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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MARC SPITZER-Chairman  
JIM IRVIN  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
MIKE GLEASON

Arizona Corporation Commission

DOCKETED

JUN 23 2003

AZ CORP COMMISSION  
DOCUMENT CONTROL

DOCKETED BY *CH*

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

**MOTION TO DISMISS ALL COUNTS OF THE AMENDED COMPLAINT AGAINST THE PHONE COMPANY OF ARIZONA, LLP**

**(EXPEDITED ORAL ARGUMENT REQUESTED)**

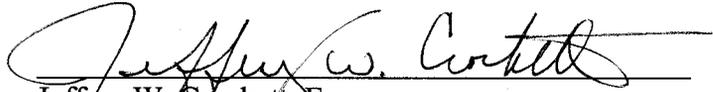
Pursuant to Rules 12(b)(1) and 12(b)(6), Arizona Rules of Civil Procedure, The Phone Company of Arizona, LLP, through its counsel undersigned, hereby submits its Motion to Dismiss all Counts of the Amended Complaint against The Phone Company of Arizona, LLP, in the above-captioned proceeding. This motion is supported by the pleadings and papers on file herein and the attached Memorandum of Points and Authorities, which is incorporated herein by this reference.

Snell & Wilmer

LLP  
LAW OFFICES  
One Arizona Center, 400 E. Van Buren  
Phoenix, Arizona 85004-2202  
(602) 382-6000

1 RESPECTFULLY submitted this 23rd day of June, 2003.

2 SNELL & WILMER

3 

4 Jeffrey W. Crockett, Esq.

5 One Arizona Center

6 400 East Van Buren

7 Phoenix, Arizona 85004-2202

8 Attorneys for Respondent The Phone Company of Arizona, LLP

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. FACTUAL BACKGROUND**

11 On October 18, 2002, the Utilities Division Staff ("Staff") of the Arizona Corporation  
12 Commission ("Commission") filed a Complaint and Petition for Relief (the "Complaint") against  
13 LiveWireNet of Arizona, LLC, The Phone Company Management Group, LLC, The Phone  
14 Company of Arizona Joint Venture, doing business as The Phone Company of Arizona, On  
15 Systems Technology, LLC, and its principal, Tim Wetherald, Frank Tricamo and David Stafford  
16 Johnson, and The Phone Company of Arizona, LLP (also referred to herein as the "LLP"). Since  
17 the filing of the Complaint, the various parties to this proceeding have participated in substantial  
18 discovery. On June 2, 2003, Staff filed its amended complaint (the "Amended Complaint") in the  
19 above-captioned docket.

20 **II. LEGAL ARGUMENT**

21 The Commission should dismiss all five counts of the Amended Complaint against The  
22 Phone Company of Arizona, LLP, because none of the allegations of wrongdoing or requests for  
23 relief derive from actions of the LLP or its partners, and therefore, the Amended Complaint fails  
24 to state any cause of action upon which relief can be granted. Furthermore, the Commission lacks  
25 subject matter jurisdiction over the complaint as applied to The Phone Company of Arizona, LLP,  
26

1 because the LLP is not a public service corporation, and the Commission’s jurisdiction to hear  
2 complaints under A.R.S. § 40-246 is limited to complaints against public service corporations.

3 **A. Commission Lacks Subject Matter Jurisdiction.**

4 Staff correctly states in its Amended Complaint that the Commission has jurisdiction to  
5 hear complaints against public service corporations pursuant to A.R.S. § 40-246, and that the  
6 Commission has jurisdiction to supervise and regulate public service corporations pursuant to  
7 Article XV of the Arizona Constitution and Title 40 of the Arizona Revised Statutes. A “public  
8 service corporation” is defined (in relevant part) in Article XV, Section 2 of the Arizona  
9 Constitution as “[a]ll corporations other than municipal engaged in...transmitting messages or  
10 furnishing public telegraph or telephone service....” However, Staff has not alleged that The  
11 Phone Company of Arizona, LLP, or any of its partners, is a public service corporation. In fact,  
12 The Phone Company of Arizona, LLP, has not applied for nor obtained a certificate of  
13 convenience and necessity (“CC&N”) in Arizona or any other jurisdiction. Moreover, Staff has  
14 not alleged any conduct on the part of The Phone Company of Arizona, LLP, or its partners that  
15 would render the LLC a public service corporation. Since Staff’s stated basis for jurisdiction in  
16 this proceeding is the Commission’s jurisdiction to hear complaints against public service  
17 corporations, there can be no jurisdiction over The Phone Company of Arizona, LLP, which is  
18 not a public service corporation. Accordingly, The Phone Company of Arizona, LLP, hereby  
19 requests that the Commission dismiss all counts against the LLP pursuant to Rule 12(b)(1) of the  
20 Arizona Rules of Civil Procedure for lack of subject matter jurisdiction.

21 The Phone Company of Arizona, LLP, notes that Staff did not oppose the LLP’s prior  
22 motion to dismiss the Complaint, as discussed below in Section II.B.1., and there is no reason to  
23 believe that Staff would oppose this motion to dismiss the Amended Complaint.

24 . . . .  
25 . . . .  
26 . . . .

1           **B.    Staff's Amended Complaint Fails to State a Claim Against The Phone**  
2           **Company of Arizona, LLP, Upon Which Relief Can Be Granted.**

- 3           1.    **COUNT ONE.   The Phone Company of Arizona (and Tim**  
4           **Wetherald and On Systems Technology, using The Phone**  
5           **Company of Arizona as their alter ego) advertised, offered and**  
6           **provided telephone service without a CC&N in violation of**  
7           **A.R.S. § 40-281 and applicable laws, orders, rules and**  
8           **regulations of the Commission.**

