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File No. 3356500-14

May 20, 2004

Via Federal Express

Dale Hardy Rooberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
200 Madison Street
Jefferson City, MO 65101

FILED

MAY 21 2004

**Missouri Public
Service Commission**

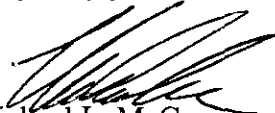
Re: Case No. TC-2004-0397

Dear Mr. Roberts:

Enclosed please find an original and eight (8) copies of News-Press & Gazette Company's Reply in Support of Respondent's Motion to Set Aside Default, Application for Rehearing and For Leave to File Answer. Please file stamp the enclosed extra receipt copy and return to me in the enclosed envelope for my records.

If you have any questions concerning this matter, then please do not hesitate to contact me. Thank you very much for your attention to this matter.

Very truly yours,



Michael L. McCann

MLM/drh
Enclosures

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

MAY 21 2004

The Staff of the Missouri Public Service
Commission,)

Complainant,)

v.)

News-Press & Gazette Company d/b/a St.
Joseph Cablevision,)

Respondent.)

Case No. TC-2004-0397

Missouri Public
Service Commission

**REPLY IN SUPPORT OF
RESPONDENT'S MOTION TO SET ASIDE DEFAULT, APPLICATION FOR
REHEARING, AND FOR LEAVE TO FILE ANSWER**

COMES NOW Respondent News-Press & Gazette Company d/b/a St. Joseph Cablevision ("NPG"), and for its Reply to the Staff's Response to NPG's Motion to Set Aside Order Granting Default and/or Application of Rehearing and for Motion to Leave to File Answer, states as follows:

**I. THE STAFF CONCEDES IMPROPER SERVICE OF BOTH THE COMPLAINT AND
THE ORDER GRANTING DEFAULT.**

In its Response, the Staff does not dispute that it never attempted to serve NPG with a copy of the Order Granting Default and fails to even attempt to demonstrate proper service of the Complaint. These admissions require entry of NPG's Motion to Set Aside and for Leave to File Its Answer.

In its Motion, NPG verified that neither its registered agent nor its attorney of record were ever served with a copy of the Order Granting Default. See NPG's Motion at ¶¶ 19-23. A response to this deficiency is notably absent from the Staff's Response. Accordingly, as the Order was never properly served, the seven days parties are afforded to set aside a default judgment has not begun to lapse, and the instant motion is timely.

Independently, with respect to the legally deficient manner in which service of the Complaint was attempted, the Staff merely suggests improper service of the Complaint by the Commission should be deemed practically sufficient because the incorrect individual in the incorrect organization “could” have promptly and timely delivered the Notice of Complaint to the correct person at the correct company. *See Staff’s Opposition* at p. 2. This single response to the service defect is flawed for numerous reasons.

First, the Staff does not now dispute the failure to observe statutory formalities governing service of the Complaint. The Staff, acknowledging that service was made upon both the wrong entity and the wrong individual within the entity, merely suggests that this individual should have forwarded the Complaint to the appropriate person at the appropriate company.

Second, the suggestion that the admittedly defective service of process is excused because actual notice should or could have been affected directly conflicts with Missouri law requiring **strict compliance** with the precise statutory requirements regulating service of process. As Missouri Courts have consistently held, even actual notice by a defendant is insufficient to confer proper jurisdiction in the absence of compliance with statutory formalities. *Howell v. Autobody Color, Inc.*, 710 S.W.2d 902 (Mo. App. 1986); *State ex rel. MFA Mutual Ins. Co. v. Rooney*, 406 S.W.2d 1 (Mo. en banc 1966). Here, the Staff does not even allege actual notice, but rather queries whether the Staff’s improper service could or should have afforded actual notice. Of course, the argument misses the point that the admitted failure to strictly comply with specific statutory framework for service precludes any finding of proper service, regardless of whether actual notice should have or did occur.

