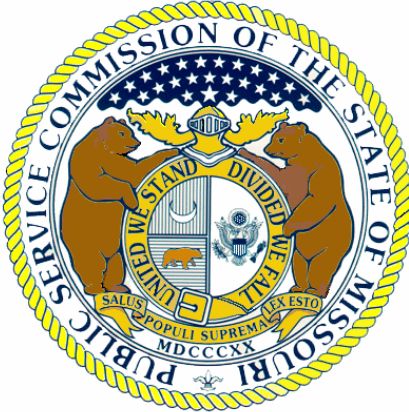


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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

REPORT AND ORDER

Issue Date: July 24, 2007

Effective Date: August 3, 2007

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Appearances

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REGULATORY LAW JUDGE: **Cherlyn D. Voss, Regulatory Law Judge**

REPORT AND ORDER

Syllabus: In this Report and Order, the Missouri Public Service Commission denies MCC Telephony of Missouri, Inc., a waiver from Commission Rule 4 CSR 240-32.080(5)(A)(1), and declines, at this time, to open a docket to consider whether to make revisions to the quality of service rules contained in 4 CSR 240-32.080(5)(A)(1).

PROCEDURAL HISTORY

On April 25, 2006, MCC Telephony of Missouri, Inc. ("MCC Telephony"), filed its application with the Missouri Public Service Commission for waiver of compliance with requirements of 4 CSR 240-32.080(5)(A)(1) related to time standards for installation of service. MCC Telephony cited two factors it claims prevent it from meeting the applicable installation standard. First, its contract with the competitive local exchange company ("CLEC"), Sprint, to provide network interconnection, switching, numbering and other key inputs to its service does not require Sprint to meet that standard. Second, incumbent local exchange companies' ("ILECs") long porting intervals jeopardize MCC Telephony's ability to meet this standard.

On April 28, 2006, the Office of the Public Counsel filed an objection to MCC Telephony's application. On May 1, 2006, Missouri Independent Telephone Company Group ("MITG") filed its Application to Intervene in Opposition to Waiver.¹ MITG opposed MCC Telephony's application on the basis that MCC Telephony, as a Voice Over Internet

¹MITG is comprised of six small rural incumbent local exchange companies, who are classified as Rural Telephone Companies under the Telecommunications Act of 1996. MITG members provide local, basic local, and exchange access services.

Provider (“VoIP”) provider, should be charged with the same obligations of other certificated local exchange companies (“LECs”), including the members of MITG, in providing such service, including the provisions of 4 CSR 240-32.080(5)(A)(1). The Commission granted MITG intervention on May 12, 2006. No other party requested intervention.

On July 11, 2006, the Staff of the Missouri Public Service Commission filed its recommendation and supporting memorandum concerning MCC Telephony’s application. Staff recommended that the Commission open a case to consider whether to make revisions to the quality of service rules applicable to all telecommunications companies in lieu of considering a waiver solely for MCC Telephony. Alternatively, Staff recommended that the Commission deny MCC Telephony’s request based upon its belief that MCC Telephony failed to demonstrate good cause for the requested waiver.

On September 20, 2006, the Commission established a procedural schedule that included dates for the filing of prepared testimony, the filing of prehearing position statements and set an evidentiary hearing. The parties filed direct, rebuttal and surrebuttal testimony.

The parties each filed prehearing position statements identifying two primary issues in this case: 1) Is there good cause for the Commission to grant MCC Telephony’s request for a waiver of 4 CSR 240-32.080(5)(A); and 2) Should the Commission conduct a rulemaking to revise the Commission’s quality of service rules?

The evidentiary hearing was held at the Commission’s offices in Jefferson City, Missouri, on January 25, 2007. MCC Telephony, MITC, Staff and Public Counsel participated in the hearing. MCC Telephony and Staff presented evidence. Calvin Craib, the Senior Vice President, Business Development for Mediacom Communications

Corporation (“Mediacom”), Mark Trefry, Vice President of Telephony for Mediacom, and Darin Liston, Manager Marketing Technical Support for Sprint Nextel Corporation, each testified on behalf of MCC Telephony. Larry Henderson, Telecommunications Technical Specialist II for the Staff, testified on behalf of Staff. During the hearing 9 exhibits were offered and admitted, including the prefiled testimony of the witnesses.

