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BEFORE THE ARIZONA CORPORATION COMMISSION

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MARC SPITZER
Chairman
JAMES M. IRVIN
Commissioner
WILLIAM A. MUNDELL
Commissioner
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Commissioner
MIKE GLEASON
Commissioner

Arizona Corporation Commission

DOCKETED

OCT 17 2003

DOCKETED BY *CAJ*

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ARIZONA CORPORATION COMMISSION
REGISTRATION CONTROL

UTILITIES DIVISION STAFF,

Complainants,

vs.

LIVEWIRENET OF ARIZONA, LLC,
Respondents,

THE PHONE COMPANY MANAGEMENT
GROUP, INC

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
JOHNSON

Respondents,

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

Respondents.

DOCKET NO. T-03889A-02-0796
T-04125A-02-0796
T-04125A-02-0577
T-03889A-02-0578
T-03889A-03-0152
T-03889A-03-0202

**SUPPLEMENTAL TESTIMONY AND
MOTION TO DISMISS DAVID
STAFFORD JOHNSON**

1 COMES NOW, David Stafford Johnson ("**Johnson**"), and pursuant to A.R.S. 12(b)(6)
2 and 56, respectfully moves the Arizona Corporation Commission to receive Supplemental
3 Testimony for an Order dismissing David Stafford Johnson as a Respondent from this action
4 as follows: :

5
6 1. The Staff of the Utilities Division of the Arizona Corporation Commission
7 ("**Staff**") brought its Complaint ("**Complaint**") against The Phone Company Management
8 Group, LLC, f/k/a LiveWireNet of Arizona, LLC ("**PCMG**"), On Systems Technology, LLC
9 ("**On Systems**"), and its principals, Tim Wetherald, Frank Tricamo, and David Stafford
10 Johnson, on October 21, 2002. The Staff specifically named Johnson as an individual
11 Respondent. At no time was Johnson interviewed, contacted or consulted prior to the filing of
12 the Complaint. At the time of filing of the Complaint, Johnson was not an owner, member,
13 manager nor in any other manner affiliated with any of the other Respondent in these matters.

14 2. In its Complaint, the Staff questioned the adequacy of PCMG's service to its
15 customers, its compliance with applicable laws, and financial viability, and asserts four claims
16 for relief. See Complaint, Paragraphs 8-45.

17
18 3. None of those allegations or claims in the Complaint directly named or
19 implicated Johnson in any manner whatsoever. Instead, the Staff merely identifies Johnson as
20 a member of On Systems, without making any specific allegations against Johnson. See
21 Complaint, Paragraphs 7,12. In the Direct Testimony of John F. Bostwick ("**Bostwick Direct**
22 **Testimony**"), submitted to the Commission on March 28, 2003, Mr. Bostwick clarified Staff's
23 understanding by indicating that "*On Systems Technology, LLC owns all the membership*
24 *interest in PCMG...Mr. Wetherald is the principal of On Systems Technology, LLC ... which*
25 *manages Mile High Telecom Joint Venture. ...Thus, management responsibility for the multi-*
26 *state, multi-company operations of the complies listed above is apparently all managed by one*
man." See Bostwick Direct Testimony p. 12. And on Page 10 of his Direct Testimony, Mr.

1 Bostwick states that *“LiveWireNet or the Phone Company Management Group, dba The Phone*
2 *Company, was an entity that was owned by On Systems and Mr. Tim Wetherald.”*

3
4 4. Mr. Bostwick, in his Direct Testimony, mentions Johnson’s name only once,
5 stating only that *“It is interesting to note that David Stafford Johnson who is listed in*
6 *correspondence as the President of T-COMM was at one time affiliated with the Phone*
7 *Company Management Group.”* See P. 26 of Bostwick Direct Testimony. Mr. Bostwick
8 acknowledges in his Direct Testimony a letter of resignation submitted by Johnson on February
9 1, 2002 as manager of PCMG, months before any services were provided to any customers in
10 the State of Arizona. The timing of this resignation is consistent with the sale by Live Wire
11 Networks, Inc. of LiveWireNet of Arizona, LLC (“LWN”) to On Systems on January 10, 2002
12 and the filing by PCMG of an application on January 30, 2002 in Docket No. T-03889A-02-
13 0080 requesting a name change, both of which events were acknowledged by Mr. Bostwick in
14 his Direct Testimony. In his affidavit submitted with his Motion to Dismiss filed in this matter
15 in May, 2003 (“**Johnson Affidavit**”), Johnson acknowledged that he was a co-manager of
16 LWN prior to its sale to On Systems, but resigned immediately upon conclusion of that sale,
17 which was months before any service was provided in the State of Arizona by PCMG. Johnson
18 was never a member of LWN nor of PCMG, a fact now undisputed by Staff.

19 5. Mr. Bostwick, in his Direct Testimony, made five findings, none of which
20 mentioned Johnson’s name nor implicated Johnson in any manner whatsoever. See p. 31 of
21 Bostwick Direct Testimony. Mr. Bostwick, in his Direct Testimony, made five
22 recommendations for action, again none of which mentioned Johnson’s name nor implicated
23 Johnson in any manner whatsoever. See p. 31 of Bostwick Direct Testimony. Johnson submits
24 that it is difficult to respond to a complaint when no specific allegations are made against him,
25 and the only testimony submitted in support of even naming Johnson as a Respondent was the
26 comment made by Mr. Bostwick in his Directed Testimony described in Paragraph 4. above.

1 6. Without being informed of the specific allegations against him, Johnson
2 nevertheless filed a Motion to Dismiss with this Commission on May 12, 2003, claiming, in
3 relevant part, that even if all the Counts in the Complaint were taken as true, and even if such
4 Counts named Johnson, the allegations are not sufficient to support any claim against Johnson
5 because the Staff had failed to allege that Johnson participated in or was aware of any of the
6 events that form the bases of its Complaint, and that the Staff had failed to assert any claims
7 upon which Johnson could otherwise be held personally responsible under the Commission
8 rules.

