Decision No. C04-0249

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.

ORDER DENYING PARTIES' EXCEPTIONS IN PART AND GRANTING IN PART AND REMANDING MATTER TO ALJ FOR FURTHER LIMITED FINDINGS

Mailed Date: March 15, 2004
Adopted Date: January 14, 2004

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Colorado Public Utilities Commission (Commission) for consideration of exceptions to Recommended Decision No. R03-1087 (Recommended Decision) filed separately by Commission Staff (Staff); Michael Glaser (Glaser), Timothy Wetherald (Wetherald), and On Systems Technology, LLC (On Systems) (together, Glaser et *al*.); and Mile High Telecom Partners, L.L.P. (Mile High).

2. In the Recommended Decision, the Administrative Law Judge (ALJ) generally found that although Glaser and Wetherald had authority to execute a Stipulation and Settlement Agreement entered into between Mile High and Staff, they had no authority to bind Mile High or the Mile High Telecom Joint Venture (Joint Venture) (between Mile High and On Systems) to the terms of the Agreement without prior approval of the managing partners. Because the Settlement Agreement obligated Mile High to an amount of approximately $185,000, prior approval of the managing partners was necessary in order for Glaser and Wetherald to bind Mile High to the terms of the Settlement Agreement.

3. The ALJ further held that a letter purporting to provide approval to Glaser and Wetherald to bind Mile High to the Settlement Agreement was invalid because the signatory had no authority as a general partner to permit Glaser and Wetherald to bind Mile High. Additionally, the ALJ found that even if the signatory to the authorization letter could be construed to be a Mile High general partner, no evidence was presented that the signatory had authority to execute the letter, or that the general partners ever approved the Stipulation and Settlement Agreement.

4. The ALJ determined Staff's allegations could be bifurcated into whether Glaser and Wetherald, as signatories to the Stipulation, misrepresented that they had full authority to bind Mile High to the terms of that document, and whether Glaser and Wetherald unreasonably and fraudulently signed the Stipulation and induced Staff to do so on the basis of the purported general partner letter. According to the ALJ, because Glaser and Wetherald were properly retained as Mile High's legal counsel and manager, they could execute the Stipulation in those capacities, but they could not bind Mile High to the terms of that document.

5. Regarding Staff's allegation that Glaser and Wetherald should be sanctioned pursuant to 4 *Code of Colorado Regulations* (CCR) 723-1-11 and whether Glaser and Wetherald committed fraud, the ALJ held that given the elements required to prove fraud and negligent misrepresentation, and given Staff's failure to properly investigate whether Glaser and Wetherald were authorized to bind Mile High to the Stipulation, Glaser and Wetherald should not be sanctioned for Rule 11 violations.

6. In response to Glaser and Wetherald's motion for summary judgment, the ALJ denied the motion, finding that Staff had presented a *prima facie* case from which a determination could be made.

7. Glaser and Wetherald assert that the Commission has no statutory or constitutional authority to make determinations regarding the Colorado Partnership Act, without a prior court ruling that they lacked authority to bind Mile High and the Joint Venture to the Stipulation. Additionally, Glaser and Wetherald argue that that ALJ misinterpreted partnership law in finding that the authorization letter they relied on for authority to bind Mile High to the Stipulation was invalid because the signatory was not a Mile High general partner.

8. Staff disagrees with Glaser and Wetherald's position and argues that the Commission does indeed have authority to make a determination in a matter involving a utility under its jurisdiction. Staff maintains that the ALJ erred in finding that Glaser and Wetherald could execute the Stipulation but could not bind Mile High nor the Joint Venture to its terms. Rather, Staff asserts that if an agent cannot bind a principal by his signature, then he is not authorized to execute the document as an authorized agent.

9. Glaser and Wetherald agree with the ALJ's Recommended Decision that denied Staff's request for imposition of Rule 11 sanctions, however, they argue he did so for the wrong reasons. Glaser and Wetherald contend that no evidence was presented that they did not have the authority to bind the partnership.

10. According to Staff, the ALJ erred in applying a fraudulent misrepresentation standard to assess whether Rule 11 had been violated. Staff argues that the ALJ erred in finding that Staff unjustifiably relied on the misrepresentations of Glaser and Wetherald and therefore, the misrepresentations do not amount to fraud. Staff takes the position that under the correct standard to determine a Rule 11 violation, Glaser and Wetherald did violate Rule 11 and should be appropriately sanctioned.

11. Finally, Glaser and Wetherald take exception to the ALJ's denial of their motion for summary judgment. Glaser and Wetherald argue that the ALJ improperly denied them due process for a number of reasons, including the fact that they provided the only expert testimony regarding their authority to bind Mile High and the Joint Venture; the ALJ improperly shifted the burden of proof to Glaser and Wetherald; Staff failed to establish a *prima facie* case; and the ALJ improperly allowed Mile High to present evidence. Staff disagrees with Glaser and Wetherald,

indicating that all parties to this matter were allowed to testify, cross-examine witnesses, and offer legal arguments and briefs.

12. Now, being duly advised in the matter, we grant the exceptions of Glaser et *al*. and Staff in part, and deny the exceptions in part, consistent with the discussion below and remand this matter to the ALJ for limited findings.

B. Background

13. The Recommended Decision comprehensively presented the facts and procedural background of this matter. We find it is not necessary to rehash them fully once again here. However, we touch on the more salient facts in order to provide context to our discussion.

C. Procedural Background

14. This proceeding originated on February 28, 2002, when the Commission initiated a show cause proceeding against Mile High for the purpose of determining whether it should be sanctioned for providing local exchange and emerging telecommunications services within the State of Colorado without a certificate of public convenience and necessity (CPCN) or an effective tariff on file with the Commission.[1]

15. Staff and Mile High reached an agreement to settle the show cause proceeding as memorialized in the Stipulation and Settlement Agreement dated May 3, 2002.[2] A hearing was held in connection with the Stipulation on May 10, 2002, and it was approved by the ALJ on May 24, 2002.[3] That decision became administratively final on June 13, 2002.

