Decision No. C03-0077

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02A-463AT

IN THE MATTER OF THE APPLICATION OF MILE HIGH TELECOM JOINT VENTURE D/B/A MILE HIGH TELECOM TO DISCONTINUE OR CURTAIL JURISDICTIONAL TELECOMMUNICATIONS SERVICE.

ORDER DENYING EXCEPTIONS

Mailed Date: January 21, 2003
Adopted Date: December 18, 2002

I. BY THE COMMISSION:

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R02-1261 (Recommended Decision) filed by On Systems Technology, LLC (On Systems) on November 27, 2002. On Systems argues that the administrative law judge (ALJ) erroneously recommended denial of On Systems' motion to consolidate this docket with Complaint Docket No. 02F-275T and stay this proceeding. According to On Systems' reasoning, it will be irreparably harmed and put out of business forever, if this docket goes forward.

2. Qwest Corporation (Qwest) filed a response to On Systems' exceptions. Mile High Telecom Partners, LLP (Partners) and Premier Communications, Inc. (Premier), also filed a joint response to the exceptions. The responding parties agree that it is in the best interests of Qwest, the Partners, and Colorado consumers that this issue be brought to closure as soon as possible. Therefore, the responding parties request that we deny the exceptions of On Systems and adopt the Recommended Decision.

3. A transcript was filed in this matter, however, none of the parties dispute any findings of fact by the ALJ, nor does any party cite any portion of the transcripts to dispute any finding in the Recommended Decision.

4. Now, being duly advised in the matter, we deny On Systems' exceptions and uphold the Recommended Decision in its entirety.

B. Background

5. On August 30, 2002, Applicant, Mile High Telecom Joint Venture[1] (the Joint Venture) filed an application seeking authorization to discontinue providing jurisdictional telecommunications service to the Joint Venture's customers in Colorado. The Joint Venture indicated that the application was a result of a notice from Qwest of discontinuance of service, which was the result of the Joint Venture's failure to pay Qwest for undisputed portions of Qwest's invoices to the Joint Venture for resale services.

6. Qwest filed a motion on September 16, 2002 to set an emergency hearing in this matter and to approve its proposed transition plan citing actual and potential financial losses from continuing service to the Joint Venture as grounds for its motion. Regarding the reasoning for its motion for an emergency hearing, Qwest indicates that prior to its last disconnect notice of August 22, 2002 to the Joint Venture that precipitated this docket, Qwest issued two prior disconnect notices, however, the Joint Venture sought relief from the Commission each time.

7. The first notice to disconnect was issued to the Joint Venture in May 2002. In response, the Joint Venture sought Commission relief in the form of an order requiring Qwest to

[1] The Joint Venture is comprised of two partners, On Systems and the Partners. Mr. Tim Wetherald serves as manager of On Systems and the Joint Venture.

continue providing service to the Joint Venture. Qwest and the Joint Venture also agreed to a process whereby the Joint Venture would make payments on its account, and Qwest agreed to continue providing service. The parties also agreed to a procedure to resolve past billing matters. However, according to Qwest, the Joint Venture failed to make payments on the account as had been agreed.

8. Qwest issued a second notice to disconnect in July 2002. Again, the Joint Venture sought relief from the Commission in the form of an emergency hearing. As a result of that hearing the ALJ stayed the disconnect notice and ordered Qwest to continue processing orders from the Joint Venture. However, the ALJ's order was contingent upon the Joint Venture making payments on the undisputed balance of approximately $811,000 then due on the Joint Venture's account. Specifically, the ALJ ordered the Joint Venture to make bi-weekly payments of approximately $100,000 plus 1.5 percent interest per month beginning July 2002. In addition, all Qwest invoices sent after July 19, 2002 were to be paid in full within 45 days of billing.

9. Qwest maintains that the Joint Venture made two payments on the undisputed past due accounts, but failed to make any other payments either on the past due accounts or on new monthly billings. As a result, Qwest issued the Joint Venture a third disconnect notice on August 22, 2002. In response, the Joint Venture filed the application to disconnect which is the subject of this docket.

10. Interventions in this docket were filed by Qwest, Commission Staff (Staff), the Office of Consumer Counsel (OCC), the Partners, and Premier. Reverend Edward D. Schneider, representing consumers of the Joint Venture filed a late intervention.