9           Count One of Staff's Amended Complaint must be dismissed under Rule 12(b)(6) of the  
10          Arizona Rules of Civil Procedure because Count One fails to state any cause of action against  
11          The Phone Company of Arizona, LLP, or any of its partners. Specifically, Count One fails to  
12          allege that The Phone Company of Arizona, LLP: (i) is a public service corporation subject to the  
13          Commission's jurisdiction under A.R.S. § 40-246, the Arizona Constitution or Title 40 of the  
14          Arizona Revised Statutes; (ii) is a public service corporation subject to A.R.S. § 40-281;  
15          (iii) advertised telephone service for sale in Arizona; (iv) offered telephone service for sale in  
16          Arizona; (v) provided telephone service for sale in Arizona; (vi) failed to comply with any  
17          Arizona law, including A.R.S. § 40-281; or (vii) failed to comply with any rule, regulation or  
18          order of the Commission. Dismissal is appropriate if "it appears beyond a doubt that the [Staff]  
19          can prove no set of facts which would entitle [Staff] to relief." Mintz v. Bell Atl. Sys. Leasing  
20          Int'l, Inc., 183 Ariz. 550, 556, 905 P.2d 559, 565 (Ct. App. 1995) (quoting 5A C. Wright & A.  
21          Miller, Federal Practice and Procedure § 1357, at 325 (1990)). When deciding whether a party  
22          fails to state a claim under Rule 12(b)(6), the Commission's inquiry regarding the legal  
23          sufficiency of the claim is limited to the contents of the complaint. See id. In its Amended  
24          Complaint, Staff has not identified The Phone Company of Arizona, LLP, as a wrong-doer, and  
25          Staff has certainly not alleged any facts that would support such a claim against the LLP. To the  
26          contrary, Staff stated in a prior filing in this docket--*and after substantial discovery*--as follows:

Staff does not oppose the dismissal of the complaint against The Phone Company of Arizona, LLP. At the time Staff's complaint was filed the legal relationship between The Phone Company of Arizona, LLP and other parties was not clear.

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Based on facts now known to Staff, Staff believes there is no legal relationship between The Phone Company of Arizona, LLP and The Phone Company Management Group, LLC. The Phone Company of Arizona, LLP is no longer a necessary party to this action. Staff no longer believes The Phone Company of Arizona, LLP is guilty of any of the allegations as set forth in Staff's Complaint. Additionally, Staff's testimony does not provide for recommendations directed toward The Phone Company of Arizona, LLP. The Phone Company of Arizona, LLP's request [to be dismissed] should be granted. (*Staff's Response to Qwest's Motion for Clarification, LiveWireNet's Motion to Dismiss and The Phone Company of Arizona, LLP's Motion to Dismiss Complaint* at page 4, April 7, 2003) (emphasis added).

Obviously, Staff is the entity which brought the Complaint and the Amended Complaint against the respondents in this proceeding. Thus, Staff's conclusion that The Phone Company of Arizona, LLP, is not guilty of any of the allegations contained in the Complaint (or the Amended Complaint) should be dispositive. Perhaps more importantly, due process requires that a party knows of the charges that he or she will face. In this case, there are no charges against The Phone Company of Arizona, LLP, and the LLP has no way to prepare for the complaint proceeding.

The Administrative Law Judge raised a question earlier regarding whether Respondent Tim Wetherald may have been a general partner of The Phone Company of Arizona, LLP. However, Travis Credle, the Chairman of the Managing Partners Committee of the LLP, clarified this point in his sworn affidavit filed April 11, 2003, in this docket, a copy of which is attached hereto as Attachment "A." According to Mr. Credle, Mr. Wetherald is not now nor has he ever been a general partner of the Phone Company of Arizona, LLP. In addition, the LLP's Colorado counsel further clarified this fact in a filing with the Arizona Secretary of State dated May 19, 2003, which was filed June 2, 2003, in this docket, and a copy of which is attached as Attachment "B." Thus, there is no basis to attribute any of the alleged misconduct of Mr. Wetherald or his various business enterprises to the LLP, and Staff has not attempted to make such an attribution in its Amended Complaint.

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2. **COUNT TWO. The Phone Company of Arizona, The Phone Company Management Group and/or On Systems Technology and Tim Wetherald, are not fit or proper entities to provide telephone service in Arizona in a violation of A.R.S. § 40-361(B).**

Count Two of Staff's Amended Complaint must likewise be dismissed under Rule 12(b)(6) because Count Two fails to state any cause of action against The Phone Company of Arizona, LLP, or any of its partners. Specifically, Count Two fails to allege that The Phone Company of Arizona, LLP: (i) is a public service corporation subject to the Commission's jurisdiction under A.R.S. § 40-246, the Arizona Constitution or Title 40 of the Arizona Revised Statutes; (ii) is a public service corporation subject to A.R.S. § 40-361(B); (iii) has violated any requirement of A.R.S. § 40-361(B); (iv) possesses a CC&N or has ever applied for a CC&N; or (v) is an unfit or improper entity to provide telephone service in Arizona. Since Staff has not alleged that The Phone Company of Arizona, LLP, has a CC&N, has applied for a CC&N, or is providing telephone service in Arizona, the LLP's fitness is irrelevant. If The Phone Company of Arizona applies for a CC&N at some time in the future, Staff will have the opportunity to assess the LLP's fitness to provide telephone service at that time.

Staff also asserts in Count Two that the CC&N of The Phone Company Management Group, LLC, should be revoked since the company is no longer a fit and proper entity to provide telephone service in Arizona. The Phone Company of Arizona, LLP, has no ownership interest in or legal relationship to The Phone Company Management Group (formerly LiveWireNet of Arizona, LLC), and Staff has not alleged any such interest or relationship. Thus, no interest of the LLP is affected by the relief requested by Staff under Count Two.

