BEFORE THE
MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Application of	)	
MCC Telephony of Missouri, Inc.	)	Case No. TE-2006-0415
For a Waiver of Compliance with	)	
The Requirement of 4 CSR 240-240-32	)	

APPLICATION FOR REHEARING

Comes now MCC Telephony of Missouri, Inc. (MCC) by and through its attorneys, and pursuant to Section 386.500 RSMo and 4 CSR 240-2.160, moves and applies for rehearing of the Commission's Report and Order entered in this case on July 24, 2007 (hereinafter "the Order"). In support thereof, MCC submits the following to the Commission:

1. On July 24, 2007, the Commission entered the Order denying MCC's application for a waiver of 4 CSR 240-32.080(5) (A) (1). The Order bears an effective date of August 3, 2007. This application is therefore timely under Section 386.500 and 4 CSR 240-2.160.

2. The Order is unlawful, unjust and unreasonable and just grounds exist for the Commission to rehear the matter and enter a new modified report and order.

ERRONEOUS FACTUAL FINDINGS AND CONCLUSIONS.

3. On page 7, paragraph 6, the Commission found that "[a]s a facilities based provider, MCC Telephony's installation process is different from that of most carriers, in that, installation of basic local service by MCC Telephony requires a MCC Telephony employee to visit the home or business where the service is to be connected at a time when the prospective customers is home." In support of that finding, the Commission cites the testimony of MCC witness Calvin Craib. In the cited testimony, Mr. Craib actually stated "unlike traditional carriers, MCC is not able to turn up service remotely at the switch. A home visit is required in

all cases to turn up service." Craib Direct, p. 5, l. 3-4. Mr. Craib's testimony demonstrates that incumbent LECs can turn up service remotely, but MCC cannot, rendering MCC's installation interval longer than the incumbent LECs' interval, because MCC must gain access to the customer's premises. The distinction made by Mr. Craib's testimony is between incumbent LECs and MCC, not between facilities based and non-facilities based providers; so the evidence only supports a distinction between traditional carriers and MCC, not between facilities based and non-facilities based providers.

4. On page 6, paragraph 9, the Commission finds as a matter of fact that "MCC Telephony does not face any challenges regarding number porting, including length of porting intervals, not faced by other companies offering basic local service," citing the testimony of Sprint witness Darin Liston as support. In the cited portion of the transcript, Mr. Liston was asked to address only a subset of the elements of the porting process, but that testimony does not address other "challenges" MCC faces in the porting process. This finding cannot apply to incumbent LECs (the finding is a comprehensive "other companies," without limitation). The unrebutted evidence is that the porting intervals vary from LEC to LEC (see CC Schedule 2, attached to Mr. Craib's surrebuttal testimony) and that MCC cannot meet the five-day installation rule because it must wait for the incumbent LEC to perform necessary functions relating to porting numbers, and the LEC often takes the entire five-day period to perform its part of the process. Craib Surrebuttal, p. 6, l. 17 - p. 7, l. 5.

5. On page 6, paragraph 12, the Commission concludes as a matter of fact that customer scheduled appointed as to installation dates "are not customer requested installation dates." In so finding, the Commission adopted a Staff argument that the provider must first offer an installation date within the five-day window, and that the customer must then agree to a later

date. There is absolutely nothing in the rule to support the Commission's adoption of this argument. As a matter of fact, the language of the Commission's own rule does not support the finding that customer-scheduled appointments are not customer-requested. The Commission cannot use this proceeding to rewrite its own rule.

6. On page 7, paragraph 13 of the Order reads:

> After taking a prospective customer's ordering information, MCC Telephony's customer service representative offers that customer the earliest possible time slot a technician is available to complete the installation. Based upon MCC Telephony's failure to complete such installations with the five-day installation period, the Commission finds MCC Telephony has too few installation technicians to complete installations in compliance with the five day installation standard.

7. The Commission's finding is utterly arbitrary and unsupported by the evidence. There is no evidence in the record from any source that supports a conclusion that more technicians necessarily would reduce installation time. In making this finding, the Commission is engaging in gratuitous speculation with absolutely no support in the record. The evidence supplies ample evidence that technician strength is sufficient to meet customer requested installation dates for voice services at prices highly competitive with those of telecommunication service providers in the same market.

8. Also on page 7, at paragraph 15, the Commission recites that

> If MCC Telephony can save money on installation costs, it will have an unfair competitive advantage over other companies providing voice service.

