

REIZ D. JENNINGS  
CHAIRMAN

MARCIA WEEKS  
COMMISSIONER

CARL J. KUNASEK  
COMMISSIONER



0000157629



JAMES MATTHEWS  
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

DATE: July 5, 1996

DOCKET NO: S-3046-I

TO ALL PARTIES:

Enclosed please find the recommendation of Hearing Officer Marc E. Stern. The recommendation has been filed in the form of an Opinion and Order on:

Nutek Information Systems, Inc.; Jeffrey A. Shuken; (Cease and Desist)  
A.K.s Daks Communication, Inc.; SMR Advisory Group, L.C.;  
and Albert Koenigsberg

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Hearing Officer by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by 5:00 p.m. on or before:

July 15, 1996

The enclosed is NOT an order of the Commission, but a recommendation of the Hearing Officer to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

July 16, 1996 and July 17, 1996

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

  
James Matthews  
EXECUTIVE SECRETARY

JM  
Enc.  
cc: ALL PARTIES

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 RENZ D. JENNINGS  
CHAIRMAN  
3 MARCIA WEEKS  
COMMISSIONER  
4 CARL J. KUNASEK  
COMMISSIONER

5 IN THE MATTER OF THE OFFERING OF )  
6 SECURITIES BY: )

DOCKET NO. S-3046-I

7 NUTЕК INFORMATION SYSTEMS, INC. )  
JEFFREY A. SHUKEN )  
8 6390 Greenwich Drive, Suite 110 )  
San Diego, California 92122 )

DECISION NO. \_\_\_\_\_

9 AKS DAKS COMMUNICATION, INC. )  
10 SMR ADVISORY GROUP, L.C. )  
ALBERT KOENIGSBERG )  
11 3081 N. University Drive, Suite 315 )  
Sunrise, Florida 33351 )

12 **OPINION AND ORDER**

13 DATES OF HEARING: April 3, 4, 5, 6, 7, 10, 11, 12, and 13, 1995

14 PLACE OF HEARING: Phoenix, Arizona

15 PRESIDING OFFICER: Marc E. Stern

16 APPEARANCES: LAW PRACTICE OF J.B. GROSSMAN, P.A., by Mr.  
17 J.B. Grossman and Mr. Kenneth J. Dunn, and ROSHKA  
18 HEYMAN & DeWULF P L C, By Mr. Paul J. Roshka,  
19 Jr., local counsel, on behalf of A.K.s Daks  
Communications, Inc., SMR Advisory Group, L.C. and  
Mr. Albert Koenigsberg;

20 MANROEL, GELLER AND ASSOCIATES, by Mr.  
Stuart M. Manroel, on behalf of Nutek Information  
Systems, Inc., and Mr. Jeffrey A. Shuken; and

21 Mr. Scott S. Wakefield, Special Assistant Attorney  
22 General, and Mr. W. Mark Sendrow, Assistant Attorney  
23 General, on behalf of the Securities Division of the  
Arizona Corporation Commission.

24 **BY THE COMMISSION:**

25 On November 29, 1994, the Securities Division ("Division") of the Arizona Corporation  
26 Commission ("Commission") filed a Notice of Opportunity for Hearing regarding Proposed Order to  
27 Cease and Desist ("Notice") against Nutek Information Systems, Inc. ("Nutek"), Mr. Jeffrey A. Shuken,  
28 A.K.s DAKS Communication, Inc. ("ADC"), SMR Advisory Group, L.C. ("SMR"), and Mr. Albert

1 Koenigsberg. Pursuant to law, all of the above-named Respondents were duly served with the Notice.

2 In the Notice it was alleged that the Respondents offered for sale securities in the form of  
3 membership interests in various limited liability companies ("LLC") within or from Arizona that were  
4 not registered pursuant to the Arizona Securities Act ("Act") and were not exempt from any other  
5 provisions thereunder, all in violation of A.R.S. § 44-1841 of the Act; that the Respondents in connection  
6 with the offers to sell securities, acted as dealers and salesmen within Arizona, although not registered  
7 pursuant to the Act in violation of A.R.S. § 44-1842; and that the Respondents, in connection with the  
8 offers of securities, directly or indirectly, committed fraud in violation of A.R.S. § 44-1991.

9 The Division requested that the Commission issue Orders directing that: the Respondents cease  
10 and desist from violating the Act pursuant to A.R.S. § 44-2032; the Respondents pay the Commission  
11 an administrative penalty of up to \$5,000.00 for each violation of law pursuant to A.R.S. § 44-2036; and  
12 the Respondents make restitution, if warranted, to correct the conditions resulting from their acts,  
13 practices, or transactions, pursuant to A.R.S. § 44-2032.

14 On December 14, 1994, Nutek and Mr. Jeffrey A. Shuken filed with the Commission a request  
15 for a hearing waiving his and/or Nutek's right to hearing being set within the time frame set forth in  
16 A.R.S. § 44-1971 and 44-1972. The Division had no objection to Mr. Shuken's and/or Nutek's request.

17 On December 16, 1994, by Procedural Order, the Commission indicated to Mr. Shuken and Nutek  
18 that, since ADC, SMR, and Mr. Koenigsberg had not yet requested a hearing or waived their rights to  
19 a hearing, the matter would not yet be set for a hearing.

20 On December 19, 1994, a request for a hearing was filed on behalf of ADC, SMR, and Mr.  
21 Koenigsberg waiving their rights to hearing being set pursuant to A.R.S. §§ 44-1971 and 44-1972.

22 On December 28, 1994, by Procedural Order, the Commission ordered a hearing to commence  
23 on February 8, 1995.

24 On January 11, 1995, ADC, SMR, and Mr. Koenigsberg filed a Motion to Continue the above-  
25 captioned proceeding until late March or April 1995 because of a prior commitment of counsel,  
26 requesting that the Commission allow for a hearing lasting approximately ten days. Neither the Division,  
27 Mr. Shuken, or Nutek objected to this request.

28 On January 19, 1995, by Procedural Order, the Commission continued the proceeding from

1 February 8, 1995 until April 3, 1995. During the interim period, discovery took place.

2 On March 3, 1995, Nutek and Mr. Shuken filed a formal answer to the Notice.

3 On March 17, 1995, by Procedural Order, the Commission ordered the Division, if it intended  
4 to charge the Respondents with additional allegations, to request leave and amend its Notice not later than  
5 March 24, 1995.

6 On March 24, 1995, the Division filed a Motion to Amend the Notice which did not add any  
7 additional Respondents, but set forth additional facts supporting its allegations that the Respondents  
8 violated the Act. Included in the additional allegations contained in the Amended Notice was information  
9 concerning the offering which had been made by the Respondents and the fact that at least 16 Arizona  
10 residents had invested.

11 On April 3, 1995, by Procedural Order, the Commission granted the Division's Motion to Amend  
12 the Notice.

13 On April 3, 1995, a full public hearing was commenced before a duly authorized Hearing Officer  
14 of the Commission at its offices in Phoenix, Arizona. At that time, Respondents appeared with counsel  
15 and filed a pre-hearing memorandum of law. The Division appeared and was represented by counsel.  
16 Testimony was taken and over 125 exhibits were admitted into evidence during the course of the  
17 proceeding. At the conclusion of the hearing, the matter was taken under advisement pending submission  
18 of a Recommended Opinion and Order to the Commission.

19 On June 22, 1995, the Respondents joined in filing their closing memorandum in the form of  
20 Proposed Findings of Fact and Conclusions of Law. The Division also filed its closing memorandum  
21 on that date.

## 22 DISCUSSION

### 23 I. Background

24 During all relevant times herein, ADC was a Florida corporation owned solely by Mr.  
25 Koenigsberg, its President. SMR was a Texas LLC, the majority interest of which was owned by Mr.  
26 Koenigsberg, its President and CEO.

27 Nutek was a California corporation employed by ADC, SMR, and Mr. Koenigsberg as an  
28 independent sales office ("ISO") to market membership interests in LLCs. Mr. Shuken was employed

1 by Nutek and, according to records from the California Secretary of State, was its Chief Financial Officer  
2 and a corporate director.

