

The Staff of the Missouri Public
Service Commission,

Complainant,

v.

WWC License LLC d/b/a Cellular One
Long Distance.

Respondent.

Case No. TC-2004-0347

COMES NOW Respondent, WWC License LLC d/b/a Cellular One Long Distance (“WWC License”), a subsidiary of Western Wireless Corporation, by and through counsel and pursuant to Section 386.500 RSMo and 4 CSR 240-2.160, and for its *Application for Rehearing and Reconsideration*. WWC License herein requests the Commission to:

- 1) Correct the erroneous statement in its July 29, 2004, *Determination on the Pleadings and Order Directing General Counsel to Seek Penalties* (“Order”) that WWC did not respond to Staff’s Motion for Summary determination, and address the two pleadings filed by WWC License in response to Staff’s Motion.
- 2) Reconsider its hard line approach to instances of inadvertent failure to timely file Annual Reports and begin now to engage in lawful and appropriate exercise of its clear discretion under

Section 392.210.1. By doing so, the Commission will: (a) better serve the public interest; (b) comply with the public policy behind and the content and intent of the Public Service Commission Law and the United States and Missouri Constitutions; and (c) better serve state fiscal and judicial economy. The Commission can grant rehearing of this matter and authorize Staff to negotiate with WWC License (and similarly situated entities) to come to a more appropriate resolution of this issue to be presented to the Commission, or grant WWC License relief as requested in the WHEREFORE clause below.

In support of this Application for Rehearing and Reconsideration, WWC License respectfully states as follows:

BACKGROUND:

1. On July 29, 2004 the Commission issued its *Determination on the Pleadings and Order Directing General Counsel to Seek Penalties* (“Order”) in this case. This *Order* bears an effective date of August 8, 2004. This *Application for Rehearing and Reconsideration*, therefore, is timely filed pursuant to Section 386.500 and 4 CSR 240-2.160.
2. The Commission’s *Order* finds WWC License in violation of Section 392.210.1 and 4 CSR 240-3.540¹ for failing to file its PSC Annual

¹ This rule became effective April 30, 2003. Prior to that, the effective rule with the same or similar requirements was found at 4 CSR 240-10.080.

Report for the calendar year 2002 on time, and directs the Commission's General Counsel to seek statutory penalties in the Circuit Court.

3. WWC License had zero revenues (\$0.00) in Missouri in calendar year 2002. WWC timely filed its "Statement of Revenues" for 2002 on or about February 27, 2003 showing that fact. Having inadvertently failed to file its Annual Report ten weeks later, WWC did file its PSC Annual Report for 2002 on February 13, 2004, two days after receiving notification from the PSC that it had failed to file that report. At \$100 per day from April 15, 2003 to February 13, 2004, WWC License could face fines of up to \$30,500 in this matter.

PLAIN ERROR IN JULY 29 ORDER:

4. The Commission's *Order* of July 29 contains a plain error when it recites that "[t]he company did not respond to Staff's motion for summary disposition, and the time for doing so has now passed." [footnote omitted] (*Order*, page 3) **WWC License responded in a timely manner to Staff's *Motion for Summary Disposition* when it filed, on April 30, 2004, its *Response to Staff's Motion for Summary Determination* in this case. Then, on May 13, 2004, WWC License filed its *Motion for Leave to Amend Answer* in this case, also as a result of Staff's *Motion*. (See **Attachment 1**, printout from Missouri PSC Electronic Filing and Information System (EFIS).)**

WWC's *Motion for Leave to Amend Answer* has not been ruled on by the Commission, and WWC hereby renews that *Motion*. **Apparently, neither document (Items #11 and #12 on Attachment 1) was noticed or read by the Commission before it issued its *Determination on the Pleadings and Order Directing General Counsel to Seek Penalties on July 29*. WWC License avers that the Commission must correct this error in its July 29 *Order*.**

THE COMMISSION'S FAILURE OR REFUSAL TO EXERCISE DISCRETION IN THE ENFORCEMENT OF SECTION 392.210.1 IS BOTH CONTRARY TO LAW AND CONTRARY TO THE PUBLIC INTEREST

5. The Commission's *Order* of July 29 also cites 4 CSR 240-2.117(2), which authorizes a determination on the pleadings under certain circumstances, "whenever such disposition is not otherwise contrary to law or contrary to the public interest." However, **the Commission's *Order* of July 29 is both "contrary to law" and "contrary to the public interest."**

