

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 02C-577T

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RE: IN THE MATTER OF AN INVESTIGATION OF COMPETITIVE LOCAL EXCHANGE CARRIERS AND EMERGING COMPETITIVE TELECOMMUNICATIONS SERVICE PROVIDERS CONCERNING ALLEGED VIOLATIONS OF COLORADO REVISED STATUTES AND COMMISSION RULES OF PRACTICE AND PROCEDURE RELATING TO THE FILING OF ANNUAL REPORTS BY PUBLIC UTILITIES.

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**DECISION REJECTING APPLICATION FOR  
REARGUMENT, REHEARING, OR RECONSIDERATION**

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Mailed Date: March 26, 2003  
Adopted Date: March 26, 2003

**I. BY THE COMMISSION**

**A. Statement**

1. This matter comes before the Commission for consideration of the Application for Reargument, Rehearing, or Reconsideration (RRR) untimely filed by DMJ Communications, Inc. (DMJ), on February 25, 2003. The Application for RRR requests that we modify Decision No. R03-0042 (Recommended Decision) by the Administrative Law Judge (ALJ), which recommended revocation of DMJ's Certificate of Public Convenience and Necessity (CPCN). The ALJ recommended revocation on the grounds that DMJ, despite a number of requests from the Commission, failed to file its annual report as required by Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-1-25(a)(1) (Rule 25). DMJ failed to file Exceptions to the Recommended Decision pursuant to § 40-6-109(2), C.R.S., and, consequently, as to DMJ the Recommended Decision became the decision of the Commission by operation of that statute on February 3, 2003. DMJ now purports to request reconsideration of the Recommended Decision (now the Commission's decision) under the provisions of § 40-6-114(1), C.R.S.

2. Now being duly advised in the premises, we reject the Application for RRR. In light of that rejection, DMJ's CPCN to provide telephone services in Colorado is now revoked. DMJ is ordered to give notice to its customers that it is no longer qualified to provide telephone services in the state, and, as a result, customers must choose a new telephone provider by the date specified below, if they wish to maintain service. We also order Qwest Corporation (Qwest),<sup>1</sup> a party to this case, to provide the list of DMJ customers to the Commission to enable the Commission itself to issue notice to customers in the event DMJ violates this order and fails to issue notice. On the date specified below, Qwest is ordered to disconnect DMJ from the public switched network.

## **B. Discussion**

3. The Commission initiated this show cause proceeding to consider whether the CPCNs of certain telecommunications companies should be revoked for failure to file annual reports for calendar year 2001, as required by Commission rules.<sup>2</sup> *See* Decision No. C02-1298 (Mailed Date of October 30, 2002). After hearing, the ALJ determined that the companies listed on Appendix A to the Recommended Decision had failed to file the required annual report despite numerous inquiries from Commission Staff. Consequently, the ALJ determined that the CPCNs of those companies should be revoked, that the Respondents shown on Attachment A to the Recommended Decision should be ordered to cease and desist from providing services as competitive local exchange carriers and/or emerging competitive telecommunications service providers, and that the Respondents should be disconnected from the public switched network.

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<sup>1</sup> DMJ provides local service to end-users by reselling Qwest's services. As such, the facilities used to provide service to DMJ's customers are provided by Qwest.

<sup>2</sup> *See*, § 40-3-110, C.R.S., and 4 CCR 723-1-25(a)(1). As pertinent to this proceeding, the annual reports for calendar year 2001 were due April 30, 2002.

The Respondents were allowed to avoid these sanctions by filing their 2001 annual reports prior to the effective date of the Recommended Decision (*i.e.*, by February 3, 2003).<sup>3</sup>

4. DMJ failed to file its annual report or Exceptions to the Recommended Decision within 20 days of its issuance. Therefore, the Recommended Decision became the decision of the Commission on February 3, 2003 as to DMJ pursuant to § 40-6-109(2), C.R.S. Under the provisions of § 40-6-114(1), C.R.S., DMJ's Application for RRR was due on February 24, 2003. On February 25, 2003, DMJ untimely filed its Application for RRR to Decision No. R03-0042. In that Application DMJ states that it has now complied with Commission rules and Colorado statutes and has filed its Annual Report for the Calendar year 2001. DMJ requests that we reject Decision No. R03-0042 as having been remedied by its subsequent actions.

