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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

2004 APR 30 A 10: 53

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JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

AZ CORP COMMISSION
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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 CONVENIENCE OF CONVENIENCE
AND NECESSITY.

DOCKET NO. T-03889A-02-0796

DOCKET NO. T-04125A-02-0796

Arizona Corporation Commission
DOCKETED

APR 30 2004

DOCKETED BY *Mae*

DOCKET NO. T-04125A-02-0577

DOCKET NO. T-03889A-02-0578

DOCKET NO. T-03889A-03-0152

DOCKET NO. T-03889A-03-0202

Exceptions to ALJ Dion's Recommended Decision of Respondents

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

Tim Wetherald

1 **Introduction**

2

3 1. ALJ Dion's Recommended Decision clearly shows that
4 respondents concern about his ability to be impartial, fair and
5 to not prejudge was well founded. It is clear from the total
6 lack of evidentiary support in the record, complete lack of
7 legal authority that ALJ Dion's Recommended Decision is a ruling
8 based on bias not on fact, law or evidence.

9 2. Because Respondents have so little time to file these
10 exceptions¹, Respondents must state for the record that they take
11 exception to virtually all of ALJ Dion's Recommended Decision
12 and believe that his bias is so overwhelmingly apparent that
13 this matter should be reheard by an independent ALJ.

14

15 **Count I**

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17 3. ALJ Dion's findings that PCMG's CC&N did not include
18 authority to for PCMG to operate under the d/b/a PCA is both
19 factually and legally in error. His reliance on A.A.C. 14-1104
20 is improper and a stretch worthy of a circus performer. The use
21 of a d/b/a/ is not prohibited under the commissions rules or
22 under Arizona Statute. The use of a d/b/a does not constitute
23 the creation of a new entity. Further there is no requirement
24

25 ¹ Respondents did not receive the Recommended Decision until Monday April 26th, 2004. Since they are to be filed no later than 12 pm Friday April 30th, 2004 and Respondents are out of State these exceptions must be mailed via overnight delivery on Thursday April 29th, 2004. Giving Respondents only 2 days to prepare and write their exceptions.

1 under the ACC rules or Arizona Statute for PCMG to notify the
2 Commission prior to the use of a d/b/a. Other Arizona Regulatory
3 Agencies such as the Insurance Commission have specific
4 requirements related to the use of trade names or d/b/a. It is
5 clear from a legal perspective that the term proper name does
6 not encompass trade names or a d/b/a, otherwise the State would
7 require the registration of trade names, which they don't. Nor
8 would there be a need for other regulatory agencies to
9 specifically address their use.

10 4. In addition even if (and I am not conceding that it
11 is) PCMG was required to notify the Commission prior to using a
12 d/b/a, it would not negate PCMG's CC&N without a contested
13 hearing and order of the Commission. In short PCMG would still
14 be operating under its CC&N.

15 5. It is important to note that even if R14-2-1004 A.2's
16 use of the term proper name included the use of a trade name or
17 d/b/a, it is clearly a requirement that only applies to the
18 initial granting of the CC&N not a condition to the maintenance
19 of the CC&N. Clearly R14-2-1004 B which establishes the
20 conditions for maintaining a CC&N are void of the "proper name"
21 requirement or the requirement to notify the commission of its
22 use. Further it was not a requirement imposed in the original
23 order granting PCMG's CC&N.

24 6. ALJ Dion gives no legal support or rationale for his
25 conclusion and clearly is in violation of ARS 41-1030 (A) (B). As

1 a simple matter of law ALJ Dion's Recommendation in regards to
2 Count I must be rejected and the Commission must find that PCMG
3 did in fact offer services with a valid CC&N.
4

5 Counts II, III and IV
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7 7. ARS 41-1030 speaks for itself. ALJ Dion's draconian
8 logic regarding R14-2-1106(A) simply doesn't meet the mark;
9 otherwise why have the Rule divided into two separate categories
10 - requirements for obtaining and requirements for keeping. The
11 purpose of ARS Title 41 is clearly to eliminate this kind of
12 discriminatory and biased regulatory action. The Commission
13 could have made it part of R14-2-1006(A) but did not, and cannot
14 by order now go and modify the rule for their own discriminatory
15 means.

