through a multi-level marketing enterprise."

In fact, to the best of Staff' knowledge, many of Mr. Wetherald's ventures in operating or managing telecommunications entities have ended in bankruptcy. This was significant to Staff, given that Staff also had information in its possession that indicated that Mr. Wetherald and other companies owned and or managed by him were seriously delinquent in their payments to Qwest as well. Staff had information that Mile High Telecom Joint Venture, the company managed by Mr. Wetherald in Colorado owed Qwest almost $5 million for services that it had not paid. When asked in a Staff data request about prior bankruptcies, Mr. Wetherald only acknowledged two bankruptcies in which he was involved in Colorado. However, there were at least 4 other companies in Washington state and Oregon in which he was an officer and/or on whose behalf he had filed bankruptcy petitions or there were involuntary petitions filed against.

Mr. Wetherald and an entity called Telecom Advisory Services, are also the subject of an SEC complaint before the United States District Court for the Southern District of Florida alleging violations of federal securities laws in connection with the sale of the partnership interests in the Arizona Phone Company LLP as well as similar partnership interests in other States. Staff Ex. S-1, p.

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[1] Staff requests that the Judge take judicial notice of all of the proceedings referenced in its Late Filed Exhibit dated April 2, 2004.

13, Ex. JFB-1. The U S District Court for the Southern District of Florida issued a preliminary injunction against these entities for alleged securities fraud in connection with their most recent telephone company operations. Telecom Advisory Services (comprised in part of Leon Switchkow, Mark David Shiner), sold partnership shares to investors in phone companies in Arizona, Colorado and other states. According to the Complaint, both of these individuals had prior negative histories that had not been revealed to investors. According to Mr. Wetherald's responses to Staff data requests, there was no relationship between himself and the companies owned and/or managed and operated by him and the Telecom Advisory Services. However, this was contradicted by Staff counsel's cross-examination of Mr. Travis Credle (one of the investors) and Mr. David Stafford Johnson and information contained in the SEC Complaint and a Complaint filed by the LLP in the Arizona Superior Court. Tr. (Credle) at p. 550; and Tr. (Stafford Johnson) at pp. 766-767. All three witnesses testified as to the relationship between Mr. Wetherald, his phone company operations and Telecom Advisory Services. Indeed, On Systems and Mr. Wetherald were selected as managers of the LLPs by Telecom Advisory Services. Tr. (Credle) at p. 550. According to Mr. David Stafford Johnson, Telecom Advisory Services pocketed most of the investor's monies in these operations leaving the actual phone company operations significantly under-funded. Tr. (Stafford Johnson) at pp. 783-784. The witnesses also testified that members of Telecom Advisory Services were frequent visitors at Mr. Wetherald's headquarters in Colorado and that some of Mr. Wetherald's operations may have been devoted to the work of Telecom Advisory Services. Tr. (Stafford Johnson) at pp. 766-767.

In summary, Staff believes that all of these circumstances combined demonstrate that Mr. Wetherald and the companies he owns and/or manages are not fit and proper entities to provide service in Arizona.

E. LiveWireNet (n/k/a Phone Company Management Group d/b/a The Phone Company) Should Be Subject to Fines for Acting in Violation of Commission Rules

Staff believes that LiveWireNet (n/k/a PCMG d/b/a The Phone Company) should be subject to fines for its violation of Commission orders and rules. Particularly egregious is the Company's failure to provide notice to its customers, as ordered, that their service was subject to impending disconnection.

The Commission's fining authority is governed by A.R.S. Sections 40-424 and 40-425. A.R.S. Section 40-424 (Contempt of corporation commission; penalty) provides as follows:

> "A. If any corporation or person fails to observe or comply with any order, rule, or requirement of the commission or any commissioner, the corporation or person shall be in contempt of the commission and shall, after notice and hearing before the commission, be fined by the commission in an amount not less than one hundred nor more than five thousand dollars, which shall be recovered as penalties."
>
> B. The remedy prescribed by this article shall be cumulative."

A.R.S. 40-425 (Penalty for violations not otherwise provided for; separate and continuing offenses; responsibility of corporation for acts of officers, agents or employees) provides as follows:

> "A. Any public service corporation which violates or fails to comply with any provision of the constitution or of this chapter, or which fails or neglects to obey or comply with any order, rule or requirement of the commission, the penalty for which is not otherwise provided, is subject to a penalty of not less than one hundred nor more than five thousand dollars for each offense.
>
> B. Each violation is a separate offense, but violations continuing from day to day are one offense.
>
> C. In enforcing penalties the act or omission of any officer, agent of employee of a public service corporation, acting within the scope of his duties or employment is the act, omission or failure of such corporation."

