

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 03C-372T

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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.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
WILLIAM J. FRITZEL  
GRANTING MOTION FOR  
SUMMARY JUDGMENT**

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Mailed Date: June 17, 2004

**I. STATEMENT**

1. By Decision No. C03-0985, mailed on August 29, 2003, the Commission issued an Order to Show Cause and Notice of Hearing. The Commission ordered On Systems Technology, LLC (On Systems) to appear before the Commission on October 15, 2003 to show cause why the Commission should not take action 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.<sup>1</sup>
2. Proper notice was given to On Systems on August 29, 2003.
3. On September 8, 2003, Staff of the Public Utilities Commission (Staff) filed an Entry of Appearance and Notice pursuant to Rule 9(d) of the Commission's Rules of Practice Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1.
4. The October 15, 2003 hearing date was vacated at the request of Staff. Following a prehearing conference held on October 15, 2003, the matter was reset for hearing for December 15 and 16, 2003.
5. At the request of Staff, the hearing was once again vacated and rescheduled for February 5 and 6, 2004.
6. On January 20, 2004, On Systems filed a Motion to Vacate and Reschedule the Hearing Scheduled for February 5 and 6, 2004. The motion was granted by Decision No. R04-0124-I, and the hearing was rescheduled for April 22 and 23, 2004.
7. On April 8, 2004, Staff filed a Motion for Summary Judgment. By Interim Order No. R04-0396-I, the hearing scheduled for April 22 and 23, 2004 was vacated.
8. On April 27, 2004, On Systems filed a Response to Staff's Motion for Summary Judgment.

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<sup>1</sup> Ordering paragraph no. 1, page 7 of Commission Decision No. C03-0985.

9. On May 14, 2004, Staff filed a Motion to Strike On System's Response to Staff's Motion for Summary Judgment and Motion to Dismiss. Staff states that the response should be stricken since it was untimely filed, the manager of On Systems is not authorized to file pleadings on behalf of On Systems, and that the response is largely unresponsive.

10. The motion of Staff to strike the response of On Systems for the reason that it is unresponsive has merit and will be granted. The response to Staff's motion does not present legal argument in response to Staff's Motion for Summary Judgment, nor does it demonstrate that an actual factual controversy exists. On Systems' response states that there are numerous issues of fact in this case, however, it fails to state specific facts and to demonstrate that there are any material facts at issue. Staff's Motion to Strike On Systems' Response is granted.

## **II. THE MOTION FOR SUMMARY JUDGMENT**

11. In its Motion for Summary Judgment, Staff states that summary judgment is appropriate in this case since there exists no material facts at issue and that it is entitled to judgment as a matter of law. In support of its motion, Staff has attached to its Motion for Summary Judgment the sworn testimony of Staff member Karlton Kunzie and numerous exhibits. Staff contends that the testimony and exhibits demonstrate that there exists no genuine issue of material fact.

12. Staff alleges in its Motion at pages No. 1 and 2 that as a matter of law On Systems has:

- (1) Violated § 40-5-105, C.R.S., by acquiring assets of a public utility without the required authorization of the Colorado Public Utilities Commission (Commission);

- (2) Violated § 40-15-204, C.R.S., by acquiring a certificate of public convenience and necessity issued pursuant to Part 2 of Article 15, Title 40 without the required authorization of the Commission;
- (3) Violated § 40-15-303, C.R.S., by acquiring a certificate of public convenience and necessity issued pursuant to Part 3 of Article 15, Title 40 without the required authorization of the Commission;
- (4) Violated Commission Decision No. R02-1261 by sending a customer notice to customers of Mile High Telecom Joint Venture (Joint Venture) that was not approved by the Commission as required and which was contrary to the Commission approved customer notice in Docket No. 02A-463AT;
- (5) Violated Commission Decision No. R02-1261 by soliciting customers to switch to On Systems despite On Systems being excluded from the list of alternative providers under the transition plan approved in Decision No. R02-1261;
- (6) Violated § 40-3-101, C.R.S., by billing customers for service that it was unable to provide and which was never provided; and
- (7) Violated Commission Decision No. R03-1361-I by failing to respond to Staff audit as compelled by such order.

13. 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 if there exists no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. The sworn testimony of Karl Kunzie and attached exhibits, demonstrate that there exists no genuine issue of material fact and that 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). Staff, as the moving party for summary judgment has the initial burden to establish that there is no genuine issue material fact and that it is entitled to summary judgment as a matter of law. *Petersen v. Halstead*, 829 P.2d 373 (Colo. 1992). Upon a showing by the moving party that there is no genuine issue and material fact, the burden shifts to the non-moving party to demonstrate by admissible facts that a real

controversy exists. *Hauser v. Rose Health Care Systems*, 857 P.2d 524 (Colo. App. 1993); *Knittle v. Miller*, 709 P.2d 32 (Colo. App. 1985).