[1] *See* Decision No. C02-0165.

[2] Section II of the Stipulation extended its terms to the Joint Venture, which, as indicated above, is a joint venture between Mile High and On Systems.

[3] *See* Decision No. R02-0608.

16. On August 27, 2002, Staff filed a motion requesting that the Commission reopen this matter (Motion to Reopen). The Motion to Reopen indicated that Staff had received information causing it to question the authority of Wetherald, Mile High's manager, and Glaser, Mile High's legal counsel, to enter into the Stipulation and bind Mile High and/or the Joint Venture to its terms and conditions. Staff requested that the Commission remand the matter back to the ALJ for the purpose of determining whether the Stipulation was valid and/or whether Mile High and the Joint Venture complied with its terms. We granted the Motion to Reopen on September 10, 2002 pursuant to Decision No. C02-1058.[4]

17. After considering the briefs submitted by the parties, the ALJ bifurcated the issues involved in this proceeding.[5] Phase I, the portion of the case addressed by the Recommended Decision at issue here, involves an inquiry into the authority of Glaser and/or Wetherald 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 subjects them to sanctions under Rule 11. The ALJ deemed necessary 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) only in the event the Stipulation was found to be valid in Phase I.

18. Hearings before the ALJ were conducted on March 11 and 12, 2003 and were continued to July 14, 2003. Each party was afforded full opportunity to present witnesses and evidence, cross-examine witnesses, and offer argument. Prior and subsequent to Staff's case-in-

[4] In response to Staff's subsequent motion requesting clarification of Decision No. C02-1058, we granted the ALJ discretion to "… consider upon remand, any matters necessary to the disposition of this docket, including any ancillary matters attendant to this case, should he deem it appropriate to do so." *See* Decision No. C02-1215.

[5] *See* Decision Nos. R02-1181-I and R02-1345-I.

chief, Glaser et *al.* moved to dismiss the proceeding on the ground that Staff had failed or was unable to sustain its burden of proof as required by 4 CCR 723-1-82(a)(3). The ALJ denied the motions after hearing oral argument on the issues.

19. Upon the conclusion of the July 14, 2003 hearing, Glaser et *al.* again moved to dismiss the proceeding on the ground that Staff had failed to establish a *prima facie* case. The ALJ took the motion under advisement and subsequently denied the motion for the reasons indicated in the Recommended Decision. All parties to the proceeding submitted Statements of Position by the August 8, 2003 deadline.

D. Factual Background

20. Mile High was formed pursuant to a Partnership Agreement dated February 19, 2001 as a Colorado limited liability partnership for the purpose of obtaining a Colorado competitive local exchange carrier license and entering into various agreements to provide communications services within Colorado. The Partnership Agreement also places certain restrictions on the authority of individual partners to bind the partnership. For example, Article 7.9 provides: "[W]ithout a vote of the Managing Partners or the Voting Partners, a partner may not enter into any obligation involving a total obligation of the Partnership in an amount of ten thousand ($10,000) dollars or more."

21. The Partnership Agreement permits the partners to appoint up to five "managing partners" to be responsible for Mile High's management. Mr. Swichkow served as managing

partner from Spring 2001 until the initial meeting of Mile High's partners on December 6, 2001.[6] He submitted his resignation on that date and was replaced by five elected managing partners.

22. The Partnership Agreement allowed the managing partners to retain a contracted management firm to assist in the performance of Mile High's daily business. Pursuant to that provision, Mile High entered into an Amended and Restated Agreement (Management Agreement) with On Systems, which was formed in 2000 for the purpose of owning and operating telecommunications companies and providing telecommunications services within Colorado. Wetherald is the principal member of On Systems.

23. The Management Agreement authorized On Systems to perform a variety of services relating to the management of Mile High at the direction of the managing partners. It also authorized On Systems to locate, evaluate, select, retain, and supervise vendors, contractors, consultants, and related service providers.

24. In May 2001 On Systems, through Wetherald, entered into negotiations for the possible purchase of Maxcom, Inc. (Maxcom), that owned a Colorado CPCN to provide local exchange telecommunications service. Mile High, through Wetherald, also entered into a verbal licensing agreement with Maxcom that ostensibly allowed Mile High to provide such a service. Sometime after May 2001, Mile High began providing local exchange telecommunications service in Colorado under the licensing arrangement.

25. According to the record, about September 2001, Staff became aware of this arrangement and initiated an inquiry to determine whether Mile High's provision of local

[6] Mr. Swichkow apparently served as a managing partner through his affiliation with FL Acquisitions, Co., a Florida limited liability company, the owner of six Mile High partnership units. Mr. Swichkow has never individually owned any partnership units in Mile High.

exchange telecommunications service utilizing Maxcom's CPCN was in compliance with Colorado law.

26. The show cause proceeding regarding the Licensing Agreement was formally initiated on February 28, 2002. About that time, Wetherald and Glaser executed an agreement whereby On Systems retained Glaser to represent it and its "related and affiliated entities." The record further reveals that Wetherald provided Glaser with copies of the Partnership Agreement and the Management Agreement at a February 21, 2002 meeting.[7] Glaser entered his appearance as legal counsel for Mile High in this matter on March 1, 2002.

27. On Systems, through Wetherald, also retained a consultant who recommended that a joint venture be formed between On Systems and Mile High in order to mitigate liability concerns pertaining to Mile High's partners. As a result, a Joint Venture Agreement between On Systems (a 30 percent participant) and Mile High (a 70 percent participant) was entered into with an effective date of March 22, 2002, for the purpose of applying for and obtaining a CPCN authorizing it to provide telecommunications service in Colorado.

28. The Joint Venture Agreement also provides for the formation of a Management Committee consisting of two representatives from each Participant (Mile High and On Systems) to "… have exclusive authority to determine all matters related to overall policies, objectives, procedures, methods and actions…." With some exceptions, Management Committee decisions were to be made by a majority vote of the appointed members of each Participant in proportion to their Participating Interest.