9 7. Staff filed a Response to Johnson's Motion to Dismiss on May 22, 2003, stating
10 in relevant part that despite the testimony included in the Bostwick Direct Testimony described
11 in Paragraph 3. above, (i) a filing with Staff on July 31, 2002 indicated Johnson was a minority
12 member of PCMG, and that fact alone was sufficient for Johnson's Motion to Dismiss to be
13 denied; (ii) Johnson was a "*representative*" of LWN at the time of the purchase LWN by On
14 Systems, arguing that somehow that status, which was terminated months before any services
15 were provided in the State of Arizona, implicates Johnson; and (iii) that Johnson was a
16 member of On Systems and as such Johnson was subject to the jurisdiction of this Commission
17 in this matter, without other justification.

18 8. Johnson submitted a letter to this Commission and to Staff on May 30, 2003
19 ("**Johnson Letter**") clarifying the ownership status of On Systems and PCMG. In response to
20 item (i) in Paragraph 7., Johnson attached to the Johnson Letter affidavits from Mr. Wetherald
21 ("**Wetherald Affidavit**") and Johnson ("**Johnson Supplemental Affidavit**") stating that the
22 document referred to by Staff in its aforementioned response was in error, and that Johnson was
23 never a member of PCMG and was not a current member of On Systems, which state of facts is
24 consistent with the Direct Testimony of Mr. Bostwick. Attached to this Motion as **Attachment**
25 **1** is an Affidavit from Mr. Tad Miller who prepared the filing referred to by Staff in it
26 Response to Johnson's earlier Motion to Dismiss, and which confirms each of the Wetherald

1 and Johnson Supplemental Affidavits in stating that Johnson was never a member nor manager
2 of PCMG. Staff has apparently accepted this conclusion by not repeating its allegation in the
3 Amended Complaint.

4
5 9. In response to Item (ii) in Paragraph 7. above, attached to this Motion as
6 **Attachment 2** is an Affidavit from Mr. Hinsdale of LWN stating that Johnson was never a
7 member of LWN and never involved with the original application by LWN for a Certificate of
8 Convenience and Necessity in Arizona ("**Hinsdale Affidavit**"). The Hinsdale Affidavit also
9 states that LWN never provided any services to any customer in the State of Arizona. Johnson
10 has previously submitted the Johnson Supplemental Affidavit evidencing his resignation as co-
11 manager of LWN months before any services were provided to customers in the State of
12 Arizona, which resignation is confirmed in the Hinsdale Affidavit and the Wetherald
13 Supplemental Affidavit. Also attached as **Attachment 3** to this Motion is a Supplemental
14 Affidavit from Mr. Wetherald ("**Wetherald Supplemental Affidavit**") stating that after the
15 name change of LWN to PCMG, Johnson was not involved in any manner with the operations
16 or management of PCMG.

17 10. In response to item (iii) in Paragraph 7. above, the Wetherald Supplemental
18 Affidavit states that Johnson never was involved with the management or operations of On
19 Systems nor in any other manner involved with the matters before this Commission. Staff has
20 never alleged any specific actions or conduct of Johnson would indicate that Johnson had
21 anything to do with PCMG, On Systems of any other Respondent in this matter.

22 11. Staff filed an amended complaint on June 2, 2003 ("**Amended Complaint**"). In
23 its Amended Complaint, Staff alleged Five Counts, again none of which name or implicate
24 Johnson in any manner whatsoever. In its Amended Complaint, Staff did not identify Johnson
25 as a member of PCMG, but did identify Johnson as a member of On Systems during what Staff
26 calls "*relevant times*", which is undefined. See Paragraph 5. of Amended Complaint.

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2 In the **First Count of the Amended Complaint**, Staff requests that the Phone Company of
3 Arizona and its owner and manager be subject to fines. Johnson is not named in this Count.
4 Johnson is in no manner nor has he ever been associated or affiliated with the Phone Company
5 of Arizona, nor has Staff ever alleged same.

6 In the **Second Count of the Amended Complaint**, which again does not name Johnson, Staff
7 requests that the PCMG CC&N be revoked, a matter rendered moot by the voluntary surrender
8 of the CC&N by PCMG on April 3, 2003.

9
10 In the **Third Count of the Amended Complaint**, again which does not name Johnson, Staff
11 again requests that the PCMG CC&N be revoked. See foregoing paragraph.

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13 In the **Fourth Count of the Amended Complaint**, which again does not name Johnson, Staff
14 for the third time requests that the PCMG CC&N be revoked. See foregoing paragraph.

15
16 Finally, in the **Fifth Count of the Amended Complaint**, which does not name Johnson, Staff
17 requests that the Phone Company of Arizona, PCMG, On Systems and Mr. Wetherald be
18 subject to fines for willful violation of Commission orders. Johnson has in no manner
19 whatsoever been affiliated with any of these entities or individuals during the pendency of the
20 matters before this Commission.

21 Staff then attempts to implicate "*principals*" of On Systems on the theory that PCMG
22 and the Phone Company of Arizona, not On Systems, are the "*alter ego*" of those alleged
23 "*principals*". See Paragraph 31. of Amended Complaint. Staff makes no attempt whatsoever to
24 define the "*principals*". Staff has acknowledged that Johnson was never a member of PCMG
25 nor a manager of PCMG. Further Staff never alleges that Johnson had any involvement
26 whatsoever with the Phone Company of Arizona, and all facts before this Commission clearly

1 indicate that Johnson was never a manager of On Systems, was not even a member of On
2 Systems during the pendency of the matters before this Commission, and at no time had any
3 ownership, managerial or operational role. in any other Respondent in these matters. See
4 Paragraph 12. of Bostwick Direct Testimony, Paragraph 39 of Amended Complaint. Paragraph
5 3. of this Motion. Johnson Affidavit, Wetherald Affidavit, Johnson Supplemental Affidavit,
6 Wetherald Supplemental Affidavit. Johnson submits that he is not a "principal" as defined (or
7 undefined) by Staff, and therefore should be dismissed a Respondent in this matter.

8 12. This Court denied Johnson's Motion to Dismiss on September 9, 2003 without
9 explanation.