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

14. On January 13, 2003, the United State Bankruptcy Court for the District of Colorado granted FutureOne, Inc.'s (FutureOne) Bankruptcy Trustee's Motion for Authority to Sell FutureOne's membership interest in Amcom, LLC (Amcom) to On Systems.

15. FutureOne owned 100 percent of the stock of Amcom.

16. The Commission granted Certificates of Public Convenience and Necessity to Amcom to provide competitive local exchange services in U S WEST Communications, Inc., now known as Qwest Corporation's (Qwest) operating territory, and Emerging Competitive Part 3 Telecommunications Services in the State of Colorado. Amcom assets included a certificate to provide local exchange telecommunications services in the State of Colorado, a certificate to provide emerging competitive telecommunications in the State of Colorado, a customer base, and an interconnection agreement with Qwest Corporation.

17. Amcom and On Systems are public utilities under the provisions of §§ 40-1-103 and 40-15-201(2), C.R.S.

18. In January 2003, the bankruptcy court granted the motion of FutureOne's bankruptcy trustee to sell debtor's membership interest in Amcom.

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

20. No application was filed with the Commission to authorize the transfer, and at no time has the Commission authorized the transfer of assets and certificates.

21. By Decision No. R04-0159, mailed on February 12, 2004, the Commission revoked the Certificates of Public Convenience and Necessity held by Amcom. Thus the Certificates of Public Convenience and Necessity transferred from Amcom to On Systems no longer exist.

22. In Docket No. 02A-463AT, the Joint Venture composed of On Systems and another company filed an application for authorization to discontinue providing jurisdictional telecommunications service to its customers in Colorado. The transition plan that was approved by the Commission in Decision No. R02-1261 established procedures for the transition of residential and business customers of the Joint Venture to other telecommunications providers prior to the Joint Venture ceasing operations. Under the terms of the transition plan, the Joint Venture was required to provide its customers with a notice that was approved by the Commission in the transition plan concerning the need of these customers to select another carrier within a time certain or be defaulted to Qwest. If the Joint Venture failed to provide this notice, Qwest was required to perform this obligation.

23. The Joint Venture failed to provide the approved notice, therefore under the terms of the Commission's Order, Qwest sent notice to the Joint Venture's customers. The notice letter provided the Joint Venture customers a list of jurisdictional telecommunications carriers who had authorization to provide service from the Commission. The transition plan specifically excluded On Systems as an alternative provider. On April 2, 2003, On Systems sent a purported notice letter (Exhibit A, KRK-7) advising the Joint Venture/ Mile High customers that the Joint Venture / Mile High was ceasing operations. This letter also indicated that On Systems had agreed to provide telecommunications services at the same rates as provided by the Joint Venture. This letter is in direct violation of the transition plan approved in Decision No. R02-1261.

24. At no time after April 1, 2003 did On Systems have the technical or legal ability to provide local exchange services in Colorado. (See Exhibit A, KRK-8; testimony of Karlton Kunzie, page 13, lines 1 through 14.) After the non-authorized “Notice” letter was mailed by On Systems, some of the Joint Venture customers agreed to migrate to On Systems as an alternate provider. These customers were unaware that On Systems could not legally provide local exchange services to these customers.

25. On Systems sent bills for service to some of the customers who agreed to migrate to On Systems after the unauthorized notice letter was sent, and On Systems charged for services which were not provided.. (Exhibit A, testimony of Kunzie, page 14, lines 15 through 23, page 15, lines 1 through 8; Exhibit KRK-9)

26. In another example of On Systems’ failure to comply with Commission orders, Staff filed a Motion to Compel On Systems to answer Staff’s Audit Questions. By Decision No. R03-1361-I mailed on December 4, 2003, the Commission ordered On Systems to respond to the audit questions within seven days of the effective date of the order. On Systems failed to respond to Staff’s audit questions and consequently violated the Commission order.

27. The transfer of all shares in Amcom from FutureOne to On Systems, including the certificates of public convenience and necessity held by Amcom without the authorization by this Commission clearly violated Colorado law. Under the provisions of §§ 40-5-105, 40-15-202, and 40-15-303, C.R.S., the transfer of assets from one public utility to another, and the transfer of certificates of public convenience and necessity transferred to On Systems required authorization of the Commission. No application for the transfer of assets and certificates was ever filed with the Commission. No authorization for the transaction was given by this

Commission. On Systems violated the above statutes by obtaining the assets and certificates without authorization. On Systems was notified by Staff that authorization for the transfer was required by state law. (*See* pages 6 and 7 of the sworn testimony of Karlton Kunzie, and KRK-5 and KRK-6).

28. The revocation of the certificate of public convenience and necessity transferred to On Systems by FutureOne (Decision No. R04-0159, Docket No. 03C-371T) and the revocation of authorities of On Systems to operate as a provider, including a reseller, of jurisdictional emerging competitive telecommunications services, competitive local exchange services, (Decision No. R03-1342, Docket No. 03C-414T) is an appropriate remedy for the failure of On Systems to obtain approval from the Commission.

