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November 10, 2004

FILED<sup>2</sup>  
NOV 10 2004  
Missouri Public  
Service Commission

The Honorable Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102-0360

Re: The Staff of the Missouri Public Service Commission v.  
Lockheed Martin Global Telecommunications Services, Inc.  
Case No. TC-2004-0415

Dear Judge Roberts:

Enclosed for filing in the referenced matter please find the original and five copies of Respondent's Application for Rehearing.

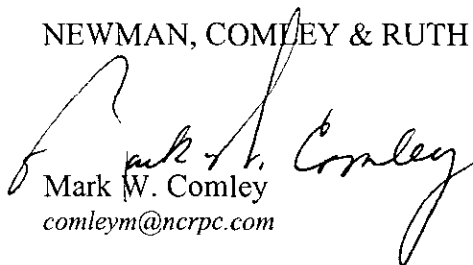
Would you please bring this filing to the attention of the appropriate Commission personnel.

Please contact me if you have any questions regarding this matter. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:

  
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MWC:ab

Enclosure

cc: Office of Public Counsel  
David Meyer  
Winafred Brantl

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

**FILED<sup>2</sup>**  
NOV 10 2004  
Missouri Public  
Service Commission

The Staff of the Missouri Public Service )  
Commission, )

Complainant, )

Case No. TC-2004-0415

v. )

Lockheed Martin Global )  
Telecommunications Services, Inc., )

Respondent. )

In the Matter of Lockheed Martin Global )  
Telecommunications Services, Inc.'s 2002 )  
Annual Report to the Commission as an )  
Interexchange Telecommunications )  
Carrier )

Case No. XE-2004-0488

**RESPONDENT'S APPLICATION FOR REHEARING**

COMES NOW Respondent Lockheed Martin Global Telecommunications Services, Inc. (hereinafter "Lockheed Martin") in the captioned cause, by and through its attorneys of record, and pursuant to Section 386.500, RSMo, and 4 CSR 240-2.160, moves and applies for rehearing of the Commission's Order Granting Motion for Summary Disposition and Order Authorizing General Counsel to Seek Penalties (hereinafter "the Order"). Lockheed Martin requests that the Commission reconsider its inflexible approach to instances of inadvertent failure to timely file annual reports and engage in lawful and appropriate exercise of its clear discretion under Section 392.210.1. By doing so, the Commission will: (a) better serve the public interest; (b) comply with the public policy behind and the content and intent of the Public Service Commission Law and the United States and Missouri Constitutions; and (c) better serve state fiscal and judicial

economy. The Commission can grant rehearing of this matter and authorize Staff to negotiate with Lockheed Martin to come to a more appropriate resolution of this issue to be presented to the Commission, or grant Lockheed Martin relief as requested in the WHEREFORE clause below. In support of its application for rehearing, Lockheed Martin states as follows:

1. On November 2, 2004 the Commission issued its Order Granting Motion for Summary Disposition and Order Authorizing General Counsel to Seek Penalties. The Order bears an effective date of November 12, 2004. This Application for Rehearing, therefore, is timely filed pursuant to Section 386.500 and 4 CSR 240-2.160.

2. The Order finds Lockheed Martin in violation of Section 392.210.1 and 4 CSR 240-3.540(1)<sup>1</sup> for failing to file its 2002 annual report by April 15, 2003, and directs the Commission's general counsel to seek statutory penalties in the circuit court.

3. Lockheed Martin had revenues of \$170.00 in Missouri in calendar year 2002. Having inadvertently failed to file its annual report, Lockheed Martin did file its 2002 annual report on March 24, 2004. At \$100 per day from April 15, 2003 to March 24 2004, Lockheed Martin could face fines up to \$34,400 in this matter.

4. The Order cites 4 CSR 240-2.117(2), which authorizes a determination on the pleadings under certain circumstances, "whenever such disposition is not otherwise contrary to law or contrary to the public interest." However, the Order is both "contrary to law" and "contrary to the public interest."