3 From approximately March 1994 until January 1995, ADC, SMR, and Mr. Koenigsberg were  
4 involved in the formation and subsequent offer and sale of investment opportunities in the form of  
5 membership interests in 40 separate LLCs recently formed by them in Texas that were to be engaged in  
6 the communications business. Investors in the LLCs were secured through telephone solicitations and  
7 offering materials which were mailed to them by the Respondents. Acting on behalf of the LLCs, ADC  
8 and SMR were to secure leases from the Federal Communications Corporation ("FCC") licensees,  
9 construct, maintain, and operate a 220-222 MHZ ("220 MHZ") business communications system. The  
10 Respondents represented that the system would be capable of providing services such as dispatch service,  
11 private calling, interconnect calling, call forwarding and roaming dispatch networking. The proposed  
12 venture involved the LLCs entering into a cooperative operating relationship utilizing compatible systems  
13 which were to be joined together in the Western Regional Network ("WRN"). The WRN was to extend  
14 from the State of Washington southward through Oregon and California and extend eastward into Nevada  
15 in the vicinity of Reno and Las Vegas.

16 On October 18, 1994, a Division investigator, Mr. Kenneth Oliverio, spoke by phone with Mr.  
17 Shuken at Nutek's office, located in San Diego, California. Mr. Shuken spoke with Mr. Oliverio about  
18 investing in an LLC that was to be part of the WRN. Subsequently, on November 7, 1994, Mr. Oliverio  
19 had an additional conversation with Mr. Shuken regarding an investment in an LLC. During this  
20 conversation Mr. Shuken informed Mr. Oliverio that he would be able to invest in an LLC known as  
21 Washington 220 Holdings. Membership interests in the respective LLCs were sold in a range from  
22 \$2,000 to \$3,500 per unit with each LLC being made up of 100 units<sup>1</sup>. It was also explained that  
23 investors in the LLCs would only be liable for their capital investment in the event the entity failed. It  
24 was further represented to Mr. Oliverio that after the 40 LLCs' membership interests were sold out, the  
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27  
28 <sup>1</sup> The LLCs membership interests were to be owned 72 percent by investors, 20 percent by  
the FCC's license holder and 8 percent by SMR.

1 LLCs would unify their operations into the WRN<sup>2</sup> in order to generate the maximum amount of revenue  
2 from providing a communications service similar to cellular telephones.

3 The initial offering materials sent to Mr. Oliverio and prospective investors led them to believe  
4 that the actual negotiation for the leases of the FCC licenses, construction and management of the LLCs  
5 would be handled by ADC and SMR.

6 The initial offering materials which were sent to Mr. Oliverio and prospective investors contained:  
7 some brief promotional materials from ADC explaining 220 MHZ communication service; a financial  
8 forecast for the WRN based on an accountant's compilation report resulting from representations of SMR  
9 and ADC; various background biographies concerning ADC, SMR and their officials; and a signature  
10 page for investors to reserve a designated number of units at the going rate per unit, to be returned along  
11 with their checks to SMR via Federal Express. Some of the signature pages sent to prospective investors  
12 in the respective LLCs contained information that a Membership Summary and membership purchase  
13 documents relative to the particular LLCs would be forwarded to the investors. The prospective investors  
14 were given seven days in which to examine the documents and request a refund in writing if they chose  
15 to do so.

16 At the time prospective investors sent their reservations to SMR for the requested number of  
17 membership interest units together with their payments, investors were offered an opportunity to pay an  
18 extra \$25.00 as a fee for a compliance interview to be conducted subsequently by an independent  
19 company known as Compliance Interviews of America ("CIA"). During the interview, investors were  
20 to be questioned with regard to their understanding that their investments represented risk capital and  
21 subject to total loss if the respective LLC failed. When the Division's investigator contacted CIA, its  
22 representatives explained that he was to ask an investor a standardized set of 18 questions to ensure that  
23 investors were not misled by ISOs such as Nutek.

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25 <sup>2</sup> The initial offering materials described the WRN at note three as follows: "the WRN is  
26 a proposed entity which SMR has planned to serve as a tie between the proposed and existing 40 LLCs.  
27 The form of this entity has not yet been decided as of the date of this report. Each of these LLCs will  
28 possess a license for a mobile communications radio system operating in the 220 MHZ band in California  
and surrounding area. This proposed organization is subject to FCC and the LLC corporation shareholder  
approvals."

1 A number of proxy ballots were also sent to investors prior to any disclosure being made wherein  
2 the investors were asked to ratify ADC's and SMR's actions for the selection of the equipment that was  
3 used to construct the transmission sites of the various LLCs, to pay for the construction of an office for  
4 a firm known as Pagers Plus Cellular ("PPC") that was to market the services of the LLCs, to utilize  
5 SMR as an administrator for the LLCs, and to form the network to be known as the WRN as outlined in  
6 the initial offering materials. There is no evidence that investors were offered a thorough discussion of  
7 the options available to them when proxies were sent for their vote and it appears that early proxies  
8 mailed to investors were treated as affirmative votes if they were not returned by investors and that later  
9 proxies were treated as "negative votes" if they were not returned.

10 In January 1995, ADC and SMR sent a Membership Summary to each investor in the various  
11 LLCs who had previously paid for their membership interests. It was referred to as the "Brick" and  
12 began with a provision informing the investor that he had made a reservation in a particular LLC and that  
13 he had the right at that time to either become a member of the LLC or to decline membership within  
14 seven calendar days from the date of receipt of the Brick and to request, in writing, a full refund of the  
15 reservation fee. It was also noted that an investor became a member by either subscribing to the enclosed  
16 subscription agreement or by failing to request a refund in writing within the seven day period which  
17 would be deemed a waiver of his right to request a refund.

18 The Membership Summary contained full descriptions of the respective LLCs including: a  
19 glossary of terms; a summary of the offering; nine pages describing the risk factors associated with the  
20 offering; a description of the business of the company which described the inter-relationship of the  
21 respective LLC with ADC and SMR and their officials including Mr. Koenigsberg, their President; a  
22 description of the Class A and Class B membership interests; the LLC's regulations; and a description  
23 of the subscription procedure for investors who had previously paid for and had reserved units in the  
24 respective LLCs. The Brick also contained a number of exhibits as follows: financial statements  
25 compiled for the respective LLC; the LLC's Articles of Organization; any amendments to the Articles  
26 of Organization; the complete regulations of the LLC; a copy of the administrative agent agreement with  
27 ADC; a copy of a representative membership recruiter agreement; a sample of a management and  
28 construction agreement with a licensee; a copy of the management and construction agreement with

1 SMR; a representative copy of an agreement to perform compliance interviews by CIA; and a copy of  
2 a license agreement or an antenna site lease with the FCC licensee.

3 All investors in the respective LLCs had previously paid for their membership interests in most  
4 cases at least several months prior to their receipt of the Membership Summaries. The Membership  
5 Summaries clearly disclosed and warned of the highly speculative and risky nature and lack of liquidity  
6 of an investment in the respective LLCs. It was pointed out that the LLCs had no operating history and  
7 there were no guarantees of success and they were facing challenges raised by various securities  
8 regulators including the instant proceeding in Arizona which could create problems for investors. The  
9 disclosures made within the "Risk Factors" portion of the respective Membership Summaries while not  
10 necessarily industry specific made it reasonably clear using broiler plate warning language that an  
11 individual investor was making a highly risky investment. While the formation of the WRN had been  
12 promoted in the initial offering materials sent to investors, the Membership Summaries made it clear that  
13 the WRN was merely a proposal and that there was no guarantee that it would ever exist or that a  
14 respective LLC would become a member of any such network.

15 On January 6, 1995, a certified public accounting firm, Keefe McCullough & Co., ("Keefe")  
16 wrote to ADC as the administrative agent of the LLCs stating that it had found that membership  
17 reservation fees in the respective LLCs were being combined into a single administrative account to fund  
18 purchases of communications equipment and other expenses and then being charged back to the  
19 respective LLCs. Keefe also noted that the expenditures for equipment and expenses were from funds  
20 that were subject to refund claims. The firm also pointed out the specifics of the risks related to the lack  
21 of an operating history, anticipated negative cash flows and the fact that there were no assurances of  
22 profitability for the various LLCs.

