



BEFORE THE ARIZONA CORPORATION COMMISSION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

MARC SPITZER  
Chairman  
JAMES M. IRVIN  
Commissioner  
WILLIAM A. MUNDELL  
Commissioner  
JEFF HATCH-MILLER  
Commissioner  
MIKE GLEASON  
Commissioner

Arizona Corporation Commission

DOCKETED

APR 03 2003

DOCKETED BY *nae*

ARIZONA CORPORATION COMMISSION  
DOCKETING UNIT

2003 APR -3 P 4: 16

RECEIVED

UTILITIES DIVISION STAFF,  
Complainants,

vs.

LIVEWIRENET OF ARIZONA, LLC,  
Respondents,

THE PHONE COMPANY MANAGEMENT  
GROUP, LLC,  
Respondents,

THE PHONE COMPANY OF ARIZONA JOINT  
VENTURE d/b/a THE PHONE COMPANY OF  
ARIZONA,  
Respondents,

ON SYSTEMS TECHNOLOGY, LLC, and its  
Principles, TIM WETHERALD, FRANK  
TRICAMO and DAVID STAFFORD,  
Respondents,

THE PHONE COMPANY OF ARIZONA, LLP,  
and its members,  
Respondents.

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

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

1 LiveWireNet of Arizona, LLC ("LiveWireNet"), a/k/a Phone Company Management  
2 Group, LLC ("PCMG") by and through its attorneys, and SHUGART THOMSON &  
3 KILROY, P.C., for its Response to Motion to Dismiss as Against the Phone Company of  
4 Arizona, LLP and Motion to Intervene, respectively states as follows:

5  
6 The Motion to Dismiss as Against the Phone Company of Arizona, LLP and Motion to  
7 Intervene ("Motion"), is an impermissible attempt by the Phone Company of Arizona, LLP  
8 ("Arizona LLP") to reposition itself in this action so that it can pursue funds to which has no  
9 legal right as an intervener despite an untimely attempt to escape liability as a respondent. As  
10 discussed below, Arizona LLP has presented no justification for its untimely Motion, has no  
11 legal right to PCMG's property, and will not be prejudiced if it remains a respondent in this  
12 action. On the other hand, Respondent PCMG will be greatly prejudiced if the Arizona  
13 Corporation Commission ("ACC") grants Arizona LLP's Motion. Thus, the ACC should deny  
14 Arizona LLP's Motion in its entirety.<sup>1</sup>

15  
16 **I. The Arizona LLP's Motion is Untimely and It Should Not be Dismissed as**  
17 **A Respondent in this Action**

18 This action was originally filed by the Utilities Division of the Arizona Corporation  
19 Commission ("Staff") on October 18, 2002, naming the Arizona LLP as one of the respondents.  
20 In response, rather than filing a Motion to Dismiss, the Arizona LLP filed its Answer to  
21 Complaint on November 7, 2002. Counsel for Arizona LLP also attended and participated in  
22 the pre-hearing that was held on January 7, 2003. Likewise, over the course of the last two  
23 months, the Arizona LLP has actively participated as a respondent in this action.

24  
25 <sup>1</sup> PCMG advises the ACC that simultaneously with the filing of the response, PCMG has  
26 voluntarily surrendered its Certificate of Convenience and Necessity ("CCN") to the  
Commission, and has requested cancellation of its effective tariff immediately. Thus, PCMG  
submits that the Motion is moot.

