

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

2003 JUL 31 P 2:54

AZ CORP COMMISSION
DOCUMENT CONTROL

1
2 **MARC SPITZER**
Chairman
3 **JIM IRVIN**
Commissioner
4 **WILLIAM A. MUNDELL**
Commissioner
5 **JEFF HATCH-MILLER**
Commissioner
6 **MIKE GLEASON**
Commissioner

Arizona Corporation Commission
DOCKETED

JUL 31 2003

DOCKETED BY *CAR*

7
8 UTILITIES DIVISION STAFF,
Complainant,

9 vs.

Docket No. T-03889A-02-0796
T-04125A-02-0796

10 LIVEWIRENET OF ARIZONA, LLC n/k/a THE
11 PHONE COMPANY MANAGEMENT GROUP, LLC;
12 THE PHONE COMPANY OF ARIZONA JOINT
13 VENTURE, d/b/a/ THE PHONE COMPANY OF
14 ARIZONA; ON SYSTEMS TECHNOLOGY, LLC, and
its principals, TIM WETHERALD, FRANK TRICAMO,
DAVID STAFFORD, MARC DAVID SHINER and
LEON SWICKOW; THE PHONE COMPANY OF
ARIZONA, LLP and its members

15 Respondents.

Docket No. T-04125A-02-0577

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

Docket No. T-03889A-02-0578

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

Docket No. T-03889A-03-0152

23 IN THE MATTER OF THE APPLICATION OF THE
24 PHONE COMPANY MANAGEMENT GROUP, LLC
25 FOR CANCELLATION OF FACILITIES BASED AND
RSOLD LOCAL EXCHANGE SERVICES.

Docket No. T-03889A-03-0202

26 IN THE MATTER OF THE APPLICATION OF THE
27 PHONE COMPANY MANAGEMENT GROUP, LLC
28 d/b/a/ THE PHONE COMPANY FOR THE
CANCELLATION OF ITS CERTIFICATE OF
CONVENIENCE AND NECESSITY.

**STAFF'S RESPONSE TO LLP'S
MOTION TO DISMISS**

1 **I. Introduction**

2 On June 23, 2003, The Phone Company of Arizona, LLP, (“LLP”) moved through counsel to
3 have all Counts of the Amended Complaint against LLP dismissed. LLP argues the Counts must be
4 dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Arizona Rules of Civil Procedure because
5 (1) the Commission lacks jurisdiction over the subject matter of the case, and (2) Staff has failed to
6 state a claim upon which relief can be granted. Contrary to LLP’s claims, the Arizona Corporation
7 Commission does have subject matter jurisdiction over the LLP and the amended complaint does
8 state a claim against LLP for which relief may be granted. LLP’s motion to dismiss should be
9 denied.

10 **II. The Commission has Subject Matter Jurisdiction over LLP as a Public Service**
11 **Corporation**

12 LLP first moves to have the complaint against it dismissed under Arizona Rules of Civil
13 Procedure Rule 12(b)(1) arguing that the Commission lacks jurisdiction over the subject matter
14 because the LLP is not a public service corporation. LLP admits that the Commission has
15 jurisdiction to hear complaints against public service corporations under A.R.S. § 40-246. Article
16 XV, Section 2 of the Arizona Constitution defines public service corporations as “[a]ll corporations
17 other than municipal engaged in ... transmitting messages or furnishing public telegraph or telephone
18 service....” The question then is whether LLP acted as a public service corporation by providing
19 telephone service in Arizona. Staff believes it did.

20 The LLP, and On Systems Technology, LLC formed the Phone Company of Arizona Joint
21 Venture d/b/a The Phone Company of Arizona (“Joint Venture”) on June 6, 2002. The agreement
22 forming the Joint Venture was entered into with the express purpose of “providing
23 telecommunications intraexchange and interexchange service to Arizona” through a variety of
24 technologies.¹ The LLP held a 70% interest in the Joint Venture. By providing telephone service as
25 a partner in the Joint Venture, LLP acted as a public service corporation in Arizona. Because LLP
26 acted as a public service corporation in Arizona, the Commission has jurisdiction over the subject
27 matter of this complaint and LLP’s motion to dismiss on those grounds should be denied.