23 A copy of Keefe's letter was included in the compilation of Financial Statements in the  
24 Membership Summaries sent to the investors in the respective LLCs formed by ADC, SMR and Mr.  
25 Koenigsberg, but this disclosure was not made prior to an investor committing his funds.

26 When the Membership Summaries were sent out in January 1995, they showed that 60 percent  
27 of the funds invested in the various operating LLCs had already been expended. The Membership  
28 Summaries also revealed that the ISOs had been paid sales commissions of approximately 33 percent of

1 the funds collected to sign up investors in the respective LLCs and 12 percent of the funds raised had  
2 been paid to ADC for its administrative fees and for equipment which had been purchased.

3 Before investors were sent their Membership Summaries, in order to facilitate the operations of  
4 the respective LLCs, ADC and SMR established the formation of management committees which were  
5 categorized as follows: finance and administration; engineering; license acquisition and expansion; legal;  
6 advertising and marketing; and equipment purchasing and upgrades. Investors were given the  
7 opportunity to apply for official positions with their respective LLCs or their management committees  
8 which they had been asked to approve by proxy by SMR.

9 Over the course of the offering in the 40 LLCs from March 1994 through January 1995,  
10 approximately 920 individuals invested a total of \$10,400,000.00, including 17 Arizonans who invested  
11 \$147,500 in 15 of the LLCs. In January 1995, members of all of the LLCs met in Sacramento, California  
12 and the members of the respective LLCs elected not to form the WRN at that time. Following the  
13 organizational meeting of all the LLCs in Sacramento, California, ADC and SMR made refunds to any  
14 investors who requested them including two of the 17 Arizona investors who received complete refunds  
15 of the \$13,000 which they had invested.

## 16 **II. Does A Membership Interest in an LLC Constitute a Security?**

17 The Division alleges that the membership interests in the respective LLCs which were proposed  
18 to make up the WRN, when considering the entire investment scheme involved, constitute either  
19 investment contracts, preorganization certificates or subscriptions and, therefore, are securities under the  
20 Act. These terms are used to define a security under A.R.S. § 44-1801(22). The Division has also taken  
21 the position that the investments in the respective LLCs should be characterized as securities at the time  
22 investors invested their monies or as characterized by the Respondents when they made their  
23 "reservations". Pursuant to A.R.S. § 44-1801(18), "sale" or "sell" are defined as "a sale or other  
24 disposition of a security or interest in a security for value and includes a contract to make such a sale or  
25 disposition".

26 The controlling case in this area to determine whether or not the offer and sale of the membership  
27 interests in the respective LLCs offered by the Respondents constitute a security is S.E.C. v. W.J. Howey  
28 Co., et al., 328 U. S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244(1946)("Howey"), as modified in United

1 Housing Foundation v. Forman, 421 U.S. 837 (1985) ("Forman"), wherein the United States Supreme  
2 Court devised a three-prong test to determine whether an instrument is an investment contract. Using  
3 the Howey test, an instrument (the membership interest reservation) is an investment contract if it  
4 evidences: (1) an investment of money; (2) in a common enterprise with an expectation of profits; and  
5 (3) which are derived substantially from the efforts of others. This test has been adopted by this  
6 Commission, our courts in Arizona, and the Ninth Circuit Court of Appeals. The Howey test is an  
7 objective standard which requires a transaction to be characterized at the time it transpired. Daggett v.  
8 Jackie Fine Arts, Inc., 152 Ariz. 559, 565, 733 P.2nd 1142, 1148 (App. 1986).

9 In the instant case, the evidence strongly suggests that the Respondents, SMR, ADC, and Mr.  
10 Koenigsberg utilized the respective LLCs as investment vehicles to raise capital for the construction of  
11 the transmission sites in order to beat the FCC's deadline to begin construction on all sites by December  
12 2, 1994, because the promoters would not be able to complete, in the limited time available, a full blown  
13 public offering which would meet the requirements of the Act. This evidence is supported by the  
14 testimony of Mr. Jay Valinsky, a securities attorney called as a witness by the Respondents. By utilizing  
15 the sale of membership interests in the LLCs which are not specifically defined as securities under the  
16 Act, the Respondents obviously hoped to avoid the scrutiny that would be placed upon them in a public  
17 offering. The Respondent's contention that the membership interests in the LLCs should be considered  
18 as interests in general partnerships does not overcome this evidence. In determining the scope of  
19 protection offered by the Act, however, Arizona courts look to the underlying economic reality of a  
20 transaction, disregarding the form in favor of substance. Rose v. Dobras, 126 Ariz. 209, 624 P.2nd 887  
21 (App. 1981).

22 In applying the Howey test to the evidence concerning the offer and/or sale of the membership  
23 interests in the instant case, the evidence supports the conclusion that the membership interests are  
24 securities under the Act.

25 A. Investment of Money

26 An "investment of money" is typically defined as a commitment of capital to an enterprise with  
27 the expectation of gaining a profit while subjecting the investor to a risk of financial loss. Hector v.  
28 Wiens, 553 F.2nd 429, 432 (Ninth Cir. 1976). In this case, 17 Arizona residents invested a total

1 \$147,500.00 between March 1994 and January 1995 in 15 of the 40 LLCs formed by the Respondents  
2 that were proposed to make up the WRN. Ostensibly, the commitment of these monies returned with the  
3 "signature page" of the offering materials were merely reservations, but they amount to investment  
4 contracts, preorganization certificates or subscriptions which are securities under the Act. While some  
5 of the investors were advised on their signature pages that they would have an opportunity to seek a  
6 refund within seven days of the receipt of the Brick, other investors were not advised of this possibility  
7 at the time their monies were tendered. It does not appear that the Respondents had adequate monies to  
8 refund all investors' funds if they chose to seek a refund once it was offered and thus their capital was  
9 at risk in the enterprise from the very beginning. The Respondents' position that the capital of the  
10 investors in the respective LLCs was not at risk until after receipt of the Membership Summaries and  
11 passage of the seven day review period is inconsistent with the evidence. Thus, we find that the first  
12 prong of the Howey test is met.

13 B. A Common Enterprise with an Expectation of Profits

14 As determined in Arizona, a "common enterprise" for purposes of the Howey test requires that  
15 the fortunes of the investor become interwoven with and dependent on the endeavors and gainful  
16 achievement of those seeking the investment of third parties. Arizona courts have developed two tests  
17 to determine whether a common enterprise with an expectation of profits exists satisfying the second-  
18 prong of the Howey test; if either or both of these tests are satisfied, the common enterprise requirement  
19 is satisfied:

- 20 (a) Horizontal Commonality: is found with the pooling of investor funds which are  
21 collectively managed by the promoter or a third party. The record establishes that  
22 members' monies for the respective LLCs membership interests were pooled together and  
23 collectively managed by ADC and Mr. Koenigsberg who was the only signatory to the  
24 accounts. Clearly, the horizontal commonality test is met here.
- 25 (b) Vertical Commonality: is found when there is a positive correlation between the success  
26 of the investor and the success of the promoter or some third party without requiring a  
27 pooling of investor funds. Since we have found horizontal commonality, we shall not  
28 deal with the issue of vertical commonality.

1 Besides finding a common enterprise with horizontal commonality here, we find evidence which  
2 is uncontroverted in the record that investors in membership interests in the respective LLCs expected  
3 to earn a profit when they invested and thus the second prong of Howey is met.

4 C. Efforts of Others

5 The last factor of the Howey test requires that an investor's profits be derived substantially from  
6 the managerial efforts of others. The Division has pointed out that the Ninth Circuit Court of Appeals  
7 in S.E.C. v. Glenn W. Turner Enterprises, Inc., held that the term "solely" in Howey's third prong  
8 should not be strictly construed ruling that the focus should be on "whether the efforts made by those  
9 other than the investor are the undeniably significant ones, those essential managerial efforts which affect  
10 the failure or success of the enterprise." 474 F.2d 476, 482 (9th Cir. 1973), cert. denied, 414 U.S. 821,  
11 94 S.Ct. 117, 38 L.Ed. 2d 53(1973). Arizona courts have looked at the "efforts of others" in a broad  
12 fashion in determining where the truly significant efforts are made on behalf of investors. There are  
13 slightly more than 900 individual investors in the 40 LLCs involved in the enterprise to form the  
14 proposed WRN. These investors are scattered primarily throughout the United States with a few from  
15 Canada. Clearly, the investors had to rely on the expertise of SMR and its technical staff, ADC and Mr.  
16 Koenigsberg if the enterprise was to succeed. In the limited time frame involved, they were responsible  
17 for the following: acquisition of licenses and equipment; construction of the transmission sites and  
18 related equipment; securing subscribers for the system; developing a billing system; and collecting  
19 revenues from the subscribers.