1            Nevertheless, on March 21, 2003, the Arizona LLP filed its Motion. Apparently coming  
2 out of the haze of confusion allegedly caused by Tim Wetherald and PCMG, the Arizona LLP  
3 claims that it should be dismissed as a respondent in this action because “none of the  
4 allegations of wrongdoing or requests for relief derive from actions of Arizona LLP” and “there  
5 is no legal relationship between the Arizona LLP and the other entities identified in Staff’s  
6 Complaint.” *See* Motion, p. 5. This feigned confusion and untimely attempt to escape liability  
7 is belied by the Arizona LLP’s admission that it was involved in a business relationship with  
8 other Respondents. *See* Motion, p. 5, ¶ 4. Further, the Arizona LLP fails to provide any  
9 legitimate reason, *i.e.* recently discovered facts, that justify its attempt to exit this case at this  
10 late juncture. As the ACC is well aware, this case is no longer in its early stages; the show  
11 cause hearing is currently scheduled for April 15, 2003.<sup>2</sup> Likewise, given that the Arizona LLP  
12 is not an innocent party that was inadvertently named as a respondent in this action, the  
13 dismissal of the Arizona LLP as a respondent will greatly prejudice the remaining Respondents,  
14 who may incur additional liability that is more properly attributable to the Arizona LLP.  
15

16  
17            Further, to the extent that the ACC deems the Arizona LLP’s Motion to be a request for  
18 summary judgment pursuant to Ariz. R. Civ. P. 56 and 12(b)(6), it is wholly deficient.<sup>3</sup> The  
19 Motion is not accompanied by any affidavits verifying the accuracy of the Arizona LLP’s  
20 allegations. Although Rule 56(b) does not require that Arizona LLP’s Motion be accompanied  
21 by supporting affidavits, the Arizona LLP must nevertheless establish that there is no genuine  
22

---

23 <sup>2</sup> *See* page 1, *supra* PCMG will file a motion to cancel this proceeding in light of its voluntary  
24 surrender of its CNN of its tariff.

25 <sup>3</sup> If, upon a Rule 12(b)(6) motion, “matters outside the pleading are presented to and not  
26 excluded by the court, the motion shall be treated as one for summary judgment and disposed  
of as provided in Rule 56.” Ariz. R. Civ. P. 12(b)(6); *e.g.*, *Pritchard v. State*, 788 P.2d 1178,  
1184 (Ariz. 1990).

1 issue of material fact and, in turn, summary judgment is appropriate. *See* Ariz. R. Civ. P. 56(c);  
2 *Burrington v. Gila County*, 767 P.2d 43, 48 (Ariz. App. 1988). Here, despite the Arizona  
3 LLP's bare allegations, a genuine issue of material fact exists regarding its relationship to the  
4 other Respondents and its liability in this action. *See* Affidavit of Tim Wetherald, ¶¶ 4-8,  
5 attached as Exhibit 1. Thus, the ACC should not allow the Arizona LLP to escape liability and  
6 should deny its request to be dismissed as a respondent in this action.  
7

8 **II. Arizona LLP Has No Legal Right to the \$100,000 Certificate of Deposit and**  
9 **Therefore Should Not Be Allowed to Intervene in this Action**

10 The Arizona Administrative Code, R14-3-105(A), addresses intervention and provides:  
11 "Persons, *other than the original parties to the proceedings*, who are directly and substantially  
12 affected by the proceedings shall secure an order from the Commission ... granting leave to  
13 intervene before being allowed to participate." (emphasis supplied). The plain language of  
14 R14-3-105(A) specifically exempts original parties to the proceeding from intervening. Such  
15 an exemption is common sense, given that intervention is rendered moot where a party is  
16 already an original participant in an action. Here, given that the Arizona LLP was named as a  
17 Respondent at the outset, it is already an original party to the action, and therefore cannot seek  
18 to intervene pursuant to R14-3-105(A).  
19

20 Likewise, the applicable rules of civil procedure also do not support the Arizona LLP's  
21 attempt to intervene. A party may intervene in an action as a matter of right or by permission  
22 of the Court. *See* Ariz. R. Civ. P. 24(a), (b). One may seek permission to intervene if: (1) a  
23 statute confers a conditional right to intervene; or (2) the applicant's claim or defense shares a  
24 common question of law or fact with the main action. *See* Ariz. R. Civ. P. 24(b). One may  
25 intervene as a matter of right if *a timely application* is made and: (1) intervention is premised  
26