[7] The record indicates that Glaser was provided with a copy of the Joint Venture Agreement sometime after its effective date.

29. The Joint Venture Agreement also designated On Systems as manager with overall responsibility for Joint Venture Operations. As part of these powers and duties, On Systems was authorized to defend all litigation or administrative proceedings arising out of Joint Venture operations with the proviso that the Participants "… approve in advance any settlement involving payments, commitments or obligations in excess of Fifty Thousand Dollars ($50,000) in cash or value."

30. Glaser and Wetherald initiated discussions with Staff designed to settle the show cause matter, which resulted in the Stipulation. The purpose of the Stipulation was to bring Mile High into compliance with Colorado law. Staff was provided with copies of the Partnership Agreement and the Management Agreement at this time. It obligated Mile High and/or the Joint Venture to finalize the transfer of Maxcom's CPCN, first to On Systems and then to the Joint Venture (with corresponding tariff adoptions) and to post a $165,000 bond or letter of credit designed to protect Mile High's customers. The Stipulation also obligated Mile High to issue $25,000 in bill credits to its customers.

31. Parties bound by the terms of the Stipulation included Staff, the Joint Venture, Mile High, and Mile High's "… principals, managers, partners, employees, representatives, agents, assigns, or successors." Wetherald executed it as Mile High's authorized agent and Glaser signed it in his capacity as legal counsel for Mile High.

32. Subsequent to execution of the Stipulation, Staff received information calling into question Glaser's and Wetherald's authority to bind Mile High to the terms of the Stipulation. As a result, Staff requested an express acknowledgment that the Stipulation had been reviewed, that Mile High agreed to be bound by its terms and conditions, and that Wetherald was authorized to

execute the Stipulation on Mile High's behalf. In response to that request, Glaser prepared and forwarded to Swichkow proposed correspondence (Swichkow letter) for Swichkow's signature, containing the representations requested by Staff.

33. According to the record, prior to signing the letter, Swichkow consulted the attorney who had prepared the Partnership Agreement. The attorney advised that, as a member of one of Mile High's general partners (FL Acquisitions), Swichkow could make the representations contained in the Swichkow letter on Mile High's behalf so long as the Stipulation did not involve an expenditure of Mile High funds in excess of $10,000, and so long as Swichkow did not represent himself to be one of Mile High's managing partners. Since it contained no such representation and since Wetherald had assured him that On Systems, not Mile High, would bear all expenditures called for by the Stipulation, Swichkow signed the letter and returned it to Glaser and Wetherald. Swichkow did not review the Stipulation prior to the time he signed and returned the letter.

34. Glaser and Wetherald forwarded the Swichkow letter to Staff on May 2, 2002, and a copy of the letter was attached to the Stipulation. At that time, Staff was unaware of whether Swichkow was a Mile High partner and it did not conduct an independent inquiry into Swichkow's status. The Swichkow letter did not specifically disclose Swichkow's authority to make the representations it contained on behalf of Mile High.

E. ALJ's Findings

35. The ALJ first analyzed whether the Stipulation was invalid because neither Wetherald nor Glaser were authorized by Mile High or the Joint Venture to represent either of those two entities in this matter. The ALJ looked to the language of the Partnership Agreement, the Joint Venture Agreement, and the On Systems Management Agreement. The ALJ determined

that the Partnership and Joint Venture Agreements provide for the retention of a manager to perform day-to-day management functions, and that On Systems was retained for this purpose pursuant to the Management Agreement.

36. Further, the Management Agreement authorized On Systems to retain consultants when it deemed it necessary and advisable to do so. The ALJ extrapolated the definition of "consultant" to include "legal counsel," and concluded that the authority granted to On Systems (Wetherald) by the Management Agreement to retain consultants included the authority to retain Glaser for Mile High and the Joint Venture in this matter. Consequently, the ALJ concluded that Glaser had authority to represent Mile High and the Joint Venture in this proceeding and to negotiate the terms of the Stipulation.

37. The ALJ found that the Stipulation was designed in part to facilitate the acquisition of an appropriate telecommunications CPCN by Mile High. As such, he concluded that, because the purpose of the Management Agreement was for On Systems to acquire for Mile High such telecommunications licenses, and the Joint Venture Agreement provided Wetherald with authority to "defend all administrative proceedings arising out of Operations," Wetherald therefore had authority to represent Mile High in this matter, and to negotiate the terms of the Stipulation on its behalf.

38. Despite this determination, the ALJ nonetheless found that neither Glaser nor Wetherald could bind Mile High or the Joint Venture to the terms of the Stipulation. Although the Joint Venture authorized On Systems to defend administrative proceedings, the ALJ found that it also required specific approval of any settlement of such proceedings involving an obligation in excess of $50,000. Because the Stipulation required Mile High to issue customer

refunds of $25,000 and post a bond or Letter of Credit in the amount of $165,000, the ALJ found that this provision of the Joint Venture Agreement required pre-approval by the managing partners prior to the Stipulation's execution.

39. The ALJ found no evidence that On Systems or Mile High approved the Stipulation under the terms of the Joint Venture Agreement prior to it being signed by Wetherald and Glaser. Further, Wetherald's signature on the Stipulation could not be construed as approval by On Systems since the record indicated that he executed it on behalf of Mile High. Nor did the ALJ find any evidence was presented indicating that On Systems and Mile High jointly approved the Stipulation by a vote of the Joint Venture's Management Committee.

40. Notwithstanding Glaser and Wetherald's contention that Swichkow, as a Mile High general partner, had authority pursuant to Colorado partnership law[8] to provide advance approval to Glaser and Wetherald to execute the Stipulation on behalf of Mile High, the ALJ found that Swichkow had no authority as a general partner to authorize Glaser and Wetherald to bind Mile High to the Stipulation. The ALJ found that the Swichkow letter that purportedly provided that authorization came from Swichkow individually, as he was not a Mile High general partner.

