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BEFORE THE ARIZONA CORPORATION COMMISSION  
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COMMISSIONERS

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Arizona Corporation Commission  
**DOCKETED**

WILLIAM A. MUNDELL

APR 03 2003

JEFF HATCH-MILLER

DOCKETED BY

MIKE GLEASON

UTILITIES DIVISION STAFF

**DOCKET NO. T-03889A-02-0796**  
**DOCKET NO. T-04125A-02-0796**

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,

**REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT AS AGAINST THE PHONE COMPANY OF ARIZONA, LLP, AND MOTION TO INTERVENE**

Respondents.

The Phone Company of Arizona, LLP (also referred to herein as the "Partnership"), through its counsel undersigned, replies to the response filed by respondents LiveWireNet of Arizona, LLC, the Phone Company Management Group, LLC, On Systems Technology, LLC, and its principals Tim Wetherald, Frank Tricamo and David Stafford Johnson (collectively, "The Phone Company Management Group") on April 2, 2003, and reasserts its request that the Arizona

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1 Corporation Commission (the “Commission”) issue its order dismissing the Utilities Division  
2 Staff’s complaint (the “Complaint”) in the above-captioned dockets as against The Phone  
3 Company of Arizona, LLP. The Phone Company of Arizona, LLP, further requests that if the  
4 Commission grants the motion to dismiss, that the Commission permit the Partnership to remain  
5 in this proceeding as an intervenor.

6 **I. THE MOTION TO DISMISS IS BOTH TIMELY AND PROPER**

7 A. **Procedural Issues.** The Phone Company Management Group asserts that the  
8 motion to dismiss should be denied because The Phone Company of Arizona, LLP, filed an  
9 answer to the Complaint on November 7, 2002, *rather than* a motion to dismiss. However,  
10 pursuant to A.A.C. R14-3-106(H), a party challenging the sufficiency of a complaint at the  
11 Commission must file both an answer *and* a motion to dismiss. While this is a departure from the  
12 Arizona Civil Rules of Procedure, those rules only apply to the extent that they do not conflict  
13 with the Commission’s own rules, regulations and orders. *See* A.A.C. R14-3-101(A). Here, the  
14 Commission has a specific rule which requires the filing of both an answer and a motion to  
15 dismiss.

16 Although the motion to dismiss was not filed by the Partnership at the time it filed its  
17 answer, it is not prohibited from filing its motion to dismiss at this time. Rule R14-3-106(E)  
18 states that “[t]he Commission or presiding officer, in his discretion, may allow any formal  
19 document to be amended or corrected,” and that “[f]ormal documents will be liberally construed  
20 and defects which do not affect substantial rights of the parties will be disregarded.” Formal  
21 documents are defined in the rule to include applications, complaints, answers, motions replies  
22 and protests. *See* A.A.C. R14-3-106(A). Moreover, A.A.C. R14-3-101(B) states that the  
23 Commission’s rules “shall be liberally construed to secure just and speedy determination of all  
24 matters presented to the Commission.” Thus, The Phone Company of Arizona, LLP, could  
25 amend its answer to include the motion to dismiss, but such an exercise would be a waste of time  
26 and resources. The motion to dismiss is permitted under the Commission’s rules, and the

1 Commission's Administrative Law Judge certainly has the discretion and authority to grant the  
2 motion.

3 The Phone Company Management Group appropriately references in its response the  
4 "haze of confusion" caused by Tim Wetherald and The Phone Company Management Group.  
5 (Response at page 3, line 2). As Commission Staff and the Administrative Law Judge are well  
6 aware, The Phone Company Management Group has gone to extraordinary and unprecedented  
7 lengths to obscure the truth, obstruct the Commission's investigation, and circumvent the  
8 Commission's orders. By comparison, The Phone Company of Arizona, LLP, has responded to  
9 Staff questions and data requests throughout the investigative process. The Phone Company  
10 Management Group argues that because The Phone Company of Arizona, LLP, has participated  
11 in this proceeding, it is now precluded from filing its motion to dismiss. This is nonsense, and it  
12 is not supported by the Commission's rules. The Commission Staff (which obviously brought the  
13 Complaint) pre-filed the direct testimony of its witness John Bostwick on March 28, 2003. None  
14 of the recommendations contained in Mr. Bostwick's testimony are directed at The Phone  
15 Company of Arizona, LLP. Dismissal of the Partnership at this juncture is appropriate.