28 ¹ See Attachment 1, LLP response to Staff Data Request 1-1 at ¶ 2.3 of attached agreement.

1 LLP in its motion states that it has never applied for or obtained a Certificate of Convenience
2 and Necessity ("CC&N"). But whether LLP ever applied for or obtained a CC&N is irrelevant to
3 determination of the Commission's jurisdiction. The Commission's power over public service
4 corporations is not dependent on the public service corporation having a CC&N. *Tonto Creek*
5 *Estates Homeowners Ass'n v. Arizona Corp. Comm'n*, 177 Ariz. 49, 58 (App. Div. 1 1993). The
6 Commission's power to regulate public service corporations is derived from the corporation's
7 performance of a public service. *Mountain States Tel. and Tel. Co. v. Arizona Corp. Comm'n*, 132
8 Ariz. 109, 114 (App. Div.1 1982).

9 The Phone Company of Arizona provided telephone service in Arizona. LLP subjected itself
10 to the Commission's jurisdiction by participating in the provision of telecommunications service as a
11 public service corporation through the Joint Venture, and its motion for dismissal under Rule 12(b)(1)
12 of the Arizona Rules of Civil Procedure, for lack of subject matter jurisdiction should be denied.

13 **III. The Amended Complaint States a Cause of Action Against LLP Upon Which Relief may**
14 **be Granted.**

15 Motions to dismiss for failure to state a claim upon which relief may be granted are
16 disfavored. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983) (motion to dismiss denied
17 despite improper retroactive application of statute in pleading); *Williams v. Williams*, 23 Ariz.App.
18 191, 194 (1975). The nonmoving party's allegations must be taken as true and all inferences must be
19 resolved in nonmoving party's favor. *Southwestern Paint & Varnish Co. v. Ariz. Dept. of*
20 *Environmental Quality*, 191 Ariz. 40, 41 (App. Div. 2 1997) review granted, affirmed in part 194
21 Ariz. 22. Here, Staff is the nonmoving party. Therefore, if the facts alleged in Staff's complaint will
22 allow relief from the LLP, the LLP's motion must be denied. When taken as true, the allegations
23 contained in all Counts of the amended complaint entitle the Commission to seek relief from LLP.
24 Therefore, LLP's motion under ARCP 12(b)(6) should be denied.

25 The LLP entered into an agreement making it a partner in the Joint Venture known as the
26 Phone Company of Arizona Joint Venture d/b/a The Phone Company of Arizona. The Joint Venture
27 and the Phone Company of Arizona are one and the same entity. Therefore, all allegations in the
28 amended complaint against The Phone Company of Arizona are allegations against the partners to the

1 Phone Company of Arizona including LLP.

2 Count One alleges that the "Respondents advertised and offered telephone service in Arizona
3 as 'The Phone Company of Arizona.'" The Phone Company of Arizona is the d/b/a of the Joint
4 Venture. As described above, the LLP was a general partner of the Joint Venture. Therefore, the
5 Count alleges that the LLP offered to and did provide telephone service in Arizona without the
6 CC&N required under A.R.S. § 40-482. If the allegation that LLP offered telephone service in
7 Arizona without a CC&N is taken as true, the Commission may seek relief in the form of fines or
8 sanctions for the LLP's illegal activities. Therefore, Count One of the amended complaint against the
9 LLP should not be dismissed.

10 Count Two alleges that the Phone Company of Arizona is not a fit and proper entity to
11 provide telephone service in Arizona. If true, the Phone Company of Arizona, and therefore LLP, is
12 in violation of A.R.S. Section 40-361(B) requiring the provision of adequate, efficient, and
13 reasonable service. If the Commission determines the Phone Company of Arizona is not providing
14 adequate, reasonable, or efficient service, the Commission may determine what is adequate,
15 reasonable, or efficient and enforce its determination through an order or regulation. See A.R.S § 40-
16 321. Because it must be viewed as true that The Phone Company is not a fit and proper entity to
17 provide service, Count Two should not be dismissed.

18 Count Three alleges that The Phone Company is not financially capable of continuing
19 operations in Arizona. If it is true, and it must be assumed to be true, that The Phone Company is not
20 financially capable of continuing operations in Arizona, the Commission may order relief under the
21 same statutes discussed in Count Two above. Therefore, Count Three should not be dismissed.