20 The case of Williamson v. Tucker, 645 F.2d 401(5th Cir. 1981), provides a blueprint to examine  
21 the efforts of others test established by Howey. The Court there found that an investor is dependent on  
22 the efforts of others when he was unable to exercise meaningful partnership powers because of a  
23 dependence on the promoter or a third party. As evidence of the dependency of an investor on a promoter  
24 or third party, the Court cited the following factors: an agreement among the parties which leaves  
25 investors with limited powers comparable to those of a limited partner; the fact that investors are so  
26 inexperienced they are incapable of intelligently exercising their partnership powers; or the promoter or  
27 manager possesses some unique entrepreneurial or managerial ability such that the investors cannot  
28 replace or otherwise exercise meaningful partnership powers.

1 ◆ Agreements limit investors' powers.

2 The record established that there were numerous agreements involved in the respective LLCs'  
3 operations such as: the leases for the FCC 220 MHZ licenses; the leases for transmission sites; the  
4 contracts with ADC as an administrative agent; the contracts with SMR to construct transmission sites  
5 and operate the systems; and the contracts with PPC to secure subscribers for the respective LLCs. These  
6 agreements clearly restrict investors' rights with regard to their exercise of managerial control. The  
7 respective LLCs' contracts with SMR are particularly restrictive and onerous in that they are for terms  
8 of five years and provide for like renewal periods, which authorization shall not be unreasonably withheld  
9 except for gross negligence or fraud as determined by a court of competent jurisdiction<sup>3</sup>. Additionally,  
10 the SMR agreements provided for SMR to receive 25 percent of the gross revenues from the operation  
11 of each LLC's system on a monthly basis together with an additional monthly payment of \$800.00 per  
12 channel (under the proposed plan, each LLC was to have five channels) or \$4,000.00. Lastly, investors  
13 were required, upon receipt of the Membership Summaries, to ratify all prior acts of the Respondents on  
14 behalf of the respective LLCs (including the aforementioned agreements) if they remained committed  
15 to their investments and did not request a refund.

16 ◆ Investors in the enterprise lack experience to exercise real control.

17 The Membership Summary describes the highly technical nature of the business in which the  
18 LLCs are to engage in and the problems which they will face in the formation of the WRN. The second  
19 factor examined under Williamson is whether the investors lack sufficient experience such that, they are  
20 incapable of intelligently exercising control over the business in which they have invested. Investments  
21 in the telecommunications field while not requiring technical expertise if others are engaged in the  
22 management of the business would require a high degree of expertise if one was to be engaged in the  
23 active management of the business. Absent the experience of ADC and SMR and its technical staff,  
24 investors would be like passengers on a ship in the middle of an ocean without a captain, without power  
25 and without a rudder. It is clear that the operations of a 220 MHZ communications enterprise governed  
26 by FCC regulations which are highly technical in nature and cannot be readily understood by average

27 \_\_\_\_\_  
28 <sup>3</sup> These contracts required all contract disputes between the LLCs and SMR to be litigated  
in Florida.

1 investors require them to rely on experts with the necessary technical background and knowledge if their  
2 investments are to succeed and to be profitable.

3 ◆ The Respondents are indispensable to the investors to develop the LLCs.

4 The Williamson court next suggested an evaluation of the promoters' or managers' unique  
5 abilities such that the investors cannot easily replace them or otherwise exercise meaningful managerial  
6 control as general partners. In the instant case, the respective LLCs are bound to SMR through its  
7 restrictive management contracts which are not easily voided or canceled and which were executed before  
8 some investors even invested in the LLCs. Further, because of the restrictive covenants in the SMR  
9 contracts, the LLCs would be unable to replace SMR without extensive litigation. Essentially, the LLCs  
10 without SMR most probably would have been unmanageable and the investments rendered worthless  
11 because, among other duties, SMR was to handle billing and collections for the LLCs.

12 Other factors which should be considered when examining the investors' lack of control is the  
13 total number of investors and their geographical separation from SMR's offices in Florida, and where  
14 the LLCs were to do business, the western part of the United States. There is no question that SMR,  
15 ADC and Mr. Koenigsberg are indispensable to the investors in the LLCs because the investors therein  
16 are lacking real control due to contracting away the management of their investments. Here the three  
17 Williamson factors are found together with others that strongly indicate the investors in the LLCs are  
18 depending on the efforts of others (i.e., ADC, SMR and Mr. Koenigsberg) in order to earn a profit on  
19 their investments.

20 Throughout the proceeding, the Respondents argued that the investments described herein did not  
21 constitute investments in securities. Their position is that the investment did not take place at the time  
22 the initial reservations were made when signature pages were returned specifying the number of units  
23 being paid for by the investors, but at the time investors made their elections after receipt of their  
24 Membership Summaries.

25 In support of their position, the Respondents relied strongly upon Williamson maintaining that  
26 the individual investors in the respective LLCs did not rely upon the efforts of others, and that they  
27 possessed the ability to exercise control of their LLCs for purposes of the Howey test. The Respondents  
28 argued that the investors were involved in 40 separate general partnerships and not an investment in a

1 common enterprise. In support of this argument, the Respondents also cited a long series of cases  
2 including Rivanna Trawlers Unlimited v. Thomason Trawlers, 840 F.2nd 236 (4th Cir. 1988) and others.  
3 These cases started with a presumption that a general partnership existed and that they were not  
4 securities. However, the cases cited by the Respondents were factually dissimilar and involved far  
5 limited numbers of investors than is the case here.

6 After analyzing the factors presented in the offering herein, we find that the efforts of others or  
7 third prong of Howey is met and that the membership interests offered and sold by means of reservations  
8 by the Respondents, Nutek, Mr. Shuken, ADC, SMR, and Mr. Koenigsberg in the respective LLCs  
9 constitute investment contracts, preorganization certificates or subscriptions and therefore, are securities  
10 under the Act. We believe that the Respondents acted in an innovative manner in order to raise the  
11 amount of capital needed in such a short time. In fact, the Respondents began to take action on behalf  
12 of the respective LLCs by entering into agreements with the various licensees and beginning construction  
13 of the systems even before the LLCs were sold out and before their members could actively participate  
14 in their operations. Further supporting our opinion that the membership interests in the respective LLCs  
15 constituted securities under the Act is the fact that proxy votes presented to investors merely provided  
16 an illusion of control. The investors had no available options presented to them and in some instances,  
17 SMR and ADC had already acted on behalf of the respective LLCs. Having found that a membership  
18 interest constitutes a security, the Respondents are subject to the provisions of the Act.

19 **III. Did Respondents Offer and/or Sell Unregistered Securities in Violation of the Act?**

20 The Division has alleged that all of the above named Respondents offered and/or sold  
21 unregistered securities in violation of Act. Pursuant to A.R.S. § 43-1841, it is unlawful to sell or offer  
22 for sale within or from this state any securities unless such securities have been registered by description  
23 under §§ 44-1871 through 44-1875 or registered by qualification under §§ 44-1891 through 44-1902,  
24 except securities exempt under §§ 44-1843 or 44-1843.01 or securities sold in exempt transactions under  
25 § 44-1844.

