



Missouri Public Service Commission

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February 24, 2000

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DANA K. JOYCE
General Counsel

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. TC-2000-176

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of a **STAFF RESPONSE TO MISSOURI COMM SOUTH, INC.'S MOTION TO STRIKE**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Julie A. Kardis
Assistant General Counsel
(573) 751-8706
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JAK:sw
Enclosure
cc: Counsel of Record

FILED²

FEB 24 2000

Missouri Public
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

FEB 24 2000

Missouri Public
Service Commission

Nixa Area E-911 Board,)
)
 Complainant,)
)
 vs.)
)
 Missouri Comm South, Inc.,)
)
 Respondent.)

Case No. TC-2000-176

STAFF RESPONSE TO MISSOURI COMM SOUTH, INC.'S MOTION TO STRIKE

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its response respectfully states:

1. On August 20, 1999, the Nixa Area E-911 Board (Complainant) filed its Complaint requesting that the Missouri Public Service Commission (Commission) order Missouri Comm South, Inc. d/b/a Missouri Comm South, Inc. (Respondent):

to provide an accounting of all amounts collected on behalf of the Complainant, to provide an accounting of all service users in the Complainant's area serviced by the Respondent, to remit all taxes collected on behalf of the Complainant to the Complainant, to comply with all statutory requirements and procedures governing the Respondent's collection of taxes on behalf of the Complainant, and for any other relief deemed just and equitable by the Commission.

2. In response to the Complaint, Respondent filed its Motion to Strike on August 20, 1999, in which Respondent states that the relief sought by the Complainant in its Complaint is beyond the jurisdiction of the Commission. Respondent points out that an accounting is an action in equity, *Weltscheff, M. D. v. Medical Center of Independence, Inc.*, 604 S.W.2d 796, 801 (Mo.App.1980), and that "the commission has no power to declare or enforce any principle of law or equity." *Straube et al. v. Bowling Green Gas Co.*, 360 Mo. 132, 227 S.W.2d 666, 668

(1950) (citing *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo.1943)). In sum, Respondent states, "Relief in the form of any accounting or an award of money of any kind cannot be granted by this agency since such are beyond its jurisdiction."

3. On December 23, 1999, the Commission issued its Order Directing Staff Investigation and Report which directed Staff to file a response to Respondent's Motion to Strike by January 24, 2000. In its Order Granting Motion to Extend Time Within Which to Answer Data Requests, the Commission extended Staff's deadline to file its response until February 24, 2000.

4. In its Motion to Strike, Respondent states that the Commission does not have jurisdiction to order Respondent to provide an accounting of amounts collected and to remit to the Complainant all taxes collected on behalf of the Complainant. American Jurisprudence defines the word accounting as, "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due." 1 AM. JUR. 2D Accounts and Accounting §52. Similarly, under Missouri law, an accounting is a two-part remedy consisting of both an accounting of amounts owed and a judgment for the balance due. *Thornton v. Rowlett*, 613 S.W.2d 177 (Mo.App.1981). While the Commission may not possess the equitable powers of a court of general jurisdiction, it is invested with specific statutory powers. Pursuant to §392.210, RSMo 1994, the Commission has jurisdiction to order Respondent to provide an accounting of the amounts collected on behalf of the Complainant:

The commission shall at all times have access to all accounts, records and memoranda kept by telecommunications companies, and may designate any of its officers or employees who shall thereupon be authorized under the order of the commission to inspect and examine any and all accounts, records and memoranda kept by any such company; and the commission may, after hearing, prescribe, by order, the accounts in which particular outlays and receipts shall be entered, charged or credited.

This statutory provision bears a strong resemblance to the first part of the aforementioned two-part equitable accounting. However, the similarity of an explicitly granted statutory power to an equitable power does not preclude the Commission from exercising the statutory power simply because it does not possess broad equitable powers.

5. In its Motion to Strike, Respondent cites Missouri case law to support the position that the Commission lacks jurisdiction to award pecuniary relief. While this case law may prevent the Commission from ordering Respondent to remit collected taxes to the Complainant, the Commission is not precluded from ordering Respondent to begin remitting taxes to the Complainant in accordance with all applicable laws, rules, and statutes, assessing penalties against Respondent, or from conducting a decertification proceeding.

6. Pursuant to §§386.570 and 392.360, RSMo 1994, the Commission may order its General Counsel to pursue maximum penalties in circuit court pursuant to §§386.570 and 392.360, RSMo 1994. Section 386.570, RSMo states that any corporation which violates or fails to comply with any law or order of the Commission is subject to a penalty ranging between one hundred dollars and two thousand dollars for each offense. This section also provides "in the case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense." Pursuant to §392.360, RSMo, the Commission may also pursue penalties against any telecommunications company which shall violate any order of the Commission. This section authorizes penalties of up to five thousand dollars for each violation and each day of a continuing violation shall be deemed to be a separate and distinct offense. It appears to Staff that Respondent has violated various statutes, Commission rules, Commission orders, and its own tariff which, if substantiated, expose Respondent to penalties under §§386.570 and 392.360, RSMo 1994. First, §190.305, RSMo 1994 requires all service providers

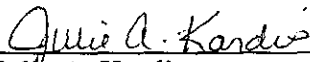
to “provide the governing body with a list of amounts uncollected along with the names and addresses of the service users refusing to pay the tax imposed by this section, if any.” Pursuant to §190.310, RSMo 1994, all service providers must remit collected taxes quarterly to the governing body and file quarterly returns with the governing body. Commission Rule 4 CSR 240-34.010 (1)(A) also requires basic local exchange telecommunications companies to collect emergency telephone service surcharges and to remit the surcharge revenue to the appropriate governmental entity. If the allegations set forth in the Complaint are substantiated, Respondent has failed to provide Complainant with a list of amounts uncollected, to remit to Complainant taxes collected quarterly, and to file quarterly returns with Complainant pursuant to Chapter 190, RSMo. Furthermore, Respondent may be in violation of page 31, Section 3.3.4 of its own tariff filed with the Commission on January 5, 1998, which states that Respondent “will collect 911 surcharges and remit all surcharge revenue to the appropriate governmental entity pursuant to §190.310, RSMo.”

7. If, after notice and a hearing, the allegations in the Complaint are substantiated, the Commission also has authority to revoke Respondent’s certificate of service authority entirely or revoke Respondent’s certificate in the Nixa exchange only pursuant to §392.410, RSMo 1999. This statute allows the Commission to alter or modify any certificate of service authority upon its own motion after notice and a hearing. Although it has gone unchallenged, the Commission frequently has used §392.410, RSMo 1999 to cancel such certificates.

WHEREFORE, Staff requests that the Commission deny Respondent’s Motion to Strike because it seeks to bar the Commission from exercising powers granted to it by statute.

Respectfully submitted,

DANA K. JOYCE
General Counsel



Julie A. Kardis
Assistant General Counsel
Missouri Bar No. 44450

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 24th day of February 2000.



**Service List for
Case No. TC-2000-176
February 24, 2000**

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