

Decision No. C03-0191

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-054T

IN THE MATTER OF THE JOINT APPLICATION OF VANION TELECOM, INC. DBA
VANION, INC. AND APOLLO COMMUNICATIONS, LLC TO EXECUTE A TRANSFER.

**ORDER GRANTING PETITION FOR DECLARATORY
ORDER AND MOTION FOR EMERGENCY STAY IN PART**

Mailed Date: February 19, 2003
Adopted Date: February 19, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of a Petition for Declaratory Order, Motion for Emergency Stay and Motion to Shorten Response Time, filed by Apollo Communications, LLC (Apollo) on February 14, 2003. According to the filing, Qwest Corporation (Qwest) has threatened to discontinue providing service to Apollo's customers, on or about February 20, 2003 if an overdue balance of \$812,364.42 is not paid in full.

2. Apollo indicates that it has acquired the assets and customers of Vanion Telecom, Inc. (Vanion) at public auction and has subsequently filed an application for transfer of those assets and for a certificate of public convenience and necessity (CPCN) to provide telecommunications services. Apollo therefore requests a stay of Qwest's discontinuance of service to Vanion's customers (which Apollo has also acquired and is currently servicing) until such time as its pending applications before the Commission have been considered.

3. Now, being duly advised in the matter, we grant Apollo's Petition for Declaratory Order and Motion for Stay in part, consistent with the discussion below.

B. Discussion

4. This proceeding involves an application filed by Vanion to execute a transfer of assets to Apollo. Vanion is a Colorado competitive local exchange carrier (CLEC), providing local exchange telecommunications services in Colorado, and headquartered in Colorado Springs. Vanion also has a Letter of Registration issued by the Commission. According to the petition, Vanion provides voice and data services to approximately 5,000 business and residential customers through self-owned facilities, leased facilities and through resale. Additionally, Vanion holds a Commission approved interconnection agreement with Qwest through which it provides voice and data circuits to end users, using 25 separate Qwest billing account numbers (BAN).

1. Apollo's Petition and Motion

5. According to Apollo's pleading, Vanion encountered severe financial difficulty beginning in late 2002. As a result, Apollo was formed and subsequently entered into an agreement to purchase an unidentified promissory note from Vanion's primary investor (also unidentified in the parties' pleading). The note was secured by all of Vanion's assets. Apollo proceeded to foreclose on the note and finally purchased all of Vanion's assets at public auction, which was held as a result of Apollo's foreclosure of the note. Apollo specifically indicates in the pleading that it did not assume any of Vanion's debts or liabilities, which presumably included the approximately \$800,000 owed to Qwest. It should be noted that neither Vanion nor Apollo filed an appropriate application with the Commission for the transfer of Vanion's assets until February 7, 2003, nor does Apollo hold a CPCN to provide telecommunications services to Vanion's former customers.

6. According to Apollo, on January 28, 2003, in conjunction with Sun West,¹ it proposed a plan for the discontinuance of service by Vanion and the transition of customers to Sun West. According to the proposed plan, Sun West is to own the circuits and control the switches and “be primarily responsible to Qwest.”² Apollo had apparently retained some of Vanion’s former employees and continued operating the Vanion system and continued to provide service to Vanion’s former customers. According to the parties, it was their intent to transition the customers to the Sun West network.

7. The proposed transition plan, among other things, also required that Qwest issue 25 new BAN numbers to Sun West, and to work with Sun West to coordinate a “cut-over” of the circuit groups to the new BAN numbers without interruption of service. The transition plan further required Qwest to continue to provide service to all existing Vanion BAN numbers. In return, Apollo agreed to pay Qwest for all telecommunications services provided under the Vanion BAN numbers from the date of execution of a transition agreement, until service to Vanion was terminated and cut-over to the new Sun West BAN numbers. Sun West also agreed to increase its wire transfers to Qwest to cover the payments already required by Sun West, to cover its current charges with Qwest, in addition to the more than \$900,000 in arrears for previously provided services, and the costs to cover the new BAN numbers.