5. In its pleading DMJ contends that it did not knowingly or willfully ignore the Show Cause Order, or any other order of the Commission. According to DMJ, it has operated its business as a Competitive Local Exchange Carrier since October 14, 1998 to this date, and, until its failure to file the 2001 annual report, has never failed to comply with all orders of the Commission. DMJ states that it has never been the subject of a complaint by the Commission or the public. DMJ claims that it has not seen the Show Cause Order initiating this docket or Decision No. R03-0042. According to DMJ, management responded with the required reports immediately upon being contacted by telephone call directly from Commission Staff.

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<sup>3</sup> Advanced Telecom, Inc., and Shared Communications Services, Inc., filed their Exceptions on January 21, 2002; DMJ did not file Exceptions to the Recommended Decision. In Decision No. C03-0172 (Mailed Date of February 13, 2003) the Commission granted the Exceptions as to Advanced Telecom, Inc., and Shared Communications, Inc.

### C. Findings and Conclusions

6. We reject the Application for RRR. Section 40-6-114(1), C.R.S., provides:

After a decision has been made by the commission or after a decision recommended by an individual commissioner or administrative law judge has become the decision of the commission, as provided in this article, any party thereto may *within twenty days thereafter, or within such additional time as the commission may authorize upon request made within such period*, make application for rehearing, reargument, or reconsideration of the same or of any matter determined therein.

(emphasis added) The statute, therefore, required that DMJ file an Application for RRR within 20 days after Decision No. R03-0042 became the decision of the Commission by operation of law, or by February 3, 2003.<sup>4</sup> The 20-day requirement for filing an Application for RRR (or a motion for extension of time) is imposed by statute, and the Commission lacks the authority to waive that requirement. Therefore, the Commission lacks the authority to consider DMJ's untimely Application for RRR, and, as such, the Application is rejected.<sup>5</sup>

7. Moreover, we would deny the Application for RRR even if we were permitted to consider its merits. The Commission's official files reveal that, contrary to its assertions, DMJ has not complied with Commission rules in the past. Specifically, Commission files indicate that DMJ filed its 1999 Annual Report delinquent on June 16, 2000 (it was due April 30, 2000); its year 2000 Annual Report was filed delinquent on December 19, 2001 (it was due April 30, 2001); and, as shown by the record in this case, its year 2001 annual report was filed on February 25, 2003 with its untimely Application for RRR (instead of on April 30, 2002). These

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<sup>4</sup> Alternatively, DMJ could have submitted a motion for extension of time to file an Application for RRR if such motion were filed within the 20-day period provided for an Application for RRR. DMJ did not file such a motion.

<sup>5</sup> Section 40-6-112, C.R.S., permits the Commission to reopen a docket for purposes of amending a final decision. However, the record fails to show grounds for taking this extraordinary action.

actions indicate that DMJ has consistently violated the Commission rule requiring it to file its annual report by April 30 of each year.

8. The record in this case indicates that Commission Staff made repeated attempts in this docket to obtain the year 2001 Annual Report from DMJ.<sup>6</sup> The Commission's Show Cause order initiating this docket and the Recommended Decision itself provided further opportunity to DMJ to comply with Commission rule. DMJ, despite these numerous requests and opportunities for compliance with Rule 25(a)(1), still failed to file its Annual Report until after the decision revoking its CPCN was final.

9. DMJ asserts that it was unaware of this show cause proceeding. However, the order of the Commission reminding companies of their obligation to file the year 2001 Annual Report in accordance with the Commission's Rule 25, Decision No. C02-208, was mailed to DMJ's designated customer contact on March 5, 2002 at the address of record listed in DMJ's Year 2000 Annual Report. That address is still listed in DMJ's tariff on file with the Commission.

