0000002437

ORIGINAL

05CB

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

2004 APR -8 A 10: 31

AZ CORP COMMISSION
DOCUMENT CONTROL

COMMISSIONERS

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

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.	**DOCKET NO. T-03889A-02-0796** **DOCKET NO. T-04125A-02-0796**
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.	**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 RESOLD 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	**DOCKET NO. T-03889A-03-0202**

Arizona Corporation Commission
DOCKETED

APR - 8 2004

DOCKETED BY

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 7th Day of April, 2004, with:

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

Copy of the foregoing mailed USPS Overnight.
This 1st 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

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

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.	**DOCKET NO. T-03889A-02-0796** **DOCKET NO. T-04125A-02-0796**
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.	**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 RESOLD 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 OF CONVENIENCE AND NECESSITY.	**DOCKET NO. T-03889A-03-0202**

Closing Brief of Respondents

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

Tim Wetherald

Introduction

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

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

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

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

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

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

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

[1] 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.

8. As this Docket progresses the focus becomes a clear "Get Tim" proceeding. Indeed the Amended Complaint largely focuses on Mr. Wetherald's prior business dealings, regulatory history and SEC allegations. In fact the largest portion of the hearing was spent on issues revolving around Mr. Wetherald not on actual facts of current conduct.

9. It is precisely this rush to "shut down" Mr. Wetherald's activities and operations that has led to an over zealous procedural history in this Docket. As will be shown below, the procedural history has denied Mr. Wetherald, The Phone Company Management Group, LLC and ON Systems Technology, LLC their Constitutional Rights to Equal Protection and Due Process.

Arguments

Count I

Providing Services without a CC&N

10. There can be no doubt that the Staff is completely confused by the names used in the companies advertisements and the name on the bill sent to customers. However, it is also clear that Staff failed to show that any entity other than the Phone Company Management Group, LLC ever provided services to any consumers in Arizona. Even Staffs witnesses confirm that

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

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

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

13. It is also clear form both the Application for a CC&N filed by the JV and the concurrent Application to discontinue

[2] The Phone Company of Arizona (PCMG) received its firs Qwest bill on My 22, 2002. Which would indicate that PCMG began offering services to customers in April of 2002.

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

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

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

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

Count II

Fit and Proper Entity

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

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

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

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

ARS 41-030 (B) States:

> **An agency shall not base a licensing decision in whole or in part on a licensing requirement or condition that is not specifically authorized by statue, rule or state tribal gaming compact. A general grant of authority in statute does 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.**

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

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

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

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

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

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

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

> **"…a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to,…a person 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…"**

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

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

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

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

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

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

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

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

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

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

30. It is clear that Mr. Credle made these representations to the Staff in order to spur them to take 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 5th 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 de 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

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

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

COUNT III

Financial Ability

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

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

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

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

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

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

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

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

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

Count IV
Technical Ability

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

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

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

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

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

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

---

[3] 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.

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

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

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

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

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

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

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

Count V

Violation of Commission Orders

54. Count V alleges that respondents PCMG, TPCA, ONS, and Wetherald acted in "contempt and willful violation of several Commission orders". Two of the orders were procedural orders issued in the current Docket(s) and the other is the original order granting the CC&N to PCMG (formerly LiveWire).

55. In the first instance, procedural orders are clearly not orders of "The Commission" as contemplated by ARS 40-424 and 40-425 and as such are not subject to the remedies under those statutes. In fact it is clear that the Constitutional and Legislative intent was not to vest the power to issue binding orders in the hands of an ALJ. It would create a wholly absurd result and allow the Commission or other Administrative Agency the ability to circumvent due process by simply using the term "procedural order" and thereby exempting the "procedural order(s)" from statutory timeframes before the order is effective and thereby depriving a party to its rights of remedy either before the agency itself or the trial or appellate courts. Part of that right is to allow remedies when orders and decisions are contested and to allow "reasonable time" for parties to seek those remedies. Hence, R14-2-109(B) states:

> **…Any party to the proceeding may serve… exceptions to the proposed order within 10 days after service thereof…"**

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

56. It is clear form the law that there is no presumption that the initial finder of fact, Judge, ALJ, agency or commission is always right and not with out reversible error. In all cases aggrieved parties are afforded the right to an appeal, rehearing or other remedies of law to preserve their rights. In all of these cases that right is afforded, at some point, prior to that order or decision becoming final and enforceable.

57. The February 25th, 2003 and March 3rd, 2003 "procedural orders" are a clear example of why those rights to remedy are so important.

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

> **"The Commission or presiding officer upon its own motion or upon motion of any party and upon written notice to all parties of record may direct that a prehearing conference shall be held for the purposes of formulating or simplifying the issues, obtaining admissions of fact and of documents which will avoid unnecessary proof, arranging for the exchange of proposed exhibits or prepared expert testimony, limitation of the number of witnesses and consolidation of the examination of witnesses, procedure at hearing and such other matters which may expedite orderly conduct and disposition of the proceedings or settlements thereof."**
> R-14-2-108(A)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

Dated this 4th day of April, 2004

By: _____

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