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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

COMMISSIONERS

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

2004 APR -8 A 10: 31

AZ CORP COMMISSION  
DOCUMENT CONTROL

UTILITIES DIVISION STAFF

Complainant,

v.

LIVEWIRENET OF ARIZONA, LLC; 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 AND DAVID STAFFORD; and  
THE PHONE COMPANY OF ARIZONA,  
LLP and its Members,

Respondents.

IN THE MATTER OF THE PHONE  
COMPANY OF ARIZONA JOINT VENTURE  
d/b/a THE PHONE COMPANY OF  
ARIZONA'S APPLICA- TION FOR  
CERTIFICATE OF CONVENIENCE AND  
NECESSITY TO PROVIDE INTRASTATE  
TELECOMMUNICATIONS SERVICE AS A  
LOCAL AND LONG DISTANCE RESELLER  
AND ALTERNATIVE OPERATOR  
SERVICE.

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.

IN THE MATTER OF THE APPLICATION  
OF THE PHONE COMPANY  
MANAGEMENT GROUP, LLC FOR  
CANCELLATION OF FACILITIES-BASED  
AND RESOLD LOCAL EXCHANGE  
SERVICES.

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

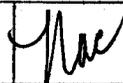
DOCKET NO. T-03889A-02-0796

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Arizona Corporation Commission

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DOCKET NO. T-04125A-02-0577

DOCKET NO. T-03889A-02-0578

DOCKET NO. T-03889A-03-0152

DOCKET NO. T-03889A-03-0202

CONVENIENCE OF CONVENIENCE AND  
NECESSITY.

**Phone Company Management Group, Tim Wetherald et al  
Notice of filing Closing Brief**

Tim Wetherald Herby submits the closing Brief for respondents.

Contact Information:

Tim Wetherald  
10730 E Bethany Rd Suite 206  
Aurora, CO 80014

RESPECTFULLY SUBMITTED this 7th day of April, 2004



Tim Wetherald  
Phone Company Management Group, LLC  
ON Systems Technology, LLC  
Telephone: (720) 984-9043  
Fax: (303) 755-1892

Original and 21 Copies of the foregoing filed  
This 7<sup>th</sup> Day of April, 2004, with:

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

Copy of the foregoing mailed USPS Overnight.  
This 1<sup>st</sup> Day of April, 2004, to:

Maureen Scott  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

Philip Dion  
Administrative Law Judge  
Hearing Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

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4 WILLIAM A. MUNDELL  
5 JEFF HATCH-MILLER  
6 MIKE GLEASON  
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8 UTILITIES DIVISION STAFF

9 Complainant,

10 v.

11 LIVEWIRENET OF ARIZONA, LLC; THE PHONE  
12 COMPANY MANAGEMENT GROUP, LLC; THE PHONE  
13 COMPANY OF ARIZONA JOINT VENTURE D/B/A THE  
14 PHONE COMPANY OF ARIZONA; ON SYSTEMS  
15 TECHNOLOGY, LLC and its principals, TIM WETHERALD,  
16 FRANK TRICAMO AND DAVID STAFFORD; and THE  
17 PHONE COMPANY OF ARIZONA, LLP and its Members,

18 Respondents.

19 IN THE MATTER OF THE PHONE COMPANY OF  
20 ARIZONA JOINT VENTURE d/b/a THE PHONE COMPANY  
21 OF ARIZONA'S APPLICATION FOR CERTIFICATE OF  
22 CONVENIENCE AND NECESSITY TO PROVIDE  
23 INTRASTATE TELECOMMUNICATIONS SERVICE AS A  
24 LOCAL AND LONG DISTANCE RESELLER AND  
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23 Closing Brief of Respondents

24 Phone Company Management Group, LLC, ON Systems Technology, LLC

25 Tim Wetherald

## Introduction

1  
2  
3 1. In order to understand this case it is critical to understand how it got started in the  
4 first place. This is not so much a procedural history (as that is well known) but rather a look at  
5 what the catalyst was that "pushed" the rock over the hill

6 2. The catalyst for this proceeding began as the result  
7 of a meeting on September 11, 2002 with ACC Staff members  
8 attended by Brad Morton. The result of this meeting was a  
9 meeting between Staff of the Telecommunications Division and the  
10 Legal Division (Direct Testimony of Brad Morton, P2, L 2-8).

11 3. On September 20<sup>th</sup>, 2002 the ACC Staff was "advised by  
12 "several of the Partners" of the LLP that "Mr. Wetherald and On  
13 Systems Technology, LLC were taking actions... without their  
14 authorization." (Amended Complaint P 14, L 18-20).