8. On February 5, 2003, Qwest sent a letter to Mr. Kendall John of Vanion, in which it indicated that Vanion was in default of a previous December 19, 2002, letter from Qwest of December 19, 20002 that advised Vanion it was in arrears to Qwest for a total of \$812,364.42.

¹ SunWest is a Colorado CLEC, based in Colorado Springs of which, according to the pleading, a Mr. Brent Hawker is a shareholder. Mr. Hawker also appears to be the primary shareholder of Apollo, and according to the Intervention filed by Qwest, also owns a controlling interest in Sun West.

² See Exhibit 4 attached to Apollo’s Petition for Declaratory Order, Motion for Emergency Stay and Motion to Shorten Response Time.

Qwest further indicated that if it did not receive payment in full on or before February 20, 2003, it would begin the disconnect process of all Vanion accounts and services provided by Qwest. Subsequently, on February 14, 2003, Apollo filed this petition.

2. Qwest's Petition to Intervene and Response To Apollo

9. Qwest filed a Petition to Intervene, Entry of Appearance and Response to Apollo's petition on February 18, 2003. In its pleading, Qwest points out that Apollo's transition plan does not address how Apollo or Vanion will pay Qwest any of the outstanding amounts Vanion owes to Qwest. Rather, the parties instead propose to transfer all Vanion's assets to Apollo, leaving Vanion with no assets and no means available to repay any of the Vanion debt to Qwest.

10. Qwest also indicates that Apollo is apparently unable to provide telecommunications services to Vanion customers without use of the Sun West switch and corresponding network, which it proposes to lease from Sun West. As such, should Sun West fail to emerge from bankruptcy protection, Apollo will be unavailable to service the Vanion customers.

11. Qwest objects to Apollo's transition plan as inadequate and prejudicial to Qwest in that it does not provide for repayment of money owed to it by Vanion, and forces Qwest to continue to provide services to Vanion for which Qwest feels it will never be paid. Qwest also objects to the motion for stay, citing these same concerns. Qwest points out that Apollo has no proven track record, is operating without a CPCN or tariffs in place, and is unable to provide service to the Vanion customers without utilizing Sun West's network. In addition, Sun West is currently operating under Chapter 11 of the U.S. Bankruptcy Code with no guarantee of successful reorganization.

12. Qwest believes that the Commission lacks full jurisdiction to impose a stay on the disconnection of services because the network used to provide service to Vanion customers, including public safety entities, healthcare, government and communication entities, utilizes the non-jurisdictional services purchased by Vanion from Qwest. Therefore, the stay sought by Vanion, according to Qwest, will not prevent interruption of service to those customers.

13. However, Qwest did propose an alternative transition plan to reach a timely resolution of this matter. Qwest's proposal is as follows:

- a.) Qwest will temporarily suspend the disconnection of Vanion's services (both jurisdictional and non-jurisdictional) until March, 20, 2003;
- b.) Qwest will be designated as the default provider for all of the Vanion customers;
- c.) the Commission will waive all applicable slamming rules regarding the transfer;
- d.) the Commission will provide 30 days notice of the transfer and the designation of Qwest as the default provider to Vanion's customers;
- e.) upon the expiration of the 30 day notice period, Qwest will begin disconnecting Vanion's jurisdictional and non-jurisdictional service in an orderly fashion and transferring those customers who have not made arrangements to purchase service from an alternate provider over to Qwest's network;
- f.) the Joint Application to transfer assets from Vanion to Apollo will be denied and converted to an Application to Discontinue all services provided Vanion.

C. Findings and Conclusions

14. After reviewing the pleadings filed by Apollo and Qwest, we determine that several concerns exist. We are, however, ultimately responsible for the ongoing provision of telecommunications services to Vanion's former end users, to ensure their health and safety. The Colorado General Assembly has granted to the Commission, extensive and broad regulatory powers. In exercising any of our powers, we are always aware that the interest of the public

should always be given first and paramount consideration. *Public Service Company. v. Public Utilities Commission*, 142 Colo. 135, 350 P.2d 543, *cert. denied*, 364 U.S. 820, 81 S. Ct. 53, 5 L.Ed. 2d 50 (1960). It is with this charge in mind, that we address the issues presented here.

