

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

**STAFF’S RESPONSE IN OPPOSITION TO
MCC TELEPHONY OF MISSOURI’S OBJECTIONS TO
STAFF’S REBUTTAL TESTIMONY**

COMES NOW the Staff of the Missouri Public Service Commission and for its response states:

1. MCC Telephony of Missouri, Inc., filed an application with the Commission requesting a waiver of compliance with the requirements of 4 CSR 240-32.080 (5) (A) 1 related to time standards for installation of service. This rule provides, in part:

(5) The service objectives, surveillance levels and monitoring criteria for the following categories are:

(A) Orders for basic local telecommunications service –

1. Service objective – that ninety percent (90%) or more of such orders shall be installed, except for customer-caused delays, delays caused by a declared natural disaster or a specific exemption requested by a company and approved by the commission staff to address a unique situation or condition –

A. Within five (5) working days after the customer ordered service; or

B. On or by the date requested if it is at least five (5) working days after the date the customer ordered service.

2. As explained in the Rebuttal Testimony of Larry Henderson, the Staff recommends that the Commission deny MCC’s application.

3. MCC has objected to and has requested the Commission to strike certain portions of Mr. Henderson’s Rebuttal Testimony.

MCC Objection 1. MCC objects to lines 22-23 on page 5; lines 1-12 on page 6. MCC objects to the form of the question and the testimony following. The question is argumentative. The testimony is an inadmissible comment on the weight of the evidence and invades the province of the Commission. It also presumes that MCC is required to repeat each point of its application in supporting testimony.

Testimony: Q. Does the direct testimony of MCC witnesses support or reiterate the points MCC tried to make in its Application for Waiver?

A. Not exactly. The direct testimony of MCC witnesses appears to take a different tack and do not appear to try and support some of the points made in MCC's application. For instance, MCC's Application for Waiver appears to justify its request by emphasizing how certain aspects of the installation process are beyond MCC's control. In contrast, the direct testimony of MCC witness Calvin Craib doesn't appear to try and make this point. Instead Mr. Craib's testimony suggests MCC's service is different than the service provided by other carriers. Calvin Craib states, "MCC is seeking a waiver of this requirement because operational constraints prevent our being able to meet this benchmark at this time...." In addition, Mr. Craib appears to try and make the point the Commission's rule is unnecessary in situations where the customer has a number of options and is not held hostage by an unresponsive utility company.

Staff Response: In its Application, MCC claims an inability to meet the installation time standard due to two factors: (1) MCC has contracted with Sprint, the CLEC, to provide network interconnection, switching, numbering and other key inputs to MCC's service; and the contract does not require Sprint to meet this standard; and (2) ILECs' long porting intervals jeopardize MCC's ability to meet this standard. In the Direct Testimony of MCC witness Craib, MCC adds that the standard should not be applied to it because it has competition for customers.

MCC's objection to the Staff testimony because it addresses the application is not well taken. The scope of relevant testimony is determined by the pleadings. In the face of an objection, a plaintiff's evidence must conform to the pleadings. *Payne v. Cornhuskers Motor Lines, Inc.*, 177 S.W. 3d 820, 837-38 (Mo. App. E.D. 2005). The Staff has not yet objected that Mr. Craib's testimony goes beyond the scope of the application. Instead, the Staff testimony has addressed both the application and the additional matter first raised in MCC's testimony.

The Staff is offering Mr. Henderson as an expert in the installation of telecommunications service. Section 490.065.2 RSMo provides that testimony by an expert witness is not objectionable because it embraces an ultimate fact to be decided by the trier of fact.

MCC Objection 2. MCC objects to Lines 12-20 on page 6. MCC objects to the form of the question and the testimony following. The question is argumentative. The testimony is an inadmissible comment on the weight of the evidence and invades the province of the Commission. It also presumes that MCC is required to offer testimony on all points or assertions in its application.

Testimony: Q. Were any claims made in MCC's Application for Waiver not addressed by direct testimony?

A. Yes. Direct testimony was not provided to support the claim that ILEC porting intervals vary greatly. In fact, MCC's response to Staff Data Request No. 6 provides porting intervals for five ILECs (AT&T, Alltel, CenturyTel, Spectra, and Embarq) and all five ILECs share the same porting intervals. Direct testimony was not provided by any MCC witnesses to support the proposal contained in MCC's Application that would hold MCC to a service objective that 90%

of MCC's installs would be installed within three working days of the time Sprint completes provisioning.

Staff Response: The Staff incorporates by reference its response to MCC Objection 1.

MCC Objection 3. MCC objects to Lines 15-19 on page 7. MCC objects to the form of the question and the testimony following. The question is argumentative and asks the witness to testify on the ultimate issue in the case. The testimony is also an inadmissible comment on the weight and effect of the evidence in the case which again invades the province of the Commission.

