

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

DOCKET NO. 02C-082T

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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.

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**ORDER DENYING MICHAEL GLASER'S EXCEPTIONS  
AND GRANTING STAFF'S EXCEPTIONS IN PART**

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Mailed Date: August 30, 2004  
Adopted Date: August 25, 2004

**I. BY THE COMMISSION**

**A. Statement**

1. This matter comes before the Commission for consideration of exceptions to the Administrative Law Judge's (ALJ) Recommended Decision No. R04-0453 (Recommended Decision) issued on April 30, 2004. The exceptions were filed individually by Michael Glaser (Glaser) and Commission Staff (Staff) on May 20, 2004.

2. In the Recommended Decision, the ALJ found that Glaser and Tim Wetherald (Wetherald) both violated Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-1-11 by signing a Stipulation and Settlement Agreement (Stipulation) with Staff, and thereby representing that they had authority to bind their clients to the Stipulation, when in fact, no such authority existed. The ALJ further found that it was reasonable to conclude that because Wetherald relied on Glaser, as his legal counsel, to ensure that Wetherald's signature on the Stipulation was legally

sufficient to bind Mile High Telecom Partners (Mile High) and Mile High Joint Venture (Joint Venture), Wetherald had no knowledge that he was violating Rule 11.

3. Regarding Glaser, the ALJ determined that, although he violated Rule 11, it was more a result of his own negligence in failing to fully review the Mile High Partnership Agreement (Partnership Agreement) and the Mile High Joint Venture Agreement (Joint Venture Agreement) than from any intent on Glaser's part to misrepresent his or Wetherald's authority to bind Mile High and the Joint Venture to the Stipulation. As a result, the ALJ ordered that a letter of reprimand should be issued against Glaser for his violation of Commission Rule 11.

4. Glaser argues that the ALJ's findings are predicated on the Commission's erroneous finding that by signing the Stipulation as the party's attorney, Glaser affirmatively represented that he possessed the authority to bind the party to the Stipulation. Additionally, Glaser maintains that Staff presented no evidence that, as an attorney, he had a duty to question the authority of Wetherald to enter into the Stipulation and Settlement Agreement on behalf of the Joint Venture and the Partnership.

5. Glaser claims that the ALJ's finding that he was negligent in failing to fully review the Partnership Agreement and the Joint Venture Agreement is devoid of support in the record and is made without any expert opinion which would support a finding of professional negligence or a violation of Rule 11.

6. Staff takes exception to the ALJ's finding that Glaser's Rule 11 violation resulted more from his negligence in failing to fully review the Partnership Agreement and Joint Venture Agreement than from any intent on his part to misrepresent his or Wetherald's authority to bind Mile High and the Joint Venture to the Stipulation.

7. Staff argues that the record does not support a finding that Glaser had not fully reviewed the documents. According to Staff, Glaser testified that he reviewed the Partnership Agreement and that he was fully aware of the \$10,000 limitation on the general partners' authority to act for the partnership. It was Glaser's contention that this limitation did not apply because Wetherald satisfied the financial obligations imposed by the Stipulation. Therefore, what is relevant is not that Glaser did not read the documents, what is relevant is that Glaser reached unreasonable conclusions based on review of those documents, according to Staff.

8. Staff urges that there could have been both intent to misrepresent and unjustified reliance on Glaser's misrepresentations. Staff asserts that there is nothing in Rule 11 that suggests a sanctioning body should consider intent. Staff does not take exception to the ALJ's findings regarding Wetherald.

9. Now, being duly advised in the matter, we deny Glaser's exceptions and grant Staff's exceptions in part.

## **II. BACKGROUND**

10. This matter originated on February 28, 2002 when Staff initiated a show cause proceeding against Mile High. A settlement agreement was reached between Mile High and Staff that settled the show cause matter. The parties reduced the agreement to the Stipulation document, which was approved by the ALJ on May 24, 2002.

11. On September 10, 2002, Staff requested that the show cause matter be reopened to determine whether the Stipulation was valid and whether Mile High and the Joint Venture complied with the terms of the Stipulation. The ALJ bifurcated the issues into Phase I and Phase II. Phase I of the matter was to determine whether Glaser, as Mile High's legal counsel, and/or Wetherald, as Mile High's Manager, had authority to bind Mile High and the Joint Venture

to the Stipulation; whether Glaser and/or Wetherald misrepresented the scope of that authority to the Commission and Staff, and, if so, Phase II was whether that conduct subjected them to sanctions under Rule 11 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1-11.