15. Apollo has indicated that it has acquired the assets and customers of Vanion, however, as indicated previously, Apollo has no effective CPCN on file with the Commission, nor does it have an effective tariff on file, calling into question whether the rates it is charging Vanion's customers are just and reasonable. Although Vanion has applied to the Commission for after-the-fact approval of its transfer of assets to Apollo in this docket, and Apollo has a CPCN application pending before the Commission, neither of these matters has been resolved as of the date of this decision. In effect, Apollo is operating as a CLEC without Commission authority.

16. We also find it troublesome that, according to Qwest, Apollo must rely on Sun West to provide it the necessary circuits and network for Apollo to provide service to Vanion's customers. This is particularly worrisome because Sun West is itself in bankruptcy proceedings.

17. Qwest argues the validity of the transition plan proposed by Apollo. According to Qwest, nowhere does the plan address payment to Qwest for amounts owed by Vanion. In fact, Apollo states in its pleading that in acquiring Vanion's assets and customers, it did not acquire or assume Vanion's debts or liabilities. We recognize that as an incumbent local exchange carrier (ILEC), Qwest is in a precarious financial position. Although Qwest is required to provide services to CLECs to ensure fair competition in its service areas, it is also entitled to be fairly compensated for the provision of that service. Equity would provide as much. However, no matter the financial disagreements between the parties, our primary responsibility remains to the public.

D. Conclusion

18. As such, we find that it is in the public interest to grant, in part, Apollo's Petition for Declaratory Order and Motion for Emergency Stay. However, we also recognize that this situation must be dealt with quickly and as seamlessly as possible to avoid any interruption of service to the end users, and to provide Qwest with relief by a date certain. Therefore, we will grant the emergency stay until and including March 24, 2003. If the dispute between Qwest and Vanion is not resolved to both parties and the Commission's satisfaction by that date, Qwest may disconnect service. In addition, if the dispute is not resolved by that date, Qwest will be the designated default provider for Vanion's regulated customers upon disconnection of service to Vanion. We further require that Apollo, no later than February 24, 2003, send out written notice to all of the former Vanion customers, apprising them of the current situation. The contents of the required notice must at a minimum contain the following information:

- The notice will inform end users of the current situation before the Commission, including the fact that Qwest has filed a disconnect notice and that Apollo filed an emergency stay, which the Commission granted until March 24, 2003. It will provide the docket number and Commission address to allow for protests to be filed.
- The notice will inform end users that if the matter between Qwest and Vanion is not resolved by March 24, 2003, the stay will be lifted and Qwest may disconnect service to Vanion at that time.
- The notice will contain information regarding end users' options, which will include alternative providers, a list of which is available from the Commission
- The notice will inform end users that if they do not make alternative arrangements by March 24, 2003, that Qwest will be their default provider.

19. Apollo shall provide an affidavit to the Commission by close of business on February 24, 2003, indicating whether it has sent the notice to end users required by this order, and attach a copy of any notice sent. We further order that should Apollo fail to provide such

affidavit by the close of business on February 24, 2003, Qwest shall instead provide this notice to end users by February 28, 2003, and Apollo will be responsible to Qwest for all charges associated with providing notice.

20. We grant Apollo's motion to shorten response time to February 18, 2003. The petition of Qwest to intervene in this matter is also granted. Qwest's motion for shortened response time is granted.

II. **ORDER**

A. **The Commission Orders That:**

1. The Petition for Declaratory Order, Motion for Emergency Stay and Motion to Shorten Response Time filed by Apollo Communications, LLC is granted in part consistent with the discussion above.

2. Apollo Communications, LLC is ordered to provide notice to the Vanion customers it is now servicing pursuant to the discussion above.

3. The Petition to Intervene, Entry of Appearance and Motion to Shorten Response Time filed by Qwest Corporation is granted.

4. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

5. This Order is effective immediately upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
FEBRUARY 19, 2003.**

(SEAL)



ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

JIM DYER

Commissioners