15 4. The original complaint was filed on October 18, 2002,  
16 less than 40 days after the initial meeting between ACC Staff  
17 and partners.

18 5. It is clear from the testimony presented at hearing  
19 that none of the respondents in this proceeding were on the  
20 Commission radar until after the September 11, 2002 meeting. It  
21 was at this point that Mr. Morton began to monitor the consumer  
22 complaints being received by the Commission for the Phone  
23 Company of Arizona (Direct Testimony of Brad Morton, P2, L 2-8;  
24 T Vol IV, P469 L 11-20).

1           6. Any reasonable person would have to conclude that the  
2 complaint was filed as a direct reaction to representations  
3 being made by the partners, not because of violations of either  
4 State Law or Commission Rules. There are only two allegations  
5 (out of seven) made in the Original Complaint that have anything  
6 to do with the operations of The Phone Company<sup>1</sup>, 1) Issues with  
7 Qwest payments and Order processing (Original Complaint Par 17)  
8 2) Customer Complaints (Original Complaint Par 18). It is also  
9 reasonable to assume that the Staff had determined to file this  
10 complaint as early as October 10, 2002 (Original Complaint Par  
11 18).

12           7. That the Staff made no attempt to contact Mr.  
13 Wetherald or anyone else in a decision making capacity to  
14 confirm or get their side of the story, nor to advise Mr.  
15 Wetherald or anyone with decision authority, of their concerns  
16 relating to customer complaints (T Vol IV, P 497 L 19-25, P 498  
17 L 1-25, P 499 L 1-12) is a strong indication that the Staff made  
18 a cognitive decision to "shut down" The Phone Company. It is  
19 also clear from the testimony of all three staff witnesses that  
20 this was done solely upon representations and information  
21 provided to them by the partners and that Staff did no  
22 independent investigation into the issues alleged forthwith.

---

25 <sup>1</sup> Because of the apparent confusion with the names under which services were advertised or provided, I use will The Phone Company when referring to issues related to the provision of service.



1 PCMG has a CC&N and could lawfully provide services (T Vol I, P  
2 45, L 2-15).

3 11. There are only three possible entities that could  
4 have (or are asserted to have) offered services. 1) The Phone  
5 Company Management Group, LLC ("PCMG") (formerly LiveWire) 2)  
6 The Phone Company of Arizona, LLP ("LLP") and 3) The Phone  
7 Company of Arizona JV (Joint Venture) ("JV"). The Staff by virtue  
8 of the Settlement Agreement with the LLP has admitted that the  
9 LLP did not provide services in Arizona. The only other  
10 possibilities left are either the JV or PCMG.

11 12. The Primary problem with the Staff's contention that  
12 it was the JV offering services using the Trade Name or DBA of  
13 The Phone Company of Arizona is simply a timing issue. The JV  
14 was not formed until June 6, 2002 (Joint Venture Agreement  
15 Exhibit A, P1). This is almost more than 60 days after The Phone  
16 Company of Arizona began advertising and almost 60 days after  
17 services had begun and bills had been sent to customers<sup>2</sup>.  
18 Needless to say it is a virtual impossibility for an entity to  
19 offer services before it exists. **Since the JV was not formed**  
20 **when services began the only entity who could have provided**  
21 **those services was PCMG.**

22 13. It is also clear from both the Application for a CC&N  
23 filed by the JV and the concurrent Application to discontinue  
24  
25

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<sup>2</sup> The Phone Company of Arizona (PCMG) received its first Qwest bill on May 22, 2002. Which would indicate that PCMG began offering services to customers in April of 2002.

1 services that PCMG had not transferred the provision of services  
2 to the JV (Docket T-03889A-02-0578).

3 14. Again this is a fact that could have been easily  
4 discerned by Staff had they made any reasonable attempt to  
5 ascertain the facts.

6 15. The only entity that could have provided services was  
7 PCMG. This is evident by Staffs own admission that it was not  
8 the LLP who provided services and by the simple fact that the JV  
9 was not formed until after services, advertising and billing had  
10 begun.

11 16. Staff failed to demonstrate at trial that either the  
12 JV or LLP ever provided services. In addition Staff's own  
13 witness, John Bostwick testified that PCMG did have a proper  
14 CC&N. Count I should be dismissed as Staff has clearly failed to  
15 meet its burden.

