Decision No. C03-0249

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 APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: March 7, 2003
Adopted Date: February 19, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of an application of On Systems Technology, LLC (On Systems) for rehearing, reargument, or reconsideration (RRR) of Commission Decision No. C03-0077 (Decision), denying On Systems' exceptions. On Systems urges two points in support of its application for RRR.

2. First, it argues that pursuant to 11 U.S.C. § 362(a) of the United States Bankruptcy Code, an automatic stay of the Decision became effective upon On Systems' filing of an Involuntary Petition for Bankruptcy, filed on behalf of Mile High Telecom Joint Venture (Joint Venture) on December 17, 2003.

3. Second, On Systems again maintains that the Commission erroneously accepted the administrative law judge's (ALJ) recommended denial of On Systems' motion to consolidate this docket with a complaint docket involving the Joint Venture and Qwest Corporation (Qwest), and to stay the proceedings in this docket.

4. Now, being duly advised in the matter, we deny the application for RRR in its entirety consistent with the discussion below.

II. DISCUSSION

A. Background

5. On August 30, 2002, the Joint Venture filed an application seeking authorization to discontinue providing jurisdictional telecommunications services to its customers in Colorado. The Joint Venture indicated that the application was the 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. Prior to the hearing on the Joint Venture's Motion to Discontinue Service, 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 the Joint Venture from Qwest, brought in a separate Complaint Docket,[1] could be determined prior to the discontinuance of local exchange service in this docket. On Systems contended 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.

7. In the Recommended Decision, the ALJ, in addition to granting the Joint Venture's motion to discontinue telecommunications services, also recommended denial of On Systems' motion to consolidate this docket with the Complaint Docket and stay of the

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

proceedings here. On exceptions to the Recommended Decision, On Systems argued that the ALJ should have granted its motion to consolidate so the Joint Venture's claims against Qwest could be determined in conjunction with the application for discontinuance of service. According to On Systems, the Joint Venture faced a "Catch-22" situation because, should the Joint Venture prevail against Qwest in the Complaint Docket, there would be no basis for the discontinuance. If, however, this docket went forward, On Systems speculated that the Joint Venture would lose all of its customers, and, should it prevail in the Complaint Docket, would then be irreparably harmed and put out of business forever.

8. In our previous decision, we found 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 would cause an unfair situation that would result from the procedural posture of the two dockets. On Systems failed to demonstrate any irreparable harm to the Joint Venture if the two dockets were not consolidated.

9. We further held that to 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, served neither the interests of the parties to this proceeding, nor the Joint Venture's customers. We found that On Systems cited 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, demonstrated none. Finally, we found that to the extent On Systems' arguments were nothing more than a collateral attack on the ALJ's ruling in the Complaint Docket that stayed those proceedings, those arguments were barred pursuant to § 40-6-112(2), C.R.S.

B. On Systems' RRR Arguments

10. On Systems makes two arguments in its application for RRR. First, it argues that the Commission does not have authority to enforce Decision No. C03-0077 because of On Systems' filing of an Involuntary Bankruptcy Petition on behalf of Mile High Telecom and the Joint Venture pursuant to Chapter 11 of the U.S. Bankruptcy Code. As a result, On Systems concludes that pursuant to 11 U.S.C. § 362(a), there was an automatic stay of the continuation of any administrative proceedings against the Joint Venture, the enforcement of any judgment against the Debtor, and any act to obtain possession of property of the estate or to exercise control over property of the estate.

11. On Systems maintains that the discontinuance proceeding was initiated solely because Qwest notified the Joint Venture it would no longer provide service to the Joint Venture because of its failure to pay certain amounts owed to Qwest. Further, requiring the Joint Venture to send notice of discontinuance to its customers will cause those customers to be lost forever. On Systems theorizes that this will be fatal to the Joint Venture's efforts to reorganize pursuant to Chapter 11 of the Bankruptcy Code. As such, On Systems concludes that our order denying its exceptions was entered in violation of the automatic stay provision found at § 362(a) of the Bankruptcy Code.