41. Even if Swichkow could be construed to be a Mile High general partner, the ALJ found that the Partnership Agreement required a vote of the Managing Partners or Voting Partners to bind Mile High to obligations of $10,000 or more. The ALJ found no evidence a vote among the general partners occurred approving the Stipulation, and therefore held the Stipulation invalid since it was not approved by On Systems or Mile High as required by the Joint Venture

[8] § 7-64-301(1), C.R.S.

Agreement or the Partnership Agreement, or pursuant to Colorado partnership law. Consequently, he found Decision No. R02-608 approving the Stipulation and Settlement Agreement must be rescinded and/or revoked.

42. In regard to Staff's allegations that Glaser and Wetherald are liable for sanctions pursuant to Rule 11, Staff made two allegations. First, Staff alleged that Glaser and Wetherald, as signatories to the Stipulation, misrepresented that they had authority to bind Mile High to the terms of that document in accordance with paragraph D.VI.k of the Stipulation. Staff's second allegation was that Glaser and Wetherald unreasonably and fraudulently signed the Stipulation and induced Staff to do the same on the basis of the Swichkow letter.

43. With respect to Staff's first allegation, the ALJ determined that paragraph D.VI.k[9] of the Stipulation did not constitute a representation from Glaser or Wetherald that they had authority to bind Mile High to the Stipulation. Rather, the ALJ found that neither Wetherald nor Glaser were parties to the Stipulation; however, since they were properly retained as Mile High's manager and legal counsel, they could execute the Stipulation in those capacities, even though they could not bind Mile High to its terms.

44. Regarding Staff's second Rule 11 allegation of fraud, the ALJ enumerated the elements necessary to establish fraud,[10] as well as the requirement that negligent misrepresentation requires justifiable reliance by the party making such an allegation. *Citing, Jimerson v. First American Title Insurance Co*., 989 P.2d 258 (Colo. App. 1999). The ALJ also

[9] In relevant part, paragraph D.VI.k of the Stipulation states that "the parties represent that the signatories to the Stipulation have full authority to bind their respective parties to the terms of the Stipulation."

[10] 1) A fraudulent misrepresentation of material fact; 2) a party relied on the misrepresentation; 3) the party had the right to rely on, or was justified in relying on the misrepresentation; and 4) the reliance resulted in harm or damages. *See Nielson v. Scott*, 53 P.3d 777 (Colo. App. 2002).

points to case law indicating that if the party alleging fraudulent misrepresentation had access to information that was equally available to both parties, or to other information which if considered would have led to the true state of facts, such party has no right to rely upon the representation. *See Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581 (Colo. App. 2000). The ALJ cites *Bassford v. Cook*, 152 Colo. 136, 380 P.2d 970 (1963), for the proposition that if the circumstances surrounding a transaction would arouse a reasonable person's suspicion, equity will not relieve a party from the consequences of inattention and negligence in failing to pursue an investigation that would lead to the true state of facts.

45. Based on this analysis, the ALJ concluded that since Staff was in possession of both the Partnership Agreement and Joint Venture Agreement prior to the time the Stipulation was executed, it had access to information that would have reasonably led it to discover that neither Glaser nor Wetherald had authority to bind Mile High or the Joint Venture to the Stipulation absent prior approval of the general partners. Therefore, Staff's reliance on Glaser's and Wetherald's representations that they had authority to bind Mile High and the Joint Venture to the Stipulation was not justified.

46. Because Staff failed to investigate whether Swichkow had authority to make the representations contained in the Swichkow letter, the ALJ further determined that Staff's reliance on the Swichkow letter was also unjustified. Therefore, the ALJ concluded that Glaser and Wetherald were not subject to sanctions under Rule 11.

F. Exceptions

47. Staff takes exception to the ALJ's application of a fraudulent misrepresentation standard to arrive at the conclusion that no sanctions should be imposed on Glaser or Wetherald under Rule 11. According to Staff, this standard is not the applicable standard under Rule 11 and

is far too lenient. Staff also takes exception with the ALJ's finding that it unjustifiably relied on the misrepresentations of Glaser and Wetherald, and therefore the misrepresentations do not amount to fraud. Staff finds this determination unsupported by the record or an objective analysis.

48. Rather, Staff argues that the proper standard in determining Rule 11 sanctions is one of objective reasonableness. That is, whether a reasonable attorney admitted to practice before the court would file such a document.[11] If, after a reasonable inquiry, a competent attorney could not form a reasonable belief that the document he is signing is well grounded in fact or is warranted by existing law, the filing of the document is sanctionable under Rule 11.[12]

49. Staff maintains that the ALJ found that a reasonable inquiry would have led Glaser to know that certain approvals were required concerning the Stipulation, and that they had not been obtained. Therefore, Wetherald was not authorized as an agent to execute the Stipulation and Glaser was not authorized as legal counsel to execute the Stipulation. Thus, according to Staff, while failing to clearly state such, the ALJ found a clear and direct violation of Rule 11 occurred.

50. Staff contends that Glaser and Wetherald falsely certified that Wetherald had authority to execute the Stipulation as an authorized agent for the Partnership and that Glaser falsely certified that he had the authority to execute the Stipulation as counsel for the Partnership. As such, both violated Rule 11 and should be sanctioned.

[11] *See Burkhart v. Kinsley Bank*, 804 F.2d 588, 589-90 & n.3 (10th Cir. 1986).
[12] *See Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988).

51. According to Staff, the ALJ seems to be reasoning that, because Wetherald was properly retained as the Partnership's manager, he could sign documents as a manager even though his signature would not have a binding effect. Staff fails to see the logic in this reasoning. Instead, Staff contends that if Wetherald cannot bind the principle by his signature, then he is not authorized to sign the document as an authorized agent. Staff notes that the ALJ ultimately found Wetherald's representation in this regard to be factually and legally untrue.

