Decision No. R04-0453

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.

RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
FINDING RULE 11 VIOLATIONS
AND IMPOSING SANCTIONS, IN PART

Mailed Date: April 30, 2004

I. PROCEDURAL BACKGROUND

1. The captioned proceeding was originally commenced on February 28, 2002, when the Colorado Public Utilities Commission (Commission) initiated a show cause proceeding against Mile High Telecom Partners, LLP (Mile High). *See*, Decision No. C02-165.

2. The Staff of the Colorado Public Utilities Commission (Staff) and Mile High ultimately reached an agreement to settle the show cause proceeding. The settlement was memorialized in a Stipulation and Settlement Agreement (Stipulation) dated May 3, 2002.[1] The undersigned administrative law judge (ALJ) approved the Stipulation on May 24, 2002. *See*, Decision No. R02-608.

[1] Section II of the Stipulation extended its terms to the Mile High Telecom Joint Venture (Joint Venture), a joint venture between Mile High and On Systems Technology, LLC.

3. On September 10, 2002, the Commission granted a motion filed by Staff to reopen this matter. It then remanded the case back to the ALJ for the purpose of determining whether the Stipulation was valid and/or whether Mile High and the Mile High Telecom Joint Venture (Joint Venture) complied with its terms. *See*, Decision No. C02-1058.

4. The ALJ bifurcated the issues involved in the remanded proceeding into two "phases."[2] Hearings were conducted in connection with Phase I on March 11 and 12, 2003 and July 14, 2003. The parties submitted Statements of Position on August 8, 2003.

5. A recommended decision was issued by the ALJ on September 23, 2003. It found that the Stipulation was invalid and that neither Glaser nor Wetherald violated Rule 11. *See*, Decision No. R03-1087. The finding that the Stipulation was not valid obviated the need to proceed with Phase II of the proceeding.[3]

6. Exceptions to Decision No. R03-1087 were filed by all parties. By Decision No. C04-0249 adopted on January 14, 2004 (mailed March 15, 2004), the Commission granted these exceptions, in part. It then remanded the matter to the ALJ for the limited purpose of determining whether Glaser and/or Wetherald violated Rule 11 and, if so, the appropriate sanctions to be imposed for such violations. In doing so, it ordered that no further hearings, inquiry, or pleadings would be necessary.

[2] Phase I involved an inquiry into the authority of Michael L. Glaser (Glaser), Mile High's legal counsel, and/or Tim Wetherald (Wetherald), Mile High's Manager, to bind Mile High and the Joint Venture to the Stipulation; whether they misrepresented the scope of that authority to the Commission or Staff; and, if so, whether that conduct subjected them to sanctions under Rule 11 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1-11 (Rule 11). An inquiry into whether Mile High and the Joint Venture complied with the terms of the Stipulation and whether Glaser or Wetherald engaged in improper conduct in connection with any noncompliance with such terms (Phase II) was deemed necessary only in the event the Stipulation was found to be valid in Phase I.

[3] The Commission upheld the ALJ's finding that the Stipulation was invalid. *See*, Decision No. C04-0249, Paragraph 78.

7. No party sought reconsideration of Decision No. C04-0249 pursuant to § 40-6-114, C.R.S. Therefore, it became administratively final on April 5, 2004.

8. In accordance with Decision No. C04-0249 and § 40-6-109, C.R.S., the undersigned ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS OF FACT

9. The findings of fact set forth in Paragraphs 16 through 36 of Decision No. R03-1087 are hereby incorporated into this recommended decision as if fully set forth herein.

III. DISCUSSION; CONCLUSIONS

A. Decision on Exceptions

10. In partially granting the exceptions filed to Decision No. R03-1087, the Commission found that the ALJ erred in the following particulars: (a) in finding that paragraph D.VI.k of the Stipulation did not constitute a representation from Glaser or Wetherald that they had authority to bind Mile High and the Joint Venture to the Stipulation;[4] (b) in finding that Wetherald was not subject to Rule 11 sanctions;[5] and (c) in applying the wrong legal standard to determine whether Glaser or Wetherald violated Rule 11 and whether sanctions should be imposed upon them for any such violations.[6]

[4] In this regard, the Commission found that Glaser and Wetherald made representations to the Staff that they could bind the Joint Venture to the Stipulation and that "Paragraph D.VI.k of the Stipulation requires that the signatories to the Stipulation have full authority to bind their respective parties to its terms." *See*, Decision No. C04-0249, Paragraph 86.

[5] *See*, Decision No. C04-0249, Paragraph 89.

[6] The ALJ's analysis in Decision No. R03-1087 was limited to the two potential Rule 11 violations identified by Staff in its Brief pursuant to Decision No. R02-1181-I, dated October 29, 2002. *See*, Decision No. R03-1087, Paragraph 37.

