

**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	)	

**Initial Brief of the MITG**

The MITG Companies<sup>1</sup> submit the following Initial Brief Supplemental to their following Statement of Position:

**Supplemental Issue: Does MCC comply with 4 CSR 240-32.080(5)(A) if it makes all installations by the installation date MCC and the customer agree to?**

MITG Brief:

At hearing the regulatory law judge identified the issue of whether MCC's current actions come within an exception of Rule 32.080. T. 108-109. The MITG interprets this issue to be whether MCC's action of entering into a customer-agreed specific installation dates fits within an exception of the Rule, thus negating the need for consideration of a variance from that Rule.

The hearing record inadequately developed this issue. There is insufficient evidence as to whether specific customer service installation dates are agreed to in all instances, or as to the reasons MCC utilizes agreed customer service installation dates. There is some evidence regarding these matters found in Exhibit 1, Craib Direct, pages 4-6, Exhibit 2, Craib Surrebuttal, pages 2, 5, and 6, and Exhibit 3 Trefry Direct, pages 2-4.

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<sup>1</sup> Alma Communications Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company/Otelco, MoKan Dial Inc., and Northeast Missouri Rural Telephone Company.

The MITG will address this issue in light of the record developed. The MITG believes that MCC VOIP telecommunications service initial installations require a customer service technician visit to the interior of the customer premises. The MITG assumes that a CATV VOIP affiliate such as MCC requires a customer service technician visit to the customer's premises in order to assure that the customer premise inside wiring is adequate, that the customer handset is compatible with the service, to connect a modem or a "multi media terminal" to the inside wiring with which to convert voice to internet protocol (IP) data or communications, to connect that terminal to the cable television cable entering the premises, to install and test backup power facilities, to conduct test calls, and to provide initial customer training as to use of the service. See T. 44, 49, 130, 141-142.

The evidence indicated that MCC meets 97.5% of its scheduled installation appointments. Exhibit 2, Craib Surrebuttal, page 6, line 15. The evidence indicated that most if not all of these scheduled installation dates were beyond 5 days of the date the customer ordered service. T. 86-87, Craib; T. 132, Trefry.

4 CSR 240-32.080(5) (A) (1) (A) requires 90% of orders for basic local service to be installed "within 5 working days after the customer ordered service." It generally appears, from the evidence cited above, that the earliest installation date MCC can meet, for customers not porting their existing numbers to MCC, is 5 days. It generally appears that, in almost all actual instances, MCC does not install service within 5 days of the date of order. T. 86, 87, 132.

The Rule contains the following exceptions:

- (a) customer-caused delays;
- (b) delays caused by a declared natural disaster;

(c) delay by specific exemption requested and approved.

None of these exceptions are applicable here. However, there is another rule whose provisions should be considered.

4 CSR 240-32.070 (4) provides:

“Each customer requesting the installation or repair of basic local telecommunications service will be provided with a commitment as to the date service will be installed or repaired. The customer may request an appointment more specific in time than the one offered by the company. If requested by the customer, the company will indicate a morning or afternoon appointment, and will make reasonable efforts to accommodate the customer’s appointment requests.”

This is a different rule, and not an exception to the rule in question.

Neither 32.070 nor 32.080 addresses what effect, if any, a specifically agreed installation date has on the obligation to install more than 90% of installations within five working days from the service order date. MCC may argue that, by obtaining an “agreed” installation date with each and every customer, even if all are outside the 5 day period, MCC has no obligation for any installation to be made within 5 days.

Such an interpretation would render the 5 day obligation of 32.080 meaningless. Rule 32.070 requires that every customer be provided with an installation commitment date. If specifically agreed installation dates are excluded from Rule 32.080, then this provision of 32.080 becomes meaningless. Ordinary rules of construction mitigate against any interpretation that renders a rule meaningless. Therefore, the MITG concludes that MCC is obligated to abide by the 5 day installation requirement of 32.080.