52. Furthermore, Staff contends that Glaser, as counsel for the Partnership and by signing the Stipulation that contained Wetherald's signature as authorized agent, was certifying pursuant to Rule 11 that Wetherald was in fact the authorized agent for the Partnership, and Glaser was authorized as legal counsel to execute the Stipulation. Staff maintains that Glaser and Wetherald knew, or should have known after reasonable inquiry that they were exceeding the authority they possessed and that the Stipulation was not enforceable against the Partnership.

53. Staff finds error with the ALJ's finding that Rule 11 does not apply to Wetherald. Staff points to a U.S. Supreme Court decision that "[Rule 11] imposes on any party who signs a pleading, motion, or other paper … an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing …."[13] Because Wetherald signed the Stipulation as an agent for the Partnership, Staff submits that under *Business Guides*, Wetherald had a duty to conduct a reasonable inquiry into whether he was in fact authorized to bind the Partnership to the terms of the Stipulation. Staff maintains that the plain language of Rule 11 and the holding in *Business Guide* make it clear that any party that signs a document can be sanctioned for violations of Rule 11.

[13] *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 551 (1991).

54. Staff also takes exception to the ALJ's finding that Staff unjustifiably relied on the representations of Glaser and Wetherald. Under the circumstances, Staff argues that its reliance on the representations was indeed justifiable. Staff disagrees with the ALJ that unjustifiable reliance should excuse a misrepresentation by an attorney or signatory.

55. According to Staff, Glaser and Wetherald knew that the Partnership had not (as they had represented) reviewed the Stipulation, had not agreed to be bound by its terms, and had not authorized Wetherald to execute it on behalf of the Partnership. Staff asserts that Glaser and Wetherald knew or should have known that Swichkow could not authorize Wetherald to execute the Stipulation pursuant to the Partnership Agreement or Colorado partnership law. Since, in Staff's view, Glaser and Wetherald actively undertook to deceive Staff and the Commission by offering a purported express acknowledgment from the Partnership that authority existed when it did not, this active deception elevates the conduct to a higher level and constitutes fraud.

56. However, Staff points out that a finding of fraud is not a prerequisite to imposition of sanctions. Rather, Rule 11 merely requires a showing of objectively unreasonable conduct. Staff asserts that to impose a duty on it to independently verify the truthfulness of the representations made by Glaser and Wetherald is unfair, burdensome, and contrary to the purpose and application of Rule 11.

57. Glaser et *al.* argues that the Commission has acted outside its jurisdiction and area of expertise in making determinations regarding partnership matters. Glaser et *al.* find nothing in the statutes from which the Commission derives its powers and authority that permits the Commission to make a determination in this matter. Rather, they argue that the Commission's expertise is limited to areas concerning the regulation of rates and charges for private and

municipal utilities; the establishment of safety regulations for motor and rail carriers; and, the regulation of the terms, conditions, rates, and charges of telecommunications service providers. Instead, Glaser et *al*. argue that, since the Commission possesses no expertise in interpreting or enforcing partnership law, and the Commission possesses no constitutional or statutory authority to interpret or enforce the provisions of the Colorado Uniform Partnership Act, a court of law must first make a finding that Glaser and Wetherald lacked authority to bind the Joint Venture to the Stipulation. Without such a finding, Glaser et *al.* argues that the Commission is powerless to address this matter.

58. Glaser et *al.* maintain that an internal dispute exists among the partners. As such, it alleges that Staff has placed the prestige, integrity, and power of the Commission behind one party to a private dispute. They argue that in choosing to believe two of the partners that pre-approval to bind the Partnership to the Stipulation was never provided, to the exclusion of all else, and thereupon filing its Motion to Reopen, Staff placed the full weight, prestige, and power of the Commission behind Mr. Petersen's and Mr. Credle's efforts to "overthrow" Mr. Wetherald.

59. Glaser et *al.* also argue that Swichkow, as a partner, had the authority to authorize Glaser's and Wetherald's acts on behalf of the Partnership. Glaser et *al*. points out that Mile High is a limited liability partnership, not a limited liability limited partnership. Therefore, pursuant to § 7-64-301(1), C.R.S., Mile High was a general partnership, and Swichkow was a general partner, and as such was authorized to act on the Partnership's behalf. Further, because On Systems through Wetherald paid the amounts due under the Stipulation, Glaser et *al.* argues that Mile High was not obligated to pay any funds; therefore, the ALJ's findings that the Stipulation imposed obligations on the Partnership were improper.

60. Glaser et *al.* also cites several factors it maintains resulted in a denial of its due process rights. Glaser et *al.* finds it improper that the ALJ denied the motion for summary judgment, because they were the only party to provide expert testimony regarding Glaser's and Wetherald's authority to bind the Partnership. The ALJ also improperly shifted the burden of proof in this matter to Glaser et *al.* in violation of Commission Rule 4 CCR 723-1-82(a)(3) by failing to make a finding that this was a show cause proceeding and, as such, Staff held the burden of proof. Additionally, Staff failed to meet its burden of proof or establish a *prima facie* case. Finally, the ALJ improperly allowed Mile High to present evidence and failed to make any credibility findings regarding Mile High's witnesses.

61. Although Glaser et *al.* agree with the ALJ's decision denying Staff's request for Rule 11 sanctions, they nonetheless find that the ALJ did so for the wrong reasons. According to Glaser et *al.*, there was no evidence that either Glaser or Wetherald made any fraudulent misrepresentation of a material fact. Nor was there any evidence that either Glaser or Wetherald knew that they did not have authority to bind the partnership and therefore misrepresented their authority to Staff.

G. Analysis

62. We find after a thorough review of the record that the matters in this proceeding can be distilled to three general issues: (1) Whether the Commission possesses authority to decide matters involving a utility under its jurisdiction that may fall under the Colorado Uniform Partnership Act; (2) Whether Glaser, Wetherald, or On Systems were denied the right to due process at any time in this proceeding; and (3) Whether Glaser and/or Wetherald are subject to Rule 11 sanctions. We address each issue in turn below.