22 Count Four alleges The Phone Company of Arizona does not have the technical capability to
23 provide telephone service in Arizona. Taken as true, the Commission may order relief under the
24 statutes discussed in Count Two above. Count Four should not be dismissed.

25 Count Five alleges The Phone Company of Arizona has acted in contempt and willful
26 violation of several Commission orders. If true, the Commission may subject The Phone Company to
27 fines under A.R.S. §§ 40-424 and 40-425. Count Five should not be dismissed.

28

1 **IV. Conclusion**

2 The Commission has subject matter jurisdiction over the LLP because the LLP acted as a
3 public service corporation in Arizona by providing telephone service to Arizona consumers.
4 Therefore, Staff's amended complaint should not be dismissed for lack of subject matter jurisdiction.
5 Staff's amended complaint alleges facts, that if taken as true, will allow the Commission to seek
6 relief from the LLP. Therefore, Staff's amended complaint should not be dismissed for failure to
7 state a claim upon which relief may be granted. LLP's motion to dismiss should be denied.

8 RESPECTFULLY SUBMITTED this 31st day of July, 2003.

9 ARIZONA CORPORATION COMMISSION

10
11 By: 

12 Gary H. Horton
13 Attorney, Legal Division
14 1200 West Washington Street
Phoenix, Arizona 85007
(602) 542-6026

15 Original and **10** copies of the foregoing filed
16 this 31 day of July, 2003, with:

17 Docket Control
18 Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

19 Copy of the foregoing mailed this 31 day
20 of July, 2003, to:

21 Lyn Farmer
22 Chief Administrative Law Judge
Hearing Division
23 Arizona Corporation Commission
1200 West Washington
24 Phoenix, Arizona 85007

25 Ernest Johnson
26 Director, Utilities Division
Arizona Corporation Commission
1200 West Washington
27 Phoenix, Arizona 85007

1 Chairman Marc Spitzer
Commissioner Jim Irvin
2 Commissioner William A. Mundell
Commissioner Jeff Hatch-Miller
3 Commissioner Mike Gleason
4 Michael L. Glaser
Michael D. Murphy
5 1050 17th Street, Suite 2300
Denver, CO 80202
6 Attorneys for LiveWireNet of Arizona, et al
7 Tim Wetherald
3025 S. Park Road, Suite 1000
8 Aurora, CO 80014
9 David Stafford Johnson, Manager
4577 Pecos Street
10 P. O. Box 11146
Denver, CO 80211-0146
11 The Phone Company Management Group,
LLC n/k/a LiveWireNet of Arizona, LLC
12
13 Roald Haugan
Managing Partners Chairman
32321 County Highway 25
14 Redwood Falls, MN 56283
The Phone Company of Arizona, LLP
15
16 Travis & Sara Credle
3709 West Hedrick Drive
17 Morehead City, NC 28557
The Phone Company of Arizona, LLP
18
19 Jeffrey Crockett
Snell & Wilmer
One Arizona Center
20 400 East Van Buren
Phoenix, AZ 85004
21
22 Frank Tricamo
14231 E. 4th Avenue, Suite 360
Aurora, CO 80011
23

Steven Petersen
2989 Brookdale Drive
Brooklyn Park, MN 55444
The Phone Company of Arizona, LLP

Timothy Berg
Theresa Dwyer
Fennemore Craig
3003 N. Central, Suite 2600
Phoenix, AZ 85003-2913

Marty Harper
Kelly J. Flood
Shughart Thomson & Kilroy, P.C.
One Columbus Plaza
3636 N. Central, Suite 1200
Phoenix, AZ 85012
Attorneys for LiveWireNet of Arizona, et al

Mark Brown
Qwest Corporation
4041 N. Central, 11th Floor
Phoenix, AZ 85012

Thomas H. Campbell, Esq.
Lewis and Roca
40 North Central
Phoenix, AZ 85004
Attorneys for DJM

Leon Swichkow
2901 Clint Moore Road #155
Boca Raton, FL 33496

Marc David Shiner
4043 NW 58th Street
Boca Raton, FL 33496

Marc David Shiner
5030 Champion Blvd., Suite 6-198
Boca Raton, FL 33496

26 Nancy Roe
27
28