26 It is clear from the record that neither Nutek or Mr. Shuken actually sold any investments to any  
27 Arizona residents. The only evidence of Nutek's and Mr. Shuken's involvement are the two telephone  
28 conversations with the Division's investigator, Mr. Oliverio which took place on October 18, 1994 and

1 November 7, 1994. It is uncontroverted that Mr. Shuken sent the initial offering materials regarding the  
2 investment in the enterprise to Mr. Oliverio. The record further established that Nutek had a contract to  
3 solicit investors on behalf of a number of the LLCs. It was also shown that Mr. Shuken, according to  
4 California state records, was both a Director of and the Chief Financial Officer of Nutek. As such, we  
5 conclude that he had the authority to, and did make an offer to Mr. Oliverio despite Mr. Koenigsberg's  
6 representations that his understanding of Mr. Shuken's normal duties did not involve direct sales of  
7 membership interests in the respective LLCs. Mr. Shuken did not appear at any time during the  
8 proceeding to deny the Division's allegations although both Nutek and he were represented by counsel  
9 during the proceeding.

10 With respect to ADC, SMR and Mr. Koenigsberg, it is clear from the evidence that these  
11 Respondents were directly involved in the offer and sale of unregistered securities within Arizona in  
12 violation of the Act. Investors' signature pages containing their subscription agreements were mailed  
13 to SMR in Florida together with their funds for their membership interests. These funds were deposited  
14 into bank accounts which were controlled solely by Mr. Koenigsberg. The Respondents did not dispute  
15 this fact. Having determined that the reservations for the membership interests were securities, it is clear  
16 from the record that their offer and sale within Arizona, unless they have been registered or are exempt  
17 or sold in exempt transactions, is a violation of A.R.S. § 44-1841(A).

18 **IV. Were the Respondents Registered as Dealers or Salesmen?**

19 Pursuant to A.R.S. § 44-1842, it is unlawful for any dealer to sell or purchase or offer to sell or  
20 buy any securities, or for any salesman to sell or offer for sale any securities within or from this state,  
21 unless the dealer or salesman is registered as such pursuant to the provisions of Article 9 of this chapter.

22 Based on the record and pursuant to evidentiary stipulations concerning nonregistration between  
23 the parties, it is equally clear that neither Nutek, Mr. Shuken, ADC, SMR, nor Mr. Koenigsberg, were  
24 registered as either dealers or salesmen, in violation of A.R.S. § 44-1842(A).

25 **V. Were the Respondents' Actions Violative of the Anti-fraud Provisions of the Act?**

26 Pursuant to A.R.S. § 44-1991, it is a fraudulent practice and unlawful for a person in connection  
27 with a transaction involving the offer or sale of securities, to directly or indirectly do any of the  
28 following:

- 1 1. Employ any device, scheme or artifice to defraud.
- 2 2. Make any untrue statement of material fact, or omit to state any material fact necessary
- 3 3. Engage in any transaction, practice or course of business which operates or would operate
- 4 as a fraud or deceit.

5 An objective test is used to determine what is or is not a material fact. In Trimble v. American  
6 Sav. Life Ins. Co., 152 Ariz. 548 (App.), 553, 733 P.2nd 1131(1986), the Arizona Court of Appeals  
7 stated, "the test to be met is simply a showing of substantial likelihood that, under all circumstances, the  
8 misstated or omitted fact would have assumed actual significant in the deliberations of a reasonable  
9 buyer." Those offering an investment opportunity have an affirmative duty not to mislead potential  
10 investors. Respondents do not have to intentionally misrepresent material facts or intentionally omit to  
11 state material facts. Scienter is not an element of a violation of A.R.S. §§ 44-1991(2) or 44-1991(3).  
12 Additionally, the Division is not required to establish that investors relied on the misrepresentations or  
13 omissions or that the misrepresentations or omissions caused injury to the investors.

14 The Division has alleged that the Respondents violated A.R.S. § 44-1991 by misrepresenting  
15 material facts and failing to disclose material facts in connection with both their original offers and sales  
16 of the membership interests in the LLCs and with their offer of rescission in January 1995 and by  
17 engaging in a course of business which operated as a fraud or deceit in connection with the original  
18 transactions and with the offers of rescission. In connection with the offers of sales and securities, the  
19 record establishes, through documentary and testimonial evidence, that Respondents violated the anti-  
20 fraud provisions of the Act.

- 21 A. Respondents misrepresented the type of service which could be provided to generate the  
22 bulk of LLC revenues.

23 Investors and offerees were led to believe that the LLCs would provide cellular telephone-like  
24 services to customers in the western United States. Respondent Shuken referred to the service as a "poor  
25 man's cellular" when describing the service to the Division's investigator. The original offering  
26 materials create an image that the LLC's 220 MHZ communications systems would operate in a fashion  
27 similar to cellular communications systems. Representations were also made touting the superiority of  
28 220 MHZ communications service or dispatch service over cellular service. Offering materials

1 represented that substantial portions of what was to be the WRN's revenue would be generated from  
2 providing cellular-like service because of projected "inter-connect revenues". Forecasted financial  
3 statements also projected significant revenues from the resale of long-distance service.

4 The primary use of the 220 MHZ frequencies in the past and presently has been for dispatch radio  
5 communications or "two-way radio" as it is more commonly known. Dispatch radio is used primarily  
6 for mobile radio purposes by business subscribers such as trucking, plumbing, and taxi cab companies  
7 which are able to utilize a system where they can speak from a central location to several mobile units  
8 at the same time. However, when the need arises users of this form of communication can be inter-  
9 connected with local telephone service in order to make a telephone call. It was pointed out that cellular  
10 telephone service has an appeal to more of a "white collar" customer who desires to speak only to one  
11 individual at a time versus the dispatch customer who may be speaking to several individuals at the same  
12 time over his communication service.

13 A significant difference with cellular service was established when it was pointed out that the 220  
14 MHZ communication system can provide only what is known as half-duplex or simplex communication  
15 versus cellular or ordinary telephone communication which is full-duplex communication. The 220 MHZ  
16 system permits only one party to talk at a time usually requiring each party to say "over" to signify that  
17 he has finished his communication. Full duplex permits both parties to talk and listen simultaneously  
18 and is the method of communication with which the vast majority of people relate to when thinking of  
19 telecommunications. According to the Division's expert, Mr. Dale Hatfield, these differences are created  
20 because of technical reasons brought about by the FCC's narrow channel allocations in 220 MHZ bands  
21 and because of the laws of physics which impose an insurmountable obstacle to developing a full-duplex  
22 portable dispatch system as opposed to equipment which is employed in a vehicle. In the opinion of the  
23 Division's expert, in order to adequately compete with cellular telephone communications systems, full-  
24 duplex capability is essential for any communication system.

25 B. The 220 MHZ systems cannot provide portable cellular like service because dispatch  
26 communication units are not available in that frequency.

27 The record established that no portable equipment is currently available in the frequency to be  
28 utilized by the LLCs for commercial purposes to provide either dispatch or telephone-like service. The

1 record further showed that while a prototype portable unit has been developed, it is only a half-duplex  
2 unit for use in providing dispatch services and has not yet been approved by the FCC for public sale.  
3 Portability is the key factor in the utilization of cellular telecommunications devices and has been  
4 responsible for its rapidly increasing growth. Physical limitations of the narrow band frequencies will  
5 prevent full-duplex communication in the 220 MHZ communications market and thus limit its economic  
6 viability. The fact cannot be explained away that dispatch communication service or 220 MHZ  
7 communication systems are unlike cellular communications service in that they lack portability and this  
8 factor should be disclosed in the initial offering materials.

9 C. The 220 MHZ communication system cannot provide service when users travel from one  
10 service area to another.

11 In the original offering materials, investors were lead to believe that the dispatch service offered  
12 by the respective LLCs would be competitive with cellular telephone service because they were given  
13 the impression that users could travel from one service area to another and the systems would "hand-off"  
14 the call from one tower site or base station to another during the user's travels. Cellular systems are  
15 capable of "hand-off" as callers travel between cell sites, but because of the narrow bandwidth inherent  
16 in 220 MHZ communications systems, the base station can not communicate to the mobile unit while the  
17 mobile unit is transmitting.

18 D. Communication inside buildings is limited with 220 MHZ communications systems.

19 While portable cellular telephone service is more than adequate inside of buildings, the  
20 communications systems to be offered by the LLCs would have poor penetration from inside of structures  
21 if the user attempted to communicate with others outside of the building. Although penetration would  
22 be limited in this instance because of the lower frequencies utilized by the 220 MHZ systems, they  
23 would provide a user with greater range and better communication capabilities in rough terrain which  
24 pose a problem for cellular users.