H. Jurisdiction

63. Glaser et *al.* maintain this Commission has no jurisdiction to determine any of the issues raised here that touch on the Colorado Uniform Partnership Act. According to Glaser et *al.*, the Commission possesses no expertise concerning the interpretation or enforcement of the provisions of the Colorado Uniform Partnership Act, nor does it possess any constitutional or statutory authority to interpret or enforce any of its provisions. Further, Glaser et *al.* cite § 40-7-101, C.R.S., for the proposition that it limits the Commission's authority to make determinations regarding the partnership issues raised here. Consequently, Glaser et *al.* conclude that a court of law must first make a finding that Glaser and Wetherald lacked authority to bind the Joint Venture to the Stipulation before the Commission may address the matter.

64. Staff disagrees, arguing that the terms of the Stipulation and its approval and enforcement are within the Commission's jurisdiction. Because the enforcement of the Stipulation turns on its enforceability, Staff concludes that the Commission is authorized to determine if it is enforceable prior to undertaking to enforce it.

65. We find no merit to Glaser et *al.*'s arguments. Through Title 40 of the Colorado Revised Statutes, the General Assembly has assigned to the Commission the authority "to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power." § 40-3-102, C.R.S.; *Public Service Company of Colorado v. Trigen Nations Energy Co. LLP*, 982 P.2d 316, 322 (Colo. 1999); *Mountain States Tel. & Tel. Co. v. Public Utils. Comm'n*, 763 P.2d 1020 (Colo. 1988); *City of Montrose v. Public Utils. Comm'n*, 629 P.2d 619 (Colo. 1981). Furthermore, it has been established that judicial action that undermines agency authority is generally disfavored. *See Marcus v. AT&T Corp.*, 138 F.3d 46, 60-61 (2d Cir. 1998); *Integrated Network Servs., Inc. v.*

Public Utils. Comm'n, 875 P.2d 1373, 1377 (Colo. 1994). Generally, Commission jurisdiction extends to the ability to render decisions regarding any matter affecting a utility, including contract, partnership, or other civil issues. *See Mountain States Tel. & Tel., supra*.

66. We also find Glaser et *al.*'s reliance on § 40-7-101, C.R.S., misplaced. Section 57 of the 1913 statute (predecessor of § 40-7-101, C.R.S.) creating the Commission "does not give the commission the right to interfere with the enforcement of public utility regulations when such powers are vested in some other officer or tribunal." *City of Englewood v. City of Denver*, 229 P.2d 667 (Colo. 1951). In interpreting this provision, the court held that, where a statute existed that specifically gave authority of municipal corporations to supply water from their water systems to consumers outside of their corporate limit, the Commission was correct not to exert jurisdiction there. Nothing in § 40-7-101, C.R.S., or any case law indicates that, where ancillary issues are intertwined with legitimate public utility issues, the Commission is precluded from deciding these matters without a prior court determination. Rather, the court has held that this Commission is empowered to fashion remedies on a wide array of issues affecting utilities under its jurisdiction. To follow Glaser et *al.*'s rationale would virtually hamstring the Commission in its broad statutory and constitutional duties. Therefore, we decline to adopt Glaser et *al.*'s line of reasoning.

I. Due Process

67. As articulated above, Glaser et *al.* alleges a litany of reasons why the ALJ denied it due process in this matter, including that the ALJ ignored its expert witness, an improper shift of burden, failure of Staff to meet its burden of proof or establish a *prima facie* case, and that the ALJ improperly allowed Mile High to present evidence or make credibility findings regarding its witnesses.

68. Staff on the other hand points out that all parties to this matter were allowed to testify, cross-examine, and offer legal arguments and submit briefs. Additionally, the ALJ was not bound to accept the expert witness' legal opinion, even if uncontroverted by the testimony of other witnesses. Further, Staff argues it did establish a *prima facie* case because the preponderance of evidence concluded that the Partnership did not approve or authorize Glaser or Wetherald to execute the Stipulation. Finally, Staff points out that Mile High was a party to the proceeding and had ongoing obligations under the Stipulation; therefore, it was a proper party to this matter.

69. We agree with Staff. Nothing we can find on the record would indicate that Glaser, Wetherald, or On Systems were denied due process at any point in this matter. Each party was afforded the full opportunity to present evidence and witnesses, cross-examine witnesses, file briefs, and make oral arguments. We also agree that the ALJ was not bound to accept the expert witness' affidavit, even if uncontroverted by other testimony. We find that Staff did meet its burden of proof and provided sufficient evidence to allow the ALJ to render a decision. We further find nothing on the record to indicate the ALJ improperly shifted the burden of proof to Glaser, Wetherald, or On Systems in violation of our Rules of Practice and Procedure, 4 CCR 723-1-82(a)(3).

70. We find nothing improper with the ALJ's decision denying the motion for summary judgment filed by Glaser, Wetherald, and On Systems. "Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991) (citations omitted). The moving party has the initial burden to show that there is no genuine issue of material fact. *Id.*

(citations omitted). In determining whether summary judgment is proper, the nonmoving party "must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts." *Id*. (citations omitted). The trier-of-fact must resolve all doubts as to whether an issue of fact exists against the moving party. *Id*. (citations omitted). Furthermore, even where it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate. *Id*.

71. With these principles in mind, we find that the ALJ did not err by denying Glaser et *al*.'s motion for summary judgment. Staff demonstrated that a question of fact existed in this matter and, resolving all doubts in favor of Staff, we find Glaser, Wetherald, and On Systems did not demonstrate the absence of genuine issues of material fact. As the court has reiterated, summary judgment is a drastic remedy and is never warranted except on a clear showing that no genuine issue exists as to any material fact.