11. Qwest filed a motion on September 16, 2002 to set an emergency hearing in this matter and to approve its proposed transition plan, citing the potential financial losses from continuing service to the Joint Venture as grounds to expedite the matter. The Commission granted Qwest's motion and set an emergency hearing on the discontinuance application, and the hearing was subsequently set for October 16, 2002. In the meantime, the Joint Venture filed a proposed transition plan to switch customers to another provider; Staff filed a motion to require Commission approval of customer notices to be issued in this docket; the OCC filed its proposed transition plan, which was responsive to Qwest's transition plan; and Premier filed a request to be designated as the default provider in any transition plan adopted by the Commission in this docket.

12. At the October 16, 2002 hearing, the attorney representing the Joint Venture moved to withdraw as its counsel in this matter. According to counsel, due to a conflict of interest between the two partners comprising the Joint Venture, he would be unable to represent the Joint Venture here. Therefore, Mr. Tim Wetherald, as manager of On Systems and the Joint Venture, requested a continuance of the hearing until such time as he could retain new counsel for representation in the proceeding. The ALJ granted the motion for continuance and set a new hearing for October 22, 2002.

13. On October 18, 2002, On Systems filed a Motion to Consolidate and for Stay, seeking consolidation and a stay of the discontinuance proceeding so that service quality credits alleged to be due to the Joint Venture from Qwest in a separate Complaint Docket[2] could be determined prior to the discontinuance of local exchange service in this docket. It was On

[2] Mile High Telecom Joint Venture v. Qwest, Docket No. 02F-275T

Systems' contention that the relief sought by the Joint Venture in the Complaint Docket might preclude the need to discontinue service and as a result, avert any harm to On Systems in its capacity as a member of the Joint Venture. On Systems also requested a stay of the discontinuance proceeding until the Motion to Consolidate was decided.

14. The Partners filed a pleading opposing On System's motion to consolidate. The Partners pointed out that each partner of the Joint Venture (the Partners and On Systems) was independently represented in the proceedings. The Partners indicated that the discontinuance proceeding should proceed separately without further delay.

15. At the October 22, 2002 hearing on the Joint Venture's application to discontinue service, appearances were entered on behalf of the Joint Venture, the Partners, On Systems, Premier, Qwest, Reverend Schneider, Staff, and the OCC. The ALJ ruled on the pending motions, including denial of Qwest's motion to strike On Systems' intervention, and denial of On Systems' motion to consolidate this docket with the Complaint Docket and for stay of these proceedings.

C. Recommended Decision

16. The ALJ found it in the public interest to grant the application of the Joint Venture seeking authorization to discontinue providing jurisdictional telecommunications services to customers in Colorado. Further, because the Joint Venture is discontinuing service, and would no longer be ready, willing, or able to offer service in accordance with its filed tariff, the ALJ found it consistent with the Joint Venture's application that the filed tariff be deemed withdrawn as of the day service is discontinued.

17. After hearing testimony on the proposed transition plans submitted by Qwest, the Joint Venture, and the OCC, the ALJ determined that the two-phase transition plan submitted by the OCC, as amended at hearing, should be adopted for use in the discontinuance. Under the OCC plan, during the first 30 days of the transition, competitors may solicit customers of the Joint Venture, while during the second 30 days of the transition, those customers who, for whatever reason, do not choose another provider will default to a provider designated by the Commission. The OCC transition plan, according to the ALJ, furthers the statutory goal of promoting competition in the local service market. No party opposed adoption of the proposed transition plan with the exception of two issues: the default provider designation and the list of alternative providers to be included in the notice to customers.

18. Steven Peterson, who testified that he was a managing partner of the Partners and authorized to testify on behalf of the Partners here, provided additional testimony in support of the application to discontinue service and testified that the Partners would comply with any Commission ordered transition plan to the best of their abilities. Mr. Peterson also offered testimony in support of Premier as the default provider.

19. Mr. Wetherald testified that On Systems was willing and able to comply with its obligations under the transition plan, and would inform the Commission should he or On Systems be unable to perform any obligation under the transition plan. Mr. Wetherald additionally testified that the Joint Venture, at the time of the hearing, had about 10,500 active residential local exchange customers and less than 100 active business accounts.