25 E. 220 MHZ equipment is more expensive than cellular telephone equipment.

26 Another factor which would mislead a prospective investor is the representation that subscribers  
27 would be able to obtain 220 MHZ equipment ( \$500 to \$800 per unit) as reasonably as cellular telephone  
28 equipment (free and up). The record shows that such is not the case and there are drastic price differences

1 with cellular subscribers able to purchase the initial equipment inexpensively in part because of the  
2 subsidization of its purchase price by cellular service providers which garner their revenues from the sale  
3 of airtime. However, we must note that charges for 220 MHZ service would appear to be moderately less  
4 to subscribers.

5 F. Other areas of misrepresentation or omissions.

6 Although offering materials projected 50 percent of the subscribers to the LLCs would use inter-  
7 connect service, according to a valuation prepared by a private company at the request of SMR, the  
8 valuation of the proposed WRN indicates a system which primarily would provide dispatch services, and  
9 not a system involving cellular telephone inter-connect services. The evidence did not establish that the  
10 Respondents would be able to provide, through dispatch service, cellular telephone-like service that  
11 would be superior to authentic cellular telephone service and there were no specific warnings to this  
12 effect to the investors. Further, the financial projections provided to prospective investors were  
13 unfounded predictions which would violate the Act's anti-fraud provisions. While disclaimers and  
14 warnings may have been apparent in the Membership Summaries, they were not available in the initial  
15 offering materials sent to investors.

16 The financial projections utilized by the Respondents and sent with the initial offering materials  
17 allegedly represented historical experience of the 220 MHZ industry, however, the Division's expert  
18 testified in a credible fashion that there is not a sufficient performance history of commercial 220 MHZ  
19 systems upon which to base this projection. In the financial projections in the initial offering materials,  
20 the Respondents also incorrectly stated the compensation to SMR. While initial financial projections  
21 indicated a management fee of 20 percent of net income with a minimum monthly charge of \$32,000 for  
22 SMR, they conflicted with the construction and management agreements executed between the various  
23 LLCs and SMR which provided SMR with 25 percent of gross monthly revenues with a minimum  
24 monthly payment of \$800.00 per channel system (or \$4,000 per LLC if all five channels were fully  
25 subscribed).

26 There is also evidence that the Respondents misrepresented to prospective and actual investors  
27 the status of the FCC licenses and actually accepted funds for payment in certain LLCs for which license  
28 rights had not yet been secured. In statements made to the Division's investigator, Respondent Shuken

1 represented that the investment involved "very little speculation" and that the "risks have been  
2 minimized". Without a license, the LLC could not conduct business and risks were clearly much higher.  
3 In fact, the Membership Summaries disclosed that the Respondents expected losses and a negative cash  
4 flow for at least one year which was not explained prior to investments being made.

5 One investor witness, Mr. Jesse Simmons, confirmed that he had not been informed about the  
6 possible problems with the investment being considered a security prior to making his investment in  
7 August 1994. Nor had Mr. Simmons been told of the action by the State of South Dakota which had  
8 ordered the Respondents to cease offering the investment in that state on June 27, 1994. He indicated  
9 that facts such as this would have been relevant and material to him prior to making his investment.

10 Initial offering materials sent to investors failed to disclose the fact that sales commissions of  
11 approximately 30 percent were being paid to ISOs such as Nutek which were engaged to find prospective  
12 investors for the respective LLCs. Additionally, there was a failure to disclose information to prospective  
13 investors concerning the financial condition and business history of ADC and SMR. The Division  
14 argued that this is material information and important to prospective investors because it indicates the  
15 ability of the promoter to carry on the operations of the venture in its start-up condition. The Division  
16 also disagreed with the Respondents' practice of charging prospective investors for a compliance  
17 interview after an investment since disclosure should have been made to prospective investors prior to  
18 monies being sent to SMR. The Division believes that because the Respondents made material  
19 misrepresentations and omitted *certain material* facts from the offer and sale of the membership interests,  
20 their actions constitute a fraudulent course of business and violate A.R.S. § 44-1991(3).

#### 21 The Respondents' Position.

22 The Respondents argued that the investments in the respective LLCs did not constitute an  
23 investment in a security. In this respect, the Respondents relied upon the Williamson test and other  
24 Supreme Court cases which flow from it with regard to the degree of control exercised by an investor to  
25 show that the investment did not constitute a security, but was instead an interest in a general partnership.  
26 Based on these arguments, it is obvious that the Respondents did not treat the offer and sale of these  
27 membership interests as securities with regard to the disclosure made in the initial offering materials.

28 However, the Membership Summary or Brick which was sent to all investors in their respective

1 LLCs in January 1995 was extremely candid and began with a proviso advising investors that they had  
2 seven calendar days from the date of receipt to examine the Membership Summary and to request a full  
3 refund or elect to retain their investment in the respective LLC.

4 Each respective LLC's Membership Summary that was admitted into the record displayed an  
5 initial disclosure on the second page that the membership interests involved a "high degree of risk" and  
6 also informed investors that "the issue of whether an interest in a limited liability company constitutes  
7 a security, and therefore, must be offered and sold in accordance with applicable federal and state  
8 securities laws, is not settled." The Respondents did not hide these facts from investors in the  
9 Membership Summary, but these disclosures did not appear in the initial offering materials. Investors  
10 were also advised that the membership interests had not been registered under any federal or state  
11 securities laws.

12 The Respondents argued that the "Risk Factors" section of each Membership Summary which  
13 consisted of nine pages, more than adequately disclosed the nature of the risks associated with an  
14 investment in the respective LLCs. There, the Respondents openly disclosed the fact that the LLC had  
15 no operating history and anticipated a negative cash flow for at least the next fiscal year and no  
16 assurances of whether profits would ever be attainable. Warnings were also given concerning the fact  
17 that there was uncertainty of market acceptance and that challenges had been brought in some states  
18 including Arizona as to the status of the LLCs' membership interests constituting securities. It was also  
19 pointed out by the Respondents that problems could arise with meeting certain FCC requirements which  
20 could result in a potential loss of an investor's entire investment. These warnings were generally of a  
21 boiler plate nature, and can be found in most prospectuses in the securities industry.

22 The Respondents made it clear that the cornerstone of their investment program involved an  
23 opportunity for the investors to secure a refund if they chose not to proceed with their investment upon  
24 receipt on the respective Membership Summary. At that time, the seven day examination period began  
25 and investors had the opportunity to either elect to continue with their investment or request a full refund.  
26 In the case of the 17 Arizona investors, the Respondents made full refunds to two investors who chose

27  
28

1 not to proceed with their investment in their LLCs<sup>4</sup>. Mr. Koenigsberg also indicated that full refunds  
2 were also made to other investors who chose not to proceed with their investments following the January  
3 1995 meeting in Sacramento, California of LLC members.

4 To further support their position that investors had a participatory interest and exercised a degree  
5 of control over the respective LLCs, the Respondents presented a demonstration of a prototype voice  
6 response unit which was to replace the use of written proxies in the future so that the investors could  
7 more actively participate in the management and control of their LLCs.

8 The investor witnesses who testified in the proceeding on behalf of the Respondents generally  
9 displayed a knowledge of their investment and satisfaction with the management of the respective LLCs  
10 by the Respondents herein. These witnesses also appeared to have some technical and business  
11 knowledge and could appreciate the risks of investing in the LLCs. The Respondents' technical  
12 witnesses also testified credibly that the venture has the potential to succeed.

### 13 CONCLUSION

14 Based upon our review of the evidence in this proceeding, it is our conclusion that the Division's  
15 allegations with regard to the main issue of whether the offer and sale of the membership interests in the  
16 respective LLCs constitute the offer and sale of a security has been proven. We believe that the evidence  
17 is overwhelming in this regard. The LLCs could not have effectively functioned and conducted business  
18 in the manner in which they were to operate without the Respondents because of complexities inherent  
19 in the communications industry and because investors were scattered throughout the United States. It  
20 is clear that the key management and control decisions were to be exercised by the Respondents, SMR,  
21 ADC and Mr. Koenigsberg.