16 8. Further there is nothing in the record or presented
17 at hearing that could lead ALJ Dion to his conclusions regarding
18 Mr. Wetherald's accounting ability or technical ability. The
19 fact that he is not an accountant is not dispositive without
20 actual proof that the accounts were kept unsatisfactory. Again
21 ALJ Dion's bias and discriminatory attitude are evident.
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Count V

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3 9. ALJ Dion's only legal authority cited in his Decision
4 is ARS 40-105(B)(3) to support his contention that procedural
5 orders are orders of the Commission. However ARS 40-105 isn't
6 even relevant to the issue. Based on ALJ Dion's reasoning 40-
7 105(B)(3) could impart the powers of the Commission on the
8 janitor or receptionist. This is clearly not the intent. Nor
9 does ARS 40-105 address the issue of procedural orders or the
10 duties and powers of an ALJ. ALJ Dion is simply trying to create
11 justification for a biased and unreasoned or unsupported decision.

12 10. In the first instance, procedural orders are clearly
13 not orders of "The Commission" as contemplated by ARS 40-424 and
14 40-425 and as such are not subject to the remedies under those
15 statutes. In fact it is clear that the Constitutional and
16 Legislative intent was not to vest the power to issue binding
17 orders in the hands of an ALJ. It would create a wholly absurd
18 result and allow the Commission or other Administrative Agency
19 the ability to circumvent due process by simply using the term
20 "procedural order" and thereby exempting the "procedural
21 order(s)" from statutory timeframes before the order is
22 effective and thereby depriving a party to its rights of remedy
23 either before the agency itself or the trial or appellate
24 courts. Part of that right is to allow remedies when orders and
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1 decisions are contested and to allow "reasonable time" for
2 parties to seek those remedies. Hence, R14-2-109(B) states:

3 ~~Any party~~ to the proceeding may serve... exceptions to the
4 proposed order within 10 days after service thereof..."

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

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

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

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

21 "The Commission or presiding officer upon its own motion or
22 upon motion of any party and upon written notice to all
23 parties of record may direct that a prehearing conference
24 shall be held for the purposes of formulating or simplifying
25 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

1 other matters which may expedite orderly conduct and
2 disposition of the proceedings or settlements thereof."

R-14-2-108(A)

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

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

13 15. It is undisputable that the issues addressed in these
14 "procedural orders" were not procedural but highly contested
15 issues of substance. A reading of the transcript of the
16 Procedural Conference on February 24th, 2003, which led to these
17 orders, clearly establishes the contested nature of the issues.
18 This is further complicated by the fact that neither Qwest nor
19 PCMG believed that the issue was rightly before the Commission
20 and outside the scope of the complaint as filed by Staff. (T Feb
21 24, 2003, P 10-11.)

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

1 17. These orders exemplify one of the biggest procedural
2 problems with this entire Docket(s). The willingness to act
3 without consideration to issues at had. Again the February 24th
4 transcript is very illuminating in this regard. It is clear that
5 no one is sure about what ALJ Dion's authority is in relation to
6 the issues between Qwest and PCMG, It is also evident that it is
7 unclear as to the actual authority to require the sending of
8 customer notices. Given the nature of the issues at hand
9 prudence and caution should have been exercised, especially on
10 the part of ALJ Dion, and the legal authority to act clarified.
11 Instead the order is issued as procedural and assumed to be
12 within the statutory authority given to a hearing officer in
13 procedural issues. In effect these orders required PCMG to
14 discontinue Services by "Order of the Commission" under the
15 guise of being procedural with no right to remedy as required
16 under the Constitution, Statute or Rule.

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

24 19. Again prudence and caution should have been the word
25 of the day, but not in this case. Instead of clarifying the

1 authority, submitting to the Commissioners for determination and
2 review, or seeking a higher authority, ALJ Dion simply issues
3 another procedural order directing staff to send the notices.