16 **B. Substantive Issues.** The Commission should dismiss the Complaint as against  
17 The Phone Company of Arizona, LLP, because none of the allegations of wrongdoing or requests  
18 for relief derive from actions of the Partnership. The Phone Company Management Group asserts  
19 that the Partnership is attempting to "escape liability" and that it is "not an innocent party," but  
20 offers no evidence to support its claim, other than a self-serving affidavit of respondent Tim  
21 Wetherald. (Response at page 3, lines 6-16). Nothing contained in Mr. Wetherald's affidavit or  
22 the response refutes the points laid out in the Partnership's motion to dismiss:

23 1. Neither The Phone Company of Arizona, LLP, nor any of its  
24 partners acting on behalf of the Partnership have ever (i) provided  
25 telecommunications services to customers in Arizona; (ii) solicited customers in  
26 Arizona for the provision of telecommunications services; (iii) applied for a  
CC&N to provide telecommunications services in Arizona; or (iv) owned or  
controlled any interest in any entity providing telecommunications services in

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Arizona or soliciting customers in Arizona for the provision of telecommunications services (the short-lived Phone Company of Arizona Joint Venture *never* obtained a CC&N and *never* provided telecommunications services to customers in Arizona, points which are not refuted in Mr. Wetherald's affidavit);

2. The Phone Company of Arizona, LLP, does not now nor has it ever held any interest in LiveWireNet of Arizona, LLC, The Phone Company Management Group, LLC, or On Systems Technology, LLC;

3. The Phone Company of Arizona LLP, does not now nor has it ever held any interest in the CC&N of The Phone Company Management Group, LLC (formerly LiveWireNet of Arizona, LLC); and

4. The Phone Company of Arizona, LLP, was briefly a joint venturer with On Systems Technology, LLC, in The Phone Company of Arizona Joint Venture, but the short-lived Joint Venture was dissolved by the Partnership effective July 31, 2002, after less than two months. The management committee of the Joint Venture never authorized the Joint Venture to provide telecommunications services to customers in Arizona, to solicit customers in Arizona for telecommunications, or to apply for a CC&N. Although an application for a CC&N was filed on behalf of the Joint Venture by Mr. Glaser in Docket No. T-04125A-02-0577, the application was filed without the authority of the management committee, and the application was subsequently withdrawn by Mr. Glaser.

The Phone Company Management Group asserts that it will be prejudiced by the dismissal of The Phone Company of Arizona, LLP, because it may incur additional liability that is more properly attributable to the Partnership. However, the Commission Staff has found no such liability on the part of the Partnership, nor has The Phone Company Management Group provided any credible basis for such liability. There is simply no basis to hold the Partnership as a respondent in this proceeding any longer.

**II. INTERVENOR STATUS FOR THE PARTNERSHIP IS APPROPRIATE**

The standard to be applied by the Commission in granting intervention is simple: (i) is the party requesting intervention directly and substantially affected by the proceeding; and (ii) will the issues presented in the proceeding be unduly broadened by the intervention. With regard to the first criteria, The Phone Company of Arizona has provided evidence that the Partnership

1 purchased Time Certificate of Deposit No. 8726 in the amount of \$100,000 at First United Bank  
2 of Colorado (Motion at pages 7-8, and Exhibit “B” to the Motion). The Partnership has alleged  
3 that Tim Wetherald and The Phone Company Management Group fraudulently obtained the CD  
4 and used it to satisfy the condition of Decision No. 63382 that The Phone Company Management  
5 Group obtain a performance bond. The ownership and disposition of CD 8726 will be addressed  
6 in this proceeding, and the Partnership will certainly be directly and substantially affected by the  
7 resolution.

8 With regard to the second criteria, the performance bond that is guaranteed by CD 8726  
9 was a condition of the certificate of convenience and necessity issued to The Phone Company  
10 Management Group (formerly LiveWireNet of Arizona, LLC) pursuant to Decision No. 63382.  
11 That certificate of convenience and necessity is the very subject of this proceeding. The Phone  
12 Company Management Group’s assertion that the Commission has no jurisdiction over the bond  
13 is preposterous. (Response, page 6, line 17). Moreover, Staff witness Bostwick addresses the  
14 questions surrounding The Phone Company Management Group’s performance bond and CD  
15 8726 in his pre-filed testimony at pages 18-19, copies of which are attached hereto as Exhibit  
16 “A.” Thus, the issues surrounding the ownership of CD 8726 are already before the Commission  
17 in this proceeding. Accordingly, The Phone Company of Arizona, LLP, meets both criteria for  
18 intervention.

19 **III. CONCLUSION**

20 WHEREFORE, in view of the foregoing, The Phone Company of Arizona, LLP, requests  
21 that the Commission grant its motion to dismiss the Utilities Division Staff’s Complaint as to the  
22 Partnership, and further, that the Partnership be permitted to remain in this proceeding as an  
23 intervenor. The Partnership has already expended substantial sums of money participating in this  
24 proceeding, on top of the million plus dollars that have likely been lost as a result of the  
25 fraudulent actions of Tim Wetherald and The Phone Company Management Group. There is no  
26 basis for continuing to hold the Partnership as a respondent in this complaint proceeding.

1 RESPECTFULLY submitted this 3rd day of April, 2003.

2 SNELL & WILMER, L.L.P.

3 

4 Jeffrey W. Crockett, Esq.

5 George A. Tsiolis, Esq.

6 Attorneys for The Phone Company of Arizona, LLP

7 ONE ORIGINAL and fifteen (15) copies  
8 of the foregoing reply were filed with  
9 Docket Control this 3rd day of April, 2003.