5. The Commission has discretion regarding the enforcement of Section 392.210.1, and its refusal to exercise sound and reasonable discretion in this case is itself an abuse of

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<sup>1</sup> This rule became effective April 30, 2003. Prior to that, the effective rule with the same or similar requirements was found at 4 CSR 240-10.080.

discretion. Section 392.210.2 RSMo provides in part for the Commission to prescribe a time with which a company may amend a “defective or erroneous” report or to “exempt any telecommunications company from the necessity of filing annual reports until the further order of the commission.” It further states, “If any telecommunications company shall fail to make and file its annual report as and when required *or within such extended time as the commission may allow, . . .*” Section 392.210.1 RSMo, emphasis added. No standard is fixed by the statute for the Commission’s discretionary exemption of a company from the requirement of filing annual reports nor its extension of time for the filing or correction of such reports. If the intent of the General Assembly had been to strictly prohibit the Commission from exercising discretion on such matters, it would not have provided the commission with the clear option of assessing the facts and circumstances of the situation and determining when and when not to make exemptions or grant extensions.

6. The language of Section 392.210.1 must also be read in conjunction with Section 386.600, which grants the Commission the authority to bring a forfeiture penalty action in the circuit court. That statute grants the authority by stating that the commission’s “action . . . *may* be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted by the general counsel to the Commission.” (emphasis added) The use of the discretionary word “may” grants the Commission discretion whether to bring such an action at all.

7. The word “shall” in a statute is not necessarily mandatory, but may be simply directory, depending on context and legislative intent. *Farmers & Merchants Bank & Trust Co. v. Director of Revenue*, 896 S.W.2d 30, 32 (Mo. banc 1995); *Kersting v. Director of Revenue*, 792 S.W.2d 651, 653 (Mo. App. E.D. 1990); *State v. Konz*, 756 S.W.2d 543, 546 (Mo. App.

W.D. 1988). The repeated grants of Commission discretion elsewhere in Section 392.210.1, coupled with the lack of mandatory direction to the Commission to bring cases seeking forfeitures suggests that the use of the word “shall” by the Legislature in Section 392.210.1 is simply directory, and discretion as to whether to pursue actions in circuit court is vested in the Commission.

8. The Supreme Court of the United States has held that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Heckler v. Cheney*, 470 U.S. 821, 831 (1985). In that case, the Court found that agency decision-making involves a balancing of factors peculiarly within the agency’s expertise, and listed five factors, only the first of which is “whether a violation has occurred.” *Id.* The Court also held that the agency had discretion not to prosecute violators, even though the statutory provision stated that violators “shall be imprisoned,” in part because no law or legislative history supported the position that all potential violations must be prosecuted. *Id.*, at 835-838.

9. It is also clear that the Commission is quite familiar with its discretion to grant extensions, as it has done so with great frequency in the past.

10. Further, Lockheed Martin respectfully submits that the Commission not only has ample discretion in the enforcement of Section 392.210.1, RSMo, but has an obligation as a matter of public policy to exercise such discretion in light of the State’s policy of promoting telecommunications competition as expressed in S.B. 507 (1996). The “purpose clause” (Section 392.185) and the “intent” language (Section 392.200.4(2)) included in S.B. 507, devices used very sparingly by the Missouri General Assembly, clearly express the policy of the State of Missouri to promote competition in the telecommunications industry. Extracting maximum

statutory fines and penalties from competitive telecommunications providers which dramatically exceed their Missouri revenues, for violation of a ministerial filing requirement, could drive some competitors out of the Missouri telecommunications market altogether and make others far less profitable. This would discourage competition, rather than promoting it, as contemplated by the General Assembly in S.B. 507 in 1996. Such a drastic penalty would be dramatically and disproportionately more harmful to the Respondent than the harm experienced by the Commission as a result of not receiving the annual report (showing \$170.00 in Missouri revenues) on time.

11. The Missouri General Assembly has also made it clear that the Commission is to construe the provisions of Chapter 392 (*which includes the annual report filing requirement*) to permit “flexible regulation of competitive telecommunications companies” such as Lockheed Martin. Section 392.185, RSMo.