1 on a statute that confers an unconditional right to intervene; or (2) “where the applicant claims  
2 an interest relating to the property or transaction which is the subject of the action and the  
3 applicant is so situated that the disposition of the action may as a practical matter impair or  
4 impede the applicant’s ability to protect that interest, unless the applicant’s interest is  
5 adequately represented by existing parties.” See Ariz. R. Civ. P. 24(a). Further, “[a] bare  
6 allegation that one’s interest may become impaired does not, without more, create a right to  
7 intervene.” See *Weaver v. Synthes, Ltd.*, 784 P.2d 268, 273 (Ariz. App. 1989). “In determining  
8 whether a motion is timely, the trial court must consider several factors, including the stage to  
9 which the lawsuit has progressed when intervention is sought and whether the applicant could  
10 have attempted to intervene earlier ... The most important consideration, however, is whether  
11 the delay in moving for intervention will prejudice the existing parties in the case.” *State ex.*  
12 *rel. Napolitano v. Brown & Williamson*, 998 P.2d 1055, 1057 (Ariz. 2000) (citations omitted).

13  
14  
15 Although not expressly stated, it appears as if the Arizona LLP is seeking to intervene  
16 as a matter of right by alleging that it has an interest in the \$100,000 Certificate of Deposit that  
17 Arizona LLP allegedly pledged as collateral for PCMG’s Bond for Utility Users, which PCMG  
18 submitted to the ACC in accordance with ACC’s decision no. 63382, February 16, 2002. The  
19 Arizona LLP’s alleged claim to the Certificate of Deposit is not enough to grant intervention in  
20 this case, assuming it otherwise has the right to intervene.  
21  
22  
23  
24  
25  
26

1 As stated above, this action was commenced last fall and the show cause hearing is only  
2 two weeks away. Thus, this action is in its final stages. Further, as a named respondent,  
3 Arizona LLP has known about this case since its inception, in October 2001. Most importantly,  
4 allowing the Arizona LLP to reposition itself now, in a manner that would shield it from  
5 liability would greatly prejudice the remaining Respondents.  
6

7 In any case, the ACC has no authority to determine what the rights of the parties are  
8 with respect to the certificate of deposit that to Arizona LLP allegedly pledges to the First  
9 United Bank, Aurora, Colorado as collateral for the Bond. PGMC apparently also has a claim  
10 to this Certificate. See Affidavit of Tim Wetherald ¶¶ 4-8. Only Colorado courts have this  
11 power upon the filing of a proper complaint by a party with standing to bring such a claim. The  
12 Arizona LLP's interest in this certificate - whatever it may be - is simply not a legitimate basis  
13 upon which to grant its Motion to intervene.  
14

### 15 III. Conclusion

16 The ACC should not allow the Arizona LLP to escape liability by dismissing it as a  
17 respondent yet allow it to intervene based on property over which the ACC has no jurisdiction.  
18 Given the maturity of this action and Arizona LLP's active participation throughout, Arizona  
19 LLP should remain a respondent in this action. The ACC's denial of the Arizona LLP's  
20 Motion will not prejudice the Arizona LLP, which has already actively participated as a  
21 Respondent in this action over the course of several months. The Denial of the Arizona LLP's  
22 Motion will not inhibit Arizona LLP's ability to protect its interests because it can assert the  
23 same arguments and defenses that it would raise as an intervener as a respondent.  
24

25 In contrast, the remaining Respondents will suffer great prejudice if the Arizona LLP  
26 is dismissed as a respondent and allowed to intervene because such a ruling would insulate a

1 potentially culpable party from liability while granting it an opportunity to pursue funds that are  
2 simply not its own and not within the jurisdiction of the ACC.

3           **WHEREFORE**, LiveWireNet respectfully requests that the ACC deny the Motion to  
4 Dismiss as Against the Phone Company of Arizona, LLP, and Motion to Intervene in its  
5 entirety.

