

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03C-371T

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.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
WILLIAM J. FRITZEL
GRANTING MOTION
FOR SUMMARY JUDGMENT,
REVOKING CERTIFICATES
OF PUBLIC CONVENIENCE AND
NECESSITY HELD BY AMCOM, LLC,
A SUBSIDIARY OF FUTUREONE,
AND CANCELING TARIFFS**

Mailed Date: February 12, 2004

I. STATEMENT

1. By Decision No. C03-0984, mailed on August 29, 2003, the Commission issued an Order to Show Cause and Notice of Hearing.
2. The Commission stated in its Decision that 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) interest in Amcom, LLC (Amcom), a wholly-owned limited liability company, to On Systems Technology, LLC (On Systems).
3. The Commission stated that Staff of the Public Utilities Commission (Staff) determined that FutureOne has not filed an application to transfer assets and therefore the Commission issued its Order to Show Cause and Notice of Hearing.

4. The Commission's show cause order was duly served on FutureOne and On Systems on August 29, 2003 as indicated by the certificate of service contained in the official file of the Commission.

5. On September 8, 2003, Staff filed an Entry of Appearance and Notice pursuant to 4 *Code of Colorado Regulations* (CCR) 723-1-9(d).

6. By Interim Order No. R03-1183-I, the motion of Staff to vacate the hearing scheduled for October 14, 2003, procedural schedule, and request to set a prehearing conference was granted. The prehearing conference was scheduled for October 27, 2003.

7. On the scheduled date, a prehearing conference was held. A new procedural schedule was developed and the hearing was rescheduled for January 20, 2004.

8. On November 28, 2003, Staff filed a Motion for Summary Judgment and Request for Remedy. Direct testimony, exhibits, and affidavit of Karlton R. Kunzie, of Staff are attached to Staff's Motion for Summary Judgment.

9. No response to Staff's Motion for Summary Judgment was filed.

10. In its Motion for Summary Judgment, Staff states there exists no genuine issue of any material fact, and that it is entitled to judgment as a matter of law, citing cases. Staff states that the sworn testimony of Karlton Kunzie, attached to Staff's motion as Exhibit A, provides a sufficient basis to indicate that no genuine issue of material fact exists, and that the only issue that remains is an appropriate remedy.

11. The Motion for Summary Judgment should be granted. Under the provisions of the Colorado Rules of Civil Procedure, C.R.C.P., Rule 56(h), summary judgment is appropriate

in this case, as there exists no genuine issue of any material fact, and Staff is entitled to judgment as a matter of law. *West American Insurance Company v. Baumgartner*, 812 P.2d 696 (Colo. App. 1990); *Harless v. Geyer*, 849 P.2d 904 (Colo. App. 1992)

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

12. On January 13, 2003, the United States Bankruptcy Court for the District of Colorado granted Futureone's Bankruptcy Trustee's Motion for authority to sell FutureOne, Inc.'s membership interest in Amcom to On Systems.

13. Futureone owns 100 percent of the stock of Amcom.

14. The Commission granted CPCNs to Amcom to provide competitive local exchange services in U S WEST Communications, Inc., now known as Qwest Corporation's operating territory, and emerging competitive Part 3 telecommunications services in the State of Colorado. The assets of Amcom include a CPCN to provide local exchange telecommunications in the State of Colorado, a CPCN to provide emerging competitive telecommunications in the State of Colorado, a customer base, and an interconnection agreement with Qwest Corporation.

15. Amcom is a regulated public utility under the provisions of §§ 40-1-103, 40-15-101, and 40-15-201(2), C.R.S.

16. In late January, 2003, the membership interest in Amcom was sold to On Systems.

17. FutureOne has not filed an application to transfer the assets, and at no time has the Commission authorized the transfer.

18. Staff has provided written notification to FutureOne advising it that it is required to file an application with the Commission for approval of the transfer. (*See* Exhibits KRK-3 and 4 of the sworn testimony of Karl Kunzie attached to Staff's Motion for Summary Judgment)

III. DISCUSSION

19. Under the provisions of §§ 40-5-105, 40-15-204, 40-15-303, C.R.S. and 4 CCR 723-25-8, the transfer of assets and CPCN of a regulated public utility require approval of this Commission prior to the transfer. No application has been filed and the Commission has not authorized the transfer.

20. Amcom's assets and CPCNs to provide local exchange telecommunications and emerging competitive telecommunications were sold to On Systems without first applying for approval of the transfer by the Commission.

21. It is found and concluded that as a matter of law, FutureOne has 1) violated § 40-5-105, C.R.S., by transferring assets of a public utility without authorization of the Commission; 2) violated § 40-15-204, C.R.S., by transferring a CPCN issued pursuant to Part 2 of Article 15, Title 40 without Commission authorization, and 3) violated § 40-15-303, C.R.S., by transferring a CPCN issued pursuant to Part 3, of Article 15, Title 40 without Commission authorization.

22. It is found and concluded that Staff's request for a remedy herein, namely the revocation of the CPCNs held by Amcom, a subsidiary of FutureOne and the cancellation of Amcom's tariffs is in the public interest and should be granted.

23. Pursuant to § 40-6-109(2), C.R.S., it is recommended that the Commission enter the following order.

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

1. The motion of Staff of the Public Utilities Commission for summary judgment is granted.

2. The certificates of public convenience and necessity held by Amcom, LLC, a subsidiary of FutureOne, Inc., are revoked and the tariffs filed by Amcom, LLC are canceled.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge