

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03C-372T

IN THE MATTER OF THE TRANSFER OF ASSETS GRANTED BY THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO FROM FUTUREONE, INC. TO ON SYSTEMS TECHNOLOGY, LLC WITHOUT COMMISSION APPROVAL, AND ALLEGED VIOLATIONS OF THE COMMISSION-APPROVED TRANSITION PLAN IN THE APPLICATION OF MILE HIGH TELECOM JOINT VENTURE TO DISCONTINUE PROVIDING REGULATED TELECOMMUNICATIONS SERVICES, AND THE ALLEGED SLAMMING OF CUSTOMERS FROM DMJ COMMUNICATIONS TO ON SYSTEMS TECHNOLOGY, LLC.

**ORDER TO SHOW CAUSE
AND NOTICE OF HEARING**

Mailed Date: August 29, 2003
Adopted Date: August 27, 2003

I. BY THE COMMISSION

A. Statement

1. On January 13, 2003, the United States Bankruptcy Court for the District of Colorado granted the Trustee's motion for authority to sell FutureOne, Inc.'s (FutureOne) membership interest in Amcom, LLC (Amcom), a wholly owned limited liability company, to On Systems Technology, LLC (On Systems). Among the assets of Amcom are a certificate of public convenience and necessity (CPCN) to provide local exchange telecommunications in the State of Colorado, a CPCN to provide emerging competitive telecommunications in the State of Colorado, the customer base, and the interconnection agreement between Amcom and Qwest Corporation (Qwest).

2. Both Amcom and On Systems hold CPCNs issued by the Colorado Public Utilities Commission (Commission). As such, Amcom and On Systems are regulated public

utilities under the jurisdiction of the Commission. *See* § 40-15-201(2), C.R.S.; 4 *Code of Colorado Regulations* (CCR) 723-25-4.

3. In a letter dated February 24, 2003, Staff of the Public Utilities Commission (Staff) notified On Systems of the statutory requirement to file an application to transfer assets. Pursuant to its police powers derived from Article XXV of the Colorado Constitution and Title 40 of the Colorado Revised Statutes, the Commission retains jurisdiction over a transfer of assets of a regulated public utility irrespective of the order issued by the U.S. Bankruptcy Court.

4. Staff notified On Systems that it does not have the authority to provide local exchange or emerging competitive telecommunications services under the CPCN acquired from FutureOne without Commission approval for the transfer.

5. On Systems is a 30 percent member of the Mile High Telecom Joint Venture (Joint Venture) which holds a CPCN that was issued to the Joint Venture as a result of a Stipulation and Settlement Agreement in Docket No. 02C-082T. On September 27, 2002, the Commission re-opened the show cause docket to review the validity of the Stipulation entered into by Staff and the Mile High Telecom Partners, LLP (Partners). The Stipulation was signed by Mr. Timothy Wetherald as agent for the Partners and manager of the Joint Venture.

6. On August 30, 2002, the Joint Venture filed an application to discontinue providing regulated telecommunications services in Docket No. 02A-463AT. Under terms of Decision No. R02-1261 approving the discontinuance, the transition plan specified that all customers of Mile High Telecom who did not select an alternative provider within 30 days would be defaulted to Qwest. In addition, On Systems' agreement to be removed from the transition plan's list of alternate providers included in the Notice Letter to customers was accepted.

7. Staff alleges that Mile High Telecom sent a letter dated April 2, 2003 to more than 4,000 former customers of Mile High Telecom who were switched to DMJ Communications, Inc. (DMJ). In that letter, Mile High Telecom urged those 4,000 customers to transfer their telecommunications service to On Systems because DMJ's CPCN had been revoked by the Commission for failure to file an annual report. As a result of this solicitation, Mr. Wetherald informed Staff that approximately 1,500 customers elected to switch from DMJ to On Systems.

8. Staff has learned that, at the time of the April 2, 2003, letter, On Systems did not have the functional ability to serve these 1,500 customers even though it was soliciting their business. On Systems had not completed the Qwest-required competitive local exchange carrier questionnaire, did not have billing account numbers with Qwest, and did not have an interconnection agreement with Qwest.

9. Staff is concerned that On Systems might not have Letters of Authorization or Third Party Verifications from these 1,500 customers that were transferred from DMJ. If that is found to be the case, then On Systems would also be liable for slamming these 1,500 customers under 4 CCR 723-2-25.

10. Finally, Staff alleges that the actions of On Systems and Tim Wetherald as manager were designed to intentionally mislead the former customers of Mile High Telecom. Staff alleges that the April 2, 2003, letter sent by Mile High Telecom violates the transition plan in the Mile High Telecom Joint Venture Discontinuance Docket by encouraging customers to switch to a provider that explicitly agreed to be excluded from the Commission-approved list of alternative providers. While On Systems would have been free to solicit these customers once the initial 30 days had passed, Staff does not believe that On Systems should have solicited these

customers prior to April 26, 2003, because On Systems was not a Commission-approved alternative provider and should not have had access to the list of Mile High Telecom customers who needed to find another provider as a result of the discontinuance.

