

FILED³

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

JUN 14 2004

**Missouri Public
Service Commission**

The Staff of the Missouri Public Service
Commission,

Complainant,

v.

Heartland Health System, Inc.

Respondent.

Case No. TC-2004-0390

REPLY BRIEF OF RESPONDENT
HEARTLAND HEALTH SYSTEM, INC.

COMES NOW Heartland Health System, Inc. ("Heartland"), by and through its attorneys of record, and for its Reply Brief in this matter states and alleges as follows:

STATEMENT OF FACTS

Heartland is a telecommunications company and public utility as defined in RSMo § 386.020 (2000) and is subject to the jurisdiction of the Missouri Public Service Commission pursuant to § 386.250. Heartland was granted a certificate of service authority to provide shared tenant services in Case No. TA-94-188 on March 15, 1994.

In April of 2003, Heartland timely submitted its 2002 Annual Report to the Commission by mail. Exhibit 2, Rebuttal Testimony of Helen V. Thompson, p. 1:18-19. As such, Heartland timely complied with Commission Rule 4 CSR 240-3.540(1) that requires all telecommunications companies to file an annual report on or before April 15 of each year.

Heartland did not receive notification that its 2002 Annual Report was not received by the Commission until almost a year later. Although the Commission's policy and practice has changed such that the Staff now sends a reminder letter if it does not receive an annual report by April 15. Heartland received no such notice. In February 2004, Heartland received its first

notification that its 2002 Annual Report was not received by the Commission when it received the Notice of Complaint filed in this action. Exhibit 2, Rebuttal Testimony of Helen V. Thompson, p. 1:20-24. Upon receipt of the Notice of Complaint in this action, Heartland immediately responded by re-filing its 2002 Annual Report on March 4, 2004. Exhibit 2, Rebuttal Testimony of Helen V. Thompson, p. 2:4-9, and Exhibit 3 Shared Tenant Services Carrier Annual Report attached to the Transcript of Hearing May 12, 2004.

ARGUMENT

Heartland's position is simple. Heartland timely filed its 2002 Annual Report on or before April 15, 2003 as required by Commission Rule 4 CSR 240-3.540(1). Heartland is unaware why the Commission has no record of receiving its 2002 Annual Report in April of 2003. It may have been lost in the mail or by the Staff after receipt.

The sole issues for consideration by the Commission are whether or not Heartland timely filed its 2002 Annual Report and whether or not there should be pursuit of a penalty action in circuit court. Missouri courts have imposed a duty upon the Commission to first determine matters within its jurisdiction before proceeding to the courts. As a result, "[t]he courts have ruled that the Division cannot act only on the information of its staff to authorize the filing of a penalty action in circuit court; it can authorize a penalty action after a contested hearing." *State ex rel. Sure-Way Transp., Inc. v. Division of Transp., Dept. of Economic Development, State of Mo.*, 836 S.W.2d 23, 27 (Mo. App. W.D. 1992) (relying on *State v. Carroll*, 620 S.W.2d 22 (Mo. App. 1981)); see also *State ex rel. Cirese v. Ridge*, 138 S.W.2d 1012 (Mo. banc 1940). If the Commission determines after a contested hearing that the company failed, omitted or neglected to file its annual report and/or pay its annual assessment, the Commission may then authorize its General Counsel to bring a penalty action in the circuit court as provided in Section 386.600.

Proof of Mailing

Courts in Missouri have held that “[p]roof of mailing under Missouri law requires proof that the letter was put in an envelope with sufficient postage with the correct address of the addressed recipient and was placed in the mail.” *Nichols v. Momma Stuffleati’s*, 965 S.W.2d 171, 175 (Mo. App. W.D. 1997). “Direct proof, however, may be impractical for offices which handle a large amount of mail.” *Lake St. Louis Community Association v. Ringwald*, 652 S.W.2d 158, 160-161 (Mo. App. E.D. 1983). “In view of the volume of mail involved and in the absence of evidence that defendant did not receive her notice, evidence of ‘settled custom and usage of [the senders] office, regularly and systematically followed in the transaction of its business’ was enough,” *Id.* at 160-161.

