Decision No. C03-0408

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

DOCKET NO. 03A-054T

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IN THE MATTER OF THE JOINT APPLICATION OF VANION TELECOM, INC. DBA VANION, INC. AND APOLLO COMMUNICATIONS, LLC TO EXECUTE A TRANSFER.

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**ORDER APPROVING STIPULATIONS IN PART**

Mailed Date: April 18, 2003
Adopted Date: April 16, 2003

## I. BY THE COMMISSION

### A. Statement

1. This matter comes before the Commission on a request for approval of two stipulation and settlement agreements, pursuant to Rule 83(a) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. The first stipulation was entered into by Staff of the Colorado Public Utilities Commission (Staff), Apollo Communications, LLC (Apollo), and Vanion Telecom, Inc. (Vanion) (Apollo Stipulation). The second stipulation was entered into by Staff and Qwest Corporation (Qwest) (Qwest Stipulation). The two stipulations combined represent the parties' agreements to settle the issues in dispute in this docket and to allow Apollo to continue operating as a competitive local exchange carrier (CLEC).

2. Vanion is a Colorado CLEC with its headquarters in Colorado Springs. Vanion is currently authorized to provide local exchange telecommunications services, emerging competitive services, and non-optional operator services pursuant to a Certificate of Public

Convenience and Necessity (CPCN) and a Letter of Registration (LOR) both granted by Decision No. C00-18.

3. Apollo is a Colorado limited liability company organized on November 26, 2002. Brent L. Hawker is the principal owner of Apollo. Following negotiations between Vanion principals and Mr. Hawker, on November 27, 2002, Apollo entered into an agreement to purchase a Promissory Note from Vanion's primary creditor. The Note was secured by substantially all the assets of Vanion. Apollo subsequently began foreclosing on the Note, ultimately conducting an Asset Foreclosure Sale and acquiring some of the assets of Vanion on December 14, 2002. Apollo, did not, by way of purchasing the Note or conducting the Asset Foreclosure Sale, assume any of Vanion's debts or liabilities.

4. Upon the completion of the sale of assets, Apollo assumed the obligation to provide service to Vanion's customers on December 14, 2002.

5. Qwest, pursuant to an interconnection agreement with Vanion, provided Vanion with 25 Billing Account Numbers to provide end users with voice and data circuits. In late December 2002, Vanion received written notice from Qwest that Vanion was in default for failure to pay Qwest for telecommunications services rendered by Qwest. Qwest claimed an outstanding amount due of $812,364.42. The written notice notified Vanion that Qwest would initiate action to disconnect all accounts and services provided to Vanion by Qwest on or after January 20, 2003 if payment was not received on or before that date. On February 5, 2003, Qwest sent a second written notice to Vanion, again demanding payment and notifying Vanion that it would initiate disconnect actions to the Vanion customers on or after February 20, 2003 if payment was not received by that date.

6. On February 10, 2003, Apollo sought to acquire certain assets held by Vanion, listed in Exhibit C to the Apollo Stipulation, by filing the Joint Application that opened the above captioned proceeding.

7. On February 14, 2003, Apollo filed a Petition for Declaratory Order, Motion for Emergency Stay, and Motion to Shorten Response Time. Apollo filed the Petition to obtain relief from Qwest's notice of its intent to disconnect service to Vanion's customers due to the overbalance owed by Vanion to Qwest.

8. By Decision No. C03-0191, we granted Apollo's motion for stay of the disconnection, required Apollo to send written notice to all of Vanion's customers informing them of the possibility of disconnection, and ordered Qwest to serve as the default provider for Vanion's customers and to provide notice to Vanion's customers should Apollo fail to mail such notice.

9. On February 24, 2002, Apollo filed an Application for Rehearing, Reargument, or Reconsideration of Decision No. C03-0191. By Decision No. C03-0229, we denied the application, but did extend the deadline for Apollo to proceed with the customer notice to March 3, 2003 and extend the stay of Qwest's disconnection to March 31, 2003. These extensions were granted to allow the parties time to negotiate settlement terms.

10. On March 3, 2003, Apollo and Qwest filed a Joint Motion for an Extension of Time within which Apollo must issue the customer notice. On March 4, 2003, Apollo and Qwest supplemented that motion providing more information concerning the state of their negotiations. By Decision No. C03-0246, we granted Apollo and Qwest's request and ordered that Apollo and

Qwest inform us, by March 12, 2003, that they either have reached a settlement or will have determined that a settlement is not possible.

11. On March 12, 2003, Apollo, Qwest, and Staff filed an Unopposed Joint Motion for Extension of Time in order to allow the parties additional time to negotiate a resolution of their differences. We granted this Motion with Decision No. C03-0300 and thereby extended the date for a settlement to March 19, 2003 and the emergency stay until April 17, 2003.

12. On March 20, 2003, the parties filed a Joint Notice of Settlement, stating that they had arrived at an agreement in principle to resolve their disagreements in this matter and representing that they would file two separate agreements with the Commission on or before March 31, 2003.

13. On April 1, 2003, Apollo and Vanion filed an Amendment to the Joint Application to Transfer, stating that Vanion's CPCN is included in the assets which are the subject of this transfer.