10. Along with its Application for RRR, DMJ filed a copy of its year 2001 Annual Report. That report shows a new address for the company. This is the first notice to the Commission of a new address for DMJ. It is the responsibility of the utility to keep the Commission informed of a new address by filing a new Utility Designee Form, which can be found on the Commission web site, or will be mailed or faxed upon request of a company. DMJ was aware of this responsibility because Commission files reveal that it previously filed a Utility

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<sup>6</sup> Written notice of this filing requirement was mailed to the last addresses provided by DMJ to the Commission on March 5, 2002; July 18, 2002; September 19, 2002; and November 25, 2002, the mailing date of the Show Cause Order.

Designee Form on April 30, 2001. Moreover, it is DMJ's responsibility to know what is required of it by rule, and Rule 25 is clear that an annual report must be filed April 30 of each year for the preceding year's revenues.

11. Finally, we note that on January 29, 2003, USURF America, Inc. (USURF), publicly announced that it had completed the acquisition of DMJ. Subsequently, Commission Staff and USURF exchanged correspondence confirming this transfer of assets. Under § 40-5-105, C.R.S., and Commission Rule 4 CCR 723-1-55, the Commission must approve any transfer of assets out of the ordinary course of business by a regulated telecommunications provider, such as DMJ, prior to such transfer. The import of these publicly available facts is that DMJ also violated Commission statute and rule by transferring its CPCN to USURF without Commission approval.

12. In summary, DMJ's history of untimely filing of its Annual Reports and its other violations of Commission rules, such as transferring its assets to USURF outside the ordinary course of business, would lead us to deny its Application for RRR on its merits, even if we were to consider the merits of that application. Decision No. R03-0042 revoking DMJ's CPCN is final; therefore, DMJ no longer has authority to operate as a provider of regulated telecommunications services in Colorado.

13. Currently, DMJ is providing resale residential local service to approximately 130 Colorado customers. The wholesale provider of these services is Qwest Communications. DMJ is directed to send the attached notice (Attachment 1) to its customers by April 2, 2003. The notice informs DMJ's customers that DMJ no longer has authority to provide local telephone service in the state. As such, customers must select an alternative provider by the date specified in the notice. A list of alternative providers is included in Attachment 1 and must be included in

the notice. DMJ shall file an affidavit with the Commission signed by an appropriate officer of the company affirming that it has sent notice to customers as directed in this order. The affidavit shall be filed with the Commission by April 7, 2003.

14. Qwest shall provide to the Commission, by letter directed to Director Smith, the names, addresses, and telephone numbers of DMJ's resale customers. Qwest shall provide this information by April 2, 2003. In the event DMJ fails to send customer notice and file the affidavit as ordered above, the Commission shall send notice to affected customers stating that DMJ has been found in violation of Commission rules and will be unable to continue to provide service. That notice will inform customers that the telephone service they currently receive from DMJ will be terminated by May 12, 2003, and that they must choose another provider by that time if they wish to maintain service.

15. DMJ shall cease and desist from providing regulated telephone services in Colorado by May 12, 2003. Qwest shall disconnect DMJ from the public switched telecommunications network on May 12, 2003.

## **II. ORDER**

### **A. The Commission Orders That:**

1. The Application for Reargument, Rehearing, or Reconsideration untimely filed by DMJ Communications, Inc., on February 25, 2003 is rejected.

2. DMJ Communications, Inc., shall send the notice appended to this Order as Attachment 1 to its customers by April 2, 2003. By April 7, 2003, DMJ shall file an affidavit with the Commission confirming that it has sent the attached notice to customers.

DMJ Communications, Inc., shall cease and desist from providing regulated telecommunications service in Colorado on May 12, 2003.

3. Qwest Corporation shall provide to the Commission, by letter directed to Director Smith, the names, addresses, and telephone numbers of DMJ Communications, Inc.'s resale customers. Qwest Corporation shall provide this information by April 2, 2003. In the event DMJ Communications, Inc., fails to send customer notice and file the affidavit as ordered above, the Commission shall send notice to affected customers informing them that DMJ Communications, Inc., has been found to be in violation of Commission rules and will be unable to continue to provide service effective May 12, 2003. Qwest Corporation shall disconnect DMJ Communications, Inc., from the public switched network on May 12, 2003.

4. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
March 26, 2003.**



(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

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JIM DYER

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Commissioners

COMMISSIONER POLLY PAGE ABSENT.