“Requirements for process and manner of service are wholly as constituted by statute, and where not met, a court is without power to adjudicate.” *Ponder v. Aamco Transmission, Inc.*, 519 S.W.2d 303 (Mo App. 1976). Because the formalities of service were not followed, the default

judgment “remains void forever”, and “any kind of proceeding to cancel is proper.” *Grooms v. Grange Mutual Casualty*, 32 S.W.3d 618, 620 (Mo. App. E.D. 2000); *Shapiro v. Brown*, 979 S.W.2d 526, 529 (Mo. App. E.D. 1998); *Worley v. Worley*, 19 S.W.3d 127, 128 (Mo. banc. 2000). *Grooms, Id.*; *Jones v. Fliteline Motors, Inc.*, 809 S.W.2d 179, 181 (Mo. App. W.D. 1991)(“Valid service of process is a prerequisite to in personam jurisdiction.”) As proper service of process in the manner and form prescribed by law is a prerequisite to the court’s jurisdiction, the default judgment is void and must be set aside. *In Interest of K.K.M.*, 647 S.W.2d 886 (Mo. App. E.D. 1983).

II. THE STAFF’S ATTEMPT TO ARGUE THE MERITS OF NPG’S ANSWER DEMONSTRATES NPG’S ENTITLEMENT TO THE INSTANT RELIEF.

The only argument advanced by the Staff, other than the assertion that the improperly served Complaint should have been forwarded to the person upon whom service is required under controlling statute, is the Staff’s assertion that Respondent’s “proposed Answer admits that the 2002 annual report was not filed in a timely manner.” Staff’s Response at 2. This attempt to reach the merits of the Complaint while ignoring NPG’s denials and various affirmative defenses underscores precisely the need for the Commission to consider the case on the merits. The Staff’s attempt to interject, out of context, and rely upon a purported admission from NPG’s proposed Answer illustrates the need to examine the underlying merits of the claims in this case. Moreover, it is entirely inappropriate to rely upon NPG’s Answer in arguing the underlying merits of the Staff’s claims, while arguing that NPG should not be allowed leave to even file the Answer. Likewise, the Staff should not be allowed to suggest the lack of meritorious defenses by raising a **single** alleged admission, while ignoring dozens of other denials and defenses contained in NPG’s Answer.

III. EVEN IF SERVICE OF THE COMPLAINT IS DEEMED PROPER, RESPONDENT'S MOTION TO SET ASIDE DEFAULT IS WELL-TAKEN

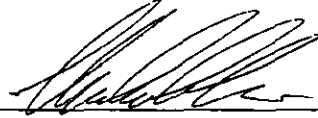
Because "appellate courts look with favor on trial on merits and with disfavor when default judgments are not set aside," a judicial body should liberally set aside default judgments under appropriate circumstances. *Traders Bank of Kansas City v. Cherokee Inv.*, 642 S.W.2d 122, 125 (Mo. App. 1982). "Good cause for setting aside default includes mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." *Greater Southern Sav. & Loan Ass'n v. Wilburn*, 877 S.W.2d 581 (Mo. 1994). Here, even if the facts were viewed in a light most unfavorable to NPG, there is no suggestion that NPG intentionally or recklessly impeded the judicial process. Moreover, the Staff does not now dispute the existence of meritorious defenses, as outlined in NPG's Motion and proposed Answer. Finally, the Staff does not assert any injury or prejudice it would suffer if the default judgment was set aside. *Kitchens v. Missouri Pacific R. Co.*, 737 S.W.2d 219 (Mo. App. 1987).

CONCLUSION

As the Staff does not dispute the failure to appropriately serve the Order and raises only a legally irrelevant argument when attempting to demonstrate *de facto* service of the Complaint, NPG requests that its Motion be granted and that the order entering default be set aside and that the Answer attached to the Motion, now relied upon by the Staff, be deemed timely filed. Independently, NPG seeks entry of its Motion on the grounds that excusable neglect has been demonstrated.

Respectfully submitted,

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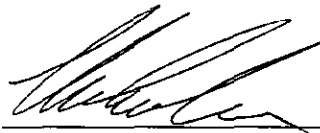
ATTORNEY FOR NEWS-PRESS &
GAZETTE COMPANY

Certificate of Service

On this 20th day of May, 2004, a true and correct copy of the above document was served upon each of the parties set forth below via overnight, express delivery.

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P.O. Box 7800
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Attorney for NPG