

Decision No. R04-0085

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

DOCKET NO. 03F-179T

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THE COLORADO OFFICE OF CONSUMER COUNSEL,

Complainant,

v.

DMJ COMMUNICATIONS, INC.,

Respondent.

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**RECOMMENDED DECISION OF  
HEARING COMMISSIONER  
GREGORY E. SOPKIN  
CONCERNING REPARATIONS**

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Mailed Date: January 22, 2004

**I. STATEMENT**

1. This docket was initiated by a complaint filed by the Office of Consumer Counsel (OCC) that a regulated utility – DMJ Communications, Inc. (DMJ or the Company) – “slammed” over 4,000 local exchange telephone customers to its service, in violation of Colorado statute and Commission rule.<sup>1</sup>

2. By way of background, on May 1, 2003, OCC filed a Complaint against DMJ, initiating this docket. On May 5, the Colorado Public Utilities Commission (PUC or the Commission) issued its Order to Satisfy or to Answer the Complaint in this matter. On May 9, OCC filed its Amended Complaint in accordance with C.R.C.P. 15 and Commission Rule 4 CCR

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<sup>1</sup> “Slamming” is defined in Commission Rule 4 CCR 723-2-25.1.2 as “[a]ny change in an end-use customer’s presubscription to a telecommunications service subject to the jurisdiction of the Commission which is made without appropriate consent of the customer.”

723-1-22 (hereinafter the "Complaint"). On May 23, DMJ filed an Unopposed Motion For Enlargement of Time to File Answer and to Modify Procedural Schedule.<sup>2</sup> On May 28, an Interim Order directed DMJ to file its Answer to the Complaint on or before June 25, 2003.<sup>3</sup> On June 13, 2003, the Hearing Commissioner further extended DMJ's time within which to file an Answer to the Complaint up to and including July 25, 2003.<sup>4</sup> After the withdrawal of DMJ's counsel, Joyce Howard, Executive Vice President of DMJ, began representing Respondent on a pro se basis.<sup>5</sup> DMJ requested an additional extension of time, to which OCC objected. In the interim, OCC moved to compel DMJ to respond to OCC's First Set of Data Requests. The Hearing Commissioner denied DMJ's request for extension of time, and granted OCC's motion to compel discovery.<sup>6</sup> DMJ was directed to answer the Complaint and respond to OCC's discovery by August 8, 2003.<sup>7</sup> Despite the Hearing Commissioner's orders in this case, DMJ neither filed an Answer to the Complaint nor responded to OCC's discovery requests.

3. On September 5, 2003, OCC filed a Motion for Order Deeming Allegations of the Complaint Admitted, Granting Relief Sought and for Modification of Procedural Schedule. By Decision No. R03-1123-I, the Hearing Commissioner granted the Motion in part, and entered the following findings:

- a) DMJ was given proper notice of OCC's Complaint in accordance with Commission rules;
- b) DMJ failed to answer the Complaint within the time allowed by the Commission;

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<sup>2</sup> Also on May 23, 2003, Trial Staff of the Commission (Staff) petitioned for leave to intervene in this docket, which was subsequently granted in Decision No. R03-0669-I (June 13, 2003).

<sup>3</sup> See Decision No. R03-0577-I (May 28, 2003).

<sup>4</sup> See Decision No. R03-0669-I (June 13, 2003).

<sup>5</sup> See Decision No. R03-0840-I (July 29, 2003).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

c) DMJ violated § 40-15-112, C.R.S. by requesting the transfer of more than 4,000 customer accounts, wholly or in part, to DMJ from Mile High Telecom, Inc. (Mile High); and

d) DMJ violated Commission Rule 4 CCR 723-2-25 by submitting to Qwest orders to change the basic local exchange carrier from Mile High to DMJ for more than 4,000 customers without first obtaining confirmation from the customer in accordance with the procedures set out in Commission rules.