16  
17 **Count II**

18 **Fit and Proper Entity**

19  
20  
21 17. Count II of the Amended Complaint should be dismissed  
22 as a matter of law. In any event Staff again grossly failed to  
23 meet their burden. First I will deal with the legal issues  
24 raised by this count.  
25

1           18.       Count II of the Staff's Amended Complaint has three  
2 assertions. 1) Allegations made in other State and Federal  
3 proceedings against Tim Wetherald, ON Systems Technology, LLC  
4 and The Phone Company Management Group, LLC; 2) that Tim  
5 Wetherald has "owned or Managed approximately 4 companies" that  
6 have file for bankruptcy; 3) Tim Wetherald entered into Consent  
7 Decrees with the States of Washington and Oregon; and as a  
8 result of the above, are not "fit and proper" entities. The last  
9 two allegations in Count II are reasserted in Counts III and IV  
10 and will be dealt with at that time.

11           18.       The Arizona Administrative Procedure Act of 1995  
12 clearly prohibits the action contemplated by Staff in Count !!.  
13 ARS 41-1001.01 (A)7 Regulatory Bill of Rights states:

14           [To ensure fair and open regulation by state agencies, a  
15           person:]... Is entitled to have an agency not base a  
16           licensing decision in whole or in part on licensing  
17           conditions or requirements that are not specifically  
18           authorized by statute, rule or state tribal gaming compact  
19           as provided in 41-1030 (C).

20 ARS 41-030 (B) States:

21           An agency shall not base a licensing decision in whole or in  
22           part on a licensing requirement or condition that is not  
23           specifically authorized by statute, rule or state tribal  
24           gaming compact. A general grant of authority in statute does  
25           not constitute a basis for imposing a licensing requirement  
          or condition unless a rule is made pursuant to that general  
          grant of authority that specifically authorizes the  
          requirement or condition.

26 The Arizona Court of Appeals has repeatedly held that the  
27 granting of CC&Ns is "far from a plenary power of the

1 Commission" (US West v. Arizona Corp. Com'n, 197 Ariz. 16 (App.  
2 1999) 3 P.3d 936, 295 Ariz. Adv. Rep. 41).

3 19. In addition the principle that the Arizona  
4 Corporation Commission must find an applicant a "fit and proper  
5 person" is based on ARS 40-607 (c) which was repealed by the  
6 Arizona legislature. The current Title 40 governing Public  
7 Utilities and the ACC's authority is decidedly void of any such  
8 ambiguous requirement or condition.

9 20. Likewise the Commission's own rules relating to the  
10 granting of a CC&N are void of any such requirement or  
11 condition. The rules governing the granting of a CC&N are set  
12 forth in R14-2-1105 and R14-2-1106 (A), which like Title 40 are  
13 void of the requirement or condition that the applicant be found  
14 or be required to be "fit and proper". In fact R14-2-1106 (A) is  
15 very specific as to why the Commission may deny a CC&N. None of  
16 the reasons for denial include a finding that the person or  
17 entity be found "fit and proper".

18 21. However, in the present instance the Commission Staff  
19 is not attempting to deny a CC&N but rather to revoke an  
20 existing CC&N and to possibly impose sanctions against its  
21 principals, namely Tim Wetherald. This action too, clearly  
22 constitutes a licensing decision as set forth in ARS 41-1030  
23 (C). Again both Title 40 and the Commission Rules are void of  
24 the "fit and proper" requirement or condition. In fact R14-2-  
25 1106 (B), like (A) is very specific in the reasons that this

1 Commission can revoke a CC&N, none of which is a finding,  
2 requirement or condition of being a "fit and proper entity" as  
3 alleged in Count II of this Complaint.

4 . 22. Furthermore, 11 USC 525 specifically prohibits this  
5 Commission from denying or revoking a license or in this case a  
6 CC&N because Mr. Wetherald or other principals are or have been  
7 associated with, owned or managed other companies which filed  
8 for bankruptcy protection. 11 USC 525 (A) states:

9 "a governmental unit may not deny, revoke, suspend, or  
10 refuse to renew a license, permit, charter, franchise, or  
11 other similar grant to, condition such a grant to, a person  
12 that is or has been a debtor under this title or a bankrupt  
or a debtor under the Bankruptcy Act, or another person with  
whom such bankrupt or debtor is or has been associated."

13 The fact that Mr. Wetherald has owned or managed other companies  
14 that have filed for protection under the Bankruptcy Act, whether  
15 it is 1 or 100, cannot be made an issue in this proceeding. This  
16 Commission is bared by Federal Law from using it as a foundation  
17 to revoke or deny a CC&N.