20. Dian P. Callaghan testified on behalf of the OCC in support of its proposed transition plan and that the OCC supports Qwest being appointed as the default provider. The OCC's proposed transition plan includes Qwest as the default provider.

21. John Trogonoski testified on behalf of Staff regarding his analysis concluding that the Commission designate Qwest as the default provider for the proposed transition plan. Mr. Trogonoski offered testimony regarding his appraisal of the two providers that have indicated a willingness or desire to be designated as the default provider here, Qwest and Premier. Based on the criteria established by Mr. Trogonoski, he testified that Staff does not believe Premier has demonstrated its ability to accommodate the customer demands that may be required of the default provider. Therefore, Mr. Trogonoski recommended that Qwest be designated as the default provider in this case.

22. Pat Parker testified on behalf of the OCC in support of the OCC's proposed list of alternative providers and offered testimony on how she compiled the list. Ms. Parker offered that the OCC supported using its proposed list because it is consumer friendly, and will minimize confusion by including only companies that currently offer residential local telephone service in the Denver metro area.

23. The ALJ determined that the default provider should be Qwest. Based on testimony regarding Premier's limited number of employees and precarious financial position, he found that Premier was not in a position to handle the large number of potential customers. Rather, the ALJ determined that Qwest could better transition the Joint Venture's customers because Premier did not demonstrate the financial, technical, and managerial capability to serve as the default provider.

24. To further enhance competition during the discontinuance notice period, the ALJ recommended that the Joint Venture provide its published subscriber list information to providers of jurisdictional telecommunications services in Colorado upon request. Further, the list of alternative providers supplied to Joint Venture customers as part of the Notice Letter is to be the

list advocated by the OCC. However, the ALJ determined that On Systems would be stricken from the list by stipulation of the parties. The ALJ also found it appropriate to waive all "slamming" and "cramming" rules to ensure the transition plan operates as intended.

D. On Systems' Exceptions

25. In its exceptions, On Systems argues that the ALJ erroneously recommended denial of On Systems' motion to consolidate this docket with the Mile High Telecom Joint Venture v. Qwest docket (Docket No. 02F-275T) (Complaint Docket) and stay the proceedings here. According to On Systems, the Joint Venture set forth, in the Complaint Docket, substantial claims against Qwest for service quality credits. As of June 2002, the disputed amount of Qwest's charges, according to On Systems, were approximately $1.3 million and the service quality credits claimed by the Joint Venture were approximately $2 million.

26. On Systems indicates that in this docket, the Joint Venture is being forced to discontinue services because it has failed to pay money that it allegedly owes to Qwest. In the Complaint Docket, On Systems points out that the Joint Venture has claims for service quality credits against Qwest in amounts that equal or exceed the amounts claimed by Qwest in this docket. If the Joint Venture prevails against Qwest in the Complaint Docket, On Systems argues that there would be no basis for the discontinuance. If however, this docket goes forward, On Systems speculates that the Joint Venture will lose all of its customers, and if it prevails in the Complaint Docket, then the Joint Venture will have been irreparably harmed and put out of business forever.

27. Therefore, On Systems concludes that this docket must be consolidated with the Complaint Docket so the Joint Venture's claims against Qwest can be determined in conjunction with the application for discontinuance of service. On Systems surmises that this is the only way

to protect the Joint Venture from an unfair "Catch-22" that will result from the current procedural posture of the two cases.

28. Qwest argues that On Systems' exceptions do nothing more than renew its motion to consolidate and to stay the proceedings in the Termination Docket, which if granted would result in a reversal of the ALJ's ruling ordering a stay of the Complaint Docket in Decision No. R02-1151 of October 15, 2002. Qwest additionally argues that the ALJ's denial of On Systems' Motion to Consolidate and for Stay of Proceedings was a proper exercise of discretion. Because On Systems failed to refute or object to any fact presented before the ALJ, Qwest asserts that the ALJ's ruling denying the motion to consolidate was well within the sound discretion of the ALJ. *Citing* § 40-6-113(4), C.R.S., and *Howard v. P.U.C.*, 187 Colo. 138, 528 P.2d 1303 (Colo. 1974).