4. On October 17, 2003 a hearing was held to consider appropriate remedies, if any, to be ordered against DMJ. OCC and Staff appeared at the hearing. DMJ did not appear at the hearing through counsel or any other representative.<sup>8</sup>

5. On November 14, 2003, Staff and OCC jointly filed their Statement of Position.<sup>9</sup> Staff and OCC ask the Commission to order \$189,338.30 in reparations in the form of refunds to be paid to 4,393 customers based upon a proxy of the amount DMJ would have collected from slammed customers, unless DMJ proves the actual amount received for all unauthorized services; to ensure full disclosure in future application or registration proceedings by principals and agents involved with DMJ; and make a determination whether the Commission elects to pursue statutory penalties for 4,833 violations per day, weighing the number and severity of violations against the possibility of ultimate recovery. According to Staff and OCC, the requested relief remedies DMJ's failure to disclose information in violation of Commission order and ensures that the Commission will be fully informed in future proceedings.

## **II. FINDINGS**

6. C.R.S. § 40-15-112(3) provides in relevant part:

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<sup>8</sup> The hearing was scheduled to begin at 9:00 a.m. No one from DMJ appeared. At approximately 9:15 a.m., the Hearing Commissioner attempted to contact Ms. Howard via telephone. No one answered, and the Hearing Commissioner left a message indicating that the hearing would commence as scheduled, but that Ms. Howard could contact the Hearing Commissioner forthwith to request a continuance. No one from DMJ contacted the Hearing Commissioner, either that day or thereafter.

<sup>9</sup> An Errata Statement of Position was jointly filed by Staff and OCC on November 18, 2003.

A telecommunications provider who initiates an unauthorized change in a customer's telecommunications provider in violation of this section is liable:

(a) To the customer, the customer's previously selected provider, or both, as determined by the commission, for all intrastate long distance charges, interstate long distance charges, local exchange service charges, provider switching fees, the value of any premiums to which the customer would have been entitled, and other relevant charges incurred by the customer during the period of the unauthorized change. ...

Similarly, Commission Rule 4 CCR 723-2-25.5.3.1 provides:

A telecommunications provider who initiates an unauthorized change in a customer's designated telecommunications provider, i.e., slamming, in violation of this section is liable ... [t]o the customer, the customer's previously selected provider, or both, as determined by the commission, for all intrastate long distance charges, interstate long distance charges, local exchange service charges, provider switching fees, the value of any premiums to which the customer would have been entitled, and other relevant charges incurred by the customer during the period of the unauthorized change. ...<sup>10</sup>

7. As noted above, in Decision No. R03-1123-I the Hearing Commissioner found that DMJ violated both C.R.S. § 40-15-112 and Commission Rule 4 CCR 723-2-25 by submitting to Qwest orders to change the basic local exchange carrier from Mile High to DMJ for more than 4,000 customers without first obtaining confirmation from each customer in accordance with the procedures set out in Commission rules. Thus, pursuant to C.R.S. § 40-15-112(3)(a) and Commission Rule 4 CCR 723-2-25.5.3.2, the Commission has the authority to order DMJ to refund all moneys received from customers for services provided during the unauthorized change of providers.

8. As a result of DMJ's failure to respond to discovery in this docket, Staff and OCC were unable to determine the actual amount customers paid DMJ for services rendered during the unauthorized change. However, Staff and OCC did verify that DMJ billed customers for

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<sup>10</sup> See Footnote 1 for the Commission rule definition of "slamming."

service.<sup>11</sup> After further consideration of questions raised by the Hearing Commissioner at hearing, Staff and OCC support and request a two-step remedy to address the absence of specific collection information from DMJ: Initially, relief should be ordered based upon a proxy of the amount that DMJ would have billed and collected for unauthorized services. In the event DMJ timely files for rehearing, reargument or reconsideration of the order and proves an alternative amount to be appropriate, the Hearing Commissioner could consider that amount. In the absence of such a timely request by DMJ for relief supported by sufficient evidence, the proxy amount would be the final relief ordered.

9. Staff and OCC propose that the proxy be the billed amount for basic local phone service without any features, including a basic residential line at \$14.91, plus the subscriber line charge at \$5 as billed by DMJ, and \$1.64 for taxes, totaling \$21.55 per customer per month. OCC witness Ms. Callaghan testified that this is the minimum charge included in all customer bills that would have been paid and is based on an actual DMJ bill.<sup>12</sup> This amount would then be doubled per customer because the unauthorized period of the change was approximately two months. DMJ began submitting orders to Qwest on March 11, 2003 and was no longer authorized to offer services in Colorado on May 12, 2003.<sup>13</sup>

10. In response to a subpoena issued by the Hearing Commissioner, Qwest Corporation (“Qwest”) provided OCC with a report of the March and April 2003 orders that DMJ submitted to Qwest for basic local exchange service.<sup>14</sup> OCC used the order history for two purposes. First, OCC identified orders that violated Commission rule and Colorado law.