**Issue: Is there good cause for the Commission to grant MCC's request for a waiver of 4 CSR 240-32.080(5) (A)?**

**MITG Brief:**

MCC does not have good cause for waiver. Nevertheless, the MITG does not oppose MCC being provided with a temporary waiver until the Commission conducts and completes a generic proceeding or rulemaking to assure that its rules are evaluated and modified, if necessary, to assure that the rules have no adverse competitive impacts on service providers utilizing different technologies.

When it requested certification, MCC told the Commission it would comply with this rule. In its November 3, 2004 Application for Authority, LA-2005-0150, Exhibit 7, at pages 1, 6, 8, and its verification signed by Mr. Craib, MCC stated it would comply with all Commission rules not expressly waived.

The May 5, 2005 Order granting MCC Authority, Exhibit 8, at page 6 relied upon these promises of MCC in granting the authority requested. At Ordered paragraph 3 of this Order, page 15, MCC's certificate of authority was subject to the Commission rules except those waived.

MCC entered into its agreement with Sprint before applying for service authority from this Commission, and of course also before the Commission Order granting MCC authority. See Exhibit 1 HC. This Agreement is long, definitive, and has a great amount of detail as to the combination of efforts by MCC and Sprint as to service provisioning. Without quoting the specifics of this HC Exhibit, it does contain provisions indicating the parties were aware of, and intended to comply with, all federal, state, and local regulatory requirements. See Exhibit 1 H-C, pages 9 and 19.

MCC was obligated to know the rules of the Commission when it promised to follow them. The rule in question is binding upon MCC. MCC's application for a waiver recognizes this. The MITG believes that MCC should have been aware of its inability to meet the 5 day rule at the time of entering the Sprint Agreement, and at the time it was granted a certificate subject to compliance with this rule. The MITG does not believe that "good cause" for a waiver exists.

**Issue: Should the Commission conduct a rulemaking to revise the Commission's quality of service rules?**

**MITG Brief:**

Yes. Such an effort is required to assure that regulations do not have disparate impacts on competitors. A rulemaking is preferable to considering waiver requests any time a carrier desires waiver of a specific rule.

Most of the Commission rules currently in effect were created prior to the advent of local competition. As demonstrate by the facts of this case, their applicability to different carriers utilizing different service facilities and technologies has not been considered. CLECs and CMRS providers now compete with ILECs. It costs ILECs money to comply with the Commission rules. (T. 216). When waivers of these requirements are provided competitors, ILECs may suffer competitive disadvantage.

CLECs can resell ILEC services without providing their own facilities. CLECs can provide service via their own traditional telephone facilities, or they can combine resell of ILEC facilities with their own facilities. As this case indicates, CLECs can also operate utilizing "non-traditional" facilities. Telephone service originated on a traditional phone, converted to IP by a modem or multimedia adaptor, then transmitted along CATV

affiliate coaxial cable, is one example of use of “non-traditional” facilities. CMRS providers use a completely different method of transmitting communications.

Regardless of the technology utilized, ILECs, CLECs, and CMRS providers compete with one another. Yet there has been no sustained effort to have the Commission review its rules to determine which should be applicable to these competing providers, or which should be modified.

The Commission’s standard set of waivers for CLECs include waivers of the following statutes and rules:

<b><u>Rule/Statute</u></b>	<b><u>Matter Waived</u></b>
392.210.2	Uniform System of Accounts
392.240.1	Just and Reasonable Rates
392.270	Ascertain Property Values
392.280	Depreciation Accounts
392.290	Issuance of Securities
392.300.2	Acquisition of Stock
392.310	Issuance of Stock and Debt
392.320	Stock Dividend Payment
392.330	Issuance of Securities, Debts, and Notes
393.340	Reorganizations
4 CSR 240-10.10.020	Depreciation Fund Income
4 CSR 240-30.040	Uniform System of Accounts
4 CSR 240-30.550(5)(C)	File exchange boundary maps with Commission

Application of these statutes and rules are not customarily waived for ILECs, unless done in accordance with § 392.361 RSMo.