10
11 13. On October 8, 2003, Staff filed Supplemental Testimony of Adam J. Lebrecht
12 ("**Supplemental Testimony**"). Once again, Johnson is never even mentioned in the
13 Supplemental Testimony. On the contrary, the Supplemental Testimony, by its own
14 conclusions, confirms that PCMG, the Phone Company of Arizona and On Systems could not
15 possibly be deemed "alter egos" of Johnson. In fact, Mr. Lebrecht specifically states that he is
16 testifying in support of "... *Staff's findings that PCMG, is in contempt of the Arizona
17 Corporation Commission and that Tim Wetherald, as principle decision maker of PCMG and
18 its subsidiaries, should be personally responsible for any penalties and/or judgments against
19 him and the companies operated by PCMG.*" See page 1 of Supplemental Testimony. Mr.
20 Lebrecht indeed concludes that "*Wetherald, as the corporate president, part owner and control
21 person of ON Systems, made the decisions of ON Systems and its affiliates: PCMB, The Phone
22 Company of Arizona, etc. Because of Wetherald's status as the "mastermind" of ON Systems
23 et al. operations, Staff believes he should be personally responsible for the payment of
24 \$1,865,000, and permanently enjoined from doing business related to the provision of
25 telecommunications services in Arizona.*" See pages 2-3 of Supplemental Testimony. Not
26 only is Johnson not named and no action is recommended affecting Johnson in the
Supplemental Testimony, Mr. Lebrecht clearly concludes that Johnson in no manner

1 | whatsoever could be viewed as dominating or controlling the actions of PCMG, The Phone of
2 | Arizona or On Systems.

3 |
4 | 14. Arizona Rule of Civil Procedure 12(b)(6) provides that a party may assert by
5 | motion the defense of failure to state a claim upon which relief can be granted. Further, "if
6 | matters outside the pleading are presented to and not excluded by the court [on a 12(b)(6)
7 | motion], the motion shall be treated as one for summary judgment and disposed of as provide
8 | in Rule 56." *E.g., Donlann v. MacGurn*, 55 P.3d 74, 76 n. 1 (Ariz. App. 2002) (stating that a
9 | motion to dismiss that references outside materials is to be treated as a motion for summary
10 | judgment).

11 | 15. Arizona Rule of Civil Procedure 56 provides: "A party against whom a claim,
12 | counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time,
13 | move with or without supporting affidavits for a summary judgment in the party's favor as to all
14 | or any part thereof." *E.g., Joel Erik Thompson, Ltd. v. Holder*, 965 P.2d 82, 85 n. 3 (Ariz. App.
15 | 1998) (noting that if a trial court considers affidavits in support of a motion to dismiss, the
16 | court's ruling is treated as a one of summary judgment).

17 |
18 | 16. In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the
19 | court must assume that truth of the allegations contained in the complaint. *See B.J. Logan v.*
20 | *Forever Living Products International, Inc.*, 52 P.3d 760 (Ariz. 2002); *see also Parks v.*
21 | *Macro-Dynamics, Inc.*, 591 P.2d 1005, 1007 (Ariz. App. 1979) ("A Rule 12(b)(6) motion to
22 | dismiss for failure to state a claim, which assumes the complaint's allegations are true, attacks
23 | the legal sufficiency of the complaint") (citations omitted).
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1 e. Johnson has no involvement or affiliation whatsoever with the Phone Company
2 of Arizona.

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4
5 18. Johnson's sole contact with the State of Arizona concerning PCMG is
6 insufficient for this Commission to have personal jurisdiction over him. For a non-resident to
7 be subjected to the jurisdiction of a foreign state, the activities in the foreign state must be
8 continuous, systematic and of a general business nature. *Helicopteros Nacionales de*
9 *Columbia, S.A. v. Hall*, 466 US 408, 104 Sup. Ct. 1868, 80 L. Ed. 2d 404 (1984). Although
10 Arizona's long-arm statute is very broad and is intended to allow Arizona to exert personal
11 jurisdiction over a non-resident to the maximum extent permitted by the federal Constitution,
12 *Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 367, 542 P.2d 24, 26 (1975), there are limits.
13 Mr. Johnson is a resident of the State of Colorado. Mr. Johnson held no ownership interest in
14 PCMG nor in its predecessor, LWN. Mr. Johnson held no operational or management role in
15 PCMG. Mr. Johnson held no managerial or operation role whatsoever in On Systems. Mr.
16 Johnson had no relationships whatsoever with the Phone Company of Arizona. Clearly, Mr.
17 Johnson's sole contact with the State of Arizona cannot be the basis for general jurisdiction
18 (defendant's contacts with the forum state are substantial or continuous and systematic enough
19 that the defendant may be hauled into court in the forum, even for claims unrelated to the
20 defendant's contacts with the forum, *see Helicopteros Nacionales*. When a defendant's
21 activities in the forum state are not so pervasive as to subject it to general jurisdiction, the court
22 may still find specific jurisdiction, but only if: (1) defendant purposefully avails himself of the
23 privilege of conducting business in the forum; (2) the claim arises out of or relates to the
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1 defendant's contact with the forum; and (3) the exercise of jurisdiction is reasonable. *See Shute*
2 *v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990), *rev'd on other gds*, 499 U.S. 585
3 (1991).