Heartland is a large hospital that serves the entire Northwest Missouri area. Heartland has thousands of employees and produces thousands of pages of mail a day. There is no evidence contained in the record that Heartland did not follow its regularly settled custom, usage and practice regarding the mailing of the Annual Report. Furthermore, according to the Staff’s own records, it appears Heartland has timely filed its previous reports and has timely paid all of its annual assessments. See Hearing Transcript, p. 56:18-57:20. Heartland has met its burden of proof that it timely mailed its 2002 Annual Report.

Hearsay Issue

Complainant correctly states the definition of hearsay and how Missouri courts have interpreted hearsay rulings in its brief. Complainant also correctly points out that Commission Rule 4 CSR 240-2.130(1) provides that the Commission’s Rules of Evidence supplement RSMo § 536.070 (2000), which provides in paragraph 8 that “any evidence received *without objection* which has probative value *shall be considered by the agency* along with the other evidence in the

case.” (Emphasis added.) Furthermore, the Missouri Court of Appeals for the Western District has held that whether hearsay evidence constitutes competent and substantial evidence to support administrative decisions must be controlled by the most recent decision of the Missouri Supreme Court and that the Missouri Supreme Court has held that hearsay evidence that has *not been objected to should be considered*. *Doorman v. State Board of Registration for the Healing Arts*, 62 S.W.3d 446, 454 (Mo. App. W.D. 2001); citing *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186, 195 (Mo. banc 1996) (emphasis added). “In fact, all probative evidence received without objection in a contested case *must be considered in administrative hearings*.” *Id.* (emphasis added).

Nowhere in the record is there an objection by the Staff’s Counsel to any questions posed by Heartland’s counsel. Since the alleged hearsay evidence was admitted without objection, it must be considered in this administrative hearing. Thus, the lack of a proper and timely objection by the Staff’s Counsel means that any of the alleged hearsay evidence constitutes competent and substantial evidence and should be considered. As such, pursuant to the Commission Rules and Missouri Supreme Court precedent, the Commission should consider all of the evidence presented at the hearing, regardless of whether it was hearsay or not, as competent and substantial evidence.

Notice

As mentioned above, Heartland never received any notice from the Staff that its annual report was not received. Had such notice been given this problem would have easily been cured. The Staff has realized the importance of such notice and recognized “how important it is that companies be given every opportunity to meet the requirements and we felt that it would be prudent on our part to try to notify them and give them the opportunity to get the report in.”

Transcript of Hearing, p. 29:19-23. Recently the Commission instructed the Staff to begin enforcing the penalty provisions for delinquent filings of annual reports. See Transcript of Hearing, p. 30:4-13. In doing so, the Staff changed its policy and procedure regarding delinquent filings. Beginning this year, if the Staff has not received an annual report on or before April 15, the Staff sends out a letter a couple of weeks after the April 15 deadline notifying companies that its annual report has not been received and giving the companies an opportunity to comply with the Commission's filing requirements. See Transcript of Hearing, p. 20:9-19; p. 24:6-14; and p. 28:16-29:1. By the Staff's own admission, they have had a good response with the reminder letters. Transcript of Hearing, p. 28:16-29:1.

If this policy and procedure had been in place back in 2003, at the time Heartland's 2002 Annual Report was due, a contested hearing would have been unnecessary and Heartland would not be facing any penalties. If Heartland would have received a letter in late April of 2003 that its 2002 Annual Report had not been received, Heartland would have immediately re-filed its annual report. Exhibit 2, Rebuttal Testimony of Helen Thompson, p. 2:1-9, and Transcript of Hearing, p. 54:1-6. This is evidenced by the fact that the Notice of Complaint in this action was filed on February 13, 2004 and that Heartland re-filed its 2002 Annual Report less than three weeks later, on March 4, 2004.