There are other Commission rules that impose disparate burdens on competitors. The MITG believes it to be fairly apparent how these rules can have disparate impacts on

competitors, and will not set this forth in detail at this point. The following are rules that the MITG believes the Commission should visit and consider in permitting flexible regulation of competitors on a competitively neutral basis:

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|------------------|---|
| 4 CSR 240-3.520  | Filing Requirements for Telecommunications Company Applications for Authority to Sell, Assign, Lease or Transfer Assets                         |
| 4 CSR 240-3.525  | Filing Requirements for Telecommunications Company Applications for Authority to Merge or Consolidate   |
| 4 CSR 240-3.530  | Filing Requirements for Telecommunications Company Applications for Authority to Issue Stock, Bonds, Notes, and Other Evidences of Indebtedness |
| 4 CSR 240-3.535  | Filing Requirements for Telecommunications Company Applications for Authority to Acquire the Stock of a Public Utility                          |
| 4 CSR 240-3.570  | Requirements for Carrier Designation as Eligible Telecommunications Carriers  |
| 4 CSR 240-32.040 | Metering, Inspections and Tests   |
| 4 CSR 240-32.050 | Customer Service  |
| 4 CSR 240-32.060 | Engineering and Maintenance   |
| 4 CSR 240-32.070 | Quality of Service  |
| 4 CSR 240-32.080 | Service Objectives and Surveillance Levels  |
| 4 CSR 240-32.090 | Connection of Equipment and Inside Wiring to the Telecommunications Network   |
| 4 CSR 240-32.100 | Provision of Basic Local and Interexchange Telecommunications Service   |
| 4 CSR 240-32.120 | Snap-Back Requirements for Basic Local Telecommunications Companies   |
| 4 CSR 240-32.200 | General Provisions for the Assignment, Provision and Termination of 211 Service   |
| 4 CSR 240-33.040 | Billing and Payment Standards for Residential Customers   |

4 CSR 240-33.045	Requiring Clear Identification and Placement of Separately Identified Charges on Customer Bills
4 CSR 240-33.050	Deposits and Guarantees of Payment for Residential Customers
4 CSR 240-33.060	Residential Customer Inquiries
4 CSR 240-33.070	Discontinuance of Service to Residential Customers
4 CSR 240-33.080	Disputes by Residential Customers
4 CSR 240-33.090	Settlement Agreements with Residential Customers
4 CSR 240-33.120	payment Discounts for Schools and Libraries that Receive Federal Universal Service Fund Support
4 CSR 240-33.130	Operator Service
4 CSR 240-33.140	Pay Telephone
4 CSR 240-33.150	Verification of Order for Changing Telecommunications Service Provider
4 CSR 240-33.160	Customer Proprietary Network Information
4 CSR 240-34.030	Requirements for E-911 Service Providers
4 CSR 240-34.050	Subscriber Record Information and Service Order Standards for Facilities Based Companies
4 CSR 240-33.060	Telecommunications Facilities Standards
4 CSR 240-33.070	Repair of Telecommunications Facilities
4 CSR 240-33.080	Selective Routing Standards
4 CSR 240-33.090	Database Accuracy Standards

The MITG respectfully suggests that a generic docket or rulemaking proceeding would be preferable to address these issues than individual dockets. The Commission should ask the industry for comment as to which rules need to be reviewed, and receive



comments prior to initiating any rulemaking. For each rule, the MITG suggests that the Commission should consider the following basic questions:

- A. Should the rule be discontinued as it is no longer necessary or desirable in view of local competition?
- B. If retained, should the rule be modified to assure its application does not disparately impact competitors utilizing different technologies or types of facilities to provision local service?

WHEREFORE, the MITG respectfully requests that MCC's request for variance be denied, or alternatively that a temporary variance be provided, and that the Commission institute a docket or rulemaking in which to consider the retention, discontinuation, or modification of the above listed rules consistent with the public interest in compliance with regulations resulting in no adverse competitive inequalities between competitors, together with such other and different relief as is consistent with the relief requested herein.

/s/ Craig S. Johnson  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this pleading was electronically mailed to the following attorneys of record in this proceeding this 23rd day of March, 2007, to all counsel of record in this proceeding.

/s/ Craig S. Johnson  
Craig S. Johnson