1                   3.     **COUNT THREE. The Phone Company Management Group**  
2                   **and The Phone Company of Arizona are not financially**  
3                   **capable of providing service in Arizona in violation of A.R.S. §**  
4                   **40-361(B).**

5                   Count Three of Staff's Amended Complaint must likewise be dismissed under Rule  
6                   12(b)(6) because Count Three fails to state any cause of action against The Phone Company of  
7                   Arizona, LLP, or any of its partners. Specifically, Count Three fails to allege that The Phone  
8                   Company of Arizona, LLP: (i) is a public service corporation subject to the Commission's  
9                   jurisdiction under A.R.S. § 40-246, the Arizona Constitution or Title 40 of the Arizona Revised  
10                  Statutes; (ii) is a public service corporation subject to A.R.S. § 40-361(B); (iii) has violated any  
11                  requirement of A.R.S. § 40-361(B); (iv) possesses a CC&N or has ever applied for a CC&N; or  
12                  (v) is financially unable to provide telephone service in Arizona. Since Staff has not alleged that  
13                  The Phone Company of Arizona, LLP, has a CC&N, has applied for a CC&N, or is providing  
14                  telephone service in Arizona, the LLP's financial ability to provide telephone service is irrelevant.  
15                  If The Phone Company of Arizona applies for a CC&N at some time in the future, Staff will have  
16                  the opportunity to assess the LLP's financial ability to provide telephone service at that time.

17                  Staff also asserts in Count Three that the CC&N of The Phone Company Management  
18                  Group, LLC, should be revoked due to its financial inability to provide telephone service in  
19                  Arizona. As stated above, The Phone Company of Arizona, LLP, has no ownership interest in or  
20                  legal relationship to The Phone Company Management Group (formerly LiveWireNet of  
21                  Arizona, LLC), and Staff has not alleged any such interest or relationship. Thus, no interest of  
22                  the LLP is affected by the relief requested by Staff under Count Three.

23                   4.     **COUNT FOUR. The Phone Company Management Group**  
24                   **and/or The Phone Company of Arizona lack the technical**  
25                   **capability to provide telephone service in Arizona in violation**  
26                   **of A.R.S. § 40-361(B).**

Count Four of Staff's Amended Complaint must likewise be dismissed under Rule 12(b)(6) because Count Four fails to state any cause of action against The Phone Company of

1 Arizona, LLP, or any of its partners. Specifically, Count Four fails to allege that The Phone  
2 Company of Arizona, LLP: (i) is a public service corporation subject to the Commission's  
3 jurisdiction under A.R.S. § 40-246, the Arizona Constitution or Title 40 of the Arizona Revised  
4 Statutes; (ii) is a public service corporation subject to A.R.S. § 40-361(B); (iii) has violated any  
5 requirement of A.R.S. § 40-361(B); (iv) possesses a CC&N or has ever applied for a CC&N; or  
6 (v) is technically unable to provide telephone service in Arizona. Since Staff has not alleged that  
7 The Phone Company of Arizona, LLP, has a CC&N, has applied for a CC&N, or is providing  
8 telephone service in Arizona, the LLP's technical ability to provide telephone service is  
9 irrelevant. If The Phone Company of Arizona applies for a CC&N at some time in the future,  
10 Staff will have the opportunity to assess the LLP's technical ability to provide telephone service  
11 at that time.

12 Staff also asserts in Count Four that the CC&N of The Phone Company Management  
13 Group, LLC, should be revoked due to the technical inability to provide reasonable and adequate  
14 telephone service in Arizona. As stated above, The Phone Company of Arizona, LLP, has no  
15 ownership interest in or relationship to The Phone Company Management Group (formerly  
16 LiveWireNet of Arizona, LLC), and Staff has not alleged any such interest or relationship. Thus,  
17 no interest of the LLP is affected by the relief requested by Staff under Count Four.

18 **5. COUNT FIVE. The Phone Company Management Group,  
19 The Phone Company of Arizona, On Systems Technology and  
20 Tim Wetherald have acted in contempt and willful violation of  
several Commission orders.**

21 Count Five of Staff's Amended Complaint must likewise be dismissed under Rule  
22 12(b)(6) because Count Five fails to state a cause of action against The Phone Company of  
23 Arizona, LLP, or any of its partners. Specifically, Count Five fails to allege that The Phone  
24 Company of Arizona, LLP: (i) is a public service corporation subject to the Commission's  
25 jurisdiction under A.R.S. § 40-246, the Arizona Constitution or Title 40 of the Arizona Revised  
26 Statutes; (ii) acted in contempt or willful violation of any Commission decision, including

1 Decision No. 63382; (iii) acted in contempt or willful violation of any Commission order,  
2 including the procedural orders dated February 25, 2003, March 3, 2003, April 11, 2003 and May  
3 15, 2003; or (iv) is guilty of any violation, willful or otherwise, of any statute, decision, order,  
4 rule or regulation that would subject the LLP to fines or penalties under A.R.S. §§ 40-424 and  
5 425. To the contrary, The Phone Company of Arizona, LLP, has cooperated fully with the  
6 Commission's investigation by attending multiple procedural conferences, answering questions  
7 and submitting responses to multiple sets of data requests from Staff. Moreover, representatives  
8 from the LLP has consistently stated that they will participate in this docket as witnesses and will  
9 provide whatever other information Staff of the Commission may need in resolving the issues in  
10 this docket. However, there is simply no basis to keep the LLP in this complaint proceeding as a  
11 respondent.

12 **III. CONCLUSION.**

13 For the foregoing reasons, The Phone Company Management Group requests that the  
14 Commission dismiss all counts of the Staff's Amended Complaint against the LLP because the  
15 Commission does not have jurisdiction over the LLP and the Amended Complaint fails to state  
16 any cause of action upon which relief can be granted.

17 RESPECTFULLY submitted this 23rd day of June, 2003.

18 SNELL & WILMER

19 

20 Jeffrey W. Crockett, Esq.

21 One Arizona Center

22 400 East Van Buren

23 Phoenix, Arizona 85004-2202

Attorneys for Respondent The Phone Company of Arizona, LLP

24 ONE ORIGINAL and fifteen (15) copies  
25 of the foregoing motion were filed  
26 with Docket Control this 12th day of  
June, 2003.