22 We can appreciate the difficulties faced by Mr. Koenigsberg, ADC and SMR in the formation of  
23 the respective LLCs to establish a dispatch communications system network covering a vast geographic  
24 area. We can also appreciate the almost insurmountable obstacles that Mr. Koenigsberg faced in raising  
25 such a large sum of money in a relatively short period of time in order to form the LLCs and construct  
26 the systems which could be joined as the WRN. The formation of the LLCs and monies raised for their  
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<sup>4</sup> One of these investors was Mr. Jesse Simmons.

1 formation was the only conceivable method available to meet the FCC construction guidelines since there  
2 was not enough time for a public offering to take place. Essentially, this case is one of timing which  
3 forced the Respondents to raise the financing necessary to construct the 220 MHZ dispatch  
4 communication systems without making the disclosures required in a public offering. Overcoming  
5 obstacles does not excuse the Respondents disregard for the securities laws of the respective jurisdictions  
6 including Arizona's in which the offer and sale of the LLC membership interests took place without  
7 adequate disclosure of the risks being made to investors before they invested.

8       However, in finding that the Respondents offered and sold a security in violation of the Act in  
9 Arizona, we must also take into consideration the fact that the Respondents also made good on their  
10 pledge to refund the total investment of any Arizona investors who wished to withdraw from the offering  
11 after their receipt of the Membership Summaries in the respective LLCs. More often than not, experience  
12 has shown that promoters fail to make good on refund offers. While the Membership Summaries  
13 adequately disclosed the risks, they were not disclosed to investors so that they could make an informed  
14 decision before investing.

15       Having found that the offer and sale of the membership interests in the respective LLCs to  
16 Arizona investors constitute a violation of the Act, we shall order the appropriate sanctions against the  
17 Respondents who bear the responsibility for promoting the offering. Such sanctions include, but are not  
18 limited to, ordering the Respondents to cease and desist from violations of the Act, requiring the  
19 Respondents to make an offer of restitution to investors, and assessing the appropriate administrative  
20 penalties of up to \$5,000 for each violation of the Act. From our review of the evidence, it is clear that  
21 the Respondents who bear primary responsibility in this proceeding are ADC, SMR, and Mr.  
22 Koenigsberg. The record with regard to Nutek and Mr. Shuken involve only the offer of a security to  
23 the Division's investigator. There is no evidence that either Nutek or Mr. Shuken made any other offers  
24 or sales to any Arizona residents.

25       Based on the record, Respondents, Nutek, Mr. Shuken, ADC, SMR, and Mr. Koenigsberg should  
26 be ordered to cease and desist from violations of the Act pursuant to A.R.S. § 44-2032. Nutek and Mr.  
27 Shuken offered for sale in Arizona unregistered securities in the form of either investment contracts,  
28 preorganization certificates, or subscriptions in violation of A.R.S. § 44-1841. Neither Nutek nor Mr.

1 Shuken were registered as either a dealer or a salesman within Arizona pursuant to the Act and therefore  
2 their conduct violates A.R.S. § 44-1842. There is evidence that Mr. Shuken misrepresented the nature  
3 of the risk in violation of A.R.S. § 44-1991. Although the record establishes Nutek's and Mr. Shuken's  
4 involvement, it is not crucial to the investment scheme and there is no evidence they made any other  
5 offers or sales in Arizona. Therefore, we shall order the appropriate administrative penalties be assessed  
6 against Nutek and Mr. Shuken pursuant to A.R.S. § 44-2036.

7 With regard to ADC, SMR and Mr. Koenigsberg, we find their actions constituted a violation  
8 of A.R.S. § 44-1841 in the offer and sale of unregistered securities within Arizona in the form of  
9 investment contracts, preorganization certificates or subscriptions and that these transactions were carried  
10 out by them in violation of A.R.S. § 44-1842 while acting as either unregistered dealers or as a salesman.  
11 ADC, SMR and Mr. Koenigsberg must also bear the responsibility for the failure to warn investors of  
12 the risks in the initial offering materials in violation of A.R.S. § 44-1991. Since we have found these  
13 violations with regard to the primary promoters in the proceeding, we believe that they should be ordered  
14 to cease and desist pursuant to A.R.S. § 44-2032 and assessed an appropriate administrative penalty  
15 hereinafter pursuant to A.R.S. § 44-2036 for the violations described hereinabove. Additionally, since  
16 ADC, SMR, and Mr. Koenigsberg are the Respondents primarily responsible for the venture described  
17 herein, pursuant to A.R.S. § 44-2032, we shall also issue an order directing them to make an offer of  
18 restitution in conformance with A.A.C. R14-4-308 to all remaining Arizona investors in the LLCs  
19 discussed hereinabove.

20 \* \* \* \* \*

21 Having considered the entire record herein and being fully advised in the premises, the  
22 Commission finds, concludes, and orders that:

23 **FINDINGS OF FACT**

24 1. Nutek, whose last known business address is 6390 Greenwich Drive, Suite 110, San  
25 Diego, California 92122, is a California corporation which was at all relevant times doing business within  
26 or from Arizona.

27 2. Mr. Jeffrey A. Shuken, whose last known business address is 6390 Greenwich Drive, Suite  
28 110, San Diego, California 92122, was, at all relevant times, doing business within or from Arizona as

1 a Director of and Chief Financial Officer of Nutek.

2 3. ADC, whose last know business address is 3801 North University Drive, Suite 350,  
3 Sunrise, Florida 33351, is a Florida corporation which was, at all relevant times, doing business within  
4 or from Arizona.

5 4. SMR whose last known business address is 3801 North University Drive, Suite 350,  
6 Sunrise, Florida 33351, is a Texas limited liability company which was, at all relevant times, doing  
7 business within or from Arizona.

8 5. Mr. Albert Koenigsberg, whose last know business address is 3801 North University  
9 Drive, Suite 350, Sunrise, Florida 33351, was at all relevant times doing business within or from Arizona  
10 as President and CEO of SMR and owning its majority interest. He is the President and sole shareholder  
11 of ADC.

12 6. On November 29, 1994, the Division issued the Notice against the above-named  
13 Respondents and which was subsequently amended on March 24, 1995.

14 7. From the beginning of approximately March 1994 until January 1995, ADC, SMR and  
15 Mr. Koenigsberg were involved in the formation and subsequent offer and sale of membership interests  
16 for approximately \$3,000 per unit in 40 separate LLCs formed by them in Texas to obtain FCC licenses,  
17 construct and operate the proposed WRN, a partnership group of 220 MHZ dispatch communication  
18 systems.

19 8. It was proposed that WRN would extend from the State of Washington southward into  
20 California and eastward into Nevada and enable the respective LLCs to earn significant income for their  
21 investors.

22 9. Nutek was employed as an ISO to market the membership interests in the respective LLCs  
23 by ADC, SMR and Mr. Koenigsberg.

24 10. On October 18 and November 7, 1994, Mr. Shuken spoke with a Division investigator and  
25 offered him an investment opportunity and up to three membership interests in a LLC currently being  
26 offered which was known as Washington 220 Holdings.

27 11. Mr. Shuken represented to Mr. Oliverio that there would be very little risk involved in an  
28 investment in a LLC.

1           12.     Subsequently, Mr. Shuken sent initial offering materials similar to those sent to other  
2 investors which were of a promotional nature and did not disclose the risks involved in the investment.

3           13.     After prospective investors signed and returned their signature sheets together with their  
4 payments for the requested number of units for their membership interests, if they paid an extra \$25.00  
5 for a compliance interview, they were contacted by an independent company known as CIA in order to  
6 confirm that investors understood their investments were subject to total loss if the respective LLC failed.

7           14.     Monies sent to SMR for investment in the respective LLCs were combined into a single  
8 administrative account to fund construction and purchases of equipment and later charged back to the  
9 respective LLCs.

10          15.     The risks involved in the investments in the respective LLCs were not disclosed until  
11 January 1995 when the Membership Summaries were mailed to the investors for their review in order  
12 to make a determination as to whether to elect to continue with the investment or to request a refund.

13          16.     Prior to the Membership Summaries being sent to investors in the respective LLCs, 60  
14 percent of the invested funds had been expended by January 1995 before any requests for refunds were  
15 made.