18 23. Finally, the existence of Consent Decrees in other  
19 States is not an issue this Commission can rely upon in denying  
20 or revoking a CC&N. There is clearly no condition or requirement  
21 in R14-2-1105 or R14-2-1106.

22 24. Setting aside, for the moment, this Commissions lack  
23 of legal authority to pursue remedies based on the "fit and  
24 proper" doctrine as set forth in Count II, it is necessary to  
25 address the Staffs conduct in its assertions related to Count

1 II. It is not unreasonable for Staff or any other agency to have  
2 concerns when faced with the type of allegations being made  
3 against Mr. Wetherald by the partners and the SEC. However, the  
4 Staff's total lack of investigation into the veracity of these  
5 allegations is totally with out excuse.

6 25. The Commission has two responsibilities in this  
7 instance, to protect the public interests and to promote  
8 competition in the Telecommunications Sector, both of which were  
9 breached because of Staff's lack of due diligence and eagerness  
10 to prosecute and shut down PCMG. This proceeding has cost the  
11 Arizona tax payers Hundreds of Thousands of Dollars all of which  
12 could have been avoided had this Staff simply looked before it  
13 leapt.

14 26. Even if the Commission were allowed to make a  
15 determination of "fit and proper" as enumerated in Count II, the  
16 Staff grossly failed to meet its burden. All of the evidence  
17 used by Staff to prove its allegations are entirely based on the  
18 worst kind of hearsay, press releases. Both Bostwick and  
19 Lebrecht admitted that they made no independent investigation (T  
20 Vol I, P 131-132, T Vol V, P 671-675) as to the allegations  
21 presented. In fact neither witness could even verify where or  
22 how the information even came to the Staff in the first place.  
23 To rely on this testimony would clearly violate the right to  
24 Equal Protection and Due Process. Neither Bostwick nor Lebrecht  
25 can attest to or confirm the accusations made by either the SEC

1 or other State agencies. Neither has there been an opportunity  
2 to confront my accusers.

3 27. The Staff could have called witnesses from the SEC or  
4 partners for that matter, but didn't. Their lack of due  
5 diligence and preparation should not prejudice the respondents  
6 by denying them an opportunity to confront those who actually  
7 are making the assertions being relied upon.

8 28. The Staff relied heavily upon the representations of  
9 the partners in bringing this action. It is also reasonable that  
10 the SEC and other States have relied upon the same  
11 representations by the same partners. Therefore the credibility  
12 of those partners making these accusations is critical.

13 29. The examination of Credle is a good indication of the  
14 partners' credibility. Credle's Direct Testimony is replete with  
15 accusations that Mr. Wetherald and his Attorney Mike Glasser  
16 acted without the authorization of the partners. Yet the  
17 underlying document (JV Agreement) clearly authorizes all of the  
18 actions taken. Credle, read the document, had it reviewed by an  
19 attorney, ratified the Agreement unanimously with the other  
20 members of the LPP's Management Committee (T Vol V, P604-619)  
21 and then blatantly asserts that the actions taken by ONS, PCMG,  
22 Mr. Wetherald and Mike Glaser were unauthorized.

23 30. It is clear that Mr. Credle made these  
24 representations to the Staff in order to spur them to take  
25 action against the respondents. If he was so willing to

1 misrepresent these facts to the Staff of this Commission why  
2 would he hesitate to make false and misleading representations  
3 to the SEC or other agencies?

4 31. In fact had Staff done their home work they would  
5 have found that both Credle's and Petersen's testimony to the  
6 SEC were stricken due to both perjuring themselves to a Federal  
7 Bankruptcy Judge in Denver. Further investigation by staff would  
8 have revealed that Petersen pleaded the 5<sup>th</sup> amendment nine times  
9 in front of the Colorado Commission.

10 32. In short the reliance on the SEC or other press  
11 releases, largely initiated by Credle and Petersen cannot be  
12 relied upon.

13 33. As a matter of law Count II must be dismissed as it  
14 fails to address a specific requirement or condition upon which  
15 the underling licensing revocation can be granted. In addition,  
16 the Count must fail due to the complete lack of anything that  
17 approaches credible evidence.