29. According to the Colorado Rules of Civil Procedure, "the consolidation of actions for trial which appear to be of like nature and concern themselves with the same or similar questions rests *within the sound discretion of the trial court*, and its action thereon will not be disturbed on appeal except for the abuse of discretion." (emphasis in original). *See Willy v. Atchison, T. & S.F. Ry., Co.*, 115 Colo. 306, 321, 172 P.2d 958, 965 (Colo. 1946). According to the Colorado Supreme Court, "an abuse of discretion occurs where the court's failure to order separate proceedings virtually assures prejudice to a party." *Prudential Property and Casualty Insurance Co. v. District Court for 17th Judicial District*, 617 P.2d 556, 558 (Colo. 1980). Qwest concludes that given the relevant case law here, the ALJ did not abuse his discretion by not consolidating the two cases.

30. Qwest also maintains that it will be irreparably harmed by a further delay in discontinuing the Joint Venture account. At the time On Systems filed it Motion to Consolidate,

it was indebted to Qwest in an amount exceeding $4.2 million, according to Qwest. This amount has continued to increase because the Joint Venture still receives service from Qwest and has not made any payments on its account. Therefore, Qwest urges that any measurable harm to it caused by further delay in the proceedings far outweighs the uncertain and unsupported damages claimed by On Systems. Further, Qwest argues that it has not been established what, if any, service quality credits are due to the Joint Venture. Rather, Qwest asserts that On Systems has simply generally claimed service credits owed to it in its pleading. Because the amount of quality service credits claimed by On Systems has changed several times, Qwest insists that it is impossible to determine what claim, if any, On Systems may have.

31. Qwest urges that On Systems cannot collaterally attack here, a ruling staying the proceedings in the Complaint Docket which it requested. Qwest indicates that it initially moved for a stay of proceedings in the Complaint Docket pending final decisions in the Joint Venture's Termination Docket and Show Cause Docket. The Joint Venture failed to file any response to Qwest's motion. However, according to Qwest, the Joint Venture did support a stay of proceedings in the Complaint Docket in its Response to Qwest's Motion to Join Additional Parties in that docket. Qwest cites language in the Joint Venture's Response to Qwest's Motion to Join Additional Parties in Docket No. 02F-275T, filed on September 30, 2002 that states:

> [The Joint Venture] requests that the Commission hold Qwest's Motion to Join Additional Parties in abeyance until this Commission decides Qwest's Motion to Stay and the issues raised in the Show Cause Docket and the Termination Docket. Neither the Commission nor the parties will be prejudiced by holding Qwest's above captioned Motion in abeyance until the Commission decides Qwest's Motion to Stay and the issues raised in the Show Cause Docket and the Termination Docket. In fact, the decisions in these dockets will provide the parties with guidance as to whether any joinder of parties is appropriate.

I*d*. at paragraphs 3 and 4.

32. Qwest points out that at the time the Joint Venture made this request, On Systems was the managing partner of the Joint Venture, and Mr. Wetherald was the majority owner of On Systems. As such, Qwest, concludes that On Systems cannot now complain that the very relief it requested in the Complaint Docket should be overturned. According to Qwest, the ALJ's decision staying proceedings in the Complaint Docket became final when no party sought review or appeal of the ruling to the Commission, therefore, finality occurred by virtue of the lack of direct attack by any party. Consequently, On Systems is now prohibited from raising a collateral attack of a ruling in the Complaint Docket in this proceeding. *Citing Mountain States Tel & Tel Co. v. P.U.C.*, 186 Colo. 260, 270 527 P.2d 524, 529 (Colo. 1974).

33. Finally, Qwest points out that the ALJ's decision denying On Systems' motion to consolidate this docket with the complaint docket and staying these proceedings was supported by the majority partner of the Joint Venture. According to the Partners, it would be prejudiced by the requested consolidation. Therefore the ALJ's decision should not be overturned unless there is a clear and demonstrated abuse of discretion.

34. The Partners and Premier also responded to On Systems' exceptions. The parties agree that consolidation of the two dockets would only increase the potential exposure the Joint Venture may have to Qwest for ongoing financial obligations. Therefore the Partners and Premier conclude that no good reason exists to consolidate this docket with the Complaint Docket and delaying the discontinuance of operations by the Joint Venture.