12. The Commission has exercised flexibility concerning its enforcement powers in the very recent past. To approve a stipulation and agreement between a gas utility and the Commission Staff providing for no fines or penalties arising out of a gas explosion that destroyed a home and caused injury to four family members, including severe injuries to a child,<sup>2</sup> shows the Commission’s awareness of and willingness to appropriately exercise its discretion in enforcing legal requirements, but also vividly demonstrates the arbitrary, disproportional and discriminatory nature of going to circuit court, without a hearing, in this case to seek fines and penalties against Lockheed Martin. A telephone company’s inadvertent failure to file an informational report should not, as a matter of public policy, draw the Commission’s

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<sup>2</sup> *Staff of the Missouri PSC v. Laclede Gas Co.*, MoPSC Case No. GC-2004-0557, *Order Approving Stipulation and Agreement*, issued July 27, 2004; *Gas Incident Report*, MoPSC Case No. GS-2004-0264, issued December 11, 2003, at pages 1, 2, 21, and 22.

discretionary prosecution of a penalty case when an explosion that seriously injures a child does not.

13. **A \$34,400 fine for the inadvertent and unintentional failure to file an informational report is so disproportional as to shock the conscience.**

14. As a matter of law, the Commission must hold a proper hearing on the facts of any alleged violation of its statutes, rules and regulations before proceeding into circuit court to commence a penalty action. *State of Missouri v. E.H. Carroll*, 620 S.W.2d 22 (Mo.App. S.D. 1981); *State ex rel. Cirese v. Ridge*, 345 Mo. 1096, 138 S.W.2d 1012 (Mo. Banc 1940); *State ex rel. Sure-way Transportation v. Div. of Transp., Dept. of Economic Development, State of Mo.*, 836 S.W.2d 23 (Mo.App. W.D. 1992).

15. As a further matter of law, the Commission's sudden, unprecedented, and inflexible maximum enforcement policy on late 2002 annual reports, reversing years and even decades of past Commission practice, is virtually the definition of "arbitrary and capricious" conduct by an administrative agency, and is also discriminatory, unjust, unlawful and unreasonable, violative of Article I, Section 21 of the Missouri Constitution and the 8th Amendment to the United States Constitution (prohibiting excessive fines)<sup>3</sup> and deprives Lockheed Martin of its rights of due process and equal protection as guaranteed by the Constitutions of the United States<sup>4</sup> and of the State of Missouri,<sup>5</sup> and as provided for in the Commission's own procedural rules and years of past practice.<sup>6</sup>

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<sup>3</sup> "Fines" are defined in Black's Law Dictionary as "a pecuniary criminal punishment or **civil penalty payable to the public treasury.**" (*Emphasis added.*) An "excessive fine" is further defined as "a fine that is unreasonably high and disproportionate to the offense committed."

<sup>4</sup> Amendments 5 and 14.

<sup>5</sup> Article I, Section 2; Article I, Section 10.

<sup>6</sup> 4 CSR 240-2; PSC Reports, since the memory of man runneth not to the contrary.

16. The Order is likewise not based upon competent and substantial evidence on the record as a whole and fails to provide a reviewing court with findings of fact and conclusions of law sufficient to determine the Commission's rationale and thought process leading to its decision. Section 536.140, RSMo.; *Noranda Aluminum, Inc. v. Public Service Commission*, 24 S.W.3d 243 (Mo.App. W.D. 2000); *State ex rel. A.P. Green Refractories, et al. v. PSC*, 725 S.W.2d 835 (Mo.App. W.D. 1988).

17. The Commission has also exercised discretion recently in an annual report complaint case (MoPSC Case No. SC-2004-0341) by providing S. T. Ventures, LLC, a regulated sewer company, an opportunity to show that it tried unsuccessfully to change its official address with the Commission, as a mitigating factor for not filing its 2002 annual report on time. For some companies to be afforded an opportunity to present mitigating evidence while others are dispatched without hearing to circuit court is arbitrary and capricious, unjust and unreasonable, unduly discriminatory, unreasonable and unlawful.