12. The ALJ issued his recommended decision in which he found that the Stipulation was invalid, but that neither Glaser nor Wetherald violated Rule 11. After reviewing the exceptions filed by the parties, the Commission determined that the ALJ had applied the incorrect standard in determining that Glaser and Wetherald did not violate Rule 11. The Commission additionally determined that paragraph D.VI.k of the Stipulation did not constitute a representation from Glaser or Wetherald that they had authority to bind Mile High or the Joint Venture to the Stipulation. We therefore remanded the case to the ALJ for the limited purpose of determining whether Glaser and/or Wetherald violated Rule 11 utilizing the correct "objective reasonableness" standard, as articulated under Colorado case law and, if so, the appropriate sanctions to be imposed.

13. Upon considering the matter on remand, the ALJ issued his Recommended Decision. The ALJ found that application of the language contained in Rule 11 coupled with the findings, directives, and legal standards set forth in Decision No. C04-0249 to the record before him regarding the execution of the Stipulation supported the conclusion that Glaser and Wetherald violated Rule 11 when they signed the document. Because the penumbra of Rule 11 includes pleadings, motions, and "other papers," the ALJ concluded that the Stipulation is unquestionably encompassed by the rule.

14. The ALJ points out that the record indicates Glaser and Wetherald had access to the Partnership Agreement dated February 19, 2001 and the Joint Venture Agreement between On Systems Technology, LLC (On Systems) and Mile High, effective March 22, 2002, prior to

signing the Stipulation. Consequently, the ALJ established that Glaser and Wetherald could have, through reasonable inquiry, determined that the Joint Venture Agreement required prior approval of Mile High and On Systems to the settlement of administrative proceedings involving payments, commitments, or obligations in excess of \$50,000.

15. Similarly, the ALJ determined that Glaser and Wetherald could have, through reasonable inquiry, determined that the Partnership Agreement limited individual partners from committing Mile High to obligations of \$10,000 or more without an affirmative vote of its managing or voting partners. The Stipulation in fact committed Mile High to obligations exceeding \$10,000.

16. As a result of those determinations, the ALJ found that by reviewing the Partnership Agreement and Joint Venture Agreement, Glaser and Wetherald could have established that neither signing the Stipulation nor producing the May 3, 2003 letter from Leon Swichkow<sup>1</sup> would serve to bind Mile High or the Joint Venture to the terms of the Stipulation in the absence of the required approvals.

17. In regard to sanctions under Rule 11, the ALJ first established that, when ordering sanctions against a client such as Wetherald, the fact-finder must find and the record must confirm some nexus between the proscribed conduct and a specific undertaking by, or knowledge of, the client that the rule is being violated. The purpose of Rule 11 is to deter inappropriate conduct, not to compensate an opposing party for the conduct's effect. As a result, the ALJ determined that Wetherald should not be sanctioned for Rule 11 violations

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<sup>1</sup> Mr. Swichkow was determined by the ALJ in Decision No. R03-1087 not to be a general partner, but merely one who held an interest in an entity which was a general partner of the Joint Venture.

because he was a client of Glaser. As such, the ALJ went on to find that Wetherald relied on Glaser to provide guidance in connection with legal issues raised during the course of the show cause proceeding.

18. The ALJ found it reasonable that Wetherald would have relied on his counsel to ensure that his signature on the Stipulation was legally sufficient to bind Mile High and the Joint Venture, rather than to undertake such an inquiry on his own. Because there is insufficient evidence in the record to conclude that there is any connection between a Rule 11 violation and a specific undertaking by or knowledge of Wetherald that Rule 11 was being violated, the ALJ found that the imposition of sanctions against Wetherald was precluded under applicable law.

19. As for Glaser, the ALJ determined that, although he violated Rule 11, this resulted more from his negligence in failing to fully review the Partnership and Joint Venture Agreements than from any intent on his part to misrepresent his or Wetherald's authority to bind Mile High and the Joint Venture to the Stipulation. Therefore, a non-monetary sanction in the form of a Commission reprimand should be imposed against Glaser. Finding no reason to believe that the imposition of a more severe sanction against Glaser would serve to deter similar behavior on his part in the future,<sup>2</sup> the ALJ recommended that a letter of reprimand should be issued against Glaser.