1 A COPY of the foregoing motion to  
2 dismiss was hand-delivered this  
23rd day of June, 2003, to:

3 Philip J. Dion, Administrative Law Judge  
4 Hearing Division  
ARIZONA CORPORATION COMMISSION  
5 1200 West Washington Street  
Phoenix, Arizona 85007

7 A COPY of the foregoing motion to dismiss was  
mailed this 12th day of June, 2003, to:

8 Ernest Johnson, Director  
9 Utilities Division  
ARIZONA CORPORATION COMMISSION  
10 1200 West Washington Street  
Phoenix, Arizona 85007

12 Maureen Scott, Staff Attorney  
Gary H. Horton, Staff Attorney  
13 Legal Division  
ARIZONA CORPORATION COMMISSION  
14 1200 West Washington Street  
Phoenix, Arizona 85007

16 Marty Harper, Esq.  
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17 3636 North Central Avenue  
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18 Phoenix, Arizona 85012

19 Mark Brown, Staff Attorney-Policy and Law  
20 QWEST CORPORATION  
4041 North Central, 11th Floor  
21 Phoenix, Arizona 85012

22 David Stafford Johnson, Esq.  
23 740 Gilpin Street  
Denver, Colorado 80218

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

Michael L. Glaser  
SHUGHART, THOMSON & KILROY  
1050 Seventeenth Street  
Suite 2300  
Denver, Colorado 80202



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CrockejPHX\1365146.1

# **ATTACHMENT A**

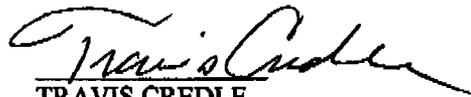
SWORN AFFIDAVIT OF TRAVIS CREDLE

STATE OF NORTH CAROLINA, COUNTY OF CHATELLET.

1. I, TRAVIS CREDLE, Affiant, being of lawful age and first duly sworn upon oath, depose and state that I have personal knowledge of the events and statements of fact described herein as follows:
2. I am the Chairman of the Managing Partners Committee of The Phone Company of Arizona L.L.P.
3. The Phone Company Of Arizona L.L.P. is a limited liability partnership formed pursuant to the provisions and in accordance with the requirements of law for the operation of a registered limited liability partnership in the State of Arizona.
4. The Phone Company of Arizona L.L.P. was formed in November 2001 pursuant to a written limited liability partnership agreement attached to this affidavit as Exhibit "A".
5. Tim Wetherald is not now, nor ever has been, a General partner of The Phone Company of Arizona L.L.P.
6. There is not now, nor has there ever been, any provisions for the establishment of, or authority given to, General Partners in the organizational structure of The Phone Company of Arizona L.L.P.
7. I heard the testimony given in open hearing on April 10, 2003 by Michael L. Glaser Esq., that Tim Wetherald is not now, nor ever has been, a General Partner, or Partner, of The Phone Company of Arizona L.L.P. and concur with that testimony based on personal knowledge that it is an accurate statement of fact.

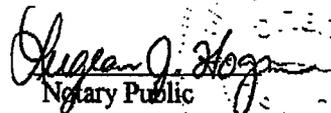
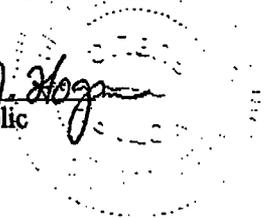
FURTHER THE AFFIANT SAYETH NAUGHT

SIGNED UNDER PENALTY OF PERJURY THIS 11 DAY OF APRIL, 2003

  
TRAVIS CREDLE

Subscribed and sworn to me this 11<sup>th</sup> day of APRIL, 2003, by TRAVIS CREDLE.

Witness my hand and official seal.

  
Notary Public  


My commission expires 3/29/2004

**EXHIBIT "A"**

APR-02-03 16:02

FROM-JOHNSON AND AUCOIN PC

9096744455

T-106 P.08/31 F-887

**PARTNERSHIP AGREEMENT**

**THE PHONE COMPANY OF ARIZONA, L.L.P.**

**AN ARIZONA LIMITED LIABILITY PARTNERSHIP**

**LIMITED LIABILITY  
PARTNERSHIP AGREEMENT  
THE PHONE COMPANY OF ARIZONA, LLP  
AN ARIZONA LIMITED LIABILITY PARTNERSHIP**

THIS LIMITED LIABILITY PARTNERSHIP AGREEMENT (the "Agreement") is entered into, and executed as of the \_\_\_\_ day of November, 2001, by and among those persons and/or entities identified on the various signature pages attached hereto (the "Partners").

**ARTICLE I - FORMATION AND BUSINESS**

**1.1 Formation.** The Partners hereby associate themselves in a limited liability partnership ("the Partnership") Agreement pursuant to the provisions and in accordance with the terms and conditions contained herein. Following the formation of the Partnership, the Partners shall register as a Limited Liability Partnership by filing a registration document with the Arizona Secretary of State and shall execute and file such further documents and take further action as shall be appropriate to comply with requirements of law for the operation of a registered Limited Liability Partnership wherever the Partnership transacts business.

**1.2 Business.** The business of the Partnership shall be for the purpose of obtaining required Arizona PUC CLEC, Competitive Local Exchange Carrier Licenses ("CLEC") and entering into necessary agreements to provide land line and/or wireless services, including cellular activations, pre-paid cellular and local dial tone programs, paging, the sales and service of wireless telephones, satellite communications and other forms of wireless communications and entertainment (the "Business"). Such Business will be done on a retail or wholesale basis in the territory of the State of Arizona or as permitted elsewhere. The Partnership shall acquire such property as may be appropriate to transact the Business and take all acts as may be appropriate to conduct the Business and may sell or otherwise dispose of the Business upon a decision of the Partners made in normal course.

**ARTICLE II - NAME AND PLACE OF BUSINESS**

**2.1 Name.** The Partnership Business and activities shall be conducted under the name "The Phone Company of Arizona, LLP". The location of the Partnership Business shall be determined by the Partners.

**2.2 Fictitious Name.** The Partnership may conduct business under another name if the Partnership's management deem it advisable, providing the Partnership complies with applicable laws.

**2.3 Nature of Partners' Interests.** The interests of the Partners in the Partnership shall be personal property for all purposes. All property owned by the Partnership, whether real or personal, tangible or intangible, shall be deemed to be owned by the Partnership as an entity, and no Partner shall have a personal ownership interest in such property.

