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July 12, 2004

FILED⁴

JUL 12 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: BCGI Communications Corp.; TC-2004-0317


Dear Judge Roberts:

Please find the original and eight copies of Respondent's Application for Rehearing and Motion to Modify Order Denying Motion to Set Aside Order Granting Default and Canceling Certificate for filing in the above matter.

Thank you very much for your attention to this matter.

Sincerely,

NEWMAN, COMLEY & RUTH P.C.

By: 
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CAM:clf

Enclosures

cc: Office of Public Counsel
David Meyer
Brian McDermott
Timothy Bass

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED⁴

JUL 12 2004

The Staff of the Missouri Public Service
Commission,)

Complainant,)

Missouri Public
Service Commission

Case No. TC-2004-0317

v.)

BCGI Communications Corp.,)

Respondent.)

**RESPONDENT'S APPLICATION FOR REHEARING AND MOTION TO MODIFY
ORDER DENYING MOTION TO SET ASIDE ORDER GRANTING DEFAULT AND
CANCELING CERTIFICATE**

COMES NOW Respondent BCGI Communications Corp. (hereinafter "BCGI") in the captioned cause, by and through its attorneys of record, and pursuant to Section 386.500, RSMo, and 4 CSR 240-2.160, and moves and applies for rehearing of the Commission's Order Denying Motion to Set Aside Order Granting Default and Canceling Certificate (hereinafter "the Order") and requests the Commission to amend the Order to allow for a customary effective date ten (10) days from the date of issuance of the same. In support of its application for rehearing and motion to modify, BCGI states as follows:

1. On January 29, 2004, the Staff of the Commission filed a complaint against BCGI alleging that BCGI did not file its 2002 annual report and requesting authority to bring a penalty action in circuit court against BCGI for its failure to file its annual report.

2. On February 4, 2004, the Commission issued a Notice of Complaint ("Notice") to inform BCGI of Staff's complaint.

3. Upon learning of the Staff's complaint, BCGI filed its annual reports for 2002 and 2003 and asked the Staff to cancel its certificate.

4. On February 9, 2004, Staff communicated to BCGI that Staff would be filing a motion to dismiss this case and to cancel BCGI's certificate and tariff if its annual filings were acceptable.

5. On February 18, 2004, Staff filed a motion to cancel BCGI's certificate and tariff and requesting that the Commission close this case.

6. BCGI did not secure counsel or file a formal answer to the Staff's complaint prior to March 6, 2004, because the company believed that its actions in paragraph 3 herein and its interactions with Staff that no further response to the complaint was required on behalf of BCGI to protect its interests.

7. The Commission issued an Order Granting Default against BCGI in this matter on June 17, 2004.

8. On June 23, 2004 BCGI timely filed a Motion to Set Aside the Default Order.

9. In its Motion to Set Aside the Default Order, BCGI stated setting aside the default order and allowing BCGI to defend itself in this complaint proceeding would not be detrimental to the public interest. BCGI's delay in responding to the complaint was not intentional or the result of willful disobedience to a Commission rule. Furthermore, BCGI's failure to respond to the complaint was based on Staff's request that this case be closed.

10. The Commission entered the Order on July 8, 2004. In the Order, the Commission indicated that the Order denies a motion filed by Staff by the Commission to set

aside the Commission's Order granting default. Notably, no motion was filed by Staff in this matter and such motion was instead filed by BCGI.

11. In the Order, the Commission also stated that the Order would become effective on July 8, 2004 rather than ten (10) days thereafter, which is the Commission's regular custom and practice. In doing so, the Commission has failed to allow BCGI any time to file an application for rehearing as it is entitled to do under Missouri law. Applications for rehearing of an order must be filed pursuant to Section 385.500, RSMo. 4 CSR 240-1.60. This statutory section provides that "[a]fter an order or decision has been made by the commission, the public counsel or any corporation or person or public utility interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefore be made to appear..." §385.500, RSMo. Furthermore, Section 385.500, RSMo, provides that "[n]o cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or any person or public utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing." *Id.* In issuing its Order Denying the Motion to Set Aside Order Granting Default and Canceling Certificate on July 8, 2004 indicating that such Order was effective on the very date it was issued, the Commission has essentially attempted to preclude BCGI from applying for a rehearing in this matter contrary to its rights under Missouri law.


12. BCGI did not file an answer or other response to Staff's Complaint on the strength of Staff's own Motion to Dismiss its Complaint. BCGI's conduct was not designed to impede the progress of the Complaint but rather was designed to aid the dismissal thereof on

Staff's own motion. Good cause exists to set the Order aside. The Commission has erroneously failed to do so.

WHEREFORE, based upon the above and foregoing, Respondent BCGI Communications, Corp. requests that the Commission modify its Order dated July 8, 2004 in this matter to alter its effective date to July 18, 2004; grant it a rehearing, with oral argument, regarding the Commission's Order Denying Motion to Set Aside Order Granting Default and Canceling Certificate; and after such hearing, set aside and vacate its Order granting a default judgment in this matter and reinstate the complaint for further proceedings before the Commission; and for such other and further relief as the Commission deems just and proper.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

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Attorneys for Respondent

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered, to Commission Staff, c/o David Meyer, Governor Office Building, 200 Madison Street, Jefferson City, MO 65102, and the Office of Public Counsel, c/o John Coffman, Governor Office Building, 200 Madison Street, Suite 640, Jefferson City, Missouri 65102 at on this 12th day of July, 2004.