4 Federal courts have disagreed about the strength of the causal relationship that must
5 exist between the defendant's forum activity and the plaintiff's claim. Some courts require that
6 the defendant's contact with the forum be the proximate cause of the injury, while others have
7 adopted the test that plaintiff must show its injury would not exist "but for" the defendant's
8 forum activities. *Compare, e.g., Pizarro v. Hoteles Concorde Int'l*, 907 F.2d 1256, 1260 (1st
9 Cir. 1990) with *Shute, supra*. In regard to this Motion, however, the result is the same under
10 either of these tests: Johnson's limited contact with the State of Arizona was neither the
11 proximate cause of any injury claimed by Staff, nor can Staff show that its claimed injury
12 would not exist if the Johnson's contact had not occurred. In fact, Staff has not even named
13 Johnson in any Count brought in its original Complaint nor in its Amended Complaint, nor has
14 Staff implicated Johnson in any way in any matter before this Commission in either the
15 Bostwick Direct Testimony or in its Supplemental Testimony. Under these circumstances,
16 this Commission lacks personal jurisdiction over Johnson and he should be dismissed.
17
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19 20 21 **Commission Lacks Subject Matter Jurisdiction**

22 19. Staff correctly states in its Amended Complaint that the Commission has
23 jurisdictions to hear complaints against public service corporations pursuant to ARS 40-246,
24 and that the Commission has jurisdiction to supervise and regulate public service corporations
25 pursuant to Article XV of the Arizona Constitution and Title 40 of the Arizona Revised
26 Statutes. A "public service corporation" is defined (in relevant part) in Article XV, Section 2

1 of the Arizona Constitution as *"all corporations other than municipal engaged in*
2 *....transmitting messages or furnishing public telegraph or telephone service ..."*

3 Staff has not alleged that Johnson is a public service corporation. Staff has
4 acknowledged that Johnson is neither a member nor manager of PCMG, nor a manger of On
5 Systems. Furthermore, Staff has not alleged any conduct on the part of Johnson that would
6 render Johnson a public service corporation., nor has Staff alleged any conduct on the part of
7 Johnson that would violate ARS 40-424 et seq. Since Staff's stated basis for jurisdiction in the
8 proceeding is the Commission's jurisdiction to hear complaints against public service
9 corporations, there can be no jurisdiction over Johnson, who is not a public service corporation.
10 In addition, since Staff has not alleged any conduct of Johnson that fails to observe or comply
11 with any order, rule or requirement of the Commission or any Commissioner as required by
12 ARS 40-424. This Commission therefore has no subject matter jurisdiction over Johnson and
13 accordingly, Johnson hereby requests that the Commission dismiss all counts against Johnson
14 pursuant to Rule 12(b)(1) of the Arizona Rules of Civil Procedure for lack of subject matter
15 jurisdiction.

16 **Staff's Amended Complaint Fails to State a Claim Against Johnson Upon Which Relief**
17 **Can be Granted.**

18 This motion is ultimately premised as one simple notion – in order to be liable, a party
19 needs to have done something wrong. Staff never alleges that Johnson did anything wrong. In
20 fact, Johnson never did anything, and based on the affidavits attached to this Motion and
21 affidavits previously submitted to this Commission, was never in a position to do anything that
22 could result in a violation of ARS 4-424 et seq. As against Johnson, as a matter of law, this
23 case is meritless, and should be dismissed.

24 20. Staff's original Complaint and Amended Complaint fail to adequately advise
25 Johnson of any allegations asserted against him, and Staff's Complaint, as Amended, should
26 therefore be dismissed as to Johnson. While Johnson is a named Respondent, Staff at no time

1 interviewed, contacted or consulted Johnson prior to the filing of the Original Complaint, and
2 have made no effort to contact Johnson since. In neither the Original Complaint nor in the
3 Amended Complaint has Johnson been named in any Count brought by Staff. Staff, in neither
4 the Bostwick Direct Testimony nor in its Supplemental Testimony, described any action or
5 involvement by Johnson in any matter related to this Complaint, as Amended. On the contrary,
6 all evidence submitted in these matters indicate that during all relevant times Johnson was not a
7 member of any other Respondent in this action, was not a manager of any other Respondent in
8 this matter, and was in no other manner involved with any other Respondent in the matters
9 described in the Complaint, as Amended. ARS 40-424 et seq. are very specific stating that "*If*
10 *any...person fails to observe or comply with any order, rule ore requirement of the commission*
11 *any commissioner,"* then such "*...person shall be in contempt of the commission and shall,*
12 *after notice and hearing before the commission, be fined by the commission in an amount not*
13 *less than one hundred nor more than five thousand dollars."* See ARS40-424. The rules
14 specifically require actual action and conduct on the part of an individual before a penalty can
15 occur. Staff has failed to allege any such action or conduct on the part of Johnson, nor that
16 Johnson violated in any manner ARS 40-424 et seq. Johnson should therefore be dismissed.

17 "Alter Ego" Theory Inapplicable as to Johnson

18 21. After failing to allege any involvement by Johnson in the matters before this
19 Commission in its Original Complaint, Staff then, without even mentioning Johnson's name
20 states in the Amended Complaint that "*Respondents Tim Wetherald, and On Systems and its*
21 *principals conducted the affairs of PCMG and The Phone Company of Arizona as their "alter*
22 *egos".* Staff, however, fails to define what it means by the term "*principle*", fails to set forth
23 any facts or basis which would even remotely tie Johnson to PCMG or The Phone Company of
24 Arizona as a "*principle*", and then fails to even attempt to address the factors which it has the
25 burden to address if it desires to tie Johnson to any of the Respondents in this matter under the
26 "*alter ego*" theory.

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2 22. Johnson submits that the rules of the Commission do not allow “*alter ego*”
3 arguments since they include other mechanisms for applying the rules of the Commission
4 against an individual officer or owner of a company. The rules allow for actions against
5 individuals associated with public service corporations (See ARS 40-424) and against
6 individuals associated with corporations which are not public service corporations (See
7 ARS40-427), but *only* if that individual violates any provisions of Chapter 40 of the Arizona
8 Revised Statutes, or any order, rule or requirement of the Commission. No such allegation has
9 ever been made by the Staff against Johnson. Johnson should therefore be dismissed.

10
11 23. However, even if the Commission allows an “*alter ego*” type argument, and
12 even if the allegations in the Complaint, as Amended, are taken as true, the allegations would
13 nevertheless be insufficient to support any claim against Johnson because (a) Staff has not even
14 named Johnson in the Counts listed in its Complaint, as Amended, (b) Staff has failed to allege
15 that Johnson participated in or was aware of any of the events that form the basis of its
16 Complaint, as Amended, and (c) Staff never asserts that Johnson took any action or undertook
17 any action which might have violated ARS 40-424 et seq., or in any other manner did anything
18 that would violate the orders or rules of the Commission. Staff has therefore failed to assert
19 claims upon which Johnson could otherwise be held personally responsible under the
20 Commission's rules.