#### **A. Exceptions**

##### **1. Glaser**

20. Glaser incorporated and adopted, as though fully set forth in his exceptions, each and every argument and motion contained in his motion for summary judgment; motion for

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<sup>2</sup> The ALJ also found that additional factors such as the absence of evidence that Glaser had engaged in other inappropriate conduct before the Commission and his belief that the Swichkow letter could authorize Wetherald to bind Mile High to the Stipulation mitigated against imposing a more severe sanction.

reconsideration of the interim order (R03-0251-I) of the ALJ's decision denying motion for summary judgment; exceptions to Recommended Decision No. R02-608; renewed motion to dismiss; renewed motion for directed verdict and position statement; motion to strike; Staff's exceptions; motion to strike Staff's statement of position; supplement to motion to strike; and all oral motions and arguments made during hearing and contained in the record.

21. Glaser argues that the ALJ's findings are predicated on the Commission's erroneous finding that, by signing the Stipulation as the party's attorney, Glaser affirmatively represented that he possessed the authority to bind the party to the Stipulation. Additionally, Glaser maintains that Staff presented no evidence that, as an attorney, he had a duty to question the authority of Wetherald to enter into the Stipulation on behalf of the Joint Venture and the Partnership.

22. Finally, Glaser argues that the ALJ's finding that he was negligent in failing to fully review the Partnership Agreement and the Joint Venture Agreement is devoid of support in the record and is made without any expert opinion which would support a finding of professional negligence or a violation of Rule 11. According to Glaser, such a finding in an action for professional negligence requires qualified expert testimony to establish that a professional defendant failed to adhere to the controlling standard of care ordinarily possessed and exercised by members of the same profession practiced by that professional defendant. *Green v. Thomas*, 662 P.2d 491, 494 (Colo. App. 1982).

23. Glaser contends that the ALJ's finding is predicated on the erroneous finding of the Commission that Wetherald and Swichkow lacked the authority to bind the Partnership and Joint Venture to the Stipulation. Glaser argues that nothing on the record supports a finding of negligence on his part.

24. In its response, Staff points out that as a Rule 11 proceeding the ALJ correctly applied the standard set forth in the Rule, which was developed by substantial case law - an objective standard of reasonableness under the circumstances. That is, whether a reasonable attorney admitted to practice before the court would file such a document.

25. Staff also argues that, despite Glaser's assertion that evidence is lacking in the way of an expert opinion as to Glaser's and Wetherald's lack of authority, the ALJ had ample evidence before him to support his finding that they lacked authority to bind the Partnership and the Joint Venture namely, the Partnership Agreement and the Joint Venture Agreement. According to Staff, these documents are the evidence that Wetherald could not bind the Partnership to the terms of the Stipulation without specific approvals, nor could Mr. Swichkow delegate to Wetherald such authority. The lack of evidence on the part of Glaser and Wetherald of having obtained such approvals further supports the ALJ's findings, according to Staff.

## **2. Staff**

26. Staff takes exception to the ALJ's finding that Glaser's Rule 11 violation resulted more from his negligence in failing to fully review the Partnership Agreement and Joint Venture Agreement than from any intent on his part to misrepresent his or Wetherald's authority to bind Mile High and the Joint Venture to the Stipulation.

27. Staff argues that the record does not support a finding that Glaser had not fully reviewed the documents. According to Staff, Glaser testified that he reviewed the Partnership Agreement and that he was fully aware of the \$10,000 limitation on the general partners' authority to act for the Partnership. It was Glaser's contention that this limitation did not apply because Wetherald satisfied the financial obligations imposed by the Stipulation. Therefore,



what is relevant is not that Glaser did not read the documents, but that Glaser reached unreasonable conclusions based on a review of those documents, according to Staff.

28. Staff urges that there could have easily been both intent to misrepresent and unjustified reliance on Glaser's misrepresentations. Staff asserts that there is nothing in Rule 11 that suggests a sanctioning body should consider intent. Staff does not take exception to the ALJ's findings regarding Wetherald.