Because the Company's actions were deliberate and particularly egregious at times, Staff is recommending penalties under A.R.S. Section 40-424, in an amount to be determined by the Commission.

F. Mr. Tim Wetherald and On Systems at all times Controlled the Actions of LiveWireNet (k/n/a The Phone Company Management Group d/b/a The Phone Company), should be Subject to Fines and other Remedies for Acting in Violation of Commission Rules

Staff also believes that the Commission should assess fines against On Systems and Mr. Wetherald, or hold both individually liable for any fines, since he and On Systems controlled the actions of the various telephone operating companies in Arizona. Tr. (LeBrecht) at pp. 682-683.

The corporate fiction will be disregarded upon the concurrence of two circumstances, i.e., when the corporation is, in fact, the alter ego of one or a few individuals and when observance of corporate form would sanction fraud or promote injustice. *Norman v. Del Elia et al.*, 111 Ariz. 480, 533 P.2d 537 (1975) (citing *Employer's Liab. Assurance Corp. v. Lunt,* 82 Ariz. 320, 323; 313 P.2d 393, 395 (Ariz. 1957). The Corporate fiction will be disregarded when the corporation is merely a business conduit of a person. *Ize Nantan Bagowa, LTD et a.l v. Scalia*, 118 Ariz. 439, 577 P.2d 725 (Ariz.Ct.App. Jan. 24, 1978). A parent corporation may be held liable for the acts of its subsidiary when the individuality or separateness of the subsidiary corporation has ceased. *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 821 P.2d 725 (1991). Plaintiffs mush prove both: (1) unity of control and (2) that observance of the corporate form would sanction a fraud or promote injustice. *Id.*

Undercapitalization of a corporation, where it is clearly shown, is an important factor in determining whether doctrine of alter ego should be applied, however, in the absence of fraud or injustice to aggrieved party, it is not an absolute ground for disregarding corporate entity. *Ize Nantan Bagowa LTD et al.*, 118 Ariz. At 443, 577 P.2d at 729.

The evidence in the record demonstrates both that LiveWireNet (n/k/a PCMG d/b/a The Phone Company) acted as the alter ego of On Systems and that both companies acted as the alter ego of Mr. Wetherald himself. Testimony at the hearing indicated that he was at all times responsible for the actions of the Companies which resulted in violation of Commission rules and orders. He operated the management company, On Systems which controlled the actions of the Phone Company. Tr. (Tricamo) at pp. 722-723. Evidence was submitted that he acted without the authority of the

limited liability partners at times. LLP Ex. 1 (Credle) . Further evidence was introduced that he controlled all bank accounts of the company and was responsible for the payment of all of the Company's obligations. Tr. (Tricamo) at pp. 725-727. Testimony was also presented at the hearing that the phone operations of these companies was severely under-funded. Tr. (Stafford Johnson) at pp. 783-784.

Staff Witness recommended fines against Mr. Wetherald and On Systems in the amount of $1.685 million. Staff Ex. S-1 (Bostwick), p. 31.

Because of the egregiousness of his conduct, Staff has also recommended additional remedies against Mr. Wetherald. Those remedies include restrictions or conditions on his ability to operate an Arizona public utility again.

G. The Stipulation for Dismissal Entered into Between Staff and Mr. Tricamo, Mr. Stafford Johnson and the LLP is in the Public Interest and Should be Approved

On February 24, 2004, Staff filed a Stipulation for Dismissal between it and the LLP, Mr. Frank Tricamo and Mr. David Stafford Johnson. Staff believes that the Stipulation for Dismissal is in the public interest for the reasons stated therein and should be approved.

III. CONCLUSION

LiveWireNet (n/k/a Phone Company Management Group d/b/a Phone Company), On Systems Inc and Mr. Tim Wetherald are not fit and proper entities to provide telephone service in Arizona and LiveWireNet's CC&N should be revoked by the Commission. LiveWireNet n/k/a Phone Company Management Group, On Systems and Mr. Wetherald should also be subject to fines for willful violation of Commission rules and orders.

RESPECTFULLY SUBMITTED this 2nd day of April , 2004.

STAFF OF THE ARIZONA CORPORATION COMMISSION

By: _____

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