21 24. If this Commission nevertheless determines to undertake a review of “*alter*
22 *ego*” arguments as they relate to Johnson, it is important to note that Staff has attempted to
23 implicate Johnson claiming “*PCMG and The Phone Company of Arizona*” are the “*alter egos*”
24 of the “*principals*” of On Systems. Staff never claims Johnson is a “*principal*”. In fact, Staff
25 claims just the opposite in the Bostwick Direct Testimony and in the Supplemental Testimony.
26 On this basis alone, Johnson should be dismissed as Respondent in this matter.

1
2 25. However, even if Staff were to somehow allege that Johnson is a "*principal*",
3 and thereby be responsible for the actions of PCMG and The Phone Company of Arizona, its
4 arguments would fail miserably. In order to establish "*alter ego*", the Staff must show both (1)
5 unity of control, and (2) observance of corporate form would sanction a fraud or promote
6 injustice. *Jabczenski v. Southern Pacific Memorial Hospital, Inc., 199 Ariz. 15, 579 P.2d 53*
7 (*App.1978*). The Jabczenski case states that two corporations can be regarded as the same if
8 "either the dominant corporation... so controls and uses the other as a mere tool or instrument in
9 carrying out its own plans and purposes that justice requires it be held liable for the results, or,
10 there is such a confusion of identities and acts as to work a fraud upon third persons." As the
11 party making the alter ego argument, Staff bears the burden of overcoming the statutory
12 presumption of corporate separateness by proving that the Commission should disregard such
13 separateness. Arizona decisions have identified several considerations as material to this issue,
14 including common officers or directors, payment of salaries and other expenses of subsidiary
15 by parent, failure to maintain formalities of separate corporate existence, similarity of corporate
16 logos, owners' making of interest-free loans to corporation, maintaining of corporate financial
17 records, commingling of personal and corporate funds, diversion of corporate property for
18 owners' personal use, observance of formalities of corporate meetings, intermixing of owners'
19 actions with those of corporation, and filing of corporate income tax returns.

19 26. Staff therefore must first show that there is unity of control between Johnson
20 and PCMG and The Phone Company of Arizona. As to PCMG and the Phone Company of
21 Arizona, Johnson never held any ownership interest, and therefore the theory of "*alter ego*" is
22 groundless. If Staff were to even allege such a tie, Staff would have to recant the testimony
23 submitted in its Supplemental Testimony which clearly states that Staff believes Wetherald, not
24 Johnson, has control over the relevant entities. Since Johnson is not an owner nor in any other
25 manner involved with PCMG or The Phone Company of Arizona, and since Staff has never
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1 even alleged any fact to establish any link between Johnson and PCMG and the Phone
2 Company of Arizona, Johnson should be dismissed as a Respondent in these matters.

3 Although Johnson was briefly a manager of LWN, his role in this entity was also very
4 limited, and he never was a member of LWN (*See Hinsdale Affidavit*). Moreover, Johnson's
5 limited activity in LWN took place before On Systems acquired LWN on January 29, 2002,
6 and before LWN under its new name PCMG provided any services to any customer in the State
7 of Arizona. Significantly, Johnson resigned his position with LWN upon the sale of LWN to
8 On Systems, months before any services were provided in the State of Arizona. Johnson was
9 never a signatory to any bank account of LWN nor of PCMG, was never a member of either,
10 and was never involved in the management and operations of LWN or PCMG (*See*
11 *Supplemental Wetherald Affidavit and Hinsdale Affidavit*). Johnson certainly never treated
either of these entities as his "*alter ego*" as alleged by Staff.

12 Further, Johnson was never involved in any respect whatsoever with the Phone
13 Company of Arizona as alleged by Staff. He was neither a member, participant, partner nor in
14 any manner involved or affiliated whatsoever with The Phone Company of Arizona nor any of
15 the activities of The Phone Company of Arizona. In fact, Staff has never alleged any specific
16 actions or conduct by Johnson that would indicated to the contrary in its Complaint, as
17 Amended, nor in any testimony submitted in this matter. On these bases alone, this Complaint,
18 as Amended, should be dismissed as to Johnson. As to Johnson, Staff clearly has presented no
19 evidence whatsoever that any of the Jabczenski factors exist which would make PCMG or the
20 Phone Company of Arizona the "*alter ego*" of even On Systems, much less Johnson.

21 27. However, even if the Commission was to determine that PCMG and the Phone
22 Company of Arizona were the "*alter egos*" of On Systems, there is clearly no evidence
23 whatsoever that On Systems was the "*alter ego*" of Johnson. It is well established that a
24 corporation is an entity created by statute with an existence separate and distinct from that of its
25 members or other related corporation or entities. Society has long benefited from and places a
26 high value on limiting corporate liability to the corporation itself. Arizona cases have indicated

1 that the concept of a corporation as a separate entity is a legal fact, not a fiction. *Washington*
2 *National Corp. v. Thomas*, 117 Ariz. 95, 570 P.2d 1268 (App. 1977). . The alter ego status is
3 said to exist *only* when there is such a unity of interest and ownership that the separate
4 personalities of the corporation and the owners cease to exist. *Dietel v. Day*, 16 Ariz. App.
5 206, 492 P.2d 455 (1972).