29. Glaser responds to Staff's exceptions by arguing that Glaser's analysis relative to the authority of Wetherald to enter into the Stipulation on behalf of the Partnership and Joint Venture was wholly reasonable and supported by law. According to Glaser, the Partnership Agreement and Joint Venture Agreement authorized Wetherald to retain Glaser and to enter into the Stipulation and Settlement Agreement.

30. Glaser argues that he had no duty to go behind the representations made by Wetherald in undertaking the representation of the Partnership and Joint Venture, or in undertaking to negotiate and enter into the Stipulation and Settlement Agreement on behalf of those entities. According to Glaser, Staff presented no evidence that he had such a duty.

31. Glaser also asserts that his expert witness submitted an uncontroverted affidavit that Wetherald had both actual and apparent authority to enter into the Stipulation and Settlement Agreement with Staff, and Glaser had the authority to represent the Partnership and Joint Venture in the Show Cause proceeding, including negotiating and entering into the Stipulation on behalf of the Partnership.

32. Glaser maintains that there is no evidence to conclude that Glaser nor Wetherald ever actually misrepresented their authority to enter into the Stipulation and Settlement Agreement, much less that they intended to do so. Glaser argues that Staff presented no evidence

that Glaser falsely represented his authority to enter into the Stipulation and Settlement Agreement on behalf of the Partnership and Joint Venture.

33. In Section D of Glaser's response brief, he indicates that Staff has taken unauthorized and unjustified action to prejudice Glaser, including sending a letter of inquiry or audit questions to certificate of public convenience and necessity applicants requesting applicants to inform them of any past or current dealings with Wetherald or Glaser, among others. Glaser finds that such conduct prejudices his ability to practice law before the Commission.

34. Staff has moved to strike the above-mentioned Section D of Glaser's response to Staff's exceptions, arguing that it has no relevance to this proceeding in general and should not be allowed to remain part of the record. Glaser filed a response in opposition to Staff stating that it is "Staff's clear intent to impose a *defacto* sanction against Glaser regardless of what this Commission ultimately decided or ordered."

### **III. ANALYSIS**

35. We are not persuaded by Glaser's arguments that he did not affirmatively represent he had authority to bind the Partnership or the Joint Venture to the Stipulation when he signed it, or that no evidence was presented regarding his duty to question the authority of Wetherald to enter into the Stipulation. As we pointed out in Decision No. C04-0249, Paragraph D.VI.k of the Stipulation contained explicit language that "the parties represent that the signatories to the Stipulation have full authority to bind their respective parties to the terms of the Stipulation." Further, the ALJ found, in Recommended Decision No. R03-1087, that the evidence indicated that both Wetherald and Glaser had access to the Partnership Agreement and the Joint Venture Agreement prior to signing the Stipulation.

36. The ALJ additionally found that, through reasonable inquiry, both Glaser and Wetherald could have determined that the Joint Venture Agreement required prior approval of the Joint Venture participants (Mile High and On Systems) for the settlement of administrative proceedings involving payments, commitments, or obligations in excess of \$50,000. Similarly, Glaser and Wetherald could have determined that the Partnership Agreement limited individual partners from committing Mile High to obligations of \$10,000 or more without an affirmative vote of its Managing or Voting Partners.

37. This determination was made by the ALJ after hearings, presentation of evidence, and a thorough review and analysis of the record. Further, we find no error with our determination that Paragraph D.VI.k of the Stipulation required the signatories to that document to have full authority to bind the respective parties to its terms. The language of the Stipulation is clear, unambiguous, and lends itself to only one interpretation -- the signatories, by signing the document, represented that they had full authority to enter into the Stipulation and bind the parties they represented to its terms. No other interpretation could reasonably be deduced.

38. We further disagree with Glaser that he had no duty to go behind the representation made by Wetherald either in undertaking his representation of the Partnership and Joint Venture, or in undertaking to bind those entities to the Stipulation and Settlement Agreement. 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 best of the signer's knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact ...