**2.4 Title to Assets.** Title to assets acquired by the Partnership shall be held in the name of the Partnership. The Partners shall execute any and all documents as may be necessary to reflect the Partnership's ownership.

### ARTICLE III - DEFINITIONS

**3.1 Agreement.** "Agreement" means this Limited Liability Partnership Agreement, as amended from time to time.

**3.2 Distributable Cash.** "Distributable Cash" means the amount by which the total cash received by the Partnership from all sources exceeds the reasonable working capital requirements of the Partnership.

**3.3 Initial Managing Partner.** "Initial Managing Partners" shall mean the persons set forth in this Agreement.

**3.4 Non-Voting Units.** "Non-Voting" Units means the Units initially issued without voting rights. Upon bona fide sale of any of the Non-Voting Units to an individual or entity not affiliated with the initial owner who is subsequently admitted as a Partner, such Non-Voting Units shall convert to Voting Units upon payment to the Partnership of Three Thousand (\$3,000.00) Dollars.

**3.5 Units.** "Units" or "Unit" shall be both the Voting and Non-Voting Units and represent interest in the Partnership.

**3.6 Voting Units.** All Units other than Non-converted Non-Voting Units shall be "Voting Units."

### ARTICLE IV - CAPITALIZATION

**4.1 Capital Contributions.** The Partnership shall be made up of a maximum of Eighty (80) Units consisting of Fifty (50) Voting Units and Thirty (30) Non-Voting Units.

The Partnership shall issue up to Fifty (50) Voting Units in exchange for a cash contribution to the Capital of the Partnership and completion of the Subscription Documents. A minimum purchase for One (1) Unit shall be \$19,975.00 unless an exception is authorized by the Initial Managing Partners.

Each Partner's Capital Contribution for Unit(s) shall be held by the Partnership and expended for Partnership's Business purposes.

The Initial Managing Partners are Paul Meyer and Leon Swichkow. Paul Meyer shall receive One (1) Non-Voting Unit and Leon Swichkow One and One-Half (1 ½) Non Voting Unit for their compensation for serving as Initial Managing Partners. Non-Voting Units shall

have an agreed fair market value of Nineteen Thousand, Nine-Hundred Seventy-Five (\$19,975.00) Dollars each for the purpose of establishing Capital Contributions.

The Partnership Recruiter, Telecom Advisory Services, Inc., a Florida corporation, shall receive, in addition to another compensation it may be entitled to receive, Twenty-Seven and One-Half (27 ½) Non-Voting Units.

**4.2 Issuance of Units.** Upon the making of a contribution to the capital of the Partnership as provided herein, each Partner shall be issued a certificate representing the appropriate number of Units. Each Partner understands, acknowledges and agrees that his/her interest in the profits and losses of the Partnership as represented by a Unit shall be diluted to the extent additional Partners are admitted to the Partnership and additional Units are issued.

**4.3 Additional Units.** In the event that the Partnership is required to seek additional funding in order to carry out its Business in addition to any loans which may be obtained, a majority of the Voting Units, shall, at a meeting of Partners called for that purpose or upon written consent, authorize the sale of additional Voting Units beyond the Fifty (50) authorized Voting Units at a price or prices to be determined by such a majority vote. Provided, however, before the Partnership shall sell any additional Voting Units, it shall first offer each existing Partner the right, but not the obligation, to purchase additional Voting Units on a pro rata basis, which right shall expire ten (10) days after receipt of written notice of such right. The Partners who elect to purchase additional Voting Units shall have the additional right to purchase any unsubscribed Non-Voting Units. This additional right shall be on a pro-rata basis and such right shall expires ten (10) days after receipt of written notice of such rights. The exercise of all rights offered under this provision shall be in writing, delivered to the Managing Partners.

**4.4 No Withdrawal.** A Partner may not withdraw from the Partnership unless granted such permission by a majority vote of all Voting Partners. In such case a withdrawing Partner shall be entitled to be paid by the Partnership for his/her Units equal to the amount of the then current book value of the Unit(s) but in no case will the payment be greater than the initial Partner's capital contribution. The purchase price shall be evidenced by an unsecured promissory note payable in eight (8) equal quarterly payments with interest at six (6%) percent. The withdrawing Partner shall be responsible for any individual liabilities which may include any damages suffered by the Partnership as a result of the wrongful withdrawal.

**4.5 Interest.** No Partner shall receive any interest on his Capital Contributions in the Partnership.

#### ARTICLE V - ALLOCATION OF NET INCOME, NET LOSS OR CAPITAL GAIN

Except as may be expressly provided otherwise in this Agreement, and subject to the

pertinent provisions of the Internal Revenue Code, the net income (profit), net loss or capital gains of the Partnership for each fiscal year are to be allocated and apportioned among the Partners pro-rata in accordance with respective Units owned.

#### ARTICLE VI - DISTRIBUTION TO PARTNERS

6.1 **Timing of Distributions.** Distributions of distributable cash shall be made as determined by vote of the Voting Partners upon recommendation by the Managing Partner.

6.2 **In-Kind Distribution.** To the extent that non-cash assets are distributed to the Partners, the fair market value of such assets shall be determined as to its value and shall be distributed at its fair market value and may be considered a cash distribution.

6.3 **Assignment of Units.** If all or part of a Partner's Unit(s) under a transfer permitted by this Agreement, allocations relating to said Units for tax and accounting purposes shall be provided and allocated between the transferee and the transferor on the basis of the number of days during the period each was the holder of the Unit(s).

#### ARTICLE VII - MANAGEMENT OF PARTNERSHIP AFFAIRS

7.1 **Voting.** Whenever a vote, agreement, decision, action or determination regarding the management, operation or control of the Partnership is required to be made by the provisions of this Agreement or otherwise, a majority of the Voting Units shall constitute approval by the Partners unless otherwise provided in this Agreement. A vote may be cast in person, by telephone, in writing or by power of attorney to another Partner. A Partner who fails to vote on any matter after the receipt of notice to such Partner as required by this Agreement, shall be deemed to have given his/her power of attorney to the Managing Partners as a group to be voted as a majority decided. However, this Agreement may not be amended to alter the allocations to Partners made hereunder or to reduce the percentage interest required to approve any Partnership act without the written affirmation consent of at least two-thirds (2/3) of the all Partners affected by such action.