14. On April 4, 2003, Staff and Qwest filed a Stipulation and Settlement Agreement in this docket. Also on April 4, 2003, Staff, Apollo, and Vanion filed a Stipulation and Settlement Agreement, and requested the Commission issue an order adopting and approving the terms and conditions of the Stipulations and contemporaneously grant the application as amended.

15. On April 7, 2003, the parties filed an Unopposed Joint Motion to Vacate the Prehearing Conference or to Convert the April 14, 2003 Prehearing Conference, for Issuance of an Initial Commission Decision and to Waive Response Time. By Decision No. C03-0374, we converted the April 14, 2003 prehearing conference to an evidentiary hearing on the merits of the Stipulations to be heard by the Commission *en banc.*

**B. Analysis**

16. We approve the Qwest Stipulation, entered into by Staff and Qwest, in total. The terms that we have concerns about, and order changes for, are all contained in the Apollo Stipulation, entered into by Staff, Apollo, and Vanion.

17. The Apollo Stipulation states that Apollo voluntarily agrees to: 1) bring itself into compliance with the Colorado statutes and Commission rules and regulations pertaining to the provision of local exchange and emerging competitive telecommunications services; 2) adopt and follow a compliance plan; and 3) pay a reparation. In general, we approve the Apollo Stipulation, including the transfer of assets from Vanion to Apollo, but require the parties to make some specific changes as outlined below. Staff, Apollo, and Vanion are required to file a compliance stipulation that reflects the changes as ordered in this decision. The terms of that compliance filing, if signed by all three affected parties, shall be effective on the date it is filed with the Commission. If a party, or parties, chooses not to sign the compliance stipulation, that party(ies) can file an application for rehearing, reargument, or reconsideration pursuant to the Commission's Rules of Practice and Procedure, 4 CCR 723-1. We note that our silence on any term contained in the Apollo Stipulation is to be construed as approval of that term. We address only the issues that we order changed in the originally filed Apollo Stipulation.

18. The first issue we raised in the Deliberations Meeting held on April 16, 2003 had not been raised before either in the Stipulations or during the evidentiary hearing. When Vanion was granted authority to operate as a local and emerging services provider, by Decision No. C00-18, it was also granted a LOR to provide non-optional operator services. The record does not reveal whether Apollo is currently providing, or plans to provide, non-optional operator services to its customers. Therefore, if Apollo is providing these regulated services, or intends to in the

near future, Vanion's LOR should be transferred to Apollo as well. If Apollo does not intend to provide non-optional operator services, then Vanion is ordered to file forthwith a Notice of Discontinuance of its LOR pursuant to Rule 4 CCR 723-25-7.9, and to withdraw its operator service tariff.

19. On page 12, paragraph 9 of the Apollo Stipulation, Apollo acknowledges that it began serving Vanion's customers on or about December 14, 2002, without appropriate consent of those customers in violation of the Commission's Rules Regulating the Changing of Presubscription contained at 4 CCR 723-2-25 (Slamming Rules). In this Stipulation, Apollo requests a retroactive waiver of the application of those rules with respect to Apollo's transfer of Vanion's customers. Staff agreed in the Stipulation not to oppose an application by Apollo to waive the Slamming Rules, in consideration of Apollo's assurances and payment of reparations as provided in the Stipulation. Our Slamming Rule reads in pertinent part, "[t]his rule applies to service provider change requests initiated by the provider as well as requests initiated by the customer." 4 CCR 723-2-25.2.1 Apollo admits that it violated this rule by transferring Vanion's customers to Apollo without notifying the customers prior to the transfer. During the evidentiary hearing, the Apollo witness, Mr. Brent Atkinson, indicated that customers were only notified *after* the transfer took place through a change on the company's web site, a change on the customers' bill remittance, and a bill "stuffer" welcome letter. We are not inclined to grant a retroactive waiver of our Slamming Rules. We are dubious of the claim that the principals of

both Vanion and Apollo were not aware of the necessity of such a request *prior to* the transfer taking place.[1]

20. We do grant a waiver of the enforcement rules found at 4 CCR 723-2-25.5.2 and 2-25.5.3. These rules call for the provider who initiates an unauthorized change to be liable to the customer for all service charges, provider switching fees, the value of any premiums to which the customer would have been entitled and other relevant charges incurred by the customer during the period of the unauthorized change, and to the local exchange provider for the fees incurred for the unauthorized change. By granting a waiver of these specific rules, we disallow customers and Vanion from seeking further payment from Apollo other than the reparations we order below. While Apollo was in violation of our Slamming Rules when it transferred Vanion's customers without their express consent, Apollo did so with no change to the customer's service terms or rates. According to the Apollo witness, no customer complaints were received. Therefore, we do not believe it is appropriate to allow customers to recover the rates they were charged from December 14, 2002 through the effective date of this decision.