THE COMMISSION HAS DISCRETION REGARDING THE ENFORCEMENT OF SECTION 392.210:

6. The Commission has discretion regarding the enforcement of Section 392.210.1, and its refusal to exercise sound and reasonable discretion in this case is itself an abuse of discretion. Section 392.210.1 RSMo.

provides in part for the Commission to prescribe a time within which a company may amend a “defective or erroneous” report or to “exempt any telecommunications company from the necessity of filing annual reports until the further order of the commission.” It further states, “If any telecommunications company shall fail to make and file its annual report as and when required *or within such extended time as the commission may allow,*” *Section 392.210.1 RSMo., emphasis added.* No standard is fixed by the statute for the Commission’s discretionary exemption of a company from the requirement of filing annual reports nor its extension of time for the filing or correction of such reports. If the intent of the General Assembly had been to strictly prohibit the Commission from exercising discretion on such matters, it would not have provided the Commission with the clear option of assessing the facts and circumstances of the situation and determining when and when not to make exemptions or grant extensions.

7. The language of Section 392.210.1 must also be read in conjunction with Section 386.600, which grants the Commission the authority to bring a forfeiture penalty action in the circuit court. That statute grants the authority by stating that the Commission’s “action ... *may* be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted by the general counsel to the Commission.” (*Emphasis added.*) The use of the

discretionary word “may” grants the Commission discretion whether to bring such an action at all.

8. The word “shall” in a statute is not necessarily mandatory, but may be simply directory, depending on context and legislative intent. *Farmers & Merchants Bank & Trust Co. v. Director of Revenue*, 896 S.W.2d 30, 32 (Mo.banc 1995); *Kersting v. Director of Revenue*, 792 S.W.2d 651, 653 (Mo.App. E.D. 1990); *State v. Konz*, 756 S.W.2d 543, 546 (Mo.App. W.D. 1988). The repeated grants of Commission discretion elsewhere in Section 392.210.1, coupled with the lack of mandatory direction to the Commission to bring cases seeking forfeitures suggests that the use of the word “shall” by the Legislature in Section 392.210.1 is simply directory, and discretion as to whether to pursue actions in circuit court is vested in the Commission.
9. The Supreme Court of the United States has held that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Heckler v. Cheney*, 470 U.S. 821, 831 (1985). In that case, the Court found that agency decision-making involves a balancing of factors peculiarly within the agency’s expertise, and listed five factors, only the first of which is “whether a violation has occurred.” *Id.* **The Court also held that the agency had discretion not to prosecute violators, even though the statutory provision stated that violators “shall be imprisoned,”** in part because no law or

legislative history supported the position that all potential violations must be prosecuted. *Id.*, at 835-838.

10. It is also clear that the Commission is quite familiar with its discretion to grant extensions, as it has done so with great frequency in the past, as evidenced on the 12-pages of **Attachment 2** listing annual report extensions since May 1, 1998. Those extensions were generally initiated by requests from utilities, but nothing in the statute or Commission precedent precludes the Commission from entertaining similar requests for additional time to file submitted after the filing of a Staff Complaint for failure to file an annual report. Also, there have been instances in the past where the Commission has accepted late-filed annual reports without any motion for additional time or an extension.

THE COMMISSION'S ORDER IS CONTRARY TO THE PUBLIC INTEREST:

11. Further, WWC License respectfully submits that **the Commission not only has ample discretion** in the enforcement of Section 392.210.1 RSMo., **but has an obligation as a matter of public policy to exercise such discretion in light of the State's policy of promoting telecommunications competition as expressed in S.B. 507 (1996).** The "purpose clause" (Section 392.185) and the "intent" language (Section 392.200.4(2)) included in S.B. 507, devices used very sparingly by the Missouri General Assembly, clearly express the policy

of the State of Missouri to promote competition in the telecommunications industry. Extracting maximum statutory fines and penalties from competitive telecommunications providers which dramatically exceed their Missouri revenues, for violation of a ministerial filing requirement, could drive some competitors out of the Missouri telecommunications market altogether and make others far less profitable. This would discourage competition, rather than promoting it, as contemplated by the General Assembly in S.B. 507 in 1996. Such a drastic penalty would be dramatically and disproportionately more harmful to the Respondent than the harm experienced by the Commission as a result of not receiving the Annual Report (showing zero Missouri revenues) on time.