12. Further, according to On Systems, the police or regulatory power exception to the automatic stay found at 11 U.S.C. § 362(b)(4) does not apply here because our order denying exceptions is exclusively the result of a common payment dispute between two non-governmental entities, the Joint Venture and Qwest. Additionally, On Systems asserts that the § 362(b)(4) exception is not applicable because the public, health, safety, and welfare are not realistically at issue here.

13. On Systems again raises its arguments on exceptions regarding the ALJ's denial of its motion to consolidate this docket with the Complaint Docket, and stay of these proceedings pending the outcome of the Complaint Docket. Again, On Systems asserts that denial of its motion to consolidate is erroneous and an abuse of discretion because of the irreparable harm that will be suffered by the Joint Venture. According to On Systems, the two dockets must be consolidated so that the Joint Venture's claims against Qwest can be determined in conjunction with the application for discontinuance of service, in order to prevent any undue prejudice to the Joint Venture due to the procedural posture of the two dockets. On Systems surmises that going forward with the discontinuance proceeding, prior to adjudication of the Complaint Docket, will prejudice the Joint Venture and put it out of business permanently.

C. Analysis

14. We find that On Systems presents nothing new here for us to consider regarding our decision on exceptions. There is nothing on the record to indicate that the ALJ erred or abused his discretion in any manner, as On Systems urges, nor does On Systems demonstrate any prejudice to the Joint Venture given the procedural posture of this docket and the Complaint Docket.

15. Rule 42 of the Colorado Rules of Civil Procedure provides for consolidating matters involving common questions of law or fact. However, "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). *Willy v. Atchison, T. & S.F. Ry., Co*, 115 Colo. 306, 321, 172 P.2d 958, 965 (Colo. 1946). 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).

16. Nothing presented by On Systems here persuades us to alter our previous decision. Its unsupported allegation of prejudice and irreparable harm does not convince us that this proceeding must be stayed pending the outcome of the Complaint Docket. Rather, we find that in order to protect the interests of those customers affected by this proceeding, it is incumbent upon us to implement a transition plan as soon as possible, that will be as seamless as possible.

17. We also reiterate that to the extent On Systems' arguments here 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."

18. We also disagree with On Systems' assertions that the § 362(b)(4) exceptions to the automatic stay requirements of § 362(a) are not applicable here. Prior to our analysis, we would point out that when On Systems brought its Motion for Order to Show Cause to stay our Decision No. C03-0077 before the U.S. Bankruptcy Court on January 29, 2003, the court dismissed the motion and our order remains in place, unaffected by the bankruptcy automatic stay. Generally, the bankruptcy court held that On Systems lacked standing to enforce the stay; however, the Joint Venture (the involuntary debtor) neither brought a subsequent motion to enforce the automatic stay, nor joined in On Systems' motion for order to show cause.

19. The bankruptcy court further determined that a party seeking to stay the Commission's decision should seek a temporary restraining order and preliminary injunction,

rather than a motion for order to show cause. Even if the motion brought by On Systems had been procedurally correct, the court reasoned that the motion for order to show cause should have been brought as an adversary complaint, rather than as a motion on a contested matter. Since the January 29, 2003 bankruptcy hearing, neither On Systems nor the Joint Venture has filed a pleading with the bankruptcy court seeking a stay of our order.

20. Beyond the findings of the bankruptcy court, we disagree with On Systems' argument regarding the inapplicability of § 364(b)(4). We find our decision to be within the police-regulatory power exceptions expressed in that section. The automatic stay provisions of § 362(a) do not apply to any State action "to enforce [a] governmental unit's or organization's police and regulatory power, including enforcement of a judgment other than a money judgment." 11 U.S.C. § 362(b)(4).

21. Commission rules implement the Colorado General Assembly's legislative charge to ensure continuity of basic telephone service to residential customers as set forth in § § 40-15-201, 40-15-202, and 40-15-502, C.R.S. Our jurisdiction in the telecommunications area includes protecting the public health, safety, and welfare of these customers. We accomplish this by, among other things, ensuring that the public has residential telephone service available at all times in order to access medical, police, and fire emergency help.

