

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
TO DISCONTINUE OR CURTAIL JURISDICTIONAL TELECOMMUNICATIONS SERVICE

**ORDER REFERRING MATTER TO ATTORNEY
GENERAL'S OFFICE FOR INJUNCTIVE RELIEF AND
FOR DETERMINATION WHETHER CRIMINAL OR
CIVIL SANCTIONS ARE APPROPRIATE**

Mailed Date: April 17, 2003
Adopted Date: April 16, 2003

I. BY THE COMMISSION

A. Statement and Findings of Fact:

1. This matter comes before the Commission for consideration of a joint motion filed by Colorado Public Utilities Commission Staff (Staff), the Colorado Office of Consumer Counsel (OCC), and Qwest Corporation (Qwest) (cumulatively, the Parties) for Expedited Order to Comply with Transition Plan and Request to Shorten or Waive Response Times. The Parties seek an order from the Commission to order Mile High Telecom Joint Venture¹ (Mile High), On Systems Technology, LLC (On Systems), and Mr. Tim Wetherald as agent or manager of Mile High and On Systems, to cease sending unauthorized letters and notices to customers of Mile High concerning the status of their phone service, and to cease soliciting these customers to choose a particular local phone company, whether that company is On Systems, DMJ Communications, Inc. (DMJ), or any other company. The Parties further request the

¹ Mile High is comprised of two partners, On Systems Technology, LLC (On Systems), and Mile High Telecom Partners, LLP. Mr. Wetherald serves as manager of On Systems and Mile High.

Commission to order Mile High, On Systems, and Tim Wetherald to comply with Commission Decision No. C03-0077 (including the Transition Plan), and to cease any actions in contravention of that order and the Transition Plan. Because the Transition Plan requires customers to default to Qwest beginning on April 28, 2003, the Parties further request an expedited order and to shorten or waive response time to this motion.

B. Background

2. On August 30, 2002, Mile High filed an application seeking authorization to discontinue providing jurisdictional telecommunications service to its customers in Colorado. Mile High indicated that the application was a result of a notice from Qwest of discontinuance of service, which was the result of Mile High's failure to pay Qwest for undisputed portions of Qwest's invoices to Mile High for resale services.

3. Qwest, Staff, OCC, the Mile High Telecom Partners, and Premier Communications, Inc., filed interventions in this docket. A hearing was held on the application on October 22, 2002.

4. Subsequent to the hearing, an Administrative Law Judge (ALJ) issued Recommended Decision No. R02-1261 (Recommended Decision) on November 7, 2002. In that decision, the ALJ, among other things, found good cause to grant Mile High's application to discontinue telecommunications service in Colorado. As part of the Recommended Decision, the ALJ also implemented a transition plan to, as seamlessly as possible, transition Mile High's customers to another telecommunications provider. As such, the ALJ adopted the two-phase plan proposed by the OCC. This transition plan delineated the process into a competitive phase and a second phase focusing on safeguarding the continuity of service to customers affected by the transition process.

5. Essentially, the transition plan required Mile High to send a notice letter (approved by the Commission) to its customers advising them that it was exiting the market. The letter was to also advise Mile High's customers of their options during the transition period.

6. During the first 30 days of the transition period, Mile High's customers were encouraged to find a new company either on their own, or from a pre-approved list of telecommunications companies provided to each customer. Those customers, who failed to choose an alternate provider for whatever reason, were to be transferred to Qwest as the Commission-designated default provider-of-last-resort during the second 30 days of the transition period.

7. In the Recommended Decision, which was upheld in its entirety by the Commission in Decision No. C03-0077, issued on January 12, 2003, the ALJ specifically found that Mile High, including the Mile High Telecom Partners, LLP and On Systems were jointly and severally liable joint venturers in implementing the transition plan.

8. Further, the ALJ found that by stipulation between Qwest and On Systems, On Systems was excluded from the list of alternative providers supplied to Mile High's customers in the notice letter. The ALJ held that such list "will minimize confusion and discouragement to customers." The ALJ ordered Mile High to "implement the Transition Plan," which included the requirement that Mile High "cooperate with Qwest, the Commission and the OCC in implementing 'the plan'."

9. According to the Parties, Mr. Wetherald, as manager of On Systems, informed Mr. Bruce Smith, Executive Director of the Commission, in a letter dated February 14, 2003, that "no notice of discontinuance would be sent." Consequently, Qwest, pursuant to Commission

order, sent a Commission-approved notice to Mile High customers. These notices were mailed on March 11, 17, 21, and 27, 2003 to all Mile High customers.

10. The Parties further allege that Mr. Wetherald sent a letter to Mile High customers on March 11, 2003 which in part stated that “there will not be any change in your service. Instead, you will continue to receive service from Mile High Telecom ... There will be no disruption in your service whatsoever...Mile High Telecom is pleased to continue to serve you as your local exchange carrier as an alternative to Qwest.” The Commission did not approve this letter, nor did Mr. Wetherald seek Commission approval prior to sending the letter to Mile High customers.

11. Mr. Wetherald sent another notice to Mile High customers dated April 2, 2003, stating in part that “On Systems Technology, LLC has agreed to continue providing you with the same high quality, affordable services at the EXACT SAME RATES.” (Emphasis in original). According to the Parties, this letter solicits customers to call On Systems to keep their current service at the same rate. However, as part of the discontinuance proceeding and transition plan On Systems was specifically stricken from the list of alternative providers and precluded from soliciting Mile High’s customers. The Parties urge that On Systems, as a joint venturer in Mile High, and Mr. Wetherald, as manager of both, cannot at the same time abandon local phone service and offer to provide local phone service to these same customers, particularly since it may not now place customer orders with Qwest.