This statement inaccurately describes the dynamics of competition and ignores the intention of Chapter 392. It is not supported by the evidence. As provided in Section 392.185, RSMo 2000:

> The provisions of this chapter shall be construed to:
>
> (1) Promote universally available and widely affordable telecommunications services;

(2) Maintain and advance the efficiency and availability of telecommunications services;

(3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;

(4) Ensure that customers pay only reasonable charges for telecommunications service;

(5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;

(6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

(7) Promote parity of urban and rural telecommunications services;

(8) Promote economic, educational, health care and cultural enhancements; and

(9) Protect consumer privacy.

9. As a consequence of competition in a given market, the price of a service is driven toward cost. It is the expected consequence of certificating alternative local exchange companies that prices for voice services in Missouri will be driven toward actual cost and not artificially inflated by the effects of regulation. Section 392.185 (6). It is the natural reaction of any company engaged in providing voice services to reduce its costs wherever it may do so and in that effort it is not "unfairly competing" but simply "competing." But installation costs are only one element of the competitive analysis. Many factors play a role in the competitive position of a carrier: price, variety of services, technology used, and customer service, to name but a few. To conclude, as the Commission erroneously does, that if MCC has lower installation costs (and there is no evidence to support such a factual finding in this case) results in MCC

having an unfair competitive advantage overlooks the many other factors that customers consider in determining which carrier's service to purchase.

10. Moreover, since the great majority of MCC's customers are porting their number to MCC, and these customers are, generally, already customers of an incumbent local exchange carrier, whose installation time is generally zero days, MCC's installation time does not, in practical terms, play any competitive role. Since the customer is already receiving the incumbent's service, the incumbent's "installation time" -- and cost -- is zero. Consequently, any differential in installation costs between MCC and the incumbent is wholly irrelevant.

11. Also, significantly, it is not the installation period that convinces the customer to change providers. It is the nature of the service and the price at which it is offered which motivates the customer. In the event that the competitive landscape changes dramatically in a short period of time and the incumbent local exchange company (ILEC) is required to port many numbers back from MCC, that ILEC could raise the issue of porting intervals then and also request a waiver of the rule just as MCC has done here, and neither company would be out-competing the other. Again the Commission's finding is inaccurate and not factually based.

ERRONEOUS CONCLUSIONS OF LAW

Issue 1: CUSTOMER-REQUESTED INSTALLATION DATES

12. The Commission erroneously found as a matter of law that when a customer agrees to an installation date outside the five-day period specified in the rule, the rule is violated because "customers are not offered a date that would comply with the service standards." Referring to its factual findings in paragraph 12, the Commission found, as a matter of law, that the customer must first be offered an installation date with the five-day window. There is absolutely nothing in the rule to support this finding, and the Commission cannot utilize the

contested case process to rewrite one of its rules. The Commission is effectively engaging in improper rulemaking. The Commission's legal conclusion relating to Issue 1 is erroneous as a matter of law.

13. Further, by concluding in paragraph 12 of the Order that MCC's process of scheduling appointments for installation of customer service does not constitute customer requested installation dates, the Commission has restricted customer choice, an elementary component of competition. The Commission's legal conclusion means that a customer is locked to the rule, and cannot opt out of the rule, even though this is the customer's wish to do so. The Commission's ruling is unreasonable and unjust and an improper interpretation of the rule.

Issue 2: GOOD CAUSE FOR WAIVER OF THE INSTALLATION RULE

14. In this case, the Commission has determined in error that good cause does not exist as a matter of law for purposes of a waiver of 4 CSR 240-32.080(5)(A)(1). Four reasons were supplied on page 12 of the Order for the determination that good cause was absent. The first was that MCC voluntarily entered its contract with Sprint and cannot claim the terms of the contract are out of its control. This reason is fallacious. Although the terms of the contract were within some bargaining control of MCC, the state of the technology behind implementation of that agreement is beyond MCC's control and it is technology which drives the time periods for installation in this case. This is what is supported in the evidence.

15. The Commission erroneously denied the waiver as well for the reasons that 1) MCC does not face any challenges regarding number porting, including the length of porting intervals, not faced by other companies offering basic local service, and 2) even if the ported numbers are excluded, MCC cannot meet the installation standard of the rule. That MCC has

the same challenges faced by other companies underscores what perhaps was hidden from the Commission until hearing in this case and now is in plain sight: No matter how many human resources may be thrown at the problem, the installation period established by 4 CSR 240-32.080(A)(1**)** is probably not being met by the bulk of competitive companies with respect to **ported numbers.** The Commission ostensibly realizes the extent of the industry wide offense to the rule when it decides to consider MCC's situation "if ported numbers are excluded." These findings would imply that a waiver for MCC's ported numbers is overwhelmingly justified under the evidence.