The following third issue was identified during the evidentiary hearing in this case: When a customer agrees to an installation date more than five working days after the customer ordered service, has that customer requested that installation date under 4 CSR 240-32.080(5)(A)(1)(B)? The parties addressed all three issues in two rounds of post-hearing briefs.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.

1. MCC Telephony is a Delaware corporation authorized to conduct business in Missouri.²
2. The Commission granted MCC Telephony a certificate of service authority to provide intrastate, interexchange, basic local and nonswitched local telecommunications

² See *MCC Telephony’s Application for Waiver*, filed April 25, 2006, page 1.

services in portions of the state of Missouri, and classified those services and the company as competitive in Commission Case No. LA-2005-0150 on May 5, 2005.³

3. Mediacom Communications Corporation is the parent company of MCC Telephony and has cable facilities in the state of Missouri.⁴

4. MCC Telephony currently offers packaged VoIP service, which includes local, national long distance and features in Missouri within the area covered by Mediacom using Mediacom's cable facilities.⁵

5. On April 25, 2006, MCC Telephony filed an application seeking a waiver from 4 CSR 240-32.080(5)(A)(1), which provides as follows:

(5) The service objectives, surveillance levels and monitoring criteria for the following categories are:

(A) Orders for basic local telecommunications –

1. Service objective-that ninety percent (90%) or more of such orders shall be installed, except for customer-caused delays, delays caused by a declared natural disaster or a specific exemption requested by a company and approved by the commission staff to address a unique situation –

A. Within five (5) working days after the customer ordered service; or

B. On or by the date requested if it is at least five (5) working days after the date the customer ordered service.

6. As a facilities based provider, MCC Telephony's installation process is different from that of most other carriers, in that, installation of basic local service by MCC Telephony requires a MCC Telephony employee visit to the home or business where the service is to be connected at a time when the prospective customer is home.⁶

³ See May 5, 2005, *Order Granting Certificate to Provide Basic Local, Nonswitched Local and Interexchange Telecommunications Services*, Case No. LA-2005-0150.

⁴ Craig Direct, Ex. 1, page 2, lines 16-17.

⁵ *Id.* at page 2, lines 11-20.

⁶ *Id.* at page 5, lines 3-4, and page 6, lines 7-10.

7. MCC Telephony provides its voice service through a joint provider arrangement with a competitive local exchange carrier, Sprint Communications Company, L.P. ("Sprint"). Under that agreement Sprint provides network interconnection, switching, numbering and other key inputs to MCC Telephony's service.⁷

8. The terms of the MCC-Sprint Agreement, including installation intervals, were not the result of arbitration, but were negotiated between MCC Telephony and Sprint.⁸

9. Other LECs perform the same steps that MCC Telephony and Sprint perform in installing service, and MCC Telephony does not face any challenges regarding number porting, including the length of porting intervals, not faced by other companies offering basic local service.⁹

10. MCC Telephony does not meet the Commission's installation standard.¹⁰

11. MCC Telephony does not meet the Commission's installation standard even if ported numbers are excused.¹¹

12. MCC Telephony's prospective customers agree to a specific date for service installation, which is often, if not always, outside the required five-day installation window. However, MCC Telephony does not offer prospective customers an installation date that is within the required five-day period.¹² Further, MCC Telephony does not inform prospective

⁷ Liston Direct, Ex. 5, page 2, line 22 through page 3, line 12 and Tr. pages 45-46.

⁸ Craib Direct, Ex. 1 HC, Schedule 1.

⁹ Tr. page 164, line 18 through page 166, line 21.

¹⁰ Henderson Rebuttal, Ex. 6, page 14 line 18 through page 15 line 19.

¹¹ Henderson Rebuttal, Ex. 6, page 8, line 17 through page 9, line 7; and Tr. page 44.

¹² Tr. pages 86, 87 and 132.

customers about the installation standards.¹³ Accordingly, such scheduled appointments are not customer requested installation dates.

13. After taking a prospective customer's ordering information, MCC Telephony's customer service representative offers that customer the earliest possible time slot a technician is available to complete the installation.¹⁴ Based upon MCC Telephony's failure to complete such installations within the five-day installation period, the Commission finds MCC Telephony has too few installation technicians to complete installations in compliance with the five-day installation standard.

