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BEFORE THE ARIZONA CORPORATION COMMISSION

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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.

DOCKET NO. T-03889A-02-0796

DOCKET NO. T-04125A-02-0796

Arizona Corporation Commission

**DOCKETED**

APR 30 2004

DOCKETED BY

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

DOCKET NO. T-04125A-02-0577

IN THE MATTER OF THE APPLICATION OF THE PHONE COMPANY MANAGEMENT GROUP, LLC f/k/a/ LIVEWIRENET OF ARIZONA, LLC TO DISCONTINUE LOCAL EXCHANGE SERVICE.

DOCKET NO. T-03889A-02-0578

IN THE MATTER OF THE APPLICATION OF THE PHONE COMPANY MANAGEMENT GROUP, LLC FOR CANCELLATION OF FACILITIES-BASED AND 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

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 prejudice 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 exceptions<sup>1</sup>, 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

16

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 <sup>1</sup> Respondents did not receive the Recommended Decision until Monday April 26<sup>th</sup>, 2004. Since they are to be filed no later than 12 pm Friday April 30<sup>th</sup>, 2004 and Respondents are out of State these exceptions must be mailed via overnight delivery on Thursday April 29<sup>th</sup>, 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  
6

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.  
22  
23  
24  
25



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 25<sup>th</sup>, 2003 and March 3<sup>rd</sup>, 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 24<sup>th</sup>, 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 hand. Again the February 24<sup>th</sup>  
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 24<sup>th</sup>  
19 conference, there could be no doubt about it after Michael  
20 Glaser's February 26<sup>th</sup> 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

16  
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.





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