18 34. Staff's argument that "fit and proper" is an all  
19 inclusive phrase and includes the issues of financial and  
20 technical ability are disingenuous at best and are clearly not  
21 the intent of the legislature or the Commission's own rules.  
22 Specifically the reference to the term itself was purposely  
23 repealed by the legislature in the Arizona Revised Statutes and  
24 is not found in the rules promulgated by this Commission. This  
25 cannot be chalked up to mere oversight, as the term and

1 condition did at one time exist. The only reasonable conclusion  
2 is that it was intentionally left out.

3 35. The financial and technical ability issues are  
4 inappropriately brought in Count II and should be required to  
5 stand on their merit in Counts III and IV.

### 7 **COUNT III**

#### 8 **Financial Ability**

9  
10 36. Clearly R14-2-1106 (A) provides that a company must  
11 show that it "processes adequate financial resources to provide  
12 the services contemplated" prior to the granting of a CC&N.  
13 However this condition is conspicuously missing from section  
14 (B). As with the prior Count (Count II) the Staff relies on ARS  
15 40-361(B) and ARS 40-321 as the legal basis for this count.  
16 However, once again these statutes could only be construed as  
17 providing a general grant of authority. Traditionally these  
18 Statutes have been interpreted to apply to physical plant and  
19 equipment, although there could be an argument made that the  
20 language is broad enough to cover financial issues as well.

21 37. Regardless, of what it might apply to in relation to  
22 Count III, it is certainly misused in this instance.

23 38. In the current circumstance the Staff is attempting  
24 to revoke the CC&N, not make a determination of just and  
25 reasonableness as called for in ARS 40-321.

1           39.       This statute clearly grants the Commission the  
2 authority to determine if the level of service is adequate and  
3 if found to be inadequate to fashion a rule or order that the  
4 service provider is to comply with. However, these statutes  
5 clearly do not grant the authority to revoke a CC&N prior to the  
6 service provider being given an opportunity to rectify the  
7 inadequacy or comply with the Commission order.

8           40.       Furthermore, the Commission has already made a rule  
9 under which a CC&N can be revoked and cannot supplant or  
10 undermine that rule under the flimsy guise of the statutes used  
11 in this Count. The clear intent of the legislature in ARS 41-  
12 1030(C) was to eliminate this very sort of ambiguous and  
13 arbitrary discretion with regard to licensing issues and  
14 decisions.

15          41.       Regardless of the above legal issue, Staff has failed  
16 to show any evidence that with regard to this Count that PCMG's  
17 financial condition put any of its patrons, employees or the  
18 public at risk in any way or in any meaning full way violated  
19 the provisions set forth in these statutes.

20          42.       It is clear that the Staff again lacks any specific  
21 or actual violation for which the CC&N of PCMG or the other  
22 respondents can be granted. The current instance is another  
23 indication of Staffs obvious discrimination towards respondents  
24 Tim Wetherald and his affiliated Companies. In fact there has  
25 never been an attempt by staff to determine a "just or

1 reasonable" level of service as contemplated by ARS 40-321, or  
2 to provide PCMG an opportunity to resolve the issues as is also  
3 contemplated by the statutes. Rather the Staff out of the shoot  
4 determined to revoke the CC&N and has reached new levels of  
5 contortion to justify its discriminatory objectives.

6 43. Count III should be dismissed because it; 1) lacks a  
7 claim for which the relief being sought can be granted; 2) fails  
8 to provide, with any specificity, a violation of the statutes in  
9 question and 3) would clearly constitute a discriminatory  
10 action.

11  
12 **Count IV**  
13 **Technical Ability**  
14

15 44. Again Staff supports this claim by asserting that  
16 respondents are in violation of ARS 40-361(B) and ARS 40-321 and  
17 lack the technical ability to provide telecommunication services  
18 in the State of Arizona. As with Counts I, II and III, Count IV  
19 lacks the same legal authority for which the relief being sought  
20 can be granted. Although this Count comes closest to the intent  
21 of the statutes in question, it clearly is misused in this  
22 instance.

23 45. Granting for a moment that Staff has shown that  
24 respondents lacked the technical ability (this is not an  
25 admission) to provide adequate services as contemplated in the

1 statutes, ARS 40-321 would not allow the revocation of  
2 respondents CC&N before the application of other remedies. As  
3 stated above, R14-2-1106(B) is completely devoid of the  
4 allegations set forth in Count IV, as a reason for the  
5 revocation of a CC&N. Once again, the statute itself is not a  
6 specific requirement upon which a licensing "decision may be  
7 based" under ARS 41-1030(C).