J. Rule 11

72. In determining the outcome of whether Rule 11 sanctions should be imposed, we find that it must first be determined whether Glaser or Wetherald had authority to bind the Partnership to the Stipulation. Second, if Glaser or Wetherald did not have authority to bind the Partnership, it must be established whether Glaser or Wetherald had knowledge that they did not have such authority and misrepresented that fact to Staff. Third, if Glaser or Wetherald did not have authority to bind the Partnership to the Stipulation, and knew they did not possess such authority, the final issue to be resolved is what sanctions are appropriate under Rule 11. Finally, it must be determined, according to Staff's allegations, whether any misrepresentations by Glaser or Wetherald amounted to fraud.

73. In determining whether Glaser and Wetherald possessed the requisite authority under the relevant agreements to bind the Joint Venture to the Stipulation, the ALJ held that although Glaser and Wetherald could not bind Mile High to the terms of the Stipulation, they could nonetheless execute the Stipulation in their respective capacities as legal counsel and Mile High manager. Because the Stipulation contained language at Paragraph D.VI.k stating, "the parties represent that the signatories to the Stipulation have full authority to bind their respective parties to the terms of the Stipulation," the ALJ found that it did not constitute a representation from Glaser or Wetherald that they had authority to bind Mile High to the Stipulation.

74. We reject this finding because it exalts form over substance. Rather, we find that Wetherald was an agent of the Joint Venture. An agency is a "fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to this control, and consent by the other so to act." *City and County of Denver v. Fey Concert Company*, 960 P.2d 657, 660 (Colo. 1998) (*citing* Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership*, § 2, at 4 (2d ed.1990)); *See also, Stortroen v. Beneficial Fin. Co.*, 736 P.2d 391, 395 (Colo. 1987). "This consensual arrangement may, but need not, amount to a contract." *Fey Concert Company* at 661. "What is critical is that the parties materially agree to enter into a particular relation to which the law attaches the legal consequences of agency …" *Id*. "One type of agency relationship is a joint venture, which is an association of two or more persons formed for the purpose of carrying out a particular business enterprise for profit." *Id*. (citations omitted). Each partner in a joint venture is an agent of the other partners with respect to the joint venture. *Id*. *See also, Ball v. Carlson*, 641 P.2d 303, 305 (Colo. App. 1981).

75. Employing these agency principles to the facts at hand, the Joint Venture Agreement created a clear manifestation of intent between Mile High and On Systems, through Wetherald, to form a joint venture in which Mile High and On Systems were partners. Therefore, each was an agent of the other. The Joint Venture Agreement, at Article 9.2(g), further provided that On Systems was authorized to defend all litigation or administrative proceedings arising out of Joint Venture operations, with the condition that the Participants "… approve in advance any settlement involving payments, commitments or obligations in excess of Fifty Thousand Dollars ($50,000) in cash or value."

76. The Stipulation called for Mile High to reimburse its customers $25,000, as well as post a bond of $160,000. This was in excess of the $50,000 limit imposed by the Joint Venture Agreement. Consequently, Wetherald was required to obtain pre-approval from the Participants of the Joint Venture in order to bind them to the Stipulation. We agree with the ALJ that there is no evidence that On Systems or Mile High jointly approved the Stipulation by a vote of the Joint Venture Management Committee as required by Article 8.2 of the Joint Venture Agreement.

77. We find that there is no indication that either On Systems or Mile High specifically pre-approved the Stipulation, either independently or jointly, prior to it being executed by Wetherald and Glaser. We further agree with the ALJ and Staff that the Swichkow letter did not constitute such pre-approval. The letter came from Swichkow individually, since

he was not a Mile High general partner.[14] Therefore, Swichkow had no authority as a general partner to authorize Wetherald to bind Mile High to the Stipulation.

78. We also agree with the ALJ's finding that, even if Swichkow could somehow be construed to be a Mile High general partner, Article 7.9 of the Partnership Agreement imposed limitations on the ability of individual partners to bind Mile High to an obligation of $10,000 or more without a vote of the Managing or Voting Partners. Thus, Swichkow had no authority to act for Mile High regarding this matter. No evidence was presented indicating the Stipulation was approved by Mile High by an affirmative vote of its Managing or Voting partners. Therefore, we agree with the ALJ that Wetherald did not have authority to bind Mile High to the Stipulation. As a result, the Stipulation is invalid.

79. Additionally, it was immaterial whether Wetherald paid the amounts required of Mile High under the Stipulation. Mile High, according to the Stipulation's terms, was the party required to post a bond or letter of credit in the amount of $165,000, and reimburse its customers $25,000. Accordingly, the ultimate responsibility for those amounts rested not with Wetherald, but with Mile High. The Stipulation does not contain a provision that relieves Mile High from being bound to those terms in the event its obligation was settled by someone else.

80. In determining whether Glaser or Wetherald violated Rule 11 and were therefore subject to sanctions, the ALJ, as detailed above, found that Staff unjustly relied on Glaser's and Wetherald's representations that they could bind the Joint Venture to the Stipulation, unjustly relied on the Swichkow letter, and failed to reasonably discover the true state of facts. Based on

[14] According to the record, Swichkow merely held an interest in an entity that was a Mile High general partner.

these findings, the ALJ concluded that Glaser and Wetherald should not be sanctioned under Rule 11. By virtue of this holding, the ALJ did not address whether Glaser or Wetherald fraudulently misrepresented that they had authority to bind the Joint Venture to the Stipulation.

81. In making his determination regarding Rule 11, the ALJ appears to have commingled the requirements necessary for a showing of fraudulent misrepresentation, negligent misrepresentation, and violations of Rule 11. The standards for a showing of fraud and Rule 11 violations are separate and distinct. As a result, we find that these issues must each be set out separately and addressed independently.

