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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner
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Commissioner
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Commissioner
MIKE GLEASON
Commissioner

Arizona Corporation Commission
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AZ CORP COMMISSION
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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

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

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

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

3. None of those allegations or claims in the Complaint directly named or implicated Johnson in any manner whatsoever. Instead, the Staff merely identifies Johnson as a member of On Systems, without making any specific allegations against Johnson. *See* Complaint, Paragraphs 7,12. In the Direct Testimony of John F. Bostwick ("**Bostwick Direct Testimony**"), submitted to the Commission on March 28, 2003, Mr. Bostwick clarified Staff's understanding by indicating that "*On Systems Technology, LLC owns all the membership interest in PCMG...Mr. Wetherald is the principal of On Systems Technology, LLC ... which manages Mile High Telecom Joint Venture. ...Thus, management responsibility for the multi-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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13. On October 8, 2003, Staff filed Supplemental Testimony of Adam J. Lebrecht ("**Supplemental Testimony**"). Once again, Johnson is never even mentioned in the Supplemental Testimony. On the contrary, the Supplemental Testimony, by its own conclusions, cofirms that PCMG, the Phone Company of Arizona and On Systems could not possibly be deemed "alter egos" of Johnson. In fact, Mr. Lebrecht specifically states that he is testifying in support of "... *Staff's findings that PCMG, is in contempt of the Arizona Corporation Commission and that Tim Wetherald, as principle decision maker of PCMG and its subsidiaries, should be personally responsible for any penalties and/or judgments against him and the companies operated by PCMG." See* page 1 of Supplemental Testimony. Mr. Lebrecht indeed concludes that "*Wetherald, as the corporate president, part owner and control person of ON Systems, made the decisions of ON Systems and its affiliates: PCMB, The Phone Company of Arizona, etc. Because of Wetherald's status as the "mastermind" of ON Systems et al. operations, Staff believes he should be personally responsible for the payment of $1,865,000, and permanently enjoined from doing business related to the provision of telecommunications services in Arizona."* See pages 2-3 of Supplemental Testimony. Not 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

whatsoever could by viewed as dominating or controlling the actions of PCMG, The Phone of Arizona or On Systems.

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

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

16. In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must assume that truth of the allegations contained in the complaint. *See B.J. Logan v. Forever Living Products International, Inc.*, 52 P.3d 760 (Ariz. 2002); *see also Parks v. Macro-Dynamics, Inc.*, 591 P.2d 1005, 1007 (Ariz. App. 1979) ("A Rule 12(b)(6) motion to dismiss for failure to state a claim, which assumes the complaint's allegations are true, attacks the legal sufficiency of the complaint") (citations omitted).

The Respondent, Johnson moves this Commission for an Order dismissing Johnson from this case for lack of personal jurisdiction, for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief can be granted. In support of this motion, Johnson states:

Commission Lacks Personal Jurisdiction

17. As stated in the Johnson Affidavit and Supplemental Johnson Affidavit

a. At all times material to this case, Johnson has resided in Denver, Colorado.

b. Johnson has had no contact with the State of Arizona in regard to the operations of On Systems, and virtually no contact with the State of Arizona concerning the operations of PCMG (formerly known as LWN). Johnson has had no contact with the State of Arizona concerning any other Respondent in this matter.

c. The sole contact that Johnson has had with the State of Arizona in regard to the operations of PCMG, is that Johnson signed and filed on behalf of LWN an application to change name to PCMG (on or about January 29, 2002). Johnson terminated any involvement he had with PCMG immediately following the aforementioned filing. Johnson was never a member of PCMG, and at all times relevant to the matters before this Commission, was never a manager of PCMG nor in any manner involved with the management or operations of PCMG.

d. Johnson has had no contact with the State of Arizona concerning the operations of On Systems, has never been a manager of On Systems, has never had any involvement with the management and operations of On Systems, and at all times relevant to the matters before this Commission, has never been a member of On Systems.

e. Johnson has no involvement or affiliation whatsoever with the Phone Company of Arizona.