8 46. Count IV asserts two allegations and claims for  
9 relief; 1) Customer Complaints about the Companies inadequate  
10 services and 2) inadequate internal management structure and  
11 insufficient staffing. In both cases however Staff has failed to  
12 meet its burden.

13 47. The first allegation asserts that "there have been 77  
14 complaints filed by customers regarding... inadequate service" and  
15 an inability to reach the company. In fact, as was demonstrated  
16 at hearing, is that this is not quite true or representative of  
17 the complaints received by the Commission, Exhibit W3 A-C shows  
18 that, with the exception of a two week period in late September  
19 2002 and October 2002, that there were only 3 complaints related  
20 to quality of service issues or the inability to reach the  
21 company from October to January<sup>3</sup>.

22 48. Mr. Morton testifies that the company was  
23 unresponsive and that the 5 day response time was not met and  
24

25 <sup>3</sup> Morton provided another 23 customer complaints at hearing during his testimony. However of those complaints only three concerned quality of service issues, and none related to the customers inability to reach the company. Most of these additional complaints were received after the ACC sent the customer notice.

1 calls went unanswered for days at a time (Direct testimony of  
2 Brad Morton, P 4-5). However an analysis of the actual  
3 complaints would indicate that this assertion is largely untrue,  
4 with the exception of the two week period in September and  
5 October 2002, most complaints were answered within the 5 days  
6 required by the Commission rule. However, what is most  
7 disturbing about Mr. Morton's testimony is that he asserts the  
8 company is not making any efforts to improve its customer  
9 service despite the fact that the customer complaints received  
10 by the Commission are becoming fewer (Direct Testimony of Brad  
11 Morton, P4, L 5-7, T Vol IV, P 501-502).

12 49. The Staff is unable to produce any substantive  
13 evidence that respondents failed to or were unable to respond to  
14 customer complaints; Brad Morton lacks the required experience  
15 or expertise to form an opinion as to the adequacy of the  
16 respondent's abilities or whether the customer service was even  
17 adequate (T Vol IV, P 474-476). The Staff could have made an  
18 analysis to demonstrate how respondents compared to other  
19 telecommunications providers, or shown what objective standards  
20 are used to monitor the compliance of companies. Instead Staff  
21 relies solely on the subjective unsupported intuition of  
22 essentially a line level consumer services person.

23 50. There is nothing in the record or evidence presented  
24 by Staff that supports in any way the assertion that respondents  
25

1 lack the ability in any manner to provide adequate customer  
2 service.

3 51. The second allegation in this Count asserts that the  
4 respondents lack management and internal structure. However this  
5 assertion is completely debunked by Frank Tricamo's testimony (T  
6 Vol V, P 705-707). As was indicated by respondent data requests  
7 the operations of the company were outsourced. As a result the  
8 company required little or no employees and therefore little to  
9 no management support directly.

10 52. However, after all is said and done, the Staff failed  
11 to show in any manner how this "outsourcing of operations" in  
12 any way was "unjust, unreasonable, unsafe, improper, inadequate  
13 or insufficient", and therefore failed to meet its burden of  
14 proof.

15 53. Count IV should be dismissed. Staff has failed to  
16 show any evidence that the respondents lacked technical ability  
17 or management structure. Staff certainly does not lack the  
18 information needed to compare relative information regarding the  
19 respondent's performance and cooperation as compared to other  
20 service providers. What is evident is that such an analysis  
21 would only serve to debunk the Staffs spurious and unfounded  
22 accusations ( as the analysis in W 3A-C demonstrates). Again the  
23 discriminatory nature of Staff's posture in this case is  
24 glaringly obvious.



1 Again ARS 40-247 would allow that an order of the commission is  
2 not final or "operative" until 20 days after it has been served.

3 56. It is clear from the law that there is no presumption  
4 that the initial finder of fact, Judge, ALJ, agency or  
5 commission is always right and not without reversible error. In  
6 all cases aggrieved parties are afforded the right to an appeal,  
7 rehearing or other remedies of law to preserve their rights. In  
8 all of these cases that right is afforded, at some point, prior  
9 to that order or decision becoming final and enforceable.

10 57. The February 25<sup>th</sup>, 2003 and March 3<sup>rd</sup>, 2003  
11 "procedural orders" are a clear example of why those rights to  
12 remedy are so important.

13 58. The first issue to be determined in relation to these  
14 orders is whether or not they are in fact "procedural". The  
15 procedural authority of the hearing officer is codified first in  
16 ARS 41-1062(A) 4 and then further defined in R-14-2-108(A).