12. The Missouri General Assembly has also made it clear that the Commission is to construe the provisions of Chapter 392 (*which includes the annual report filing requirement*) to permit “flexible regulation of competitive telecommunications companies” such as WWC License, LLC. Section 392.185, RSMo.
13. The Commission has exercised flexibility concerning its enforcement powers in the very recent past. To approve a stipulation and agreement between a gas utility and the Commission Staff providing for no fines or penalties arising out of a gas explosion that destroyed a home and caused injury to four family members, including severe

injuries to a child,² shows the Commission's awareness of and willingness to appropriately exercise its discretion in enforcing legal requirements, but also vividly demonstrates the arbitrary, disproportional and discriminatory nature of going to circuit court, without a hearing, in this case to seek fines and penalties against WWC License. A telephone company's inadvertent failure to file an informational report should not, as a matter of public policy, draw the Commission's discretionary prosecution of a penalty case when an explosion that seriously injures a child does not.

14. **A \$30,000 fine for the inadvertent and unintentional failure to file an informational report is so disproportional as to shock the conscience.**

15. The allocation of limited State resources in a time of State fiscal crisis to the prosecution of penalty actions seeking exorbitant fines from firms that have no Missouri revenue cannot possibly be in the public interest. Clogging the circuit court with a multitude of such cases through inappropriate exercise of prosecutorial discretion only exacerbates the error. It is not too late for the Commission to reconsider its posture in these cases.

² *Staff of the Missouri PSC v. Laclede Gas Co.*, MoPSC Case No. GC-2004-0557, *Order Approving Stipulation and Agreement*, issued July 27, 2004; *Gas Incident Report*, MoPSC Case No. GS-2004-0264, issued December 11, 2003, at pages 1, 2, 21, and 22.

THE COMMISSION'S ORDER IS CONTRARY TO LAW:

16. As a matter of law, the Commission must hold a proper hearing on the facts of any alleged violation of its statutes, rules and regulations before proceeding into circuit court to commence a penalty action. State of Missouri v. E.H. Carroll, 620 S.W.2d 22 (Mo.App. S.D. 1981); State ex rel. Cirese v. Ridge, 345 Mo. 1096, 138 S.W.2d 1012 (Mo. Banc 1940); State ex rel. Sure-way Transportation v. Division of Transp., Dept. of Economic Development, State of Mo., 836 S.W.2d 23 (Mo.App. W.D. 1992).
17. As a further matter of law, the Commission's sudden, unprecedented, iron-clad maximum enforcement policy on late 2002 annual reports, reversing years and even decades of past Commission practice, is virtually the definition of "arbitrary and capricious" conduct by an administrative agency, and is also discriminatory, unjust, unlawful and unreasonable, violative of Article I, Section 21 of the Missouri Constitution and the 8th Amendment to the United States Constitution (prohibiting excessive fines)³ and deprives WWC License of its rights of due process and equal protection as guaranteed by the Constitutions of the United States⁴ and of the State of Missouri,⁵ and

³ "Fines" are defined in Black's Law Dictionary as "a pecuniary criminal punishment or **civil penalty payable to the public treasury.**" (*Emphasis added.*) An "excessive fine" is further defined as "a fine that is unreasonably high and disproportionate to the offense committed."

⁴ Amendments 5 and 14

⁵ Article I, Section 2; Article I, Section 10

as provided for in the Commission's own procedural rules and years of past practice.⁶

18. The Commission's *Order* of July 29 is likewise not based upon competent and substantial evidence on the record as a whole and fails to provide a reviewing court with findings of fact and conclusions of law sufficient to determine the Commission's rationale and thought process leading to its decision. Section 536.140, RSMo.; *Noranda Aluminum, Inc. v. Public Service Commission*, 24 S.W.3d 243 (Mo.App. W.D. 2000); *State ex rel. A.P. Green Refractories, et al. v. PSC*, 725 S.W.2d 835 (Mo.App. W.D. 1988).

19. The Commission has also exercised discretion just last week in an annual report complaint case (MoPSC Case No. SC-2004-0341) by providing S. T. Ventures, LLC, a regulated sewer company, an opportunity to show that it tried unsuccessfully to change its official address with the Commission, as a mitigating factor for not filing its 2002 annual report on time. For some companies to be afforded an opportunity to present mitigating evidence while others are dispatched without hearing to circuit court is arbitrary and capricious, unjust and unreasonable, unduly discriminatory, unreasonable and unlawful.