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<sup>11</sup> Transcript p. 15, lines 4-9 and p. 17, line 16 through p. 19, line 1.

<sup>12</sup> Transcript p. 19, lines 17-25.

<sup>13</sup> Transcript p. 19, lines 2-5.

<sup>14</sup> Transcript p. 24, lines 7-25.

Second, OCC isolated the number of customers actually transferred to DMJ's service that would have paid a bill for service rendered by DMJ. For example, as explained in more detail below, DMJ may have submitted two orders transferring a Mile High customer to DMJ's service, with the first order being rejected by Qwest. Staff and OCC argue this would represent two violations, yet in the end it would have resulted in only one bill that the customer would have paid to DMJ.

11. Initially, Qwest received a total of 4,868 local service orders from DMJ, including those rejected as well as those that were completed.<sup>15</sup> In partial response to discovery, DMJ provided approximately 1500 documents in the form of the letter of authorization ("LOA") that is attached to OCC's Complaint in this case.<sup>16</sup> OCC attempted to ascertain if any of the local service request orders that DMJ submitted to Qwest had actually been authorized by the customers through one of these letters of agency.<sup>17</sup> OCC compiled a list of 35 LOAs that were dated on or before the date the local service request orders were submitted to Qwest by DMJ.<sup>18</sup> Reducing the total number of orders by the 35 orders with LOAs dated on or before the order was submitted, OCC contends DMJ committed 4,833 violations of Commission rules and Colorado law.

12. Pursuant to C.R.S. § 40-15-112(1), "[n]o provider of telecommunications service shall request the transfer of a customer's account, wholly or in part, to another provider" unless the provider has obtained the customer's authorization. Staff and OCC argue that DMJ's

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<sup>15</sup> Transcript p.26, lines 5-11. At hearing the grand total of orders was testified to be 4,872. Upon further analysis of Exhibit 2 in preparation of this Statement of Position, a calculation error was identified such that the corrected actual grand total of orders submitted to Qwest was 4,868.

<sup>16</sup> Transcript p.25, lines 16-19.

<sup>17</sup> Transcript p.26, lines 1-4.

<sup>18</sup> Transcript p. 27, lines 15-17.

submission of its local service order to Qwest without customer authorization violates the law, and thus the number of violations may be determined without any regard to whether the submitted order was processed or rejected by Qwest. In other words, even if Qwest rejected an order, Staff and OCC maintain the order was nevertheless a request by DMJ to transfer the customer's account.

13. At the hearing, OCC urged the Commission to order DMJ to refund the proxy amount of \$21.55 per month for two months for each of the customers slammed.<sup>19</sup> Upon further consideration of the Hearing Commissioner's questions, and incorporating subsequent analysis of Exhibit 2 in the preparation of its Statement of Position, Staff and OCC represented that the number of customers that most likely would have paid DMJ for unauthorized services would have been less than the number of violations determined.<sup>20</sup> Also, Staff and OCC recognized that where two orders were submitted for one customer, only one bill would be submitted to the affected customer. Therefore, Staff and OCC support reducing the 4,833 DMJ violations by the number of customers who were never actually served by DMJ, and by the number of those for whom multiple orders were submitted, to more accurately approximate the number of customers actually billed.

14. Upon further analysis of Exhibit 2, OCC incorporated additional information into the calculation of reparations requested. Of the 4,868 orders submitted to Qwest, 4,507 orders were processed as "complete," while the remaining 361 orders were rejected. Of the 4,507 completed orders, 65 orders were resubmitted one or more times for a total of 90 duplicates.

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<sup>19</sup> Transcript p. 29, lines 11-17.

<sup>20</sup> It is conceivable that DMJ billed customers even if their local service request was ultimately rejected by Qwest, resulting in no service being provided by DMJ.

Subtracting the 90 duplicates from the total leaves 4,417 customers. Of the 35 timely LOAs, only 24 of the customers were actually transferred to DMJ based upon the order history provided by Qwest. Thus, OCC reduces the number of customers slammed by the 24 who authorized the change, leaving 4,393 (4,417-24) customers slammed. Thus, Staff and OCC support reducing the number of customers affected, for purposes of estimating the number of customers likely to have been billed, to 4,393.