10 A COPY of the foregoing reply was hand-  
11 delivered this 3rd day of April, 2003, to:

12 Philip J. Dion, Administrative Law Judge  
13 Hearing Division  
14 ARIZONA CORPORATION COMMISSION  
15 1200 West Washington Street  
16 Phoenix, Arizona 85007

17 Ernest Johnson, Director  
18 Utilities Division  
19 ARIZONA CORPORATION COMMISSION  
20 1200 West Washington Street  
21 Phoenix, Arizona 85007

22 Maureen Scott, Staff Attorney  
23 Gary H. Horton, Staff Attorney  
24 Legal Division  
25 ARIZONA CORPORATION COMMISSION  
26 1200 West Washington Street  
Phoenix, Arizona 85007

27 A COPY of the foregoing reply was  
28 faxed this 3rd day of April, 2002, to:

29 Marty Harper, Esq.  
30 SHUGHART, THOMSON & KILROY  
31 3636 North Central Avenue  
32 Suite 1200  
33 Phoenix, Arizona 85012

1 Mark Brown, Staff Attorney-Policy and Law  
2 QWEST CORPORATION  
3 3033 North 3rd Street, Suite 1009  
4 Phoenix, Arizona 85012

4 Timothy Berg, Esq.  
5 Theresa Dwyer Esq.  
6 FENNEMORE CRAIG, P.C.  
7 3003 North Central Avenue, Suite 2600  
8 Phoenix, Arizona 85003

7 Michael L. Glaser, Esq.  
8 SHUGHART, THOMSON & KILROY  
9 1050 Seventeenth Street  
10 Suite 2300  
11 Denver, Colorado 80202

11 A COPY of the foregoing motion was  
12 mailed this 3rd day of April, 2003, to:

12 David Stafford Johnson, Esq.  
13 740 Gilpin Street  
14 Denver, Colorado 80218

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# **EXHIBIT A**

**Direct Testimony of John F. Bostwick**

Docket Nos. T-03889A-02-0796 and T-04125A-02-0796

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1 A. To the best of Staff's knowledge, the companies associated with Mr. Wetherald in the  
2 various States discussed above, have either voluntarily terminated their operations or their  
3 operations have been involuntarily terminated.  
4

5 **Q. What conclusions does Staff draw from the state and federal legal and regulatory**  
6 **actions discussed above?**

7 A. Staff believes that those actions indicate a pattern of inappropriate behavior on the part of  
8 Mr. Wetherald and the various companies with which he is affiliated, and that the Phone  
9 Company Management Group and the Phone Company of Arizona are not fit and proper  
10 entities to provide telephone service in Arizona.  
11

12 **Q. Has Staff received other information which has lead to serious concerns about the**  
13 **Company's management?**

14 A. Yes. The partners of the Phone Company of Arizona LLP have alleged that Mr.  
15 Wetherald took actions on their behalf without their knowledge and approval. In addition,  
16 they recently filed a letter with the Commission, indicating that Mr. Wetherald caused  
17 Roald Haugan, a Limited-Liability Partner and Managing Partner in the Phone Company  
18 of Arizona, L.L.P., to disperse \$100,000.00 from the Phone Company of Arizona, L.L.P.  
19 Partnership Reserve Account as security for a Bond for Utility Users provided by First  
20 United Bank of Colorado, as Surety, and The Phone Company Management Group,  
21 L.L.C. as Principle for a Performance Bond in the amount of \$100,000.00. It is alleged  
22 that without Mr. Haugan's knowledge or authority, the name "Tim Weatherald" was

**Direct Testimony of John F. Bostwick**

Docket Nos. T-03889A-02-0796 and T-04125A-02-0796

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1 added along with the initials of Mr. Wetherald after Mr. Haugan had executed the Time  
2 Certificate of Deposit. See JFB-9 attached.

3  
4  
5 **Q. Have any other matters come to the Staff's attention which raised concerns**  
6 **regarding the Company's management?**

7 **A.** Yes. A Complaint was recently lodged in the Arizona Superior Court by the partners of  
8 the Phone Company of Arizona, L.L.P. alleging fraud and various other improprieties on  
9 the part of Mr. Wetherald. See JFB-10 attached.

10  
11 **Q. Are the Company's recent actions in this proceeding also a concern to the Staff?**

12 **A.** Yes. The Commission recently ordered the Company to provide notice of the impending  
13 disconnection by Qwest to its customers. The Company refused to provide the notice  
14 even though ordered by the Commission to do so, stating that the Commission did not  
15 have the authority to order it to send such a notice. Additionally the Company on March  
16 13, 2003 filed a letter with the Commission advising it that PCMG had entered into a sale  
17 of assets agreement with USURF America, Inc. and that DMJ Communications will  
18 provide service to customers in Arizona pursuant to an agency agreement. Staff believes  
19 this action was taken to evade the disconnection notice that the Commission ordered be  
20 sent to PCMG's customers recently, the impending disconnection by Qwest and further  
21 action by this Commission. See JFB-11 attached.

22  
23 **Q. Does this conclude your testimony relating to Count II?**