21. Apollo has agreed to pay reparations, in part, for its violation of the Slamming Rules in the amount of $15,000 to be paid to the Colorado General Fund in six equal monthly installments beginning one month after the effective date of an order approving the Stipulation. According to the testimony of Mr. Gerald Enright, Staff, this dollar amount was calculated beginning with a starting date of December 23, 2002 (approximately one week after the transfer took place) and ending with January 21, 2003, the filed date of Docket No. 03A-026T

[1] Indeed, Mr. Hawker testified that he started King's Deer Telephone Company, a competitive local exchange carrier (CLEC), and he and his wife were majority owners of SunWest, another CLEC, well before becoming a principal in Apollo. Given this experience, Mr. Hawker should have been well aware that Apollo was subject to regulatory responsibilities.

(Application to Transfer Assets from Elite Telephone Company (Elite) to Apollo). That 29 days was then multiplied by $750 to arrive at a reparation amount of $21,750. This amount was then negotiated down during settlement discussions to the $15,000 amount. Because we find that Apollo violated the Commission's Slamming Rules on the date the transfer took place, we order a change in the amount of reparations. One additional week, seven days, should be added to the number of days to reflect that the true slamming period began on the date of transfer. The negotiated per day settlement amount was $517.24. Therefore, taking this same dollar amount times 36 days rather than 29, we arrive at a reparation amount of $18,620.69. We also do not agree that this reparation should be paid to the Colorado General Fund. Section 40-7-109, C.R.S., allows the Commission to seek penalties for rule violations through the court system to be paid into the general fund. However, § 40-15-112, C.R.S. ("Unauthorized change of telecommunications provider"), states that reparations for violation of this statute should be paid to the affected customers and local exchange provider. Following the appropriate statute, then, and based upon our finding that customers were harmed by this unauthorized transfer, we order Apollo to divide the $18,620.69 evenly between the customers at the date of the transfer. The customers that have remained with Apollo shall receive payment through either a bill credit or a check and the customers that have since left Apollo shall receive a payment through a mailed check. Apollo is ordered to complete these reparation payments within 90 days of the effective date of this decision.

22. In addition, Apollo shall forthwith draft a letter to accompany the reparation payment that explains to the current and former customers the reason for the payment citing the Commission's instant decision. This letter is to be reviewed and approved by Staff prior to being mailed to customers.

23. On pages 14 and 15 of the Apollo Stipulation, Vanion agrees to file with the Commission its Utility Designation Form, Colorado High Cost Support Mechanism worksheet, and annual report for the year 2002 through December 14, 2002. In addition, Vanion agrees to make all required payments to the Fixed Utilities Fund, the Colorado High Cost Support Mechanism, the Telecommunications Relay Services Fund, Emergency Telephone Access, and the Low Income Telephone Access Program. No timeline is mentioned in the Stipulation regarding the filing of these reports nor the payments to the funds. During the evidentiary hearing the Vanion witness, Kendall John, indicated payments could be made within 30 days. Therefore, we order Vanion to comply with the terms of the Stipulation applicable to it within 30 days of the effective date of this decision. [2]

24. The language on page 17 paragraph 3 of the Stipulation is somewhat confusing as noted by Chairman Sopkin during the evidentiary hearing. This language seems to imply that the Commission can only hold Apollo accountable for rule or statutory violations that occur during a 12-month period following the effective date of the Stipulation. This is obviously not the case, and Apollo agreed at the hearing that this was not the intent. We order the following language to replace paragraph 3 of page 17 in its entirety in order to clarify the intent of the parties: "If, during the twelve months after the effective date of an order approving this Stipulation, Apollo engages in any act or practice which constitutes a material violation of this Stipulation, the Commission may impose enhanced remedies as set forth in § 40-1-101, *et seq.*"

[2] We note that the Stipulation does not call for payment of the 1 percent late payment interest requirement for the Colorado High Cost Support Mechanism. We include that interest in the amount required to be paid by Vanion, as agreed to by Mr. John.

25. On pages 17 and 18 of the Apollo Stipulation, Apollo indicates that it will withdraw its applications in Commission Docket Nos. 03A-026T and 03A-031T as moot. We agree with this action, but also recommend that Elite file a Notice of Discontinuation of its CPCN and withdrawal of its tariff, because it was stated during the evidentiary hearing that Elite is not providing telecommunications services in Colorado, nor does it intend to.[3]

## II. ORDER

### A. The Commission Orders That:

1. The Stipulation and Settlement Agreement Between Staff of the Colorado Public Utilities Commission and Qwest Corporation is approved.

2. The Stipulation and Settlement Agreement between Staff of the Colorado Public Utilities Commission, Apollo Communications, LLC, and Vanion Telecom, Inc., is approved in part, consistent with the above discussion.

3. We also grant the Joint Application to Execute a Transfer of Assets from Vanion Telecom, Inc., to Apollo Communications, LLC, as amended.

4. Staff of the Colorado Public Utilities Commission, Apollo Communications, LLC, and Vanion Telecom, Inc., are ordered to file a compliance settlement agreement that reflects the above discussion in this Decision.

5. This Order is effective on its Mailed Date.

[3] We realize that Elite Telephone Company (Elite) is not a party to this docket and, therefore, we cannot order it to file this Notice. However, to avoid a Show Cause proceeding, we strongly recommend that Elite follow our recommendation.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS 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

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