11. Regarding the last point of error referred to above, the Commission stated that the test to be applied in determining whether Rule 11 has been violated is one of "objective reasonableness" concerning the signing party's pre-filing behavior. This involves an inquiry into whether, prior to filing a pleading, motion, or other paper, the signatory: (a) read the document; (b) undertook a reasonable inquiry into whether it was grounded in fact and was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (c) possessed a proper purpose in filing it. *See*, Decision No. C04-0249, Paragraph 88 and the cases and authorities cited therein. In remanding the matter, the Commission directed the ALJ to apply this legal standard for the purpose of determining whether Glaser and/or Wetherald violated Rule 11 and, if so, the appropriate sanctions.

B. Rule 11 Violations

12. Rule 11 states, in pertinent part, as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation … If a pleading, motion, or other paper is signed in violation of this rule, the Commission, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

13. Application of the language contained in Rule 11 and the findings, directives, and legal standards set forth in Decision No. C04-0249 to the circumstances surrounding the execution of the Stipulation supports the conclusion that Glaser and Wetherald violated Rule 11 when they signed that document.

14. Rule 11 broadly includes pleadings, motions, and "other papers." Therefore, the Stipulation is clearly encompassed by the rule. *Jensen v. Mathews-Price,* 845 P.2d 542 (Colo. App. 1992) (attorney or litigant who signs a motion or other paper has the same obligation as the signer of a pleading to ensure that the document is factually and legally justified). Under Rule 11, Glaser and Wetherald certified that they read the Stipulation when they signed it.

15. As previously indicated, the Commission has found that by signing the Stipulation Glaser and Wetherald represented that they had authority to bind Mile High and the Joint Venture to its terms. However, both had access to the Mile High Partnership Agreement dated February 19, 2001 (Partnership Agreement) and the Mile High Telecom Joint Venture Agreement between On Systems Technology, LLC (On Systems) and Mile High, effective March 22, 2002 (Joint Venture Agreement) prior to signing the Stipulation. *See,* Decision No. R03-1087, Paragraphs 24 and 30 and footnote 11. As a result of this access, both Glaser and Wetherald could have, through reasonable inquiry, determined that the Joint Venture Agreement required the prior approval of the Joint Venture Participants, Mile High, and On Systems, to the settlement of administrative proceedings involving payments, commitments, or obligations in excess of $50,000.00. *See,* Decision No. R03-1087, Paragraph 27. The Stipulation was such a settlement and it clearly obligated Mile High and the Joint Venture to commitments exceeding that amount. *See,* Decision No. R03-1087, Paragraph 29.

16. Similarly, both Glaser and Wetherald could have, through reasonable inquiry, determined that the Partnership Agreement limited individual partners from committing Mile High to an obligation of $10,000.00 or more without an affirmative vote of its Managing or Voting Partners. *See,* Decision No. R03-1087, Paragraph 17. Again, the Stipulation clearly

obligated Mile High to commitments exceeding that amount. *See*, Decision No. R03-1087, Paragraph 29.

17. Therefore, by reviewing the Partnership Agreement and the Joint Venture Agreement Glaser and Wetherald could have established that neither signing the Stipulation nor producing the May 3, 2003, correspondence from Mr. Swichkow would serve to bind Mile High or the Joint Venture to the terms of the Stipulation in the absence of the approvals described in those agreements.[7] The Commission has found that such approvals were not properly obtained. *See*, Decision No. C04-0249, Paragraphs 76 and 78. Thus, both Glaser and Wetherald violated Rule 11 by representing that they had authority to bind Mile High and the Joint Venture to its terms when, through reasonable inquiry, they could have established that such a representation was not well grounded in fact or law.[8]

C. Rule 11 Sanctions

18. Rule 11 provides that, if violated, an "appropriate" sanction shall be imposed upon the person or persons who signed the subject pleading, motion, or other paper. However, in ordering sanctions against a client under Rule 11, the fact-finder must find and the record must confirm some nexus between the proscribed conduct and a specific undertaking by or knowledge of the client that the rule is being violated. *Domenico v. Southwest Properties Venture,* 914 P.2d 390 (Colo. App. 1995); *Maul v. Shaw,* 843 P.2d 139 (Colo. App. 1992).

[7] The Commission also found that Mr. Swichkow did not have authority to authorize Wetherald to bind Mile High to the Stipulation since he was not, individually, a Mile High general partner. *See,* Decision No. C04-0249, Paragraph 77.

[8] By signing the Stipulation Glaser and Wetherald were attempting to bind Mile High and the Joint Venture to its terms through this representation. This was improper within the meaning of Rule 11 since, for the reasons previously described, this representation was not well grounded in fact or law.

19. The fact-finder has considerable discretion in fashioning the type of sanctions to be imposed for violating Rule 11. *Schmidt Construction Company v. Becker-Johnson Corporation,* 817 P.2d 625 (Colo. App. 1991). Sanctions may, but need not, include awarding the opposing party the reasonable expenses and attorney's fees incurred as a result of filing the pleading, motion, or other paper. The federal version of Rule 11 provides that sanctions should be limited to what is sufficient to deter repetition of the conduct in question. *See,* Rule 11(c)(2) of the Federal Rules of Civil Procedure (F.R.C.P.).[9] Therefore, the purpose of Rule 11 sanctions is to deter inappropriate conduct, not to compensate an opposing party for its effect. *Silva v. Witschen,* 19 F.3d 725 (1st Cir. 1994). F.R.C.P. 11(c)(2) specifically recognizes that sanctions may be of a non-monetary nature.