14. There is a cost involved for any company providing voice service to comply with the Commission's five-day installation standard.¹⁵

15. If MCC Telephony can save money on installation costs, it will have an unfair competitive advantage over other companies providing voice service.¹⁶

16. The appeal of Time Warner Cable Information Services, LLC d/b/a Time Warner Cable's ("Time Warner's") tariff filing to withdraw its Digital Phone Service from its tariff, originally assigned Commission Case No. LT-2006-0162, is currently pending before the Cole County Circuit Court as Case No. 06AC-CC00935. The outcome of that appeal could have implications on the authority of State Commissions over cable television companies offering a local voice service.

¹³ Tr. page 57 and 96.

¹⁴ Trefry Direct, Ex. 3, page 4.

¹⁵ Henderson Rebuttal, Ex. 6, page 9.

¹⁶ Tr. pages 215-216.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

Jurisdiction and Authority

MCC Telephony is a “public utility” and a “telecommunications company” as those terms are defined in Section 386.020(42) and (51), RSMo 2000. As such, it is subject to the jurisdiction of this Commission pursuant to Section 386.250, RSMo 2000. All telecommunications companies offering basic local telecommunications service in Missouri are required to comply with the Commission’s quality of service standards contained in Commission Rule 4 CSR 240-32.

Commission rule 4 CSR 240-32.080(5)(A)(1) provides as follows:

(5) The service objectives, surveillance levels and monitoring criteria for the following categories are:

(A) Orders for basic local telecommunications –

1. Service objective-that ninety percent (90%) or more of such orders shall be installed, except for customer-caused delays, delays caused by a declared natural disaster or a specific exemption requested by a company and approved by the commission staff to address a unique situation –

A. Within five (5) working days after the customer ordered service; or

B. On or by the date requested if it is at least five (5) working days after the date the customer ordered service.

This rule requires a telecommunications company to complete installation of at least of 90% of orders for basic local telecommunications service, not subject to one of the exceptions set out in the rule, within five working days after that service is ordered, **or** by the date specifically requested by the customer if that customer requests a date that is more than five working days after service is ordered. This rule is designed to ensure customers will generally not have to wait more than five working days for service installation.

Commission rule 4 CSR 240-32.080(5)(A)(1)(B) excuses a telecommunications company from not meeting the five working day installation standard in those instances when a customer requests that his or her service be installed more than five working days after service is ordered. To be said to “request” a specific date under 4 CSR 240-32.080(5)(A)1.B., a customer must be given the choice to have service installed within five working days from the date service is ordered.

The Missouri Supreme Court has held that a public utility cannot contract around regulation by the Commission.¹⁷

Standard for Approval of Waiver Request

Commission Rule 4 CSR 240-32.101(2) authorizes, for “good cause,” an application for temporary or permanent exemption from the requirements of any rule in contained in Chapter 32. Although the term “good cause” is frequently used in the law,¹⁸ the rule does not define it. Therefore, it is appropriate to resort to the dictionary to determine its ordinary meaning.¹⁹ Good cause “generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.”²⁰ Similarly, “good cause” has also been judicially defined as a “substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties.”²¹

¹⁷ *May Department Stores v. Union Electric Company*, 107 S.W.2d 41 (Mo. 1937).

¹⁸ *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).

¹⁹ *See State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term “good cause” as used in a Missouri statute); *Davis*, 469 S.W.2d at 4-5 (same).

²⁰ *Black’s Law Dictionary* 692 (6th ed. 1990).

²¹ *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective “ordinary person” standard. *See, e.g., Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm’n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) (“[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.”)

Of course, not just *any* cause or excuse will do. To constitute *good* cause, the reason or legal excuse given “must be real not imaginary, substantial not trifling, and reasonable not whimsical.”²² And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.²³

DECISION

The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

The Commission will address the issues before it in the following order:

- 1) When a customer agrees to an installation date more than five working days after the customer ordered service, has the customer requested that installation date under 4 CSR 240-32.080(5)(A)(1)(B);
- 2) Is there good cause for the Commission to grant MCC Telephony’s request for a waiver of 4 CSR 240-32.080(5)(A); and
- 3) Should the Commission conduct a rulemaking to revise the Commission’s quality of service rules?