17 "The Commission or presiding officer upon its own motion or  
18 upon motion of any party and upon written notice to all  
19 parties of record may direct that a prehearing conference  
20 shall be held for the purposes of formulating or simplifying  
21 the issues, obtaining admissions of fact and of documents  
22 which will avoid unnecessary proof, arranging for the  
23 exchange of proposed exhibits or prepared expert testimony,  
24 limitation of the number of witnesses and consolidation of  
25 the examination of witnesses, procedure at hearing and such  
26 other matters which may expedite orderly conduct and  
27 disposition of the proceedings or settlements thereof."

R-14-2-108(A)

24 R14-2-109 further defines the procedural authority of the  
25 presiding officer.

1           59.       In all cases the procedural authority of the hearing  
2 officer is narrowly defined to those issues necessary to the  
3 management of the hearing. These issues would be scheduling,  
4 scope of evidence and witnesses, the issuing of subpoenas and  
5 orderly conduct of the hearing and hearing process. In none of  
6 the statutes or rules governing the authority or conduct of the  
7 hearing officer, is the assumption that he should be allowed to  
8 issue binding orders of a contested nature.

9           60.       In is undisputable that the issues addressed in these  
10 "procedural orders" where not procedural but highly contested  
11 issues of substance. A reading of the transcript of the  
12 Procedural Conference on February 24<sup>th</sup>, 2003, which led to these  
13 orders, clearly establishes the contested nature of the issues.  
14 This is further complicated by the fact that neither Qwest nor  
15 PCMG believed that the issue was rightly before the Commission  
16 and outside the scope of the complaint as filed by Staff. (T Feb  
17 24, 2003, P 10-11.)

18           61.       If it doesn't walk like a duck, doesn't looks like a  
19 duck and doesn't talk like a duck - it's probably not a duck. In  
20 this case this order doesn't look, feel or smell like a  
21 procedural order - it clearly is not.

22           62.       These orders exemplify one of the biggest procedural  
23 problems with this entire Docket(s). The willingness to act  
24 without consideration to issues at had. Again the February 24<sup>th</sup>  
25 transcript is very illuminating in this regard. It is clear that

1 no one is sure about what ALJ Dion's authority is in relation to  
2 the issues between Qwest and PCMG, It is also evident that it is  
3 unclear as to the actual authority to require the sending of  
4 customer notices. Given the nature of the issues at hand  
5 prudence and caution should have been exercised, especially on  
6 the part of ALJ Dion, and the legal authority to act clarified.  
7 Instead the order is issued as procedural and assumed to be  
8 within the statutory authority given to a hearing officer in  
9 procedural issues. In effect these orders required PCMG to  
10 discontinue Services by "Order of the Commission" under the  
11 guise of being procedural with no right to remedy as required  
12 under the Constitution, Statute or Rule.

13 63. Even if there was any legitimate question as to the  
14 contested nature of the issues after the February 24<sup>th</sup>  
15 conference, there could be no doubt about it after Michael  
16 Glaser's February 26<sup>th</sup> letter in which PCMG questions the order,  
17 the authority of ALJ Dion to issue it and notifies the ALJ,  
18 Staff and other parties, that an appeal to the Commission would  
19 be forth coming.

20 64. Again prudence and caution should have been the word  
21 of the day, but not in this case. Instead of clarifying the  
22 authority, submitting to the Commissioners for determination and  
23 review, or seeking a higher authority, ALJ Dion simply issues  
24 another procedural order directing staff to send the notices.  
25

1           65.     To ad insult to injury, after exceeding its authority  
2 in the first place, denying respondents their constitutional  
3 rights to equal protection and due process, this staff alleges  
4 that I am in contempt of the order. In fact it is this staff  
5 that is in contempt of every constitutional right and privilege  
6 afforded to the respondents. It is both without excuse and  
7 repugnant.

8           66.     Staff may argue that the order was made in the  
9 interest of the public safety and welfare and is therefore  
10 enforceable and not subject to review or rehearing as allowed  
11 for in ARS 41-1062(B) "Except when good cause exists...". This  
12 argument fails for several reasons. First, it applies to an  
13 "agency order" not a procedural order of the ALJ improvidently  
14 given, and secondly would require that the Commissioners  
15 actually had considered the matter and issued a decision. In  
16 this case the Commissioners never had an opportunity to render  
17 or issue a decision that could be reheard. However the biggest  
18 failure of this argument is that our whole legal system is based  
19 on the assumption that the Constitutional Rights and protections  
20 given to the individual are inalienable and nonnegotiable and  
21 that there is no protection of the publics safety or welfare if  
22 the state is at any time allowed to usurp those rights for any  
23 reason.