7.2 **Management.** Participation in the management of this Partnership is not a passive involvement. It is managed by the Partners themselves. Each Partner is required to actively participate in material business decisions affecting the Partnership by exercising his/its voting privileges. Each Partner has the right and agrees to participate in one or more committees which shall oversee and conduct important business. These committees may such as: Accounting and Tax, Advertising and Public Relations, Business Standards, Insurance Coverage, Legal Oversight, Partnership Communications/Newsletter, Planning, Budget and Finance, Sales and Marketing.

The Partnership will hold formal and informal committee and Partnership meetings utilizing

various methods of communications. The Partnership may elect to hold management meetings in select geographic areas including the Partnership's offices. Meetings will be open to attendance by all Partners whether in person, by conference telephone, or video teleconference or otherwise.

**7.3 Initial Managing Partner.** The Initial Managing Partners shall be Paul Meyer and Leon Swickow and they shall be responsible for managing the organizational structure, initial capitalization and administration of the Partnership and may otherwise conduct the Partnership's operations. The Initial Managing Partners shall be obligated to devote their best efforts (but not on an exclusive basis) to the Partnership affairs. The duties of the Initial Managing Partners shall terminate at the Initial Organizational Meeting.

**7.4 Partnership Recruiter.** The Partners agree to the hiring of a Partnership Recruiter to recruit qualified Partners. The Partnership Recruiter will receive compensation and reimbursement of expenses from the Partnership in the amounts indicated in the Offering documents and in this Agreement and shall be obligated to pay all costs related to sale of the Fifty (50) Voting Units. The Initial Managing Partners may act as the Partnership Recruiter or may be affiliated with a firm engaged by the Partnership Recruiter to locate qualified Partners provided that the terms of the engagement are the same as those of other firms engaged for the same purpose at arms length.

**7.5 Managing Partners.** The Partners may appoint up to five (5) Partners as business managers ("Managing Partners") to be responsible for managing the Partnership. The Managing Partners shall have the right to retain, hire or appoint a contracted management firm to assist the Managing Partners in the daily performance of the Partnership. The management firm appointed will be subject to a majority vote of the Managing Partners at the Partnership meeting at which the Managing Partners are elected.

**7.6 Compensation of Managing Partners.** Managing Partners may receive compensation for services as may be from time to time as agreed upon by the Partners. Managing Partners will receive reimbursement for reasonable expenses incurred to perform their duties and travel to designated meeting areas and in conducting Partnership Business.

**7.7 Partners' Management Responsibilities.** Each Partner agrees to devote such time and energy as is reasonably necessary to assist in the management of the Partnership's business and use his/her best efforts to make himself available for participation at Partnership meetings or in matters whether in person or by written consent.

**7.8 Contracted Management.** The Initial Managing Partners shall have the right to retain, hire or appoint a management contractor ("Management Firm") to assist the Partnership and Managing Partners in the daily duties of the Business. Such appointment by the Initial Managing Partners may not be longer than twenty-four (24) months from the

Commencement Date hereof and automatically renewable thereafter every two (2) years unless either party gives at least ninety (90) days written notice prior to the expiration of the initial or any renewal term, however, with the Partnership's right to terminate at any time on ninety (90) days written notice. The Management Firm will be compensated in the amounts indicated in the Offering documents and in this Agreement.

**7.9 Restrictions on Authority of Partners.** Without a vote of the Partners, a Partner, the Initial Managing Partners and the Managing Partners shall have no authority with respect to the Partnership and this Agreement to:

- (a) Do any act in contravention of this Agreement;
- (b) Do any act which make it impossible to carry on the Partnership Business;
- (c) Possess Partnership property or assign the right of the Partnership or its Partners in specific Partnership property for other than Partnership purpose;
- (d) Assign the Partnership property in trust for creditors or in the assignee's promise to pay the debts of the Partnership, confess a judgement, or admit a person as a Partner.

Without a vote of the Managing Partners or the Partners, no Partner may enter into any obligation involving a total obligation of the Partnership in an amount of Five Thousand (\$5,000.00) dollars or more.

**7.10 Liability and Indemnity of the Partners.** No Partner shall be liable to the other Partners for performance of any act or for his/her failure as long as he/she is not found by an applicable Court to be liable for fraud, gross negligence or bad faith in such performance or failure.

The Partnership shall indemnify, each Partner, any employee or agent of each Partner, and any Partnership employee, against any loss or threat of loss as a result of any claim or legal proceeding related to the performance or non performance of any act concerning the activities of the Partnership. Provided however, with respect to the subject matter of the claim or legal proceeding, this indemnification shall be effective only so long as any party against whom the claim is made is not liable for fraud, gross negligence, willful misconduct or bad faith in such performance or non-performance.

Furthermore, each Partner shall not be personally liable or accountable for any loss or threat of loss, as a result of any claim or legal proceeding of whatever nature, for such loss or threat

of loss arising from operative facts and events which occurred, prior in time, to admission of the Partner into the Partnership. The indemnification provided herein shall include payment of attorney's fees other expenses incurred in settling any claim or threatened action or incurred in any finally adjudicated legal proceeding, and the removal of any liens affecting any property of the indemnity shall be made from the assets of the Partnership.

All judgments against the Partnership, Partner, employee or entity entitled to indemnification shall first be satisfied from Partnership assets. No Partner shall have liability to any other Partner if, upon audit, the Internal Revenue Service disallows any deduction or allocation taken by the Partnership, or if any governmental regulatory agency determines that any action taken by the Partnership or any Partners on behalf of the Partnership violates any State or Federal regulatory provision. The indemnification provided by this Section is specifically intended to apply not only to each Partner but also to the Initial Managing Partners.

**7.11 Meeting of Partners.** The Partners shall hold regular meeting at times and places to be selected by the Initial or Managing Partners. The initial organizational meeting shall be held no later than sixty (60) days following the sale of the fiftieth (50<sup>th</sup>) Voting Unit. Any Partner may waive notice of or attendance at any meeting, or may execute a signed written vote or consent.