6  
7 DATED this 2 day of April 2003.

8  
9 SHUGHART THOMSON & KILROY, P.C.

10  
11 By:   
12 Michael L. Glaser, Colorado Bar #13681  
13 Michael D. Murphy, Colorado Bar #14236  
14 1050 17th Street, Suite 2300  
15 Denver, CO 80202  
16 303.572.9300  
17 303.572-7883 fax

18  
19 - AND -

20  
21 Marty Harper, Arizona Bar #003416  
22 Kelly J. Flood, Arizona Bar #019772  
23 One Columbus Plaza  
24 3636 North Central Avenue, Suite 1200  
25 Phoenix, Arizona  
26 602.650.2000  
602.264.7033 fax

*Attorneys for LiveWireNet of Arizona,  
LLC, Phone Company Management  
Group, LLC, On Systems Technology,  
LLC and its principals, Tim Wetherald,  
Frank Tricamo and David Stafford  
Johnson*

1 **ORIGINAL + 13 COPIES of the foregoing served**  
2 **via Federal Express this 2nd day of April 2003 to:**

3 Docket Control  
4 ARIZONA CORPORATION COMMISSION  
5 1200 West Washington Street  
6 Phoenix, AZ 85007

7 **COPY of the foregoing sent via Federal Express,**  
8 **this 2nd day of April, 2003:**

9 Maureen A. Scott, Esq.  
10 Legal Division  
11 ARIZONA CORPORATION COMMISSION  
12 1200 West Washington Street  
13 Phoenix, AZ 85007

14 Christopher Kempley, Chief Counsel  
15 Legal Division  
16 ARIZONA CORPORATION COMMISSION  
17 1200 West Washington Street  
18 Phoenix, AZ 85007

19 Lyn Farmer, Chief Hearing Officer  
20 Hearing Division  
21 ARIZONA CORPORATION COMMISSION  
22 1200 West Washington Street  
23 Phoenix, AZ 85007

24 Ernest Johnson, Director  
25 Utilities Division  
26 ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, AZ 85007

**COPY of the foregoing sent via U.S. mail,**  
**postage prepaid, this 2nd day of April, 2003:**

23 Tim Wetherald  
24 3025 S. Parker Road, Suite 1000  
25 Aurora, CO 80014

*On Systems Technology, LLC*  
*The Phone Company of Arizona Joint Venture*  
*The Phone Company of Arizona, LLP*  
*The Phone Company Management Group, LLC*  
*d/b/a The Phone Company Management*  
*Group, LLC*

1 Timothy Berg  
Theresa Dwyer  
2 FENNEMORE CRAIG  
3 3003 N. Central Avenue, Suite 2600  
Phoenix, AZ 85003-2913

*Qwest Corporation*

4 Mark Brown  
5 QWEST CORPORATION  
6 3033 N. 3rd Street, Suite 1009  
Phoenix, AZ 85012

*Qwest Corporation*

7 Jeffrey Crockett  
8 SNELL & WILMER  
One Arizona Center  
9 400 E. Van Buren  
Phoenix, AZ 85004

*The Phone Company of Arizona*

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**BEFORE THE ARIZONA CORPORATION COMMISSION**

MARC SPITZER  
Chairman  
JAMES M. IRVIN  
Commissioner  
WILLIAM A. MUNDELL  
Commissioner  
JEFF HATCH-MILLER  
Commissioner  
MIKE GLEASON  
Commissioner

UTILITIES DIVISION STAFF,  
Complainants,

vs.

LIVEWIRENET OF ARIZONA, LLC,  
Respondents,

THE PHONE COMPANY MANAGEMENT  
GROUP, LLC,  
Respondents,

THE PHONE COMPANY OF ARIZONA JOINT  
VENTURE d/b/a THE PHONE COMPANY OF  
ARIZONA,  
Respondents,

ON SYSTEMS TECHNOLOGY, LLC, and its  
Principles, TIM WETHERALD, FRANK  
TRICAMO and DAVID STAFFORD,  
Respondents,

THE PHONE COMPANY OF ARIZONA, LLP,  
and its members,  
Respondents.