20. The fact that the Commission has indisputable discretion concerning enforcement as to every other type of regulated utility and every other sort of jurisdictional violation should itself inform the Commission that it

⁶ 4 CSR 240-2; PSC Reports, since the memory of man runneth not to the contrary; *See also*, Attachment 2 to this Application for Rehearing and Reconsideration.

is not required to set telecommunications companies apart for rigid enforcement of fines and penalties for late annual reports. The PSC Law must be read *in pari materia*.

21. As demonstrated above, the Commission has not previously pursued cases involving failure to file annual reports in the rigid manner evident in this case. **When the Missouri Tax Commission began to assess rural electric cooperatives, with no change in governing law, after not doing so for 23 years, the Missouri Supreme Court rejected the Tax Commission's new interpretation of statute**, stating, in part: "The statute under which the respondents propose to act is not so clear and free from doubt as to preclude the giving of weight to the long period of construction which it has received at the hands of the tax commission and the General Assembly." *State ex rel. Howard Elec. Coop. v. Riney*, 490 S.W.2d 1, 12-13 (Mo. 1973) [citations omitted]. In other words, the long-standing practice of the agency, "coupled with the legislative acceptance of such construction," (*id.*) is entitled to significant weight in interpreting an enforcement statute such as Section 392.210.1.

**RECOMMENDATION OF APPROPRIATE DISCRETIONARY RESOLUTION
UPON REHEARING OR RECONSIDERATION:**

22. In keeping with the actual language of Section 392.210.1 and the consistent, historic application of that statute prior to the instant

complaint (and numerous others filed contemporaneously therewith), the Commission could exercise its discretion in this matter in a manner that creates a sort of “amnesty” for companies like Respondent that inadvertently late-filed their 2002 PSC Annual Reports. This could be accomplished by granting an extension of the due dates for those reports to a reasonable date after the Respondent’s receipt of the Notice of Complaint. In many cases, that extension may run to the date on which the annual report was actually received by the Commission. For example, WWC License complied within two days of receiving notice of the instant complaint. Therefore, the Commission could retroactively extend the deadline for WWC License’s 2002 Annual Report until February 13, 2004, two days after service of the complaint. The Commission could also determine that entities like WWC License and similarly-situated entities who had zero revenues in the State in 2002, were either exempt from filing 2002 Annual Reports, or had substantially complied with the annual report requirement by timely filing their Statements of Revenues for 2002 with the Commission. WWC License hopes that the Commission will take this opportunity to reconsider its recently developed interpretation that Section 392.210 provides the Commission “no choice” or “no discretion” in dealing with regulated companies who inadvertently failed to file annual reports, its refusal to offer its standard arbitration option in these cases, and its direction to Staff that it is prohibited from

negotiating reasonable resolution of these cases. WWC License further hopes that the Commission will realize that it has several discretionary options available in interpreting and enforcing Section 392.210.

WHEREFORE, Respondent WWC License, LLC respectfully requests that the Missouri Public Service Commission: (1) grant this Application for Rehearing and Reconsideration; (2) vacate its July 29, 2004 *Determination on the Pleadings and Order Directing General Counsel to Seek Penalties*; and (3) dismiss the Complaint upon taking one of the following actions: (a) issuing an Order on Rehearing that grants WWC License an extension of time to February 13, 2004, for filing its annual report for the 2002 reporting year; or (b) issuing an Order on Rehearing that finds and concludes that WWC's submission of its "Statement of Revenue" for the 2002 reporting year, on or about February 27, 2003, constituted "substantial compliance" with the requirement of filing an annual report concerning the 2002 reporting year; or (c) issuing an Order on Rehearing that exempts WWC License from the requirement of filing an annual report for the 2002 reporting year; or (4) grant rehearing of this matter and set a prehearing conference with directions to Staff to seek to reach a reasonable resolution of this matter or to propose a procedural schedule for the matter to be heard.

Respectfully submitted,

/s/ William D. Steinmeier

William D. Steinmeier

Mo. Bar #25689

Mary Ann (Garr) Young

Mo. Bar # 27951

WILLIAM D. STEINMEIER, P.C.

P.O. Box 104595

2031 Tower Drive

Jefferson City, MO 65110-4595

Phone: (573) 659-8672

Fax: (573) 636-2305

Email: wds@wdspc.com

myoung0654@aol.com

COUNSEL FOR WWC LICENSE

LLC d/b/a CELLULAR ONE

LONG DISTANCE

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6th day of August 2004.

/s/ William D. Steinmeier