18. The fact that the Commission has indisputable discretion concerning enforcement as to every other type of regulated utility and every other sort of jurisdictional violation should itself inform the Commission that it is not required to set telecommunications companies apart for rigid enforcement of fines and penalties for late annual reports. The PSC Law must be read *in pari materia*.

19. As demonstrated above, the Commission has not previously pursued cases involving failure to file annual reports in the rigid manner evident in this case. When the Missouri Tax Commission began to assess rural electric cooperatives, with no change in governing law, after *not* doing so for 23 years, the Missouri Supreme Court rejected the Tax Commission's new interpretation of statute, stating, in part: "The statute under which the



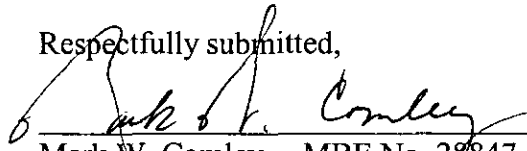
respondents propose to act is not so clear and free from doubt as to preclude the giving of weight to the long period of construction which it has received at the hands of the tax commission and the General Assembly.” *State ex rel. Howard Elec. Coop. v. Riney*, 490 S.W.2d 1, 12-13 (Mo. 1973) [citations omitted]. In other words, the long-standing practice of the agency, “coupled with the legislative acceptance of such construction,” (*id.*) is entitled to significant weight in interpreting an enforcement statute such as Section 392.210.1.

20. In keeping with the actual language of Section 392.210.1 and the consistent, historic application of that statute prior to the instant complaint (and numerous others filed contemporaneously therewith), the Commission could exercise its discretion in this matter in a manner that creates a sort of “amnesty” for companies like Respondent that inadvertently late-filed their 2002 PSC Annual Reports. This could be accomplished by granting an extension of the due dates for those reports to a reasonable date after the Respondent’s receipt of the Notice of Complaint. In many cases, that extension may run to the date on which the annual report was actually received by the Commission. The Commission could also determine that entities like Lockheed Martin and similarly-situated entities who had little or no revenues in the State in 2002, were exempt from filing 2002 Annual Reports. Lockheed Martin hopes that the Commission will realize that it has several discretionary options available in interpreting and enforcing Section 392.210.

**WHEREFORE**, Respondent Lockheed Martin Global Telecommunications Services, Inc. respectfully requests that the Missouri Public Service Commission: (1) grant this Application for Rehearing; (2) vacate its November 2, 2004 *Order Granting Motion for Summary Disposition and Order Authorizing General Counsel to Seek Penalties*; and (3) dismiss the Complaint upon taking one of the following actions: (a) issuing an Order on Rehearing that

grants Lockheed Martin an extension of time to March 24, 2004, for filing its annual report for the 2002 reporting year; or (b) issuing an Order on Rehearing that exempts Lockheed Martin from the requirement of filing an annual report for the 2002 reporting year; or (c) grant rehearing of this matter and set a prehearing conference with directions to Staff to seek to reach a reasonable resolution of this matter or to propose a procedural schedule for the matter to be heard.

Respectfully submitted,

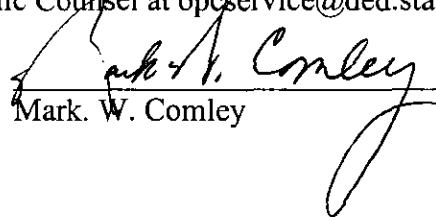


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ATTORNEYS FOR Lockheed Martin Global  
Telecommunications Systems, Inc.

**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 10th day of November, 2004, to General Counsel's Office at [gencounsel@psc.state.mo.us](mailto:gencounsel@psc.state.mo.us); Office of Public Counsel at [opcservice@ded.state.mo.us](mailto:opcservice@ded.state.mo.us).



Mark. W. Comley