29. The sworn testimony of Karl Kunzie and exhibits, all attached to the motion of Staff for Summary Judgment, demonstrates that On Systems violated the Commission-approved transition plan for the orderly transfer of business and residential telecommunications customers of the Joint Venture, of which On Systems was a partner, to other approved telecommunications providers before the Joint Venture ceased operations. By Decision No. R02-1261, Docket No. 02A-463AT, the Commission approved a Transition Plan. In this docket, the Joint Venture filed an application requesting authorization from this Commission to discontinue providing jurisdictional telecommunications service to its customers in Colorado. After hearing of the matter, the transition plan was approved in Decision No. R02-1261. Part of the transition plan required a notice letter to be mailed to the Joint Venture customers stating that the Joint Venture was discontinuing service. The notice letter informed the customers that they had an opportunity within a time certain to choose another telecommunications carrier from a list of Commission – approved carriers, attached to the transition plan, or default to Qwest. The Commission order



required the Joint Venture to mail this Commission- approved notice to its customers, however, if this was not done, Qwest then was required to furnish the approved notice. The Joint Venture did not comply with the requirement of mailing the notice letter to its customers, therefore Qwest provided notice to these customers. In a stipulation and agreement of the parties in Docket No. 02A-463AT, agreed to by On Systems, On Systems was removed as an approved telecommunications provider on the list.

30. The testimony and exhibits of Mr. Kunzie indicate that not only did On Systems as a partner in the Joint Venture fail to provide its customers with the required notice, but On Systems mailed a “non-approved notice” to the Joint Venture customers that indicated that On Systems offered to provide service to these customers. (KRK-7) This action was a violation of Commission Order R02-1261. On Systems did not have the technical or legal ability after April 1, 2003 to provide local exchange services to these customers.

31. Some of the customers who had received the On Systems “unauthorized notice letter” agree to migrate to On Systems’ service, (Kunzie testimony, Page No. 12, line 23-26; Page No. 13, line1). Staff has shown through its sworn testimony and exhibits that On Systems billed some of the customers for service that it could not and did not provide. (Kunzie testimony, pages 14 and 15, and Exhibit KRK-9)

32. In addition to the violations above, Staff alleged that On Systems may have violated the Commission’s Rules Regarding the Change of Presubscription or Slamming Rules of the Commission. Staff in its Motion for Summary Judgment concedes that this allegation is without merit since On Systems did not submit orders to Qwest to change customer service to On Systems.

33. The action or non-action by On Systems demonstrates a disregard of Colorado public utilities law, the Commission's rules, and Commission orders. The sworn testimony of Mr. Kunzie and attached exhibits demonstrates, and it is found, that On Systems: (1) Violated Section 40-5-105, C.R.S. by acquiring assets of a public utility without the required authorization of the Commission; (2) Violated Section 40-15-204, C.R.S. by obtaining a certificate of public convenience and necessity without authorization of the Commission; (3) Violated Section 40-15-303, C.R.S. by obtaining a certificate of public convenience and necessity without Commission approval; (4) violated Commission Decision No. R02-1261 by sending a customer notice to customers of Mile High Telecom Joint Venture that was not approved by the Commission; (5) violated Decision No. R02-1261 by soliciting customers to choose On Systems even though On Systems was excluded from the list of alternative providers under the transition plan; (6) violated Section 40-3-101, C.R.S. by billing customers for service that On Systems was unable to provide and which was never provided; and (7) violated Decision No. R03-1361-I by failing to respond to Staff's audit questions.

34. In light of the above findings, the question becomes what is the appropriate remedy in this case? Staff believes that the question of remedies relating to On Systems' conduct is problematic. Staff correctly states that refunds can only be ordered if the amount of payments wrongly received is known, or if a reasonable proxy can be established. Staff states that it cannot determine the amount of refunds that may be due or develop a proxy since it does not have sufficient information. Staff believes that the Commission has the power to prohibit Mr. Timothy Wetherald, the Manager of On Systems from owning, controlling, managing, operating, or being affiliated, or employed in any manner with a jurisdictional public utility. Staff also states that the Commission should order Mr. Wetherald to disclose to the Commission

any involvement that he may have with any jurisdictional public utility or Applicant to provide jurisdictional services in the future.

34. Staff's recommendation for sanctions against Mr. Wetherald is not appropriate in this docket, since Mr. Wetherald is not the respondent in this show cause proceeding. On Systems is the Respondent.

35. Due to the blatant nature of the violations of the public utilities laws and total disregard of the Commission's orders outlined above, it is appropriate to sanction On Systems. The appropriate and lawful remedy of revocation of On Systems' certificates of public convenience and necessity has already been imposed by the Commission in Decision No. R03-1342, in Docket No. 03C-414T.

36. Pursuant to § 40-6-102(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. On Systems Technology, LLC is found to be in violation of the Colorado statutes and Commission orders as detailed above.

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

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Administrative Law Judge