When the Commission's order to begin enforcing the policy on delinquent filings was made the Staff did not have the proper policy and procedure in place for such enforcement. In fact, the Staff had no policy or procedure in place whatsoever in 2003 to notify companies their annual reports were not received before the statutory penalties began to accrue. The Staff now has a policy and procedure in place to notify companies that their filings were not received on or before the April 15 deadline, which gives the company an opportunity to remedy any clerical

mistakes or lost mailings. The new policy promotes fairness in that there could be any number of reasons why the annual report was not received.

In fact, other companies have had problems similar to Heartland's. Other companies have complained they submitted their annual report by mail but that the Staff had no record of receiving it. Transcript of Hearing, p. 20:9-23. The vast majority of filings with the Commission (over 90 percent) are paper copies that are mailed in. See Transcript of Hearing, p. 27:5-11. With the large amount of filings and paperwork the Commission receives, especially around the April 15 filing deadline, it is certainly not inconceivable that some filings may get lost or misplaced. The new policy of sending out a notification letter allows companies, who through no fault of their own or due to a clerical mistake, to remedy the problem before a large penalty accrues. It also avoids costly and unnecessary hearings in cases where the problem can be and is promptly cured. Heartland was never afforded this opportunity.

The penalty at issue in this case is substantial.¹ Heartland's penalty is calculated by the Staff to be \$32,300.00. Exhibit 1, Direct Testimony of Janis E. Fischer, p. 2:14-15. To allow the enforcement of such a large penalty due to a clerical mistake or lost mailing would be improper and unjust. The Staff realizes the importance of giving companies every opportunity to meet the requirements before enforcing a large penalty action. Transcript of Hearing, p. 29:19-23. Heartland was not afforded every opportunity to meet the requirements and more importantly received no notice in time to remedy the lost report and avoid any penalties.

According to the Staff's own testimony, Heartland has timely complied with previous filings and assessments. See Transcript of Hearing, p. 27:24-28:15, and p. 35:8, and p. 57:7-14. A finding that Heartland did timely submit its 2002 Annual Report by mail is consistent with

¹ Respondent realizes the determination of a penalty is not at issue before the Commission. However, the penalty and its size is directly relevant. The sole issues before the Commission are whether or not Heartland timely filed its 2002 Annual Report and whether or not there should be a pursuit of a penalty action in circuit court.

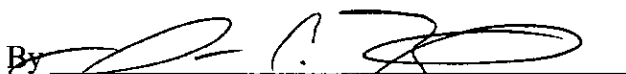
Heartland's prior history and practice of timely filing its annual reports and timely payment of all assessments. However, even if the Commission believes Heartland did not timely file its 2002 Annual Report by mail, it is clear through Heartland's prior conduct and history that this was simply a clerical oversight or lost mailing and that the delinquent filing was neither intentional nor with reckless disregard. Thus, to enforce such a large penalty under the circumstances, and in light of the Commission's and the Staff's changes regarding policy and procedure, would not be just and proper.

CONCLUSION

WHEREFORE, Heartland Health prays that the Commission find that Heartland Health System, Inc. timely filed its 2002 Annual Report with the Commission as required by Missouri statute and Commission orders, and/or, in the alternative, that the Commission not authorize its general counsel to bring a penalty action against Heartland Health in the Circuit Court as provided in § 386.600.

Respectfully submitted,

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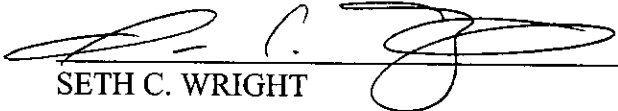
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ATTORNEYS FOR RESPONDENT
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused an original and eight copies of Reply Brief to be sent via Federal Express this 10th day of June, 2004, to: Public Service Commission of the State of Missouri, 200 Madison, Jefferson City, MO 65101; and a true and correct copy of the same to be served by Federal Express this 10th day of June, 2004, to: Bruce H. Bates, Attorney for the Staff of the Missouri Public Service Commission, 200 Madison Street, P.O. Box 360, Jefferson City, MO 65102, Attorney for Complainant.



SETH C. WRIGHT