16          17.     Prospective investors were not told that the ISOs were paid approximately 30 percent of  
17 the funds collected to sign up investors in the respective LLCs.

18          18.     The proxy votes provided to investors in the respective LLCs provided the investors with  
19 illusory control because the actual management and administration of the respective LLCs had been  
20 contracted to ADC and SMR.

21          19.     As discussed hereinabove, with respect to the offer and sale of the membership interests  
22 in the respective LLCs:

- 23           A.     Respondents failed to inform investors in respective LLCs of the extent of the risks  
24 involved prior to their investments;
- 25           B.     Respondents failed to inform investors that their entire investment was at risk and that  
26 their investments would lack liquidity prior to investing;
- 27           C.     Respondents misrepresented the nature of 220 MHZ dispatch communication systems by  
28 referring to it as "poor man's cellular";
- D.     Respondents misrepresented that substantial portions of the LLCs' revenues from "inter-  
connect revenues" and from the resale of long-distance service contrary to a study

1 prepared by a private company at the request of SMR;

- 2 E. Respondents failed to inform investors that 220 MHZ communications service is half-  
3 duplex communication versus cellular telephone communications which is full-duplex  
4 communication;
- 5 F. Respondents failed to inform investors that there was no portable cellular-like equipment  
6 available for public usage presently;
- 7 G. Respondents failed to inform investors of the transmission limitations of 220 MHZ  
8 dispatch communication systems prior to their investments;
- 9 H. Respondents failed to inform investors that 220 MHZ equipment is more expensive than  
10 cellular telephone equipment because of the subsidization by cellular service providers;
- 11 I. Respondents failed to inform investors that the industry lacked a sufficient performance  
12 history upon which to make their financial projections prior to investments being made;
- 13 J. Respondents misrepresented the costs of SMR's management fees prior to investments  
14 being made;
- 15 K. Respondents failed to inform investors of regulatory actions with regard to the offer of  
16 the investments in the respective LLCs prior to investment being made which could affect  
17 the value of the investments; and
- 18 L. Respondents failed to disclose to investors the financial condition and business history  
19 of ADC and SMR prior to investments being made.

20 20. The Membership Summaries sent to investors in the respective LLCs some months after  
21 their investments had been made, contained reasonable disclosures of the risk factors involved in the  
22 investment in the LLCs, but these warnings were given after the investments had been made.

23 21. The Membership Summaries made it clear that investments in the respective LLCs were  
24 highly speculative and that they lacked liquidity and the fact that the promoters were also facing  
25 challenges raised by various securities regulators including the instant proceeding which could affect the  
26 value of the investments.

27 22. The record established that 17 Arizonans invested \$147,500 in 15 of the 40 LLCs.

28 23. Based on the record, it was subsequently shown that two of the 17 Arizona investors  
subsequently requested and received complete refunds of the \$13, 000 which they had invested.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona  
Constitution and A.R.S. § 44-1801 et. seq.

2. The investments offered by the Respondents were securities within the meaning of A.R.S.

1 §44-1801(22).

2 3. The securities were neither registered nor exempt from registration pursuant to A.R.S.  
3 §44-1801, et. seq.

4 4. The actions and conduct of the Respondents constitute the offer and/or sale of securities  
5 within the meaning of A.R.S. §§44-1801(12) and 44-1801(18).

6 5. Respondents offered and/or sold unregistered securities within or from Arizona in  
7 violation of A.R.S. § 44-1841.

8 6. Respondents are dealers or salesmen within the meaning of A.R.S. §§ 44-1801(9) and 44-  
9 1801(19).

10 7. Respondents offered and/or sold securities within or from Arizona without being  
11 registered as dealers or salesmen in violation of A.R.S. §44-1842.

12 8. Respondents violated the anti-fraud provisions of A.R.S. §§44-1991(2) and (3) in the  
13 manner set forth hereinabove.

14 9. Respondents Nutek, Mr. Shuken, ADC, SMR and Mr. Koenigsberg are found herein to  
15 have violated the Act, should cease and desist pursuant to A.R.S. §44-2032 from any future violations  
16 of A.R.S. §§44-1841, 44-1842 and 44-1991 and all other provisions of the Act.

17 10. Respondents ADC, SMR and Mr. Koenigsberg should be ordered to make an offer of  
18 restitution pursuant to A.R.S. §44-2032 and A.A.C. R14-4-308 to the remaining Arizona investors as  
19 described hereinabove.

20 11. Respondents Nutek and Mr. Shuken should be assessed an administrative penalty pursuant  
21 to A.R.S. §44-2036, as follows: for the violation of A.R.S. § 44-1841 the sum of \$1,000; for the  
22 violation of A.R.S. §44-1842 the sum of \$1,000; and for the violation of A.R.S. §44-1991 the sum of  
23 \$1,000.

24 12. Respondents ADC, SMR and Mr. Koenigsberg should be assessed an administrative  
25 penalty pursuant to A.R.S. § 44-2036 as follows: for the violation of A.R.S. § 44-1841 the sum of \$5,000;  
26 for the violations of A.R.S. §44-1842 the sum of \$5,000; and for the violations of A.R.S. § 44-1991 the  
27 sum of \$5,000.

28 ...

**ORDER**

IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2032, Respondents Nutek Information Systems, Inc., Mr. Jeffrey A. Shuken, A.K.s DAKS Communications, Inc., SMR Advisory Group, L.C., and Mr. Albert Koenigsberg shall cease and desist from their actions described hereinabove in violation of A.R.S. §§ 44-1841, 44-1842 and 44-1991.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036 that Respondents Nutek Information Systems, Inc., and Mr. Jeffrey A. Shuken shall jointly and severally pay as and for administrative penalties: for the violation of A.R.S. § 44-1841 the sum of \$1,000; for the violation of A.R.S. § 44-1842 the sum of \$1,000; and for the violation of A.R.S. § 44-1991 the sum of \$1,000.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2036, Respondents A.K.s DAKS Communications, Inc., SMR Advisory Group, L.C., and Mr. Albert Koenigsberg shall jointly and severally pay as and for administrative penalties: for the violation of A.R.S. § 44-1841 the sum of \$5,000; for the violation of A.R.S. § 44-1842 the sum of \$5,000; and for the violation of A.R.S. § 44-1991 the sum of \$5,000.

IT IS FURTHER ORDERED that the administrative penalties shall be made payable to the State Treasurer for deposit in the General Fund of the State of Arizona.

IT IS FURTHER ORDERED that the \$5,000 administrative penalties assessed hereinabove against A.K.s DAKS Communications, Inc., SMR Advisory Group, L.C., and Mr. Albert Koenigsberg shall be reduced to \$3,000 per statutory violation if restitution is made in accordance with the terms of this Decision hereinafter.

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1 IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under  
2 A.R.S. § 44-2032 Respondents A.K.s DAKS Communications, Inc., SMR Advisory Group, L.C., and  
3 Mr. Albert Koenigsberg shall make an offer of restitution to all remaining Arizona investors pursuant to  
4 A.A.C. R14-4-308, subject to any legal setoffs for restitution made prior to the effective date of this  
5 Decision, said offers of restitution to be made within 60 days from the effective date of this Decision.

6 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

7 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.  
8  
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10

11 CHAIRMAN

COMMISSIONER

COMMISSIONER

12 IN WITNESS WHEREOF, I, JAMES MATTHEWS, Executive Secretary of the  
13 Arizona Corporation Commission, have hereunto set my hand and caused the  
14 official seal of the Commission to be affixed at the Capitol, in the City of  
15 Phoenix, this \_\_\_\_\_ day of \_\_\_\_\_, 1996.

16 \_\_\_\_\_  
JAMES MATTHEWS  
EXECUTIVE SECRETARY

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18 DISSENT \_\_\_\_\_  
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1 SERVICE LIST FOR:

NUTEK INFORMATION SYSTEMS, INC.;  
JEFFREY A. SHUKEN; AKS DAKS  
COMMUNICATIONS, INC.; SMR ADVISORY  
GROUP, L.C.; and ALBERT KOENIGSBERG

2  
3 DOCKET NO.:

S-3046-I

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