

Decision No. R04-0306

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03F-514T

M & M MORTGAGE,

COMPLAINANT,

V.

QWEST CORPORATION,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
KEN F. KIRKPATRICK
DISMISSING COMPLAINT**

Mailed Date: March 25, 2004

Appearances:

Richard L. Corbetta, Esq., Denver, Colorado, for Qwest Corporation; and

No appearance on behalf of the Complainant M & M Mortgage.

I. STATEMENT

1. This complaint was filed on December 4, 2003. On December 5, 2003, the Commission issued Decision No. R03-1368-I requiring Respondent Qwest Corporation (Qwest) to reconnect Complainant M & M Mortgage's service conditioned upon Complainant's posting of a \$3,000 cash or corporate security bond. Qwest was ordered to continue providing service provided that the Complainant remained current on a going forward basis. Complainant subsequently paid Qwest a \$3,000 cash bond and Qwest reconnected the service. Qwest filed its answer on February 5, 2004.

2. The parties attempted to mediate a settlement, but they were unsuccessful. By Decision No. R04-0095-I, January 26, 2004, the matter was set for a hearing to be held on March 9, 2004 at 9:00 a.m. in a Commission hearing room in Denver, Colorado.

3. At the assigned place and time the undersigned Administrative Law Judge (ALJ) called the matter for hearing. Respondent appeared through counsel; there was no appearance on behalf of the Complainant. The ALJ unsuccessfully attempted to contact the Complainant by telephone. At approximately 9:20 the matter was called for hearing, Qwest moved to dismiss the complaint, and the ALJ dismissed the complaint without prejudice.

4. Qwest then moved for an order of the Commission turning the \$3,000 bond over to Qwest to satisfy past indebtedness in excess of the \$3,000. Qwest was requested to provide a brief on the question of its entitlement to the bond; it did so on March 16, 2004

II. FINDINGS AND CONCLUSIONS

5. Qwest suggests that the only logical and fair result is that it be entitled to the bond up to the amount of indebtedness it claims from the Complainant. Otherwise it suggests that the bond requirement is meaningless.

6. Qwest also notes that it has incurred expenses for hearing. Qwest concedes that it could pursue a collection action but that it would incur additional expenses.

7. The bond requirement is not a deposit. A bond in a case like this is analogous to security under Rule 65(c) of the Colorado Rules of Civil Procedure. As such, it can be awarded to a prevailing party. Indeed, in Colorado there is a presumption that a prevailing defendant is entitled to a portion of the bond unless certain good reasons are apparent for not requiring payment. *City and County of Denver v. Ameritrust*, 832 P.2d 1054 (Colo. App. 1992). However,

in this proceeding, there has been no prevailing party as the case was dismissed without prejudice. Therefore the affect of the Commission's dismissal order is to place the parties in the same circumstances they were prior to the proceeding being filed. There has been no adjudication of any amounts owed by any parties. The positions of the parties are unchanged, namely, Complainant claims that Qwest owes him money, or that he owes Qwest less than it contends; Qwest claims that the Complainant owes it a certain sum of money. Therefore in order to place the parties in the same position as existed before the filing of the complaint, Qwest should refund the bond to the Complainant. Its claim to the \$3,000 is just that, a claim.¹

8. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. Docket No. 03F-514T, being a complaint of Complainant M & M Mortgage against Qwest Corporation, is dismissed without prejudice.

2. Qwest Corporation shall return the \$3,000 cash bond posted by the Complainant within ten days of the effective date of this Order.

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.

¹ As Qwest noted in its brief, it can pursue a collection action independent of any proceeding before this Commission.

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