Any Partner owning legal or beneficial interest therein, may engage in or possess an interest in any other business or venture of any nature and description independently or with others, including those which may be the same or similar to the Partnership Business and in direct competition therewith.

#### ARTICLE VIII - USE OF PROCEEDS

All monies raised by the Partnership for the Fifty (50) Voting Units will be expended generally as follows:

|                                                                |                  |             |
|----------------------------------------------------------------|------------------|-------------|
| <b>Gross Proceeds</b>                                          | <b>\$998,750</b> | <b>100%</b> |
|                                                                |                  |             |
| <b>Administration of escrow, compliance, legal, accounting</b> | <b>\$ 49,938</b> | <b>5%</b>   |
| <b>Commissions</b>                                             | <b>\$149,813</b> | <b>15%</b>  |
| <b>Marketing costs</b>                                         | <b>\$139,825</b> | <b>14%</b>  |
| <b>Partnership administration</b>                              | <b>\$ 39,950</b> | <b>4%</b>   |
| <b>Design, printing, shipping, etc.</b>                        | <b>\$ 69,224</b> | <b>7%</b>   |
| <b>Operating reserves</b>                                      | <b>\$150,000</b> | <b>15%</b>  |
| <b>Telephone company marketing, customer acquisition</b>       | <b>\$300,000</b> | <b>30%</b>  |
| <b>Telephone company equipment *</b>                           | <b>\$100,000</b> | <b>10%</b>  |

- \* any funds not used for equipments will be applied to marketing

#### ARTICLE IX - RESTRICTIONS ON TRANSFER OF UNITS

Except as provided below, no Partner ("Offeror") may sell, convey, assign, pledge, hypothecate, or encumber all or any portion of his/her Units, unless he/she first complies with the following conditions:

9.1 Time Limitations. No Partner shall transfer any Voting Units unless such transfer complies with local, State and Federal laws and regulations. Transfer or sale of any Units, assuming otherwise permitted herein, shall be permitted only on the final day of any given month.

9.2 Offer to Other Partners. All Voting Units, shall first be offered in writing to all other Partners at the price and on the terms on which they are proposed to be sold or transferred in a bona fide transaction. Such bona fide offer shall be displayed in a written form from the potential purchaser. Each Partner shall have thirty (30) days to either accept or reject the offer in writing. Failure to accept each offer in writing constitutes automatic rejection of the offer.

9.3 Permitted Transfers. Any Partner may, without the consent of other Partners, transfer or assign his/her Voting Units or Non Voting Units to other Partners. Non-Voting Units shall be freely transferrable to other Partners or third parties.

9.4 Conditions of Transfer. A duly executed and acknowledged written document of assignment must be filed with the Partnership. Such instrument shall set forth the date of transfer, number of Units assigned, name, address, social security number, or identification numbers of the new Unit owner(s). The transferring Partner must additionally:

- (a) Execute all other instruments as the Managing Partners deem necessary, and
- (b) Meet all other conditions set forth in this Agreement.

#### ARTICLE X - TERM

10.1 Term. The Partnership shall commence on the date of this Agreement (or the earliest date permitted by applicable law) and shall be dissolved on the earlier of (a) written Agreement by all Partners, (b) dissolution for any reason that may be set forth herein, or (c) twenty five (25) years from the date hereof unless extended by majority vote of the Partners.

## ARTICLE XI - DEFAULT BY A PARTNER

**11.1 Default.** A Partner's failure to make, when due, any contributions or advance required under the terms of this Agreement and the continuance of that failure for fourteen (14) business days after the Partnership notifies the Partner of the failure in writing, or a violation of any other provision in this Agreement and failure to remedy the violation within fourteen (14) business days after notice of the violation from the Partnership or other Partners, shall constitute a default hereof.

**11.2 Effect of Default.** Upon a Partner's default, the Partnership and the Partners shall have the right to expel the defaulting Partner without effecting a termination or dissolution of the Partnership. The Partnership or the non-defaulting Partners may make this election at any time within six (6) months from the date of default, upon fourteen (14) day written notice of such election to the defaulting Partner provided that default is continuing on the date notice is given. All non-defaulting Partners who elected to terminate the defaulting Partner shall be required to purchase such Units, pro-rata, in the proportion that their individual Units bear to the aggregate of all Units held by non-defaulting Partners being expelled. The purchase price for the defaulting Partner's interest shall be paid in cash or, at Purchasing Partners' option, by execution and delivery of the Partner's note payable to the order of the defaulting Partner in the amount of the purchase price. Any purchasing Partner's note shall bear interest at the rate of One (1%) Percent over the then current published prime rate at the time of the signing of the note and shall be payable in twenty four (24) equal, consecutive monthly installments of principal and interest. The first payment shall be made one month from the date of execution and delivery of the note and with such note may be prepared without penalty.

The purchase price shall be reduced by any outstanding debt. Upon receipt of the purchase price, cash or note, the defaulting Partner shall have no further interest in the Partnership, its Business, or assets, and shall execute and deliver any assignments and other instruments necessary to evidence and effectively transfer the interest of the defaulting Partner to the Purchasing Partners.

If necessary assignments and instruments are not promptly delivered after notice by the Partnership that the consideration is available to the defaulting Partner, the Partnership may deliver such consideration to the defaulting Partner and execute such assignments and instruments as the defaulting Partner's irrevocable agent. All Partners agree that any Partner who exercises the rights of the Partnership on its behalf under this section shall not be individually liable for any actions so taken. The assignments or transfer of a defaulting Partner's interest shall not relieve such Partner from any personal liability for outstanding obligations relating to the Partnership which may exist on the date of the assignment or transfer. A Partner's default shall not relieve any other Partner from liabilities and obligations under this Agreement. A defaulting Partner's Units shall not be considered in any Partnership voting required.

**11.3 Option to Cure Defaults.** Any Partner may cure another Partner's default after providing all Partners with seven (7) days written notice of intent to cure and actually cures such default within thirty (30) days after the defaulting Partner received Notice of Default without obligation to cure future defaults.

## ARTICLE XII - DISSOLUTION

**12.1 Causes of Dissolution.** The Partnership shall be dissolved on the earliest to occur of the following:

- (a) The failure of the Partnership to maintain any License as contemplated herein.
- (b) Any event stated in Article IX or any event provided by law.

Provided that when a new Partner is admitted to the Partnership or a person ceases to be a Partner, the remaining Partners shall be deemed to have agreed to continue the Business of the Partnership under the terms of this Agreement unless Partners holding a majority of the Voting Units vote to allow the Partnership to be dissolved and such vote occurs within ninety (90) days of the event otherwise causing dissolution. Upon the occurrence or such an event, the Partnership shall promptly provide notice to all Partners.

**12.2 Closing the Partnership.** Upon a dissolution of the Partnership, the Initial Managing Partner, the Managing Partners, or, in the event there are none, the person(s) elected by the Partners, shall take full account of the Partnership assets and liabilities, shall liquidate the assets as promptly as is consistent with obtaining fair market value thereof, and shall apply and distribute the proceeds therefrom in the following order: (i) creditors, (ii) for contingent or unforeseen liabilities, (iii) Partners and former Partners to satisfy liabilities for distributions owed prior to dissolution, (iv) any balance to Partners in accordance with their capital accounts.

## ARTICLE XIII - ACCOUNTING/TAX

**13.1 Method of Accounting.** At all times during the existence of the Partnership, the Partnership shall keep full and true books of account into which shall be entered fully and accurately each transaction of the Partnership. All tax and accounting elections will be binding upon the Partners.

**13.2 Partnership Accounts.** All Partnership funds shall be deposited in its name accounts maintained at whatever institution as directed and approved by a vote of the Partners. The Initial Managing Partners are authorized to establish any account in or not in the Partnership name for deposit therein of Capital Contributions or funds received from the sale of Units only.

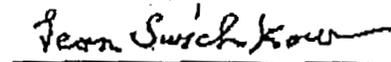
**13.3 Books and Records.** Proper books and records shall be kept recording all Partnership transactions. The books shall be kept in a manner agreed upon by the Partners. The books and records shall identify any and all property in which the Partnership has an interest.

- (a) Has received and executed a copy of the subscription Agreement attached hereto as Exhibit B;
- (b) Understands the authority to manage and control the Partnership's Business and its assets are vested in the Partners, including the appointment and removal of the Managing Partners;
- (c) Understands that the success of the Partnership's Business will depend upon the active participation and involvement in Partnership matters of all Partners, and undertakes and agrees to devote such time and energy as is reasonably necessary to assist in the management of the Partnership's Business and make his/herself available for participation at Partnership meetings or in actions by written consent; and
- (d) Has sufficient experience and knowledge of business affairs to allow him/her to intelligently exercise his/her responsibilities and obligations as a Partner.

In Witness Whereof, the Partners have entered into this Agreement as of the date aforesaid.

Initial Managing Partners

  
 \_\_\_\_\_  
 Paul Meyer

  
 \_\_\_\_\_  
 Leon Swichkow

Acknowledged, agreed to and joined into by the individual partner on the date set forth.

Partners:

Date: \_\_\_\_\_

Print Name: \_\_\_\_\_

# **ATTACHMENT B**

MAY-28-03 11:55

FROM-JOHNSON AND AUCOIN PC

3036744455

T-230 P.02/03 F-231

## JOHNSON AND AUCOIN, P.C.

### COUNSELORS AND ATTORNEYS AT LAW

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\*Admitted in Colorado only

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◊Admitted in Colorado and Wyoming  
\*Of Counsel in Louisiana

May 19, 2003

Secretary of State  
Limited Partnerships  
1700 West Washington, 7<sup>th</sup> Floor  
Phoenix, AZ 85007

Re: The Phone Company of Arizona, LLP  
Secretary of State File Number: 4001811

To Whom it May Concern:

Enclosed please find an original and duplicate copy of the Limited Partnership Amendment to Certificate; Restatement with respect to the above-captioned matter. Also enclosed is this firm's check in the amount of \$13.00 for the filing fee, along with a self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact this office at 303-674-4414. Thank you for your assistance in this matter.

Very truly yours,

JOHNSON AND AUCOIN, P.C.

  
George C. Aucoin, Jr.  
PWJ:ko  
Enclosures  
cc: Mr. Steven Petersen

Jan Brewer  
Secretary of State  
Limited Partnerships  
1700 West Washington 7<sup>th</sup> Fl  
Phoenix, Arizona 85007



Secretary of State Use:

Make Check Payable to:  
Secretary of State  
Fee: \$10.00  
Plus \$3.00 per page  
SUBMIT IN DUPLICATE with a self-addressed, stamped envelope.

All correspondence regarding this filing will be sent to the principal address of the partnership.

**LIMITED PARTNERSHIP AMENDMENT TO CERTIFICATE; RESTATEMENT  
A.R.S. §29-309**

The Phone Company of Arizona, LLP 4001811  
Name of the Limited Partnership Secretary of State file number  
Date the Certificate of Limited Partnership was filed: November 23, 2001

The amendment to the Certificate of Limited Partnership is as follows:

Pursuant to A.R.S. 29-309(c), the Certificate is hereby amended to reflect  
that Tim Wetherald is not and never has been a General Partner or Limited  
Partner or Managing Partner of The Phone Company of Arizona, LLP.

The admission of a new general partner:

Name Address  
Signature Printed name

The withdrawal of a general partner:

Name of general partner to be removed

Name of agent for service of process Phone Number

Arizona address of agent (PO Box or C/O are unacceptable) City State Zip

A restated certificate of limited partnership shall be specifically designated in its heading and shall state, either in the heading or in an introductory paragraph, the limited partnership's present name, and, if it has been changed, all of its former names and the date of filing of its original certificate of limited partnership.

Steven Peterson - Managing Partner Steven Peterson  
Signature of at least one general partner Printed name  
*limited liability*