6
7 27. The facts of this case reveal that Staff, even if it made such allegations, cannot
8 satisfy the first element of the test because Johnson certainly is distinct and separate from On
9 Systems. **First**, Johnson neither owned the majority of On Systems membership interest nor
10 controlled On Systems. See Wetherald Supplemental Affidavit, Johnson Affidavit, Johnson
11 Supplemental Affidavit, and Johnson Letter. Staff acknowledges that Johnson only owned a
12 10% membership interest and on frequent occasion states that Wetherald owned and controlled
13 On Systems. See Paragraph 39 of Amended Complaint and Bostwick Direct Testimony. Staff's
14 Supplemental Testimony further confirms that Johnson had no control over On Systems. The
15 Wetherald Supplemental Affidavit specifically states that Johnson was never involved with the
16 management and operations of On Systems. Johnson clearly had neither dominant ownership
17 nor control of On Systems. If fact, the Colorado Public Utilities Commission, in a matter made
18 know to the Commission by the Staff in the Amended Complaint, recently, through a
19 Recommended Decision of Administrative Law Judge Dale E. Isley in Docket No. 02C-082T
20 dated September 23, 2003 ("**Colorado PUC Decision**"), after an exhaustive investigation and
21 extensive discovery, found only that "*Several months after being retained as Mile High's*
22 *manager, On Systems, again through Wetherald, retained a consultant, David Stafford*
23 *Johnson, to evaluate liability issues relating to it and the various partnerships it managed,*
24 *including Mile High.*" See Paragraph 25. of Isley Recommended Decision. Johnson was not a
25 named Respondent in the matters before Judge Isley, and in no other manner was identified by
26 Judge Isley as having been involved in any manner whatsoever with On Systems or other
Respondent.

Second, there is no allegation by Staff that On Systems did not follow the legal

1 formalities for a separate, independent corporation. On Systems was incorporated well before
2 it acquired the PCMG in January of 2002, and operated several businesses well before the
3 actions which lead to the matters before this Commission commenced.

4 **Third**, there is no commingling of funds between On Systems and Johnson. Both
5 Johnson and On Systems had separate and independent bank accounts. Johnson was never a
6 signatory on any bank account of On Systems.

7 **Fourth**, Johnson and On Systems do not have identical business locations or business
8 activities. While Johnson was provided office space at an On Systems location when advising
9 On Systems, his primary place of business was separate and distinct from On Systems.
10 Johnson maintained several other unrelated clients while also advising On Systems.

11 **Fifth**, Johnson has not used the corporate form of On Systems merely to avoid
12 liabilities, provide services for another, or conceal the true ownership of the corporation.
13 Johnson represented many other clients well before and during his involvement with On
14 Systems. Johnson only received an interest in On Systems after providing corporate structuring
15 advice to On Systems as a form of consideration for his advisory services. At no point did any
16 party involved with On Systems look to Johnson as the de facto manager of the On Systems.
17 In fact Staff, on frequent occasion, has testified to the contrary. See Bostwick Direct Testimony
18 and Supplemental Testimony.

19 **Sixth**, there is no diversion whatsoever of corporate property for Johnson's personal
20 use.

21 **Seventh**, Johnson and On Systems have at all times filed separate tax returns.

22
23 **Eighth**, Johnson never treated On Systems as his "*alter ego*" as alleged by Staff.
24 Instead, Johnson was merely a member who invested in On Systems, for a limited period of
25 time. In fact, for most of the relevant times with respect to the matters before this
26

1 Commission, and all times during the pendency of the matters currently before this
2 Commission, Johnson was not even a member of On Systems.

3 A review of these factors reveals that Staff cannot satisfy the first prong of the above
4 test of "*alter ego*" as it relates to Johnson. Far from the alignment of several factors required,
5 all of the factors reveal the distinct separateness of Johnson and On Systems. Staff has made
6 no attempt to address these factors in any of its filings, and has never contacted Johnson to even
7 inquire.

8
9 28. Staff also cannot satisfy the second element of the "*alter ego*" test as it relates to
10 Johnson, because it is not inequitable to uphold the legal separateness of Johnson from PCMG,
11 The Phone Company of Arizona, and On Systems, nor will any fraud or injustice result. The
12 purpose of disregarding the corporate entity is to prevent fraud – disregarding the corporate
13 form cannot be used to inflict an obligation on its innocent, minority members. **Bad faith in**
14 **one form or another must be shown prior to disregarding the separate corporate**
15 **existence.**

16 **First**, no bad faith on the part of Johnson has ever been alleged by Staff. Staff merely
17 contend that due to the alleged "*conduct of PCMG and the Phone Company of Arizona*", by the
18 "principals" he should therefore be held liable for the actions of PCMG and The Phone
19 Company of Arizona. Such reasoning is both legally and factually flawed. It is inequitable to
20 pierce the corporate veils of PCMG, The Phone Company of Arizona, and On Systems and
21 hold Johnson responsible for the activities which occurred leading to the matters before this
22 Commission because Johnson perpetrated **no bad faith** concerning the Commission, a core
23 element of any attempt to pierce any corporate veil, nor has any such bad faith even been
24 alleged by Staff.

25 **Second**, the mere fact that Staff contends that PCMG and the Phone Company of
26 Arizona have violated the rules and orders of the Commission is insufficient to hold Johnson

1 (a) Johnson was engaged by On Systems as a consultant in January of 2002 to provide
2 certain corporate structuring advice. *See* Colorado PUC Decision, Johnson Affidavit, Johnson
3 Supplemental Affidavit, Wetherald Supplemental Affidavit and Wetherald Affidavit. Prior to
4 that time, Johnson had no involvement with any of the other Respondents in this matter. As
5 consideration for his provision of the limited services for On Systems, Johnson was granted a
6 15.38% membership interest in On Systems. Johnson was never a manager of On Systems,
7 nor in any other manner involved with the operations or management of On Systems. *See*
8 Johnson Affidavit, Johnson Supplemental Affidavit, and Wetherald Supplemental Affidavit.
9

10 (b) Also in January of 2002, On Systems purchased all of the membership interests in LWN
11 from Live Wire Networks, Inc. At the time of the purchase, LWN was authorized pursuant to
12 Decision No. 63382 to provide facilities based and resold local and long distance in Arizona, a
13 decision granted by the ACC on February 16, 2001 pursuant to an application filed by Jim
14 Hinsdale on behalf of LWN. *See* Hinsdale Affidavit. While Johnson was a co-manager of
15 LWN at the time, he held no ownership interest in LWN, and served in a co-manager position
16 only for convenience purposes. LWN never provided any services to any customers in the
17 State of Arizona prior to its sale to On Systems in January, 2002. *See* Hinsdale Affidavit.
18 Johnson resigned his co-manager position in LWN immediately following its sale to On
19 Systems, again months before any services were provided in the State of Arizona. *See*
20 Hinsdale and Johnson Affidavits, Johnson Letter and Johnson Supplemental Affidavit.
21