E. Analysis

35. On Systems finds no fault with the Recommended Decision other than the ALJ's denial of its motion to consolidate this docket with the Complaint Docket. Although a transcript was filed, On Systems does not challenge any finding of fact in support of its exceptions. We

find On Systems' arguments without merit. There is nothing on the record to indicate that the ALJ erred or abused his discretion in any manner, as On Systems urges.

36. It is well established that if a party to a Commission matter who seeks to reverse, modify, or annul a recommended decision of a Commission examiner or a decision of the Commission fails to file a transcript, the basic findings of fact of the Commission are conclusively presumed to be complete and accurate. § 40-6-113(4), C.R.S. *See, Howard* 187 Colo. 138, 528 P.2d 1303. On Systems did file a transcript in this matter, however, it failed to point to any fact presented at hearing that it objected to as inaccurate or that it refutes.

37. Qwest correctly cites *Willy* 115 Colo. 306, 321, 172 P.2d 958, 965 for the proposition that consolidation of actions for trial which are of like nature and are concerned with the same or similar questions rests within the sound discretion of the trial court and the court's actions will not be disturbed on appeal except in the case of abuse of discretion. Abuse of discretion is defined as the court's failure to order separate proceedings that virtually assures prejudice to one of the parties. *Prudential Property and Casualty Insurance Co.* 617 P.2d at 558.

38. Here, other than an unsupported assertion of irreparable harm without consolidation of the two proceedings, and a stay of this proceeding, On Systems has failed to provide sufficient argument or support for its claims of error and abuse of discretion by the ALJ, which caused it prejudice and irreparable harm.

39. Rather, we find that because Qwest is required to provide ongoing services to the Joint Venture (even though the Joint Venture has failed to make payment to Qwest for those services), any further delay in the discontinuance proceeding will negatively impact Qwest and ultimately prejudice the Joint Venture's customers. It is incumbent upon us to protect those

customers affected by this proceeding and implement as smooth and seamless a transition for them as possible.

40. There is nothing on the record or in On Systems' arguments to convince us that granting its motion to stay and consolidate the discontinuance and complaint dockets is the only way to protect the Joint Venture from an unfair situation that will result from the current procedural posture of the two dockets. As we indicated above, On Systems has failed to demonstrate any irreparable harm to the Joint Venture if the two dockets are not consolidated. However, Qwest claims the Joint Venture was indebted to it for at least $4.2 million and growing at the time On Systems' motion to consolidate was first heard in October 2002.

41. Further, although On Systems claims it is entitled to an amount of service quality credits from Qwest, the amount of credits owed, if any, is somewhat unclear at this time. To now stay these proceedings awaiting a speculative decision in the Complaint Docket, that may or may not favor On Systems, for a speculative amount of service quality credits that may or may not be greater than the amounts owed to Qwest for telecommunications services, serves neither the interests of the parties to this proceeding nor the Joint Venture's customers. On Systems cites no authority for the proposition that consolidation and staying this proceeding was justified here, and while making a general allegation that it was prejudiced by the ALJ's decision, demonstrates none.

42. Qwest also argues that On Systems' arguments requesting reversal of the ALJ's decision denying consolidation of the two dockets and staying this proceeding is a collateral attack in this proceeding of the ALJ's ruling in the Complaint Docket that stayed the Complaint Docket pending the outcome of this matter. The Joint Venture did not object to the stay in that docket. Qwest points out that the Joint Venture in fact supported Qwest's motion to stay the

complaint proceedings. Therefore, we agree that the ALJ's decision staying the Complaint Docket was final because no party sought a review or reconsideration or appeal of that ruling to the Commission.

43. To the extent On Systems' arguments now are a collateral attack on the ruling in the Complaint Docket staying that proceeding, we find those arguments barred pursuant to § 40-6-112(2), C.R.S., which states, "[i]n all collateral actions or proceedings, the decisions of the commission which have become final shall be conclusive."

44. Therefore, we deny the exceptions of On Systems consistent with the discussion above.

II. ORDER

A. The Commission Orders That:

1. The Exceptions to Recommended Decision No. R02-1261 filed by On Systems Technology, LLC are denied.

2. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

3. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING December 18, 2002.

(S E A L)

ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

POLLY PAGE

JIM DYER

Commissioners

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