

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02C-082T

IN THE MATTER OF THE PROVISION OF REGULATED TELECOMMUNICATIONS SERVICES BY MILE HIGH TELECOM PARTNERS, LLP WITHOUT THE REQUISITE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE COMMISSION AND WITHOUT AN EFFECTIVE TARIFF ON FILE WITH THE COMMISSION.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
DENYING MOTION TO
DISQUALIFY COUNSEL AND
MOTION FOR LEAVE TO
FILE REPLY TO STAFF RESPONSE**

Mailed Date: January 28, 2003

I. STATEMENT

1. On January 10, 2003, Michael L. Glaser, Esq. (Glaser), On Systems Technology, LLC, and Tim Wetherald (Wetherald) (collectively, Movants) filed a Motion to Disqualify Assistant Attorney General David M. Nocera and the Office of the Attorney General (Motion to Disqualify) in the captioned proceeding. By the Motion to Disqualify, Movants request that Mr. Nocera and the Attorney General's Office be disqualified from serving as legal counsel to the Staff of the Colorado Public Utilities Commission (Staff) in this matter on the ground that Mr. Nocera may be a witness in this case.

2. On January 17, 2003, Staff filed its Response in opposition to the Motion to Disqualify (Staff Response).

3. On January 24, 2003, Movants filed a Motion for Leave to File a Reply to the Staff Response (Motion to Reply).

4. Subject to three enumerated exceptions, none of which are applicable here, Rule 3.7(a) of the Colorado Rules of Professional Conduct (CRPC) provides that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. Therefore, before an advocate will be disqualified under CRPC 3.7 the moving party must establish that it is “likely” that the lawyer will be a “necessary” witness. *See, Religious Technology Center v. F.A.C.T., Inc.* 945 F. Supp 1470 (D. Colo. 1996). The advocate’s testimony is “necessary” if it is relevant, material, unobtainable elsewhere, and is not cumulative. *See, Religious Technology Center v. F.A.C.T., Inc., supra; Security Gen. Life Ins. Co. v. Superior Court*, 718 P.2d 985 (1986). Concerning the issue of “imputed” disqualification, subsection (b) of CRPC 3.7 provides that a lawyer shall not act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless the requirements of Rule 1.7 or Rule 1.9 have been met.

5. Movants contend that Mr. Nocera will be a material witness at the hearing of this matter since he was a “key participant in the negotiation and creation” of the Stipulation and Settlement Agreement (Stipulation) approved by Decision No. R02-608 and/or was “a central figure in the events after the Stipulation” that gave rise to Staff’s Motion to Reopen Docket, to Remand to the ALJ for a Hearing into the Validity of and/or Compliance with the Terms of the Stipulation Approved in this Docket (Motion to Reopen).

7. In so contending, Movants attribute to Mr. Nocera, personally, the allegations contained in the Motion to Reopen. *See*, for example, Motion to Disqualify; ¶ 2 (“Mr. Nocera makes the weighty accusation that Mr. Glaser and Mr. Wetherald intentionally misrepresented to

him and others at the PUC their authority to represent Mile High Telecom.”); Motion to Disqualify; ¶ 9 (“Mr. Nocera represents that the Staff of the PUC never told On Systems or Mile High Telecom that it needed to acquire an existing CPCN...”); (“These opinions and beliefs apparently are based upon Mr. Nocera’s personal knowledge from his participation in the negotiations and creation of the Stipulation.”); Motion to Disqualify; ¶ 14 (“He [Mr. Nocera] ... appears to have asserted his own beliefs and opinions as a basis for the Motion.”); Motion to Disqualify; ¶ 16 (“...Mr. Nocera makes the strong claim that he and the PUC were defrauded by Mr. Glaser and Mr. Wetherald...”). (Emphasis added).

8. However, the Motion to Reopen consistently posits the subject allegations as those of Staff. There is nothing in the Motion to Reopen to suggest, as alleged by Movants, that these allegations were Mr. Nocera’s or that he was acting in any capacity other than that of Staff counsel, either when he participated in negotiations concerning the Stipulation or when he prepared the Motion to Reopen.

9. In addition to the statements contained in Mr. Nocera’s affidavit attached to the Staff Response,¹ this position finds support in the affidavits submitted by Messrs. Glaser and Wetherald in their respective responses to the Motion to Reopen. *See, for example*, Mr. Glaser’s Affidavit of September 6, 2002 (Glaser Affidavit), ¶ 11 (“In March 2002, Mr. Wetherald and I began discussing a settlement of the Show Cause Order with the Staff.”); (“...I provided the Commission Staff with every document and piece of information available and relevant to the issues raised in the Show Cause Order.”); (“Both Mr. Wetherald and I were open and candid with the Commission Staff during this process, even to the extent of producing documents to Staff”

¹ Mr. Nocera has an obligation to determine whether his withdrawal as Staff’s legal counsel is required under applicable ethical rules and to act appropriately. *See, Taylor v. Grogan*, 900 P.2d 60 (Colo. 1995) and Comment 5 to CRPC 3.7.