15. Staff and OCC maintain that should the Commission afford DMJ a final opportunity to provide evidence that the Company received a lesser amount than the proxy amount (e.g.,  $4,393 * \$21.55 * 2 = \$189,338.30$ ), they believe it appropriate that such evidence include the names, addresses, and telephone numbers of all customers that DMJ transferred from Mile High Telecom and the total amount billed to each customer for telephone service between March 11 and May 12, 2003 as well as the amount DMJ received in payment from each of the customers.

16. Upon payment of reparations ordered herein, Staff and OCC contend DMJ should be required to file an affidavit attesting to compliance with the Commission's order and supported by documentation of payments made to customers, including the name and address to which the payment was remitted.

17. At the hearing, OCC initially asked the Commission to condition the approval of any future CPCN application by DMJ, or its principals, on compliance with fulfilling any remedies awarded in this docket. Upon further consideration of questions raised by the Hearing Commissioner, Staff and OCC modified their request in this regard. Rather than seeking denial of any future CPCN application, Staff and OCC ask the Commission to order DMJ and its officers, directors, shareholders, owners, other principals or affiliates, to disclose their



relationship to DMJ in any future PUC application or registration where any of them are an officer, director, shareholder, owner or other principal or affiliate of the applicant.

18. Staff and OCC believe the narrower scope of relief proposed is appropriately within the Commission jurisdiction to ensure disclosure in subsequent applications without dictating any specific action the Commission might take in the subsequent proceeding. The Commission's rules regarding applications for a CPCN are found at 4 CCR 723-25-4. Staff and OCC maintain the "applicant" must submit an application, but that there is a substantial lack of clarity as to the scope of disclosure. The rule provides that the applicant describe the "applicant's affiliation, if any, with any other company."<sup>21</sup> Further, the applicant must identify "any adverse decision entered by any court or regulatory body within the last five years regarding the applicant's provision of local exchange telecommunications services or other regulated telecommunications services. ..."<sup>22</sup> Thus, a newly formed corporation with the same ownership as DMJ might be under no obligation to disclose any information regarding this complaint proceeding. Staff and OCC maintain that, by exercising the broadest jurisdiction over DMJ, the Commission can ensure thorough disclosure in future applications by any principal, officer or director of DMJ. When the violations are blatant and severe, such as in this case, the Commission has an interest in identifying the individuals responsible for the violations. Such identification will allow the Commission to consider these findings relevant in future proceedings.

19. Staff and OCC note that the Hearing Commissioner expressed concern regarding whether the requested relief regarding future applications is within the scope the scope of relief

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<sup>21</sup> 4 CCR 723-25-4.1.7 (emphasis added).

<sup>22</sup> 4 CCR 723-25-4.1.8 (emphasis added).

sought in the Complaint herein. Pursuant to 4 CCR 723-1-22(d)(2) and 4 CCR 723-1-61(a), the Plaintiff is required to state the relief sought and a clear and concise statement of the matters relied upon as a basis for the pleading. The Colorado Supreme Court has recognized “that the prayer of a complaint is not the statement of the cause of action, and if the allegations of the complaint state a cause of action or show one entitled to relief, it should be granted regardless of the remedy sought.”<sup>23</sup> More recently, the Colorado Court of Appeals held that, “[w]hile a demand for judgment is necessary, ... if the plaintiff is entitled to any relief under his stated claim, such relief may be granted, regardless of the specific relief contained in the demand for judgment.”<sup>24</sup> Staff and OCC contend that, under this authority, if the Commission finds that appropriate relief includes requirements for future filings, there are no technical pleading requirements prohibiting the Commission from ordering the requested relief.

20. Staff and OCC note also request that the Commission consider ordering statutory penalties pursuant to C.R.S. § 40-7-101 *et seq.* to demonstrate a zero-tolerance policy for slamming in Colorado. They argue this is particularly appropriate here, in light of the costs and aggravation to consumers caused by DMJ, as well as DMJ’s undermining of the competitive marketplace. On the other hand, Staff and OCC state that they are mindful that the ultimate collect ability of any recovery from DMJ is suspect due to the Company’s reported financial distress and the fact that they may no longer be doing business in Colorado. Therefore, the Commission may conclude there are better uses of its resources. Should the Commission elect to pursue this remedy, Staff and OCC will recommend what they believe to be an appropriate amount and course of action.