22 (c) LWN changed its name to PCMG on January 30, 2002. Johnson has had no
23 involvement whatsoever in any capacity with PCMG since that time. *See* Johnson Affidavit,
24 Johnson Letter, Johnson Supplemental Affidavit, Wetherald Supplemental Affidavit and
25 Wetherald Affidavit.
26

1 (d) Johnson sold his remaining 10% membership interest in On Systems on August 14,
2 2002. Contemporaneous with that sale, Mr. Wetherald filed on behalf of The Phone Company
3 of Arizona Joint Venture dba The Phone Company of Arizona an application for a statewide
4 CC&N to provide resold long distance telecommunications services, resold local exchange
5 telecommunications services, and alternative operator services in Arizona. Johnson had no
6 involvement whatsoever in that application, and indeed did not even hold an ownership interest
7 in On Systems at any time subsequent to that application.

8 (e) Despite having more than a year to establish any role by Johnson in the matters before
9 this Commission, Staff has never included Johnson in any count in the Complaint and
10 Amended Complaint, has mentioned Johnson's name only once (in the Bostwick Direct
11 Testimony, *see also* paragraph 4. of this Motion) in any testimony submitted to this
12 Commission, has never alleged any violation whatsoever by Johnson of any rule, regulation or
13 order of this Commission, and has never alleged any fact that would indicate that Johnson in
14 any manner or form was involved with any matter before this Commission or in a position to
15 control or determine the actions of any other Respondent before this Commission in this matter.
16 In fact, Staff has concluded the contrary in its Supplemental Testimony. Staff has at no time
17 even attempted to interview, contact or consult Johnson concerning the matters before this
18 Commission.

1 30. Given that (i) Johnson's minimal contacts with the State of Arizona do not
2 provide personal jurisdiction over Johnson as to matters before this Commission; (ii)
3 this Commission lacks subject matter jurisdiction over Johnson since Staff has not
4 alleged nor established that Johnson is a "public service corporation"; has failed to
5 allege any facts that support any claim against Johnson in this proceeding or that
6 implicate Johnson in any manner with the matters before this Commission; and has
7 failed to allege any conduct whatsoever on the part of Johnson that violates ARS 40-284
8 et seq; and (iii) Staff has failed to satisfy any of the elements of the test which would
9 make PCMG, the Phone Company of Arizona or even On Systems the "*alter ego*" of
10 the undefined "*principles*" of On Systems, much less of Johnson, the Staff's Complaint,
11 as Amended, is insufficient as to Johnson, and Johnson should be dismissed as a
12 Respondent in these matters.

13
14 31. Johnson therefore requests an Order directing that Johnson be
15 dismissed with prejudice from the matters before this Commission, and an Order
16 directing the Commission to award Johnson reasonable fees and other expenses incurred
17 in this matter in accordance with ARS 41-1001.01 et seq.

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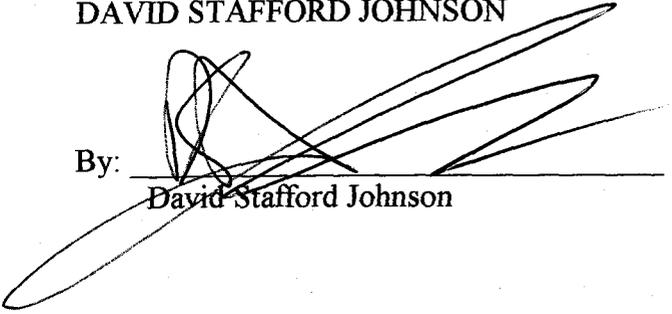
WHEREFORE, pursuant to A.R.S 12(b)(6) and 56, Johnson respectfully requests that he be dismissed from this action and summary judgment be granted as requested hereby..

DATED this 14th day of October, 2003.

Respectfully submitted,

DAVID STAFFORD JOHNSON

By:

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and long horizontal strokes, positioned over a horizontal line.

David Stafford Johnson

1 **ORIGINAL and 15 copies of the foregoing**
2 **sent via U.S. Mail, postage prepaid, this**
3 **14th day of October, 2003 to:**

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

8 **COPY of the foregoing sent via U.S. mail,**
9 **postage prepaid, this 14th day of October, 2003:**

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

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

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

25 Ernest Johnson, Director
26 Utilities Division
ARIZONA CORPORATION COMMISSION
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Tim Wetherald
3025 S. Parker Road, Suite 1000
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

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Timothy Berg
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Qwest Corporation

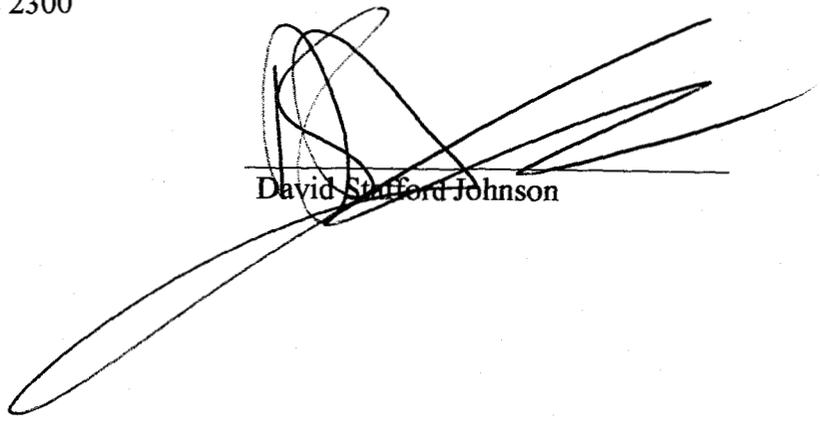
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The Phone Company of Arizona

Michael L. Glaser, Esq.
Shughart Thomson & Kilroy, P.C.
1050 17th Avenue, Suite 2300
Denver, CO 80265



David Stafford Johnson

Attachment 1

Affidavit of Tad Miller

AFFIDAVIT OF TAD MILLER

Tad Miller, being first duly sworn, deposes and states:

1. I am a resident of Denver, Colorado and I have personal knowledge of the matters set forth in this Affidavit
2. At all material times, I was a Paralegal for the law firm of Lottner Rubin Fishman Brown & Saul, P.C., which was counsel to On Systems Technology, LLC.
3. On or about July 29, 2002, under the direction of my supervising attorney, Michael L. Glaser, I prepared for execution and conveyed to the Arizona Corporation Commission a CC&N Application on or about July 29, 2002.
4. Attached to the Application was a list of the members of The Phone Company Management Group, LLC, which mistakenly listed Mr. David S. Johnson as a member of The Phone Company Management Group, LLC. Mr. Johnson was never a member of The Phone Company Management Group, LLC.