12. The Parties assert that the letters sent by Mile High, On Systems, and Tim Wetherald are confusing, misleading to customers, and contravenes the Commission-

approved transition plan and notice. According to the Parties, the two letters do nothing more than interfere with implementation of the transition plan.

13. Therefore, the Parties request that the Commission grant the Joint Motion to order: 1) Mile High, On Systems, and Tim Wetherald as agent, to immediately cease sending notices and letters to customers about the status of their phone service; 2) Mile High to cease marketing local phone service to these customers on behalf of themselves or any other local phone company, including On Systems and DMJ; 3) On Systems and Tim Wetherald, as agent to cease marketing local phone service to these customers under the guise of a customer notice on behalf of themselves or any other local phone company, including On Systems and DMJ; 4) Mile High, On Systems, and Tim Wetherald to comply with and take no further action to contravene or interfere with implementation of the transition plan; and 5) shorten or waive response time to the motion.

14. On Systems filed a response to the Parties' motion through Mr. Tim Wetherald. According to the response, On Systems argues that the Joint Motion is based on a gross misreading of relevant Commission orders and of the Commission's authority to prohibit an entity from soliciting customers in these circumstances. On Systems asserts that prohibiting it from soliciting Mile High's customers is anti-competitive. Further, Qwest should not be permitted to use the Commission's equitable powers to expand its customer base and thwart competition.

C. Analysis

15. We agree with the Parties that Mile High, On Systems, and Mr. Wetherald have violated our orders in Decision Nos. R02-1261 and C03-0077. It is clear that the letters sent by Mr. Wetherald violated the spirit and intent of the transition plan, which was to transition Mile

High's customers to another telecommunications carrier in as seamless a transition as possible. Clearly, Mr. Wetherald has chosen to eschew our directives and has charted a course to purposefully obfuscate our orders and the notice process.

16. Mile High, On Systems, and Mr. Wetherald violated the Commission decisions by, among other things, suggesting that Mile High could continue to offer services after its request to discontinue services had been approved; suggesting that On Systems could offer services when it had agreed to not be on the list of alternative providers, and the Commission so ordered; and creating confusion and discouragement to customers through misleading and inconsistent letters to customers.

17. Our directives in Decision No. C03-0077 were clear. The responsibilities of the parties to this matter were delineated in an unambiguous manner. Mile High, On Systems, and Mr. Wetherald were on notice since issuance of the Recommended Decision on November 7, 2002 of each parties responsibilities under the transition plan. Further, these responsibilities were again enumerated and confirmed in Decision No. C03-0077, issued on January 21, 2003. There could have been no confusion as to the process. However, Mile High, On Systems, and Mr. Wetherald chose to ignore the directives pursuant to the transition plan and sent letters to Mile High customers designed to confuse the situation and solicit customers in contravention to the transition plan we ordered.

18. However, we do not feel that issuing yet another order requiring Mile High, On Systems, and Mr. Wetherald to comply with previous Commission orders will have any affect. It is clear that Mile High, On Systems, and Mr. Wetherald show no willingness to comply

with our orders. Therefore, we do not see the utility in issuing another order directed to Mile High, On Systems, or Mr. Wetherald regarding this matter.

However, pursuant to § 40-7-101, C.R.S.:

Upon request of the commission, it is the duty of the attorney general or the district attorney acting for the proper county or city and county to aid in any investigation, hearing, or trial had under the provisions of articles 1 to 7 of this title and to institute and prosecute actions or proceedings for the enforcement of the provisions of the constitution and statutes of this state affecting public utilities and for the punishment of all violations thereof.

19. We determine that the best recourse left to the Commission is to invoke the procedures provided for in § 40-7-101 *et seq.*, C.R.S., and refer this matter to the Colorado Office of the Attorney General. We request that the Attorney General's Office seek injunctive relief against Mile High, On Systems, and Tim Wetherald to enjoin those parties from further sending any letters to Mile High customers or soliciting Mile High customers for the benefit of On Systems or DMJ, and to order Mile High, On Systems, and Tim Wetherald to comply with, and take no further action to contravene or interfere with implementation of the transition plan as provided in Decision Nos. R02-1261 and C03-0077.

20. We further request that the Attorney General's Office seek whatever criminal and civil sanctions are appropriate including, but not limited to, those set forth in §§ 40-7-102, 103, 104, 105, 106, 107, 108, and 109, C.R.S.

21. Since On Systems filed a response to the Parties' motion on April 15, 2003, through Mr. Wetherald, we grant the Parties' request to waive response time to the motion.

II. ORDER**A. The Commission Orders That:**

1. The Joint Motion for Expedited Order to Comply with Transition Plan and Request to Shorten or Waive Response Time filed by Commission Staff, the Colorado Office of Consumer Counsel, and Qwest Corporation is granted in part consistent with the discussion above.

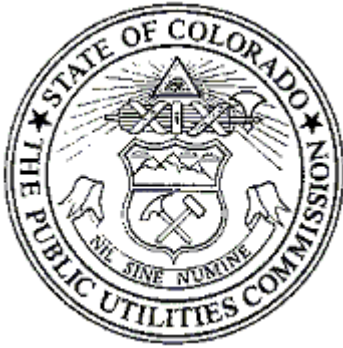
2. Pursuant to § 40-7-101 *et seq.*, C.R.S., we remand this matter to the Colorado Office of the Attorney General to pursue any relief it deems appropriate, including injunctive relief and criminal and/or civil sanctions.

3. Response time to the motion is waived.

4. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
April 16, 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

POLLY PAGE

JIM DYER

Commissioners