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<sup>23</sup> *Flemming v. Colorado State Bd. of Ed.*, 400 P.2d 932, 934 (Colo. 1965).

<sup>24</sup> *DiChellis v. Peterson Chiropractic Clinic*, 630 P.2d 103, 105 (Colo. App. 1981).

21. On the subject of statutory penalties, C.R.S. 40-7-105 states:

(1) Any public utility which violates or fails to comply with any provision of the state constitution or of articles 1 to 7 of this title or which fails, omits, or neglects to obey, observe, or comply with any order, decision, decree, rule, direction, demand, or requirement of the commission or any part or provision thereof, except an order for the payment of money, in a case in which a penalty has not been provided for such public utility, is subject to a penalty of not more than two thousand dollars for each offense.

(2) Every violation of the provisions of articles 1 to 7 of this title or of any order, decision, decree, rule, direction, demand, or requirement of the commission or any part or portion thereof, except an order for the payment of money, by any corporation or person is a separate and distinct offense, and, in case of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct offense.

(3) In construing and enforcing the provisions of articles 1 to 7 of this title relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, in every case shall be deemed the act, omission, or failure of such public utility.

22. According to Staff and OCC, DMJ submitted 4,833 (4,868 total - 35 LOAs) orders requesting the transfer of customers' accounts without authorization. The approximate period of the unauthorized change was 60 days (from March 11 through May 12, 2003). OCC states that it was unable to determine the actual dates DMJ provided and billed for service to each customer as this information was not readily available and would have required manually reviewing thousands of pages of Qwest billings. The OCC's maintains that 45 days would be a conservative estimate of the number of unauthorized billing days. The range of civil penalties the Commission could seek is between \$1 and \$2000 per offense or per customer per day. OCC suggests that the Commission could, in its discretion, multiply 4,833 violations by 45 unauthorized change days, multiplied by an equitable penalty amount per day.

23. Staff and OCC note that the Commission recently addressed slamming violations in the case, *In Re: The Joint Application of Vanion Telecom, Inc. dba Vanion, Inc. and Apollo Communications, LLC. To Execute a Transfer*.<sup>25</sup> There, the Commission approved a stipulation between Staff, Vanion and Apollo that included reparations by Apollo to customers for slamming Vanion customers to Apollo of \$517.24 per day times the 36-day period of the unauthorized change, which was ordered to be split among the customers. Staff and OCC contend this Commission may consider these recent findings in light of the facts and circumstance in this case in determining the appropriate daily penalty amount. However, according to Staff and OCC, there are no objective criteria to specify the appropriate penalty amount. Rather, the appropriate penalty amount is left to the discretion of the Commission, and ultimately the district court, based upon the entirety of the circumstances involved.

24. Staff and OCC believe there are several aggravating circumstances indicating that DMJ's violations were willful and intentional, justifying the Commission's pursuit of penalties against DMJ and/or its principals. They maintain that, based solely on the facts of the case, both reparations and civil penalties are justified. Staff and OCC contend that DMJ essentially admitted to transferring 4,833 customer accounts without authorization. At the time DMJ stated it sent LOAs to these customers, the Company already had been submitting orders to Qwest and many, if not most, of the affected customers had already been switched to DMJ.

25. Staff and OCC argue that DMJ willfully and intentionally violated Colorado law and Commission rule and orders. Staff witness Mr. Trogonoski testified that on March 5, 2003, prior to DMJ submitting a single order to Qwest, Staff met with Clyde Pittman from DMJ Communications and Douglas McKinnon from USURF to discuss a letter sent to Mr. McKinnon

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<sup>25</sup> Decision No. C03-0408, Docket No. 03A-054T (April 18, 2003).

requesting clarifications regarding USURF, their acquisition of DMJ, and to inquire whether USURF might be considering the purchase of the Mile High customer base.<sup>26</sup> Mr. Trogonoski testified that he emphasized to Mr. Pittman and Mr. McKinnon that there was a Commission-approved transition plan in place for the Mile High customers, and that those Mile High customers were not available for sale.<sup>27</sup> Further, Staff advised Mr. Pittman and Mr. McKinnon that, “if the companies were proposing to purchase that customer base, they would need to file some kind of a motion or petition with the Commission to amend the transition plan and to possibly be allowed to do something different than what the Commission had already approved.”<sup>28</sup> Mr. Trogonoski testified that it was Staff’s perception following the meeting that