18. Johnson's sole contact with the State of Arizona concerning PCMG is insufficient for this Commission to have personal jurisdiction over him. For a non-resident to be subjected to the jurisdiction of a foreign state, the activities in the foreign state must be **continuous, systematic and of a general business nature**. *Helicopteros Nationales de Columbia, S.A. v. Hall, 466 US 408, 104 Sup. Ct. 1868, 80 L. Ed. 2d 404 (1984).* Although Arizona's long-arm statute is very broad and is intended to allow Arizona to exert personal jurisdiction over a non-resident to the maximum extent permitted by the federal Constitution, *Houghton v. Piper Aircraft Corp.,* 112 Ariz. 365, 367, 542 P.2d 24, 26 (1975), there ~~are limits~~. Mr. Johnson is a resident of the State of Colorado. Mr. Johnson held no ownership interest in PCMG nor in its predecessor, LWN. Mr. Johnson held no operational or management role in PCMG. Mr. Johnson held no managerial or operation rile whatsoever in On Systems. Mr. Johnson had no relationships whatsoever with the Phone Company of Arizona. Clearly, Mr. Johnson's sole contact with the State of Arizona cannot be the basis for general jurisdiction (defendant's contacts with the forum state are substantial or continuous and systematic enough that the defendant may be hauled into court in the forum, even for claims unrelated to the defendant's contacts with the forum, *see Helicopteros Nacionales..* When a defendant's activities in the forum state are not so pervasive as to subject it to general jurisdiction, the court may still find specific jurisdiction, but only if: (1) defendant purposefully avails himself of the privilege of conducting business in the forum; (2) the claim arises out of or relates to the

defendant's contact with the forum; and (3) the exercise of jurisdiction is reasonable. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990), *rev'd on other gds*, 499 U.S. 585 (1991).

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

Commission Lacks Subject Matter Jurisdiction

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

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

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

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

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

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

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

"Alter Ego" Theory Inapplicable as to Johnson

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

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

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

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

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

26. Staff therefore must first show that there is unity of control between Johnson and PCMG and The Phone Company of Arizona. As to PCMG and the Phone Company of Arizona, Johnson never held any ownership interest, and therefore the theory of *"alter ego"* is groundless. If Staff were to even allege such a tie, Staff would have to recant the testimony submitted in its Supplemental Testimony which clearly states that Staff believes Wetherald, not Johnson, has control over the relevant entities. Since Johnson is not an owner nor in any other manner involved with PCMG or The Phone Company of Arizona, and since Staff has never

even alleged any fact to establish any link between Johnson and PCMG and the Phone Company of Arizona, Johnson should be dismissed as a Respondent in these matters.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

responsible. ARS 40-424 et seq. specifically state that a person must have failed to observe or comply with an order, rule or requirement of the Commission before that person can be held liable, separate and distinct from the actions of a corporation. No such allegation by Staff of any such conduct by Johnson, separate and distinct from PCMG, the Phone Company of Arizona, or On Systems, exists anywhere in the Complaint, as Amended, nor in any testimony submitted by Staff.

Simply put, Johnson had no ownership interest in any Respondent in this action other than On Systems, and then only in a significant minority position and for a very short period of time; had no control over nor any involvement whatsoever in the management or operations of any Respondent in this matter; and had no control over any of the actions or conduct which led to the matters currently before the Commission. Clearly, Staff cannot satisfy the second prong of the *"alter ego"* test because it is not inequitable to treat Johnson and On Systems as separate entities, nor will any fraud or injustice result. In fact, Staff concludes that Respondents other than Johnson were the *"mastermind"*, and do not include Johnson in their recommended actions. In contrast, it would be inequitable to hold Johnson liable for all the actions of PCMG and the Phone Company of Arizona through his minority ownership interest in On Systems because he had no control over any of these entities and merely provided corporate structuring advice. Not only would such a result have a chilling effect on owners and consultants, but it would also unfairly place the burden of paying penalties onto an individual not responsible for the actions leading to the penalties. For all the reasons stated above, Johnson should be dismissed from this action.

Conclusion

29. While the facts of this matter may seem complex, they are not complex as they relate to Johnson:

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

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

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

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

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

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

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

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: _____
David Stafford Johnson

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

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

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

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1050 17th Avenue, Suite 2300
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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, Affiant

STATE OF COLORADO)
)ss
COUNTY OF JEFFERSON)

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

(SEAL)

SANDRA K. LOMBARDI
NOTARY PUBLIC
STATE OF COLORADO
MY COMMISSION EXPIRES 03/07/2006

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)

CYNTHIA L. BOWLING NOTARY PUBLIC STATE OF COLORADO

Notary Public
My commission expires: March 5, 2007