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

**AFFIDAVIT OF TIM WETHERALD**



1 Tim Wetherald, first being duly sworn, deposes and states:

2 1. I am Manager of The Phone Company Management Group, LLC ("PCMG"),  
3 which holds a Certificate of Convenience and Necessity ("CCN") from the Arizona  
4 Corporation Commission ("Commission") for local exchange service.

5 2. I am also Manager of On Systems Technology, LLC ("On Systems  
6 Technology"), which owns all the membership interests in PCMG.

7 3. On Systems Technology acquired PCMG's membership interest in January 2002  
8 from LiveWire Networks, LLC.

9 4. The Phone Company of Arizona, LLP ("Arizona LLP") was aware of On  
10 Systems Technology's purchase of PCMG, and after the purchase, participated in decisions  
11 concerning PCMG's offering of local exchange service in Arizona in anticipation of PCMG's  
12 operations being transferred to The Phone Company of Arizona Joint Venture ("Joint  
13 Venture"), a joint venture between On Systems Technology and the Arizona LLP upon  
14 Commission approval. Moreover, the Management Committee of the Arizona LLP  
15 participated in management decisions with On Systems Technology concerning the offering of  
16 service by PCMG in anticipation of such service being offered by the Joint Venture upon  
17 Commission approval of applications of PCMG to discontinue service and the Joint Venture on  
18 a CCN as a part of a seamless transfer of a customer base from PCMG to the Joint Venture.  
19

20 5. Prior to PCMG's commencement of service, PCMG obtained a Bond for Utility  
21 Users ("Bond") in accordance with the Commission's Decision No. 63382, issued February 16,  
22 2001. The Bond was obtained on February 19, 2002, from The First United Bank, Aurora,  
23 Colorado, as a result of On Systems Technology pledging its own Certificate of Deposit for  
24  
25  
26

1 \$100,000 as security for the Bond, and execution of the Security Agreement, in favor of The  
2 First United Bank.

3           6.       Thereafter, the Arizona LLP submitted a second Certificate of Deposit for  
4 \$100,000 to support the Bond, but failed to execute a security agreement in favor of The First  
5 United Bank so that the Bank could seize this certificate in the event of a default on the Bond.  
6 Accordingly, since I had already executed a Security Agreement in favor of the Bank in  
7 connection with On Systems Technology's Certificate of Deposit of \$100,000 to collateralize  
8 the Bond, the Bank demanded that my name be placed on the Arizona LLP's Certificate of  
9 Deposit also supporting the Bond. Thus, the Bank would not have to obtain a new security  
10 agreement from the Arizona LLP and would have the Bond fully collateralized. Accordingly,  
11 my name was placed on the Arizona LLP's Certificate of Deposit at the direction of The First  
12 United Bank.  
13

14           7.       On December 11, 2002 in accordance with the terms of the Bond, the First  
15 United Bank gave notice to PCMG that the Bond would expire on February 19, 2003. A copy  
16 of the Bank's notification to PCMG was also sent to the Commission.  
17

18           8.       At the time PCMG received the notice, the Commission had not scheduled a  
19 hearing on the October 2002 Complaint filed by the Staff against PCMG, and since PCMG had  
20 60 days to renew the Bond, PCMG decided not to renew the Bond until it learned whether the  
21 Commission would revoke its CCN after hearing on the Staff's Complaint. At the January 7,  
22 2003 pre-hearing conference, Judge Philips ordered a hearing on the Staff's Complaint to begin  
23 February 24. PCMG decided to wait before renewing the Bond until the hearing was  
24 completed. Thereafter, the hearing was continued on several occasions and is now set for  
25 April 15, 2003.  
26