Mr. Pittman was already aware of the transition plan. He knew that DMJ was on the list of alternative providers that the Commission had approved. He had read a story about it in the Denver Post when Mile High first filed their application, and to discontinue, back in September of 2002. He was very aware of the fact that there were customers available to solicit in a period; that he wanted to, I guess, jump the gun on that solicitation period and possibly acquire those in a different manner than the Commission had approved.<sup>29</sup>

26. OCC witness Ms. Callaghan testified that, on March 17, 2003, OCC warned Clyde Pittman of its belief that there were slamming violations.<sup>30</sup> She expressed concern to him that DMJ transferred customers to its service without their authorization.<sup>31</sup> She also expressed concern that DMJ’s transfer of Mile High customers interfered with the transition plan for the Mile High customers.<sup>32</sup> She testified that, on April 11, 2002, OCC again reiterated its concerns

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<sup>26</sup> Transcript p. 50, line 7 through p. 51, line 16.

<sup>27</sup> Transcript p. 52, lines 3-7.

<sup>28</sup> Transcript p. 52, lines 8-13.

<sup>29</sup> Transcript p. 52, line 19 through p. 53, l.3.

<sup>30</sup> Transcript p. 33, lines 4-9.

<sup>31</sup> Id.

<sup>32</sup> Id.

to Joyce Howard and Clyde Pittman that DMJ was slamming customers in violation of Colorado law and Commission rules, and specifically requested that they not bill customers for such unauthorized services.<sup>33</sup> According to Staff and OCC, despite their repeated warnings, DMJ began and continued transferring customers without their authorization.

27. Staff and OCC also maintain that DMJ specifically violated the terms of the transition plan for Mile High Telecom Joint Venture ordered by the Commission in Docket No. 02A-463AT. They assert that DMJ willfully and intentionally transferred more than 4,000 Mile High customers to DMJ without customer or Commission authorization. They maintain that, on or about March 11, 2003, DMJ began submitting local service requests to Qwest to transfer Mile High's customers to DMJ in violation of the terms of the transition plan, which called for competitors to solicit these customers' business, not transfer them without customer authorization for competitive gain. Staff and OCC contend that the transition plan provided for customer choice, which DMJ effectively eliminated.

28. Staff and OCC argue that DMJ stonewalled OCC's Complaint and ignored all Commission orders to answer the Complaint, respond to discovery, and attend the hearing. Following the Hearing Commissioner's order compelling discovery, OCC received no additional response or communication from DMJ whatsoever.<sup>34</sup> The Hearing Commissioner previously found that DMJ willfully ignored its duties to answer the Complaint, respond to discovery, and otherwise comply with Commission orders.

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<sup>33</sup> Transcript p. 47, lines 2-10.

<sup>34</sup> Transcript p. 33, lines 13-19.

29. Staff and OCC conclude that they have shown that DMJ submitted orders to Qwest requesting the change in basic local service provider for thousands of customers identified herein. Although it is DMJ's burden and obligation to demonstrate prior customer consent, Staff and OCC assert that they gave every benefit of the doubt to DMJ in reviewing purported letters of authorization (LOAs) from customers and were still only able to identify a maximum of 35 timely LOAs. Staff and OCC argue that DMJ was fully aware of its course of action in contravention of the Mile High transition plan, which culminated in 4,833 violations per day of Colorado law and Commission rules. However, Staff and OCC request that the Commission limit the reparations in the form of customer refunds to \$189,338.30, to be refunded proportionately to the 4,393 customers that DMJ slammed to its service and that it actually served, unless DMJ proves that it received less funds for all unauthorized services provided in conjunction with a request for rehearing, reconsideration or reargument. Staff and OCC further request the Commission order DMJ and its officers, directors, shareholders, owners, other principals or affiliates, to disclose their relationship to DMJ in any future PUC application or registration where any of them are an officer, director, shareholder, owner or other principal or affiliate of the applicant.

### **III. DISCUSSION**

1. The Hearing Commissioner reaffirms the previous findings that DMJ violated C.R.S. § 40-15-112 by requesting the transfer of more than 4,000 customer accounts, wholly or in part, to DMJ from Mile High; and DMJ violated Commission Rule 4 CCR 723-2-25 by submitting to Qwest orders to change the basic local exchange carrier from Mile High to DMJ for more than 4,000 customers without first obtaining confirmation from the customer in accordance with the procedures set out in Commission rules.