Testimony: Q. Has MCC provided good cause for justifying a waiver of 4 CSR 240-32.080(5)(A)(1)?

A. No. MCC appears to be claiming its service is unique and parts of the ordering process are beyond MCC's control. MCC also tries to justify the waiver request through competitive considerations. In my opinion MCC has failed to justify its request.

Staff Response: The Staff is offering Mr. Henderson as an expert in the installation of telecommunications service. Section 490.065.2 RSMo provides that testimony by an expert witness is not objectionable because it embraces an ultimate fact to be decided by the trier of fact.

MCC Objection 4. MCC objects to lines 3-17 on page 14, and objects to the testimony beginning with line 20 on page 15 continuing through page 17, line 4 on grounds of relevancy. The questions and answers in the identified portions of Mr. Henderson's testimony are not relevant to the application for variance.

Testimony: Q. Why do you state that MCC has continually failed to submit is quality of service report on a timely basis to the Commission?

A. We have received four (4) quarterly quality of service reports from MCC and all four reports were not filed in a timely manner. The 4th quarter 2005 report was due on February 15th 2006; however it was received on ** _____ ** The 1st quarter 2006 report was due May 15th 2006 but was received ** _____ ** The 2nd quarter 2006 report was due August 15th but was received on ** _____ ** The 3rd quarter 2006 report was due November 15th 2006 but was received ** _____ **

Q. What quality of service results do you believe are being misreported by MCC?

A. MCC appears to have mis-reported the following results contained in its quality of service reports: percentage of service orders installed within 5 days, percentage of installation commitments met, customer trouble report rate, the percentage of out-of-service trouble cleared within 24 hours, the percentage of repair commitments met, and the average speed of answering customer calls to MCC's business or repair office.

Q. Please briefly explain why you believe MCC is misreporting its customer trouble report rate, the percentage of out of service trouble cleared within 24 hours, and the percentage of repair commitments met.

A. All three performance measures are based on the total number of trouble reports received by a company. For example a company's trouble report rate should reflect any form of trouble. In contrast the percentage of out of service trouble cleared within 24 hours is based on a subset of the company's total trouble reports. The percentage of repair commitments met should reflect whether a company met its commitment to resolve any trouble. The total number of repair commitments made to customers should equal the total number of trouble reports.

The results contained in MCC's quality of service reports are confusing and produce impossible results. For example MCC's 2nd quarter 2006 quarterly quality report shows a total of ** __ ** trouble reports were made by MCC's customers. In this same report MCC claims the company cleared ** __ ** out of service trouble reports within 24 hours and provided repair commitments for ** ____ ** trouble reports. These results do not make sense and do not appear to reflect any relationship to each other. The total number of out of service trouble reports and the total number of repair commitments should not exceed a company's total number of trouble reports.

Q. Please explain why you believe MCC may be inaccurately tracking the average speed of answer for calls to MCC's business or repair office.

A. MCC reports that ** __ ** seconds is an estimate derived from call center data and a formula. According to 4 CSR 240-32.080(5)(D)3 a company is either required to monitor its performance continuously or, if that is not possible, manual monitor 25 incoming calls on a monthly basis. Simply "estimating" the time and using a formula is not how a company's performance should be tracked.

Q. What action, if any, should be taken by the Commission to address these other compliance issues?

A. I recommend the Commission direct MCC to submit a plan on how it intends to comply with these reporting requirements.

Staff Response: Commission Rule 4 CSR 240-32.010(2) authorizes, for good cause, an application for temporary or permanent exemption from the requirements of a rule in Chapter 32.

In an instructive, but not controlling opinion, the Missouri Court of Appeals examined the meaning of "good cause" in a case concerning employment law. *Pharmflex v. Division of*

Employment Security, 964 S.W. 2d 825 (Mo. App. W.D. 1997). The Court stated that “good cause” has a well-known meaning at common law. The Court cited to another opinion that had recognized Webster’s Third New International Dictionary’s definition of “good cause” as “a cause or reason sufficient in law: one that is based on equity or justice or that would motivate a reasonable man under all the circumstances.” The Court stated that although the term does not require definition, necessary factors have been articulated where the issue is whether an unemployment claimant has good cause to voluntarily terminate employment. The term in that circumstance requires: (1) reasonableness and (2) good faith. *Id.* at 830-31.

The Staff suggests that the question of whether MCC has demonstrated good cause for a waiver of the installation standard should likewise include factors of reasonableness and good faith. The Staff suggests that MCC’s repeated failures to comply with the Commission’s rules is relevant to this good faith factor in its application for a good cause waiver of the installation time standard.

WHEREFORE, the Staff requests the Commission to overrule MCC’s objections and to deny its motion to strike.

Respectfully submitted,

/s/ William K. Haas

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 22nd day of December 2006.

/s/ William K. Haas