82. In order to establish fraud, a claimant must offer proof of the following elements: 1) a false representation of a material existing fact; 2) knowledge on the part of the one making the representation that it was false; 3) ignorance of the falsity on the part of the one to whom the representation was made; 4) an intention that the representation be acted on; and 5) damages. *See, Schader, P.C. v. ETTA Industries, Inc.*, 892 P.2d 363, 366 (Colo. 1995) (citations omitted). Additionally, the claimant must have relied on the misrepresentation, and the reliance must have been justified given the circumstances. *Id.*

83. Similarly, to establish a claim for negligent misrepresentation, the complaining party must demonstrate that the defendant supplied false information in a business transaction and failed to exercise reasonable care or competence in obtaining or communicating the information upon which other parties justifiably relied. *Zimmerman v. Kamphausen*, 971 P.2d 236, 240 (Colo. App. 1999). The misrepresentation must be of a material past or present fact. *Id.*

84. The ALJ found that Staff was not justified in its reliance on the claims made by Glaser and Wetherald that they each had authority to bind the Joint Venture to the terms of the Stipulation, because it had at its disposal the means to verify those claims. The ALJ went on to find that Staff's reliance on the Swichkow letter was also unjustified since it should have confirmed Swichkow's authority, given the importance Staff placed on such a confirmation. Consequently, as a result of this unjustified reliance, the ALJ found that Staff failed to meet its burden of proof regarding its allegations of fraud and negligent misrepresentation. We do not disturb the ALJ's findings on those specific issues.

85. However, we do take issue with the ALJ's findings regarding the imputation of those fraud findings to the possible Rule 11 sanctions at issue here. The ALJ held that neither Glaser nor Wetherald were subject to Rule 11 sanctions because Staff was unjustified on its reliance on their misrepresentations regarding their authority to bind the Joint Venture. Further, in paragraph 50 of the Recommended Decision, the ALJ determined that, since neither Glaser nor Wetherald were parties to the Stipulation, and they were properly retained by Mile High as legal counsel and manager respectively, they could execute the Stipulation in those capacities, but could not bind Mile High to its terms.

86. We reject the ALJ's reasoning in paragraph 50 of the Recommended Decision. The record shows that Glaser and Wetherald in fact made representations to Staff that they could bind the Joint Venture to the Stipulation. 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. We find no evidence on the record that Glaser or Wetherald, as signatories to the Stipulation, ever possessed such authority.

87. The ALJ also finds no sanctions available for Glaser or Wetherald because of Staff's unjustifiable reliance on the representations made by Glaser and Wetherald regarding their authority to bind the Joint Venture. However, we agree with Staff that this is the improper standard to determine whether Rule 11 sanctions are appropriate. Whether to impose sanctions pursuant to Rule 11 is not limited to a finding of fraud or negligent misrepresentation. Rather, Rule 11 is a serious matter involving the integrity of the parties' representations before this Commission.

88. Commission Rule 4 CCR 723-1-11 states in relevant part:

> 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.

The proper scope of a Rule 11 inquiry is whether the party who signed the document in question or pleadings: 1) read the documents; 2) undertook reasonable inquiry into them; and 3) possessed a proper purpose in filing them. *People v. Trupp*, 51 P.3d 985, 991 (Colo. 2002), *citing Stepanek v. Delta County*, 940 P.2d 364, 370 (Colo. 1997). The test is one of objective reasonableness concerning the signing party's pre-filing behavior. *Id*. *See also,* Sheila K. Hyatt & Stephen A. Hess, *Colorado Civil Rules Annotated* 120 (3d ed. 1998); and *McMahon v. Shearson/American Express, Inc*., 896 F.2d 17 (2nd Cir. 1990). A Rule 11 inquiry "does not turn on the outcome of the case; instead, it turns on whether the [signatory] met the reasonable

inquiry and proper purpose threshold in preparing and filing the pleading." *Id*. The standard established by Rule 11 focuses on what should have been done before a pleading was filed. So even though a case may be dismissed, this does not prevent an investigation to whether pleadings were proper. *Switzer v. Giron*, 852 P.2d 1320, 1321 (Colo. App. 1993) *citing*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

89. We therefore find that the ALJ applied the wrong standard in determining whether Rule 11 sanctions should be imposed on Glaser and/or Wetherald. We further find that the ALJ committed error by excluding Wetherald from possible Rule 11 sanctions. Nothing in Commission Rule 11, C.R.C.P. 11 or Fed.R.Civ.P. 11 require that the signatory be an attorney before sanctions may be imposed. As Staff points out, the Supreme Court in *Business Guides, supra,* determined that Rule 11 imposes an affirmative duty to conduct a reasonable inquiry into the facts and law before filing a document or pleading on *any party* who is a signatory to such documents.

90. Given the size of the record in this matter we are loathe to make a determination as to whether Glaser and/or Wetherald violated Rule 11, and as such are subject to sanctions. Rather, we find that the ALJ, having heard all the evidence and having analyzed and ruled on all motions filed as a part of this matter, is in a better position to make that determination.

91. Therefore, we remand this matter to the ALJ for the limited purpose of determining whether Glaser and/or Wetherald violated Rule 11 and, if so, the appropriate sanction under the circumstances. We further direct that the ALJ utilize the scope of inquiry as we outlined above in making his determination. We order that Glaser and Wetherald are to be considered separately in determining whether each violated Rule 11 and therefore whether each

is individually subject to sanctions. We additionally order that no further hearings, inquiry, or pleadings are necessary. We find that the ALJ has a full and complete record before him from which he may render his decision upon remand.

II. ORDER

A. The Commission Orders That:

1. The exceptions filed separately by Commission Staff and by Michael Glaser, Timothy Wetherald, and On Systems Technology, LLC are granted in part and denied in part consistent with the discussion above.

2. This matter is remanded to the Administrative Law Judge for limited findings regarding whether Michael Glaser and Timothy Wetherald individually violated Commission Rule 4 *Code of Colorado Regulations* 723-1-11. If a finding of violation of such rule is found, we further direct the Administrative Law Judge to determine the appropriate sanctions given the record before him.

3. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Mailed Date of this Order.

4. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING January 14, 2004.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

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