²² *Belle State Bank v. Indus. Comm’n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

²³ See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F. Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

Issue 1: When a customer agrees to an installation date more than five working days after the customer ordered service, has the customer requested that installation date under 4 CSR 240-32.080(5)(A)(1)(B)?

MCC Telephony argues that because its customers agree to a specific date for service to be installed, it has complied with the requirements of 4 CSR 240 32.080(5)(A)(1)(B) if it completes 90% of those installations on the agreed upon dates, even though it does not offer those customers a date that is within the five working days from the date service is requested.

MITG argues that MCC Telephony's installation of service orders by a scheduled appointment is not relevant because such installations do not fall within one of the three exceptions set out in the rule. MITG ignores the "or" between 4 CSR 240-32.080(5)(A)(1)(A) and 4 CSR 240-32.080(5)(A)(1)(B), which requires 90% of installations be completed within five working days, "or B. On or by the date requested if it is at least five (5) working days after the date the customer ordered service."

The question before the Commission here is whether MCC Telephony's installation of service on the date agreed to by the customer satisfies the installation requirement of 4 CSR 240-32.080(5)(A)(1)(B). Staff argues that 4 CSR 240-32.080(5)(A)(1)(B) does not apply, because customers are not offered a date that would comply with the service standards.

The Commission agrees with Staff. As set out above, to meet the requirements of 4 CSR 240-32.080(5)(A)(1)(B), a customer would have to "request" a date more than five working days from the date he or she orders service after first being offered an installation date within the five-day window. By simply agreeing to a later installation date, especially when an earlier date is not offered, a customer cannot be said to be requesting that date.

Because MCC Telephony does not offer its customers the option of having service installed within five working days from their service request, subparagraph 4 CSR 240-32.080(5)(A)(1)(B) does not apply. MCC Telephony has not complied with the requirements of 4 CSR 240-32.080(5)(A)(1).

Issue 2: Is there good cause for the Commission to grant MCC Telephony's request for a waiver of 4 CSR 240-32.080(5)(A)?

MCC Telephony contends good cause exists for the Commission to grant it a waiver from the requirements of 4 CSR 240-32.080(5)(A) because it can not comply with those requirements based upon two factors it argues are outside its control. Specifically, MCC Telephony argues that it can not comply because its contract with the CLEC, Sprint, to provide network interconnection, switching, numbering and other key inputs to its service does not require Sprint to meet that standard. Second, MCC Telephony argues that the ILECs' long porting intervals jeopardize its ability to meet this standard.

The Commission does not find MCC Telephony's argument persuasive for several reasons. First, given that MCC Telephony voluntarily entered into its service contract with Sprint, it cannot now claim that the terms of that contract are outside its control. Second, MCC Telephony does not face any challenges regarding number porting, including the length of porting intervals, not faced by other companies offering basic local service. Third, MCC Telephony does not meet the Commission's installation standard even if ported numbers are excluded. Finally, because there is a cost involved for any company providing voice service to comply with the Commission's five-day installation standard, granting MCC Telephony's request could give it an unfair competitive advantage over other companies providing voice service. Given the particular circumstances that exist in this

case, the Commission finds that MCC Telephony has not demonstrated good cause for the Commission to grant it a variance from the requirements of 4 CSR 240-32.080(5)(A).

Issue 3: Should the Commission conduct a rulemaking to revise the Commission's quality of service rules?

Proposed federal legislation and recent and prospective decisions by the courts and FCC could impact or even supplant the Commission's authority over cable television companies offering a local voice service in the near future. Therefore, the Commission finds that this is not the appropriate time to conduct a rulemaking to revise its quality of service rules contained in 4 CSR 240-32.080.

IT IS ORDERED THAT:

1. The Application for Waiver of compliance with requirements of 4 CSR 240-32.080(5)(A)(1) related to time standards for installation of service filed by MCC Telephony of Missouri, Inc., on April 25, 2006, is denied.
2. All other motions not specifically ruled upon by the Commission are denied.
3. This Report and Order shall become effective on August 3, 2007.
4. This case may be closed on August 4, 2007.

(S E A L)

BY THE COMMISSION



Colleen M. Dale
Secretary

Davis, Chm., Gaw, Clayton, and
Appling, CC., concur;
Murray, C., dissents;
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 24th day of July, 2007.