voluntarily, and without receiving any documents from the Staff in return.”); (“In the negotiations with the Staff, Mr. Wetherald readily agreed to every material condition of settlement the Staff proposed.”); Glaser Affidavit, ¶ 12 (“Mr. Wetherald informed me that while we were negotiating with the Commission’s Staff...”); Glaser Affidavit, ¶ 13 (“I related to Mr. Meyer what I anticipated would be the ultimate terms and conditions of settlement based on our negotiations with the Staff.”); Glaser Affidavit, ¶ 15 (“While Mr. Wetherald and I negotiated with the Staff...”); Glaser Affidavit, ¶ 16 (“At the conclusion of the negotiations between Mile High Telecom Partners and the Commission Staff, the Staff agreed on a Stipulation and Settlement Agreement...”); Glaser Affidavit, ¶ 17 (“The Staff asked to have one of the partners in Mile High Partners to advise the Commission that Mr. Wetherald had the authority to sign the document.”); Glaser Affidavit, ¶ 17 (“While Mr. Wetherald and I were negotiating a settlement with the Staff...”); Glaser Affidavit, ¶ 33 (...Staff counsel specifically confirmed to me that Cyr had visited the Staff...). (Emphasis added).

10. Similar references are contained in Mr. Wetherald’s Affidavit of September 6, 2002. *See, for example*, ¶¶ 7, 9, 10, 11, 13, 16, 17, 25, 28, 29, 32, 33, and 34 (“...the Staff had filed a Motion to Reopen the Show Cause proceeding...”)(“The allegations in the Motion about me and Mr. Glaser...have been made by the Staff...”). (Emphasis added).

11. Based on the foregoing, it appears that evidence relating to the authority of Messrs. Glaser and/or Wetherald to bind Mile High Telecom and the Joint Venture to the Stipulation (which, in turn, bears on the validity of the Stipulation, the scope of Phase I of this proceeding) and/or any representations Messrs. Glaser and/or Wetherald may have made in that regard, are possessed by one or more members of the Staff. Any knowledge Mr. Nocera may have concerning these issues appear to have arisen from his legal representation of Staff. There

is no indication that Mr. Nocera has relevant and material information concerning this issue separate and apart from that held by Staff.² Any testimony Mr. Nocera might provide as to these matters would, therefore, merely be cumulative of evidence that is obtainable elsewhere. As such, Mr. Nocera is not a “necessary” witness within the meaning of CRPC 3.7(a) and should not be disqualified from serving as Staff’s counsel at the hearing of this matter.

12. In addition, the Motion to Disqualify contends that Mr. Nocera should be required to testify about his legal interpretation of various documents at issue in this matter as well as the legal advice he provided Staff in connection with the authority of Messrs. Glaser and/or Wetherald to enter into the Stipulation. However, an inquiry into these areas would almost certainly require Mr. Nocera to reveal attorney work product and/or privileged attorney/client communications. *See*, CRPC 1.6. It is clear from the Staff Response that it has not consented to the disclosure of such work product and/or communications.

13. In sum, the Motion to Disqualify fails to establish that any testimony Mr. Nocera might be called upon to provide in this matter is necessary under applicable legal standards and will, therefore, be denied. This renders moot the request that the Office of the Attorney General be disqualified from serving as counsel for Staff.

14. The Motion to Reply will also be denied. The Commission’s procedural rules do not provide for replies to motions. *See*, 4 *Code of Colorado Regulations* 723-1-22. In addition and contrary to the position advanced in the Motion to Reply, the Staff Response did not contain

² Movants indicate that they have yet to conduct discovery regarding the Motion to Disqualify and that such discovery “...will reveal more evidence that Mr. Nocera is a material witness in this case.” However, given the relatively short response time provided by the Commission’s discovery rules, Movants had adequate time to conduct discovery on this point subsequent to issuance of Decision No. R02-1427-I and prior to the deadline imposed therein for filing the Motion to Disqualify.

“new averments and allegations of fact” that could not have been reasonably anticipated by Movants prior to the submission of their Motion to Disqualify.

II. ORDER

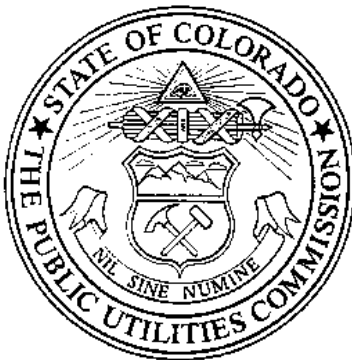
A. It Is Ordered That:

1. The Motion to Disqualify Assistant Attorney General David M. Nocera and the Office of the Attorney General filed in the captioned proceeding by Michael L. Glaser, Esq., On Systems Technology, LLC, and Tim Wetherald, is denied.

2. The Motion for Leave to File a Reply to the Staff Response in the captioned proceeding by Michael L. Glaser, Esq., On Systems Technology, LLC, and Tim Wetherald, is denied.

3. This Order shall be effective immediately.

(SEAL)



ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

DALE E. ISLEY

Administrative Law Judge