FURTHER AFFIANT SAYETH NOT.

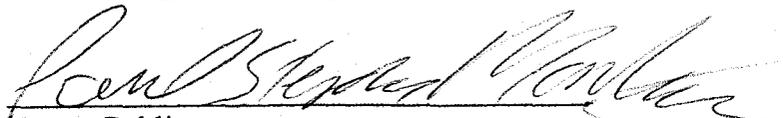


Tad Miller, Affiant

STATE OF COLORADO)
) ss
 COUNTY OF DENVER)

The foregoing was acknowledged before me this 22 day of September, 2002, by Tad Miller.

(SEAL)



Notary Public

My commission expires: My Commission Expires
08/19/2006

Attachment 2

Affidavit of James Hinsdale

AFFIDAVIT OF JAMES R. HINSDALE

James R. Hinsdale, being first duly sworn, deposes and states:

1. I am a resident of the Denver metropolitan area and I have personal knowledge of the matters set forth in this Affidavit.

2. At all material times, I have been the President of Livewire Networks, Inc., which is a Nevada corporation with its principal place of business in Colorado. Livewire Networks, Inc. has conducted no business in the State of Arizona.

3. On or about May 23, 2000, Livewirenet of Arizona, LLC was formed as a wholly owned subsidiary of Livewire Networks, Inc. Livewirenet of Arizona, LLC was to be licensed in Arizona to provide telecommunications services. Mr. David S. Johnson and I were listed as co-managers of Livewirenet of Arizona, LLC. An application for an Arizona business license was filed and it was granted on or about February 16, 2001. Mr. David S. Johnson did not participate in the aforementioned filing in Arizona, was never a member of Livewirenet of Arizona, LLC.

4. On or about January 10, 2002, Livewire Networks, Inc. sold Livewirenet of Arizona, LLC to On Systems Technology, LLC. On or about January 29, 2002, Mr. Johnson signed and filed on behalf of Livewirenet of Arizona, LLC an application to change the name to The Phone Company Management Group, LLC. On or about February 1, 2002, Mr. Johnson resigned as a co-manager of The Phone Company Management Group, LLC (formerly known as Livewirenet of Arizona, LLC).

5. At no time did Livewirenet of Arizona, LLC provide services of any type or form to any customers in the State of Arizona or in any other state.

FURTHER AFFIANT SAYETH NOT.

James R. Hinsdale
James R. Hinsdale, Affiant

STATE OF COLORADO)
)ss
COUNTY OF JEFFERSON)

The foregoing was acknowledged before me this 9th day of October, 2003, by James R. Hinsdale..

(SEAL)



Sandra K. Lombardi
Notary Public
My commission expires: 3-7-2006

Attachment 3

Supplemental Affidavit of Tim Wetherald

SUPPLEMENTAL AFFIDAVIT OF TIM WETHERALD

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

1. I am a resident of the Denver metropolitan area and I have personal knowledge of the matters set forth in this Affidavit.

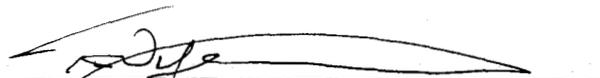
2. At all material times, I have been Manager and a member of On Systems Technology, LLC which is a Colorado limited liability corporation with its principal place of business in Colorado. On Systems Technology, LLC has conducted no business in the State of Arizona.

3. On or about January 10, 2002, Livewire Networks, Inc. sold Livewirenet of Arizona, LLC to On Systems Technology, LLC. On or about January 29, 2002, an application to change the name of Livewirenet of Arizona, LLC to The Phone Company Management Group, LLC was filed with the Arizona Corporation Commission. On or about February 1, 2002, Mr. David S. Johnson resigned as a co-manager of The Phone Company Management Group, LLC (formerly known as Livewirenet of Arizona, LLC). Mr. Johnson has never been a member of either Livewirenet of Arizona, LLC, nor of The Phone Company Management Group, LLC, and since February 1, 2002, has never been a manager of The Phone Company Management Group, LLC. Mr. Johnson has never had any role in the management of the Phone Company Management Group, LLC, has never provided any services on behalf of the Phone Company Management Group, LLC, nor has Mr. Johnson ever been involved in any manner whatsoever with the services provided by the Phone Company of Arizona in the State of Arizona.

4. In January of 2002, Mr. Johnson was offered a nominal membership interest in On Systems Technology, LLC as consideration for his providing contract services for On Systems Technology, LLC. Mr. Johnson's sole responsibility was to advise On Systems Technology,

LLC on certain corporate structuring matters. Mr. Johnson was never a manager of On Systems Technology, LLC, nor did Mr. Johnson had any role in the management of On Systems Technology, LLC. Following completion of the approved corporate restructuring of certain investments of On Systems Technology, LLC, on August 14, 2002 I purchased Mr. Johnson's nominal membership interest in On Systems Technology. Mr. Johnson is not a current member (owner) of On Systems Technology, LLC nor in any other manner affiliated with On Systems Technology, LLC.

FURTHER AFFIANT SAYETH NOT.


Tim Wetherald, Affiant

STATE OF COLORADO)
)ss
COUNTY OF Denver

The foregoing was acknowledged before me this 26th day of September, 2003, by Tim Wetherald.

(SEAL)




Notary Public
My commission expires: March 5, 2007