

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 16th day
of January, 2007.

In the Matter of the Application of MCC)
Telephony of Missouri, Inc. for Waiver of)
Compliance with the Requirement of) **Case No. TE-2006-0415**
4 CSR 240-32.)

**ORDER OVERRULING OBJECTIONS TO STAFF'S
REBUTTAL TESTIMONY**

Issue Date: January 16, 2007

Effective Date: January 16, 2007

Syllabus: This order overrules MCC Telephony of Missouri's Objections to Staff's Rebuttal Testimony.

On April 25, 2006, MCC Telephony of Missouri, Inc., filed an application with the Missouri Public Service Commission requesting a waiver of compliance with the requirements of 4 CSR 240-32.080(5)(A)1 related to time standards for installation of service. On September 20, 2006, the Commission adopted a procedural schedule jointly proposed by the parties.

On December 4, 2006, Larry R. Henderson filed rebuttal testimony on behalf of the Commission's Staff. On December 13, 2006, MCC Telephony filed objections to four specific sections of Mr. Henderson's rebuttal testimony. On December 22, 2006, Staff filed a Response in Opposition to MCC Telephony of Missouri's Objections to Staff's Rebuttal Testimony (Response).

OBJECTIONS I, II and III:

MCC Telephony objects to lines 22-23 on page 5; lines 1-20 on page 6; and lines 15-19 on page 7 of Mr. Henderson's rebuttal testimony. MCC objects to the questions contained therein on the grounds that they are argumentative and ask the witness to testify on the ultimate issue in the case. MCC further contends that the testimony contained therein includes inadmissible comments on the weight of the evidence, invades the province of the Commission, and presumes that MCC is required to repeat each point of its application in supporting testimony.

In its Response Staff made several points. First, Staff argues that Mr. Henderson appropriately addressed both MCC's application and direct testimony, because "[i]n the face of an objection, a plaintiff's evidence must conform to the pleadings."¹ The Staff further noted that it has not yet objected to MCC witness Mr. Craib's testimony, which Staff contends goes well beyond the scope of the application, but instead addressed both the application and the additional matter Staff contends was first raised in MCC's direct testimony. Staff next argues that Mr. Henderson is an expert in the installation of telecommunications service, and under Section 490.065.2, RSMo,² testimony by an expert witness is not objectionable because it embraces an ultimate fact to be decided by the trier of fact.

The Commission agrees with Staff that it was appropriate for Mr. Henderson to address both MCC's direct testimony and MCC's underlying pleading, its application, in his rebuttal testimony. The Commission also agrees with Staff that Mr. Henderson is being

¹ Payne v. Cornhuskers Motor Lined, Inc., 177 S.W.3d 820, 837-38 (Mo. App. E. D. 2005).

² All references to the Revised Statutes of Missouri are to the 2000 edition unless otherwise noted.

presented as an expert witness. Further, although the Commission is not bound by the technical rules of evidence applicable to civil cases,³ Staff is correct in its ascertain that it is inappropriate, even in civil cases, to object to the testimony of an expert witness as invading the providence of the ultimate finder of fact. Accordingly, MCC's first, second and third objections are overruled.

OBJECTION IV:

MCC Telephony objects to lines 3-17 on page 14, and the testimony beginning with line 20 on page 15 continuing through line 4 on page 17. MCC contends that the questions and answers contained in the identified portions of Mr. Henderson's testimony are not relevant to its application for variance.

In its Response, Staff contends that the testimony in question is relevant to the question of whether MCC has met its burden under Commission Rule 4 CSR 240-32.010(2) to demonstrate good cause for the requested waiver of the time standards for installation of service contained in 4 CSR 240-32.080(5)(A)1. Staff argues that the question of whether MCC has demonstrated good cause for a waiver of the installation standard should include factors of reasonableness and good faith. Staff further contends that the testimony at issue delineates "MCC's repeated failures to comply with the Commission's rules" which constitutes evidence of a lack of good faith by MCC and, as such, is relevant to a determination of whether good cause exists to grant MCC the requested waiver.

Making no determination as to whether the testimony in question indicates a lack of good faith or whether such a finding would be sufficient to negate a finding of good cause,

³ Section 386.410 RSMo.

the Commission agrees with Staff that the testimony in question is relevant to a good cause determination. Accordingly, MCC's fourth objection is overruled.

IT IS ORDERED THAT:

1. MCC Telephony of Missouri's Objections to Staff's Rebuttal Testimony are denied for the reasons set out in the body of this order.
2. This order shall become effective on January 16, 2007.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw, Clayton,
and Appling, CC., concur.

Voss, Regulatory Law Judge