16. The last reason cited by the Commission for denying the waiver was that granting MCC's waiver request would provide it an unfair competitive advantage over companies providing voice service. This reason is a restatement of the Commission finding at paragraph 15 of the Order which MCC has discussed above. It is inaccurate and unsupported by the evidence. In any case, any company believing that it would be placed at an unfair advantage could itself seek a waiver of the rule.

17. None of the four reasons given by the Commission on page 12 of the Order, either together or standing alone, can provide a foundation for the determination that MCC's has no good cause for its waiver request. Additionally, the Commission has adopted an unreasonable and unjust interpretation of "good cause" for purposes of a waiver of 4 CSR 240-32.080(A)(1). As mentioned above, the Commission must construe Chapter 392, RSMo., which is the ultimate source of Commission authority to promulgate the rule, to: 1) promote universally available and widely affordable telecommunications services; (2) maintain and advance the efficiency and availability of telecommunications services; (3) promote diversity in the supply of telecommunications services and products throughout the state of Missouri; (4) ensure that

customers pay only reasonable charges for telecommunications service; (5) permit flexible regulation of competitive telecommunications companies and competitive telecommunications services; and (6) allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest. Consistent with these rules of construction, no determination of "good cause" can be made in this matter without consideration of at least 1) the regulatory objectives of the rule and whether they are important in a deregulated environment and 2) the effect on competition **if the rule is not waived.**

18. The evidence in this case establishes that MCC is a new entrant to Missouri offering an innovative voice service at prices and under conditions to which none of its existing customers have registered complaint; that MCC encounters serious logistical obstacles to meeting the installation time intervals of the rule and because it is not different from other companies in this respect, other companies are also failing to meet the service objectives; and that the time period of "five (5) working days" in 4 CSR 240-32.080(A)(1) was promulgated in 1975, well before competition in the telecommunications industry was authorized. What is even of greater significance is that no competitor of MCC appeared in this proceeding contending that it would be disadvantaged if the waiver were granted.

19. Under the analysis of "good cause" demanded by proper construction of Chapter 392, there is ample evidence in this case that the five day time period of the rule has reached the point of irrelevance among competing voice service providers and that a failure to waive the rule in this case could risk the market exit of a popular, efficient and competitively priced voice service from Missouri for no other purpose but to cling to an anachronism. Further, the Commission has previously addressed the concept of "good cause" where refusal to grant the

waiver of a Commission rule would cost the applicant more than compliance would yield. In *In the Matter of the Application of Springfield*, Case No. XE-2006-0105, Order dated November 3, 2005, the Commission found that the City had established good cause for waiver of the rule requiring line item collection of customer contributions to the Missouri Universal Service Fund, where enforcement of the rule would cost the City two times more than the revenue generated for the State. Here, strict compliance with the rule would require -- at least according to the Commission -- the hiring of many more technicians, thus increasing MCC's costs and consequently its prices. In light of the competitive nature of telecommunications in Missouri, forcing MCC to raise its prices where there is absolutely no evidence that its customers are dissatisfied with present installation intervals, makes no sense. MCC has met its burden to establish good cause under the Commission's rules and the Commission has abused its discretion and unlawfully and unreasonably denied the waiver.

20. The evidence is also clear that customers choosing to purchase service from MCC, despite the longer installation interval, are also setting installation deadlines which are acceptable to them; and that this is the same as a customer requested deadline for installation within the exception provided in 4 CSR 240-32.080(5)(A)1.B.

CONCLUSION

21. MCC is a provider of IP-enabled voice services that voluntarily sought and obtained certification from the Commission. Since turning up service a short time ago, MCC has consistently made good faith efforts to comply with the Commission's service requirements and has submitted reports on its activities in Missouri. There is customer demand for and interest in the service which MCC offers, of which the company is proud. Nevertheless, MCC is still a

relatively new entrant that is struggling to gain a foothold in the voice services market which is still overwhelmingly dominated by the incumbent carriers.

22. The option of requesting a waiver of a specific rule exists so the Commission may respond to particular and distinctive sets of circumstances. MCC sought a waiver of the installation interval rule to address just such a set of circumstances arising out of the challenges it faces in turning up service to its customers. As it presently stands, the Commission's July 24 Order leads to the conclusion that seeking a waiver of a rule is simply not a viable course of action. MCC respectfully requests that the Commission reconsider some of the findings and conclusions in that Order, and demonstrate to Missouri telecommunications providers that the Commission is receptive to such requests..

WHEREFORE, on the basis of the above and foregoing, MCC Telephony of Missouri, Inc. respectfully requests that the Commission grant this application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 2nd day of August, 2007 to General Counsel's Office at gencounsel@psc.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov; and Craig Johnson at Craig@csjohnsonlaw.com.

/s/ Mark W. Comley