2. The methodology suggested by Staff and OCC to determine reparations is reasonable and will be adopted. Specifically, in calculating reparations, the 4,868 orders DMJ submitted to Qwest should be reduced by the 361 orders that were rejected, the 90 duplicate orders, and the 24 customers who authorized the change, leaving 4,393 customers slammed. Each of those customers slammed was billed by DMJ, at a minimum, for basic local phone service without any features, including a basic residential line at \$14.91, the subscriber line charge at \$5, and \$1.64 for taxes, totaling \$21.55 per customer per month. Since the slammed customers were billed by DMJ for two months, the \$21.55 must be doubled for each customer. Thus, the amount that DMJ must pay as reparations pursuant to the statute and rule cited above, is  $4,393 \text{ (customers slammed)} * \$21.55 \text{ (monthly bill)} * 2 \text{ (months)} = \$189,338.30$ .

3. Since it is possible (although not probable) that DMJ's actual collections from bills to the 4,393 customers who were slammed is less than \$189,338.30, the Hearing Commissioner will consider exceptions from DMJ seeking to prove the actual amount the Company received. Such evidence should include the names, addresses, and telephone numbers of all customers that DMJ transferred from Mile High Telecom and the total amount billed to each customer for telephone service between March 11 and May 12, 2003, as well as the amount DMJ received in payment from each of the customers.

4. Upon payment of reparations ordered herein, DMJ must file an affidavit attesting to compliance with the Commission's order, supported by documentation of payments made to customers, including the name and address to which the payment was remitted.

5. DMJ and its officers, directors, shareholders, owners, other principals or affiliates, must disclose their relationship to DMJ in any future PUC application or registration where any of them are an officer, director, shareholder, owner or other principal or affiliate of the applicant.



6. Concerning the question of penalties under C.R.S. § 40-7-101 *et seq.*, the Hearing Commissioner agrees with Staff and OCC that DMJ and its principals willfully and knowingly flouted Colorado statute and Commission rule. However, the Hearing Commissioner also agrees with the comment that the ultimate collect ability of any recovery from DMJ is suspect due to the Company's reported financial distress and the fact that it may no longer be doing business in Colorado. Therefore, the Hearing Commissioner concludes that it would be a waste of Commission and Attorney General resources to prosecute a penalty case in district court, likely to no effect. In addition, the Hearing Commission believes that, however remote the possibility that DMJ willingly pays the reparations ordered herein, that possibility is further diminished if massive penalties also were ordered. In other words, the slammed customers stand a better chance of collecting refunds if reparations alone are ordered.

#### **IV. ORDER**

##### **A. It Is Ordered That:**

1. The Commission orders DMJ to pay \$189,338.30 in reparations in the form of refunds to the 4,393 customers that were billed for services as a result of DMJ's submission of local service orders to Qwest (to change the basic local exchange carrier from Mile High to DMJ) during the period March 11, 2003 until May 12, 2003. Such refunds must be made immediately.

2. The Commission (or Hearing Commissioner on remand) will consider exceptions from DMJ seeking to prove the actual amount the Company received from the slammed customers is less than \$189,338.30. Such evidence should include the names, addresses, and telephone numbers of all customers that DMJ transferred from Mile High Telecom and the total amount billed to each customer for telephone service between March 11 and May 12, 2003, as

well as the amount DMJ received in payment from each of the customers. If no such exceptions are filed by DMJ within 20 days of the effective date of this order, DMJ will have waived the opportunity to provide evidence on reparations.<sup>35</sup>

3. Upon payment of reparations ordered herein, DMJ is ordered to file an affidavit attesting to compliance with the Commission's order, supported by documentation of payments made to customers, including the name and address to which the payment was remitted.

4. DMJ and its officers, directors, shareholders, owners, other principals or affiliates, are ordered to disclose their relationship to DMJ in any future PUC application or registration where any of them are an officer, director, shareholder, owner or other principal or affiliate of the applicant or registrant.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the Hearing

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<sup>35</sup> Of course, the Commission will consider all arguments made in any timely filed exceptions or application for rehearing, Reargument, or reconsideration.

Commissioner and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

c) If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

6. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Hearing Commissioner