(emphasis added)

Glaser's argument that he had no duty to go behind the representations of Wetherald in representing the Partnership and Joint Venture, or in negotiating and executing the Stipulation,

runs counter to the Court's finding in *In the Matter of Trupp*, 92 P.3d 923 (Colo. 2004) that bad faith is not a prerequisite of sanctions under Rule 11; rather, "an attorney may violate Rule 11 simply by failing to conduct an objectively reasonable inquiry prior to filing a signed pleading. *Citing Stepanek v. Delta County*, 940 P.2d 364, 370 (Colo. 1997). Further, a Rule 11 inquiry should focus on the pre-filing behavior of the attorney, utilizing an objective reasonableness standard. *Id.* (citing *People v. Trupp*, 51 P.3d 985, 991 (Colo. 2002) (*Trupp I*)).

39. The language of Rule 11 required Glaser to determine whether he had authority to bind the Joint Venture and Partnership to the terms of the Stipulation by signing it. It is reasonable to conclude that this included a duty to determine whether the representations of Wetherald were accurate. The record indicates Wetherald retained Glaser as legal counsel in the show cause matter; both parties had access to the Joint Venture and Partnership Agreements prior to entering into the Stipulation with Staff; Glaser, as legal counsel should have understood the terms of the Stipulation, including paragraph D.VI.k and the ramifications of signing the Stipulation; and Glaser had a duty under Rule 11 to ensure that his signature, and Wetherald's, could in fact bind the Partnership and Joint Venture to its terms and conditions.

40. It is also clear to us that the ALJ considered the affidavit filed by Glaser's expert witness (opining that Glaser and Wetherald had authority to enter into the Stipulation) and accorded it the weight and deference he determined to be appropriate in relationship to the entirety of the record in reaching his determinations.

41. However, we do agree with Glaser and Staff that the ALJ erred in finding that Glaser's Rule 11 violation resulted more from his negligence in failing to fully review the Partnership Agreement and Joint Venture Agreement than from any intent on his part to misrepresent his or Wetherald's authority to bind Mile High and the Joint Venture to the

Stipulation. We can find nothing on the record to support such a finding. This is speculation on the part of the ALJ. Further, a showing of negligence is not a requirement under the objective reasonableness standard of Rule 11. We therefore overturn that specific portion of the ALJ's decision. As a result, we deny as moot Glaser's exceptions that expert testimony is required to establish professional negligence on his part.

42. In Section D of his response to Staff's exceptions, Glaser charges that Staff engaged in unauthorized and unjustified actions intended to prejudice Mr. Glaser. Staff filed a motion to strike Section D to Glaser's Response in Opposition to the Staff of the Commission's Exceptions to Decision No. R04-0453. Staff asserts that Section D has no relevance to this proceeding in general, and should not be allowed to remain part of the record. We agree with Staff that Section D is not relevant to the instant matter. Nothing in Section D is a part of the record, addresses the record, or is within the scope of this docket. To the extent Glaser wishes to pursue the claims made in that pleading, we suggest he file a complaint with the Commission or take other appropriate action.

43. Therefore, we agree with and uphold the ALJ's findings that Wetherald should not be subject to Rule 11 sanctions. We further agree that Glaser did violate Rule 11 and is therefore subject to appropriate sanctions. The ALJ found that there was no reason to believe that the imposition of a severe sanction against Glaser would serve to deter similar behavior on his part in the future. As such, the ALJ recommended that a letter of reprimand should be issued against Glaser. While we understand the ALJ's reasoning here, we nonetheless find that this Order serves a similar purpose as a letter of reprimand. Nothing more will be accomplished by issuing such a letter. Therefore, this Order shall serve as a reprimand against Glaser for his Rule 11 violation as specified above.

44. We will also provide a copy of this Order to the Colorado Supreme Court Attorney Regulation Counsel for appropriate review by that entity.

#### **IV. ORDER**

##### **A. The Commission Orders That:**

1. The exceptions of Michael Glaser are denied consistent with the discussion above.
2. The exceptions of Commission Staff are granted in part and denied in part consistent with the discussion above.
3. This Order shall serve as a sanction against Michael Glaser for violation of Commission Rule 4 *Code of Colorado Regulations* 723-1-11, as discussed above.
4. A copy of this Order shall be provided to the Colorado Supreme Court Attorney Regulation Counsel for appropriate review by that entity.
5. 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.
6. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
August 25, 2004.**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Commissioners

COMMISSIONER CARL MILLER NOT  
PARTICIPATING.