20. Application of the above principles to the circumstances at hand supports a finding that Wetherald should not be sanctioned for the subject Rule 11 violation. He was, through On Systems, Glaser's client. *See,* Decision No. R03-1087, Paragraph 24. As such, he relied on Glaser to provide guidance in connection with legal issues raised during the course of the subject show cause proceeding. The Rule 11 violation in question involves such a legal issue; *i.e.,* the ability of Wetherald to bind Mile High and the Joint Venture to the terms of the Stipulation in light of the approval requirements imposed by the Partnership Agreement and the Joint Venture Agreement. It is reasonable that Wetherald would have relied on his counsel to ensure that his signature on the Stipulation was legally sufficient to bind Mile High and the Joint Venture rather than to undertake such an inquiry on his own. There is, therefore, insufficient evidence in the record to conclude that there is any connection between the Rule 11 violation described above and a specific undertaking by or knowledge of Wetherald that Rule 11 was being

[9] Rule 11 indicates that it has been modeled after F.R.C.P. 11.

violated in this way. This precludes the imposition of sanctions against Wetherald under applicable law.

21. Application of the above principles to the circumstances at hand supports a finding that a non-monetary sanction in the form of a Commission reprimand should be imposed against Glaser. The record supports a conclusion that the subject Rule 11 violation resulted more from his negligence in failing to fully review the Partnership Agreement and the Joint Venture Agreement than from any intent on his part to misrepresent his or Wetherald's authority to bind Mile High and the Joint Venture to the Stipulation.[10] Reprimand is the presumed sanction under the ABA Standards for Imposing Lawyer Sanctions (ABA Standards) for conduct of this type. *See*, ABA Standard 7.3 (reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system).[11] There is no reason to believe that the imposition of a more severe sanction against Glaser would serve to deter similar behavior on his part in the future. As indicated above, this is the purpose underlying Rule 11 sanctions.

22. Additional factors that mitigate against imposing a more severe sanction against Glaser include the following: the absence of any evidence that he has engaged in other inappropriate conduct in connection with his prior practice before the Commission; and the fact that his belief that Mr. Swichkow could authorize Mr. Wetherald to bind Mile High to the

[10] The Commission did not disturb the ALJ's findings in Decision No. R03-1087 that Staff failed to meet its burden of proof regarding its allegation that Glaser and Wetherald fraudulently or negligently misrepresented their authority to bind the Joint Venture to the Stipulation. *See*, Decision No. C04-0249, Paragraph 84.

[11] The ABA Standards have been adopted by the Office of the Presiding Disciplinary Judge of the Supreme Court of Colorado in connection with the imposition of sanctions imposed in attorney disciplinary proceedings. *In re Roose*, 69 P.3d 43 (Colo. 2003).

Stipulation was based on at least a plausible view of the law and was supported by two other attorneys.[12]

23. It would not be appropriate to sanction Glaser by ordering him to compensate opposing parties for the expenses and legal fees they incurred as a result of the subject Rule 11 violation. In this regard, it is observed that Staff was also in possession of the Partnership Agreement and the Joint Venture Agreement prior to the time the Stipulation was executed. Therefore, it could also have reasonably determined that Glaser and Wetherald's signatures on that document could not have bound Mile High or the Joint Venture to its terms in the absence of the approvals required by those agreements. Accordingly, it was in position to mitigate the expenses and fees incurred during the course of the remanded proceeding by insisting that Mile High and the Joint Venture properly authorize the Stipulation prior to the time that document was signed. *See, Pollution Control Industries of America v. Van Gundy,* 21 F.3d 152, 156 (7th Cir. 1994) (party seeking damages under F.R.C.P. 11 must have made reasonable efforts to mitigate its losses).

IV. ORDER

A. The Commission Orders That:

1. Tim Wetherald and Michael L. Glaser violated 4 *Code of Colorado Regulations* 723-1-11 in the manner described in this Recommended Decision.

[12] Although the Commission rejected the argument that Mr. Swichkow had authority to authorize Wetherald to bind Mile High to the Stipulation (*See,* footnote 7 above), Glaser submitted an opinion from Frederick B. Skillern, Esq. to the contrary. *See,* Exhibit J attached to Glaser's Motion for Summary Judgment dated February 25, 2003. Mr. Stinson, the attorney who prepared the Partnership Agreement, appears to agree with this assessment, albeit for different reasons. *See,* Decision No. R03-1087, Paragraph 32.

2. Sanctions shall not be imposed against Tim Wetherald for violating 4 *Code of Colorado Regulations* 723-1-11.

3. A sanction, in the form of a reprimand issued by the Colorado Public Utilities Commission, shall be imposed against Michael L. Glaser for violating 4 *Code of Colorado Regulations* 723-1-11.

4. 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.

5. 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.

6. 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

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Administrative Law Judge

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