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

11 21. ALJ Dion and Staff may argue that the order was made
12 in the interest of the public safety and welfare and is
13 therefore enforceable and not subject to review or rehearing as
14 allowed for in ARS 41-1062(B) "Except when good cause exists...".
15 This argument fails for several reasons. First, it applies to an
16 "agency order" not a procedural order of the ALJ improvidently
17 given, and secondly would require that the Commissioners
18 actually had considered the matter and issued a decision. In
19 this case the Commissioners never had an opportunity to render
20 or issue a decision that could be reheard. However the biggest
21 failure of this argument is that our whole legal system is based
22 on the assumption that the Constitutional Rights and protections
23 given to the individual are inalienable and nonnegotiable and
24 that there is no protection of the public's safety or welfare if
25

1 the state is at any time allowed to usurp those rights for any
2 reason.

3 22. The simple truth is that there were many other
4 options available to ALJ Dion and this Commission to protect the
5 public interests as well as the Rights to due process of the
6 respondents. There was simply no desire to do so.

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

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

20 25. The final allegation is that PCMG is in violation of
21 Commission order 63382. There is really no issue of fact here.
22 PCMG did not maintain its Bond as required by the order.
23 However, what staff has not shown or presented any evidence on
24 is that this was intentional on the part of PCMG, ONS or
25 Wetherald. The fact is that PCMG could not maintain the bond due

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

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

14
15 Alter Ego

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17 27. Again ALJ Dion's Decision lacks any findings or
18 conclusions of law that would support his conclusions and
19 clearly shows his unbridled bias and contempt for the
20 respondents. Dion bases his ruling on essentially three facts.
21 1). Tim Wetherald was an Owner of ON Systems Technology, LLC;
22 2). Tim Wetherald was a Manager of PCMG and ONS; 3). There was
23 no organizational chart provided or available. SO WHAT?
24
25

1 29. Dion is required to show the basis of his decision.
2 Dion clearly fails to do so. The facts relied upon by Dion are
3 completely innocuous.

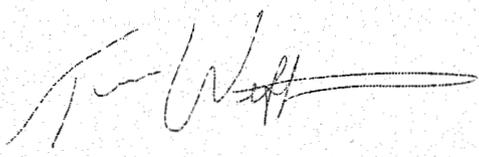
4 - 30. In order to establish "alter ego", the Staff must
5 show both (1) unity of control, and (2) observance of corporate
6 form would sanction a fraud or promote injustice. *Jabczenski v.*
7 *Southern Pacific Memorial Hospital, Inc.*, 199 Ariz. 15, 579 P.2d
8 53 (App.1978). The Jabczenski case states that two corporations
9 can be regarded as the same if "either the dominant
10 corporation...so controls and uses the other as a mere tool or
11 instrument in carrying out its own plans and purposes that
12 justice requires it be held liable for the results, or, there is
13 such a confusion of identities and acts as to work a fraud upon
14 third persons." As the party making the alter ego argument,
15 Staff bears the burden of overcoming the statutory presumption
16 of corporate separateness by proving that the Commission should
17 disregard such separateness. Arizona decisions have identified
18 several considerations as material to this issue, including
19 common officers or directors, payment of salaries and other
20 expenses of subsidiary by parent, failure to maintain
21 formalities of separate corporate existence, similarity of
22 corporate logos, owners' making of interest-free loans to
23 corporation, maintaining of corporate financial records,
24 commingling of personal and corporate funds, diversion of
25 corporate property for owners' personal use, observance of
formalities of corporate meetings, intermixing of owners'
actions with those of corporation, and filing of corporate
income tax returns.

1 34. Respondents conclude that Dion's complete lack of
2 reliance on the record or evidence presented at trial or in the
3 record and his blatant lack of legal authority for his
4 conclusions can only be interpreted as a complete bias and
5 discrimination against Respondents. Dion's entire Recommended
6 Decision is suspect and should be vacated.

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8 Dated this 28th day of April, 2004

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By: 

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