22. The U.S. Tenth Circuit Court of Appeals decided the reach of the § 362(b)(4) police-regulatory power exception to the automatic stay with respect to a Commission decision in *In re Yellow Cab Cooperative Association*, 132 F.3d 591 (1997). In that case, the Tenth Circuit upheld the Commission's decision to grant a transfer of Yellow Cab Cooperative Association's (Yellow Cab) certificate of public convenience and necessity (CPCN) to operate 300 taxicabs,

rather than the 600 it requested, pursuant to an order of the bankruptcy court. The Commission held that although Yellow Cab had authority to operate 600 cabs, it only utilized a portion of the authority by operating 300 cabs. Therefore, the unused authority under Yellow Cab's CPCN had become dormant and transfer of the full authority would cause destructive competition, which would be against the public interest.

23. The Tenth Circuit found that the Commission's transfer order was designed to effectuate public policy or public interest, and therefore satisfied both the "pecuniary purpose" test and the "public policy" test, which establish that a governmental action falls within the § 362(b)(4) police-regulatory power exception to the automatic stay. The Tenth Circuit described these two tests as follows:

> Under the 'pecuniary purpose' test, the court asks whether the government's proceeding relates primarily to the protection of the government's interest in the debtor's property and not to matters of public policy. If it is evident that a governmental action is primarily for the purpose of protecting a pecuniary interest, then the action should not be excepted from the stay. In contrast, the 'public policy' test distinguishes between governmental proceedings aimed at effectuating public policy and those aimed at adjudicating private rights. Under this second test, actions taken for the purpose of advancing private rights are not excepted from the stay.

In re Yellow Cab Cooperative Association, 132 F.3d at 597 (quoting *Eddleman v. United States Dept. of Labor*, 923 F.2d 782, 791 (10th Cir. 1991)), overruled in part on other grounds, *Temex Energy, Inc. v. Underwood, Wilson, Berry Stein & Johnson*, 968 F.2d 1003 (10th Cir. 1992).

24. The U.S. Bankruptcy Court for the District of Colorado, interpreted the Tenth Circuit's guidelines in *In re Professional Home Health Care, Inc.*, Case No. 01-12254 ABC, Adversary No. 01-1217 ABC (July 31, 2001 slip opinion). There, the bankruptcy court found that the issue under the pecuniary purpose test was "just what regulatory activity has taken place and whether such activity was undertaken to promote and protect public health, safety, or

welfare, as opposed to being undertaken primarily in furtherance of the regulator's own pecuniary interest." Slip op., pp. 4, 5. The bankruptcy court further held that "[i]n applying section 362(b)(4), the court is not charged with normatively evaluating the legitimacy of regulatory efforts, beyond determining that they are undertaken in good faith and in furtherance of promoting public health, safety, and welfare, as opposed to the government's own pecuniary interest." Slip op., pp. 8, 9.

25. Our Decision here did not advance the State's pecuniary interest. If the Joint Venture's customers save any money as a result of the transition plan we implemented as part of that decision, none of those savings will be realized by the State because it is not a customer of the Joint Venture. Our primary interest in issuing the Decision was to protect the public. It was not a pecuniary self-interest. Pursuant to our constitutional and statutory mandate, we had a good faith basis for issuing our Decision and approving a transition plan, to ensure the Joint Venture's customers suffered as little disruption in basic telephone service as possible. Applying the Tenth Circuit's and bankruptcy court's holdings to this matter, we are persuaded that our Decision satisfies the pecuniary purpose test and therefore it falls within the § 362(b)(4) police-regulatory power exception.

26. Our Decision also meets the "public policy" test, because it effectuates public policy rather than adjudicates private rights. Approval of the Joint Venture's motion for discontinuance and adoption of the transition plan assures that customers will experience no interruptions to their telephone service. This in turn assures the health, safety, and welfare of those customers.

27. Therefore, we deny On Systems' application for RRR in its entirety.

III. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument or Reconsideration of Commission Decision No. C03-0077, filed by On Systems Technology, LLC is denied.

2. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING February 19, 2003.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

JIM DYER

Commissioners

ATTEST: A TRUE COPY

Bruce N. Smith
Director

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