B. Discussion

11. The Commission is authorized, pursuant to § 40-5-105, C.R.S., to promulgate rules for the transfer of assets, including the transfer of authority to provide local exchange and emerging competitive telecommunications services. Those rules are found at 4 CCR 723-25-8.

12. The Commission has further promulgated rules which prohibit the unauthorized transfer of customers to another provider of local exchange telecommunications services (otherwise known as “slamming”). These rules are found at 4 CCR 723-2-25.

13. The Commission approved a transition plan in Docket No. 02A-463AT that included a list of alternative providers who were authorized to solicit business from the former customer base of the Joint Venture. Any other solicitation may represent a violation of the Commission’s order approving the transition plan in the application to discontinue regulated telecommunications services filed by the Joint Venture.

C. Findings of Fact

14. Staff has determined that as of the date of this order, On Systems has not filed an application to transfer assets, and therefore may have failed to comply with the requirements of § 40-5-105, C.R.S., and 4 CCR 723-25-8.

15. Notwithstanding its own authority to provide regulated telecommunications services, Staff alleges On Systems is not authorized to operate as a telecommunications provider in the State of Colorado under the CPCN that it acquired from FutureOne by order of the United

States Bankruptcy Court for the District of Colorado until such time as that transfer of assets is approved by the Commission.

16. Staff alleges On Systems circumvented and violated the Commission approved transition plan in Docket No. 02A-463AT that included a list of alternative providers who were authorized to solicit business from the former customer base of the Joint Venture.

17. Staff alleges On Systems violated 4 CCR 723-2-25 Rules Regarding the Changing of Presubscription.

D. Conclusions

18. Sufficient cause exists to hold a hearing to determine the facts of the matter, to hear material arguments, to receive evidence and testimony, and to determine what penalty or remedy, if any, shall be imposed by Order of the Commission.

19. If the Commission determines that it is appropriate to do so, the Commission may issue a decision, including but not limited to: a) an order to cease and desist the provisioning of telecommunications services in the State of Colorado; b) an order to refund, with interest, charges or fees collected for jurisdictional telecommunications services; c) an order to pay fees, penalties, and interest required under § 40-2-113, C.R.S.; d) an order to pay penalties under § 40-7-105, C.R.S., including monetary fines against company officers; e) an order to revoke the CPCNs held by Amcom and transferred to On Systems without Commission approval; and f) an order to revoke the CPCNs held by On Systems.

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

1. On Systems Technology, LLC, shall appear before the Commission, as set forth below, to show cause why the Commission should not take action and enter a decision, including but not limited to: a) an order to cease and desist the provisioning of telecommunications services in the State of Colorado; b) an order to refund, with interest, charges or fees collected for jurisdictional telecommunications services; c) an order to pay fees, penalties, and interest required under § 40-2-113, C.R.S.; d) an order to pay penalties under § 40-7-105, C.R.S., including monetary fines against company officers; e) an order revoking the certificates of public convenience and necessity held by Amcom LLC, and transferred to On Systems Technology, LLC, without Commission approval; and f) an order to revoke the certificates of public convenience and necessity held by On Systems Technology, LLC.

2. Docket No. 03C-372T is set for hearing before an Administrative Law Judge of the Colorado Public Utilities Commission:

Date: October 15, 2003

Time: 9:00 a.m.

Place: Colorado Public Utilities Commission
Logan Tower, Office Level 2
1580 Logan Street
Denver, Colorado

3. The Staff of the Public Utilities Commission shall file, at least 30 days prior to hearing: a) two copies of a list containing the name, address, and title of each of its witnesses; and b) two copies of each of the exhibits which it plans to present at the hearing. Copies of the witness list and exhibits shall be served upon all parties to the proceeding.

4. On Systems Technology, LLC, shall file, at least 20 days before hearing: a) two copies of a list containing the name, address, and title of each of their witnesses; and b) two copies of each of the exhibits which they plan to present at the hearing. Copies of the witness list and exhibits shall be served upon all parties to the proceeding.

5. No witness shall be permitted to testify, nor shall any document be received in evidence, except in rebuttal, unless filed and served as provided in this Order.

6. If Staff of the Public Utilities Commission or On Systems Technology, LLC, fail to meet the above requirements, the Commission may dismiss the proceeding or any defense, upon motion filed by any other party, unless good cause for non-filing is shown.

7. No motion for continuance shall be granted if filed within 20 days before the first day of the hearing, except for good cause shown.

8. No exception to the procedure in the Order shall be made except upon timely motion showing good cause.

9. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 27, 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