24           67.     The simple truth is that there were many other  
25 options available to ALJ Dion and this Commission to protect the

1 public interests as well as the Rights to due process of the  
2 respondents. There was simply no desire to do so.

3 68. The second procedural order that respondents are accused  
4 of being in contempt of is the April 11, 2003 order to compel  
5 PCMG's and Wetherald's response to Staff's data requests.

6 69. In the first place this again is not an order of the  
7 commission and is not subject to either ARS 40-424 or 40-425.  
8 Secondly, as near as I can tell, there is an assumption that a  
9 Data Request is the functional equivalent of a subpoena for the  
10 production of documents. If this is the case, than both the Rule  
11 and Statute are clear. The April 11 Order is only enforceable by  
12 petition to the courts (41-1062(A) 4 and R14-2-109). Again this  
13 seems to be an attempt by staff to fore go its actual remedies  
14 under the law and take a short cut and bring an action not  
15 permissible under ARS 41-1062 or the 40-424 and 40-425.

16 70. Be that as it may. I only have two issues beyond the  
17 possible legal arguments (of which I am admit tingly over my  
18 head on). First, I did eventually comply and second, I was  
19 somewhat in tilt mode waiting to know whether or not I would be  
20 appearing pro se or if Michael Glaser would be required to  
21 continue as counsel.

22 71. The final allegation is that PCMG is in violation of  
23 Commission order 63382. There is really no issue of fact here.  
24 PCMG did not maintain its Bond as required by the order.  
25 However, what staff has not shown or presented any evidence on

1 is that this was intentional on the part of PCMG, ONS or  
2 Wetherald. The fact is that PCMG could not maintain the bond due  
3 to it adversarial relationship with the LLP. Because of the  
4 false allegations made by the LLP, to the bank where the cash  
5 collateral to secure the bond was, neither PCMG, ONS or  
6 Wetherald had control of the collateral and was unable to  
7 recollateralize the bond. The failure of PCMG to maintain the  
8 bond was not contemptuous, or malicious, there simply were not  
9 the resources to do so.

10 72. Count V should be dismissed as a matter of law.  
11 Neither of the procedural orders apply to the remedies requested  
12 in the Amended Complaint as they are certainly not Commission  
13 orders. The failure to maintain to bond was not intentional but  
14 impossible. Punitive action in such a case doesn't serve the  
15 public interest but demonstrates malicious prosecution.

### 17 Conclusion

18  
19 73. The Staff has not met their burden of proof in Counts  
20 I, II III and IV. There is simply no evidence to support the  
21 contention that any entity other than PCMG ever provided or  
22 offered services to Arizona consumers. Like wise there is no  
23 justification for the allegations in Count II regarding fit and  
24 proper entities. Count II has nothing to with what I did or how  
25 Arizona consumers have been injured by my any of the allegations

1 alleged. In the first instance both the Oregon and Washington  
2 Consent decrees and stipulations happened over 10 years ago and  
3 would not be required to be disclosed in the current application  
4 process required for a new CC&N. The bankruptcies can not, as a  
5 matter of law, be used as a condition. The allegations by the  
6 SEC and other states are not yet adjudicated and if used here  
7 would be the same as prejudgment and punitive action for un-  
8 adjudicated allegations, hence violating my right to the  
9 presumption of innocence and due process.

10 74. Although financial ability is clearly a requirement  
11 to receive a CC&N is clearly not a condition of retaining a  
12 CC&N. Like wise neither is technical ability. However in  
13 relation to Technical ability the staff grossly falls short of  
14 showing that respondents are not technically proficient. Morton  
15 did no analysis of the complaints and fails to show that  
16 respondents are in fact any different than any other provider.  
17 Given the animosity of the Staff towards respondent Wetherald  
18 any thing alleged should be held to a high standard of proof and  
19 not the subjective statements of someone not clearly an  
20 independent opinion.

21 75. In short the Staff fails to prove any of the  
22 allegations or show a basis for this action in the first place.  
23 All Counts should be dismissed.  
24  
25

1 Dated this 4<sup>th</sup> day of April, 2004

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By: 

Tim Wetherald  
CN Systems Technology, LLC  
Manager of The Phone Company  
of Arizona JV  
10730 E Bethany Dr Suite 206  
Aurora, CO 80014