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File No. 3356500-14

July 8, 2004

Via Federal Express

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

FILED

JUL 09 2004

Re: Case No. TC-2004-0397

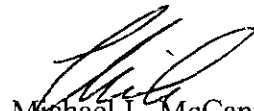
**Missouri Public
Service Commission**

Dear Mr. Roberts:

Enclosed please find an original and eight (8) copies of the Motion to Reconsider of News-Press & Gazette Company D/B/A St. Joseph Cablevision. 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, 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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WA 765723.1

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

JUL 09 2004

Missouri Public
Service Commission

The Staff of the Missouri Public Service
Commission,)

Complainant,)

v.)

Case No. TC-2004-0397

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

Respondent.)

**RESPONDENT'S MOTION FOR RECONSIDERATION AND/OR REHEARING OF
DETERMINATION ON THE PLEADINGS AND ORDER DIRECTING GENERAL
COUNSEL TO SEEK PENALTIES AND TO SET THIS MATTER FOR A HEARING**

COMES NOW News-Press & Gazette Company d/b/a St. Joseph Cablevision ("NPG"), and pursuant to 4 CSR 240-2.160, moves the Missouri Public Service Commission (the "Commission") for reconsideration and/or rehearing¹ of its Determination On The Pleadings and Order Directing General Counsel To Seek Penalties (the "Determination") and to set this matter for a hearing. In support of its motion, NPG states to the Commission as follows:

BACKGROUND

1. On February 13, 2004, the Staff of the Commission filed a complaint with the Commission against NPG (the "Complaint"), alleging that NPG was subject to penalties for failing to timely file its 2002 Annual Report.

2. Because NPG never received notice of the Complaint, NPG did not respond to the Complaint and the Commission issued an Order Granting Default (the "Default Order") on April 6,

¹ Although NPG's motion is styled as a Motion for Reconsideration and/or Rehearing, NPG notes that it has never been provided with a hearing before the Commission. NPG requests a rehearing in order to fulfill the statutory requirement that it request a rehearing as a prerequisite to filing a petition for writ of review with the Missouri courts.

2004. NPG subsequently moved the Commission to set aside the Default Order and allow it to file an Answer.

3. On June 24, 2004, the Commission set aside the Default Order for improper service upon NPG.

4. On June 29, 2004, NPG filed its Answer to the Complaint. In its Answer, NPG denied most of the material allegations raised by the Staff. For example, NPG's Answer denied that it was a "telecommunications company" or "public utility" as defined in RSMo. § 386.020 because NPG never actually exercised its authority under its Certificate of Service Authority and never provided telecommunications services in the State of Missouri.

5. NPG's Answer also raised six, separate affirmative defenses.

6. On July 1, 2004, the Commission, sua sponte, entered a Determination on the Pleadings and Order Directing General Counsel To Seek Penalties without notice or motion.

DETERMINATION ON THE PLEADINGS

7. Under 4 CSR 240-2.117(2), the Commission has authority to make a determination on the pleadings to "dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest." For the reasons set forth below, the Commission's Determination was "contrary to law" and "contrary to the public interest."

8. The procedure for determination on the pleadings is similar to the procedure for judgment on the pleadings used in the Missouri courts. See introductory comment to 4 CSR 240-2.117. Generally, judgment on the pleadings is only proper where no factual issue remains in dispute and the opposing party cannot prevail under any legal theory. *A.R.H. v. W.H.S.*, 876 S.W.2d 687, 688 (Mo.App. E.D. 1994) (emphasis added). The benefit of all reasonable inferences drawn

from the facts pleaded by the party opposing judgment on the pleadings must be given to the opposing party. *Id.*

9. The Commission's Determination was procedurally improper because many questions of material fact remain in this case. *Angelo v. City of Hazlewood*, 810 S.W.2d 706, 707 (Mo.App. E.D. 1991) (stating that judgment on the pleadings should not be sustained where a material issue of fact exists).

10. For example, although NPG admitted that it did not file a 2002 Annual Report, a question of fact exists as to whether NPG qualifies as a "telecommunications company" as that term is defined in RSMo. § 386.020(51). Under RSMo. § 392.210, only "telecommunications companies" are required to file annual reports. NPG did not own, operate, control or manage any facilities used to provide "telecommunications service" as that term is defined in RSMo. § 386.020(53). The term "telecommunications service" means the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means, but does not include cable television services. As stated in NPG's Motion to Set Aside Default, NPG did not provide telecommunications services during the time period applicable to NPG's 2002 Annual Report.

11. In fact, after obtaining its Certification of Service Authority to provide competitive inter-exchange intrastate telecommunications services, NPG never provided "telecommunications services."

12. RSMo. §392.410(5) requires any Certificate of Authority not exercised within one year from its issuance shall be null and void, making it unenforceable under Missouri law. *State ex rel. Missouri Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 789 (Mo. 1999); *NME Hospitals, Inc. v. Department of Social Services, Division of Medical Services*, 850 S.W.2d 71, 75 (Mo. en banc 1993) (stating that the word "void" means that which has no force and effect, is without legal

efficacy, is incapable of being enforced by law, or has no legal or binding force). Thus, for example, a factual issue remains as to whether NPG's Certificate of Service Authority was rendered void several years ago. Taking the facts alleged by NPG in the light most favorable to NPG, Missouri law requires NPG's Certificate to have been rendered void. Thus, the Commission's Determination was in error.

13. As another example of the Commission's error in entering its Determination, the Commission lacks subject matter jurisdiction over the Complaint. The Commission does not have jurisdiction over NPG because it was not a "telecommunications company" and did not provide "telecommunications services." A determination on the pleadings is not proper where subject matter jurisdiction does not exist. *State ex rel. Missouri Cable Telecommunications Ass'n v. Missouri Public Service Commission*, 929 S.W.2d 768, 771-72 (Mo.App. W.D. 1996) (stating that if the Missouri Public Service Commission acted without jurisdiction, all further acts by it are void).

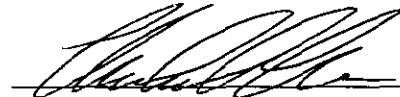
14. In addition, the Commission failed to address NPG's affirmative defenses in its Determination.

15. Accordingly, the Commission's Determination violated Missouri law, due process and the public interest because it was made on the pleadings sua sponte, depriving NPG of the opportunity to be heard and to present evidence on its denials and affirmative defenses.

WHEREFORE, NPG respectfully requests that the Commission reconsider or grant a rehearing on its Determination on the Pleadings and Order Directing General Counsel To Seek Penalties and set this matter for a hearing.

Respectfully submitted,

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ATTORNEY FOR NEWS-PRESS &
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Certificate of Service

On this 8th day of July, 2004, a true and correct copy of the above document was served upon each of the parties set forth below via overnight, express delivery.

Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Bruce H. Bates
Office of the General Counsel
Missouri Public Service Commission
P.O. Box 360
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