

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

| | | |
|--|---|-------------------------|
| The Staff of the Missouri Public Service Commission, |) | |
| |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Case No. TC-2004- _____ |
| |) | |
| K.C. Fibernet, |) | |
| |) | |
| Respondent. |) | |

COMPLAINT

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”) and initiates its complaint pursuant to Section 386.390 and 4 CSR 240-2.070, against K.C. Fibernet (the “Company”) for violation of the Commission’s statutes and rules relating to annual report filings and annual assessment payments. In support of its complaint, Staff respectfully states as follows:

GENERAL ALLEGATIONS

1. Respondent K.C. Fibernet is a “telecommunications company” and “public utility” as defined in Section 386.020 RSMo (2000) and is subject to the jurisdiction of the Missouri Public Service Commission pursuant to Section 386.250. K.C. Fibernet has provided the following contact information to the Commission:

K.C. Fibernet
1111 Main St., Ste. 300
Kansas City, MO 64105

According to the records of the Missouri Secretary of State's Office, K.C. Fibernet's current owner/parent company is TCI of Missouri, Inc. which is located at the following principal office address:

K.C. Fibernet
c/o TCI of Missouri, Inc.
2232 Dell Range Blvd.
Cheyenne, WY 82009

According to the records of the Missouri Secretary of State's Office, the registered agent of TCI of Missouri, Inc. is located at the following address:

TCI of Missouri, Inc., parent of K.C. Fibernet
c/o C T Corporation System
120 South Central Avenue
Clayton, MO 63105

2. Section 386.390.1 authorizes the Commission to entertain a complaint "setting forth any act or thing done or omitted to be done by a public utility in violation of any law, or of any rule, order or decision" of the Commission.

3. Commission practice Rule 4 CSR 240-2.070(1) provides that the Commission's Staff, through the General Counsel, may file a complaint.

4. The Missouri courts have imposed a duty upon the Public Service Commission to first determine matters within its jurisdiction before proceeding to those courts. As a result, "[t]he courts have ruled that the Division cannot act only on the information of its staff to authorize the filing of a penalty action in circuit court; it can authorize a penalty action only after a contested hearing." *State ex rel. Sure-Way Transp., Inc. v. Division of Transp., Dept. of Economic Development, State of Mo.*, 836 S.W.2d 23, 27 (Mo.App. W.D. 1992) (relying on *State v. Carroll*, 620 S.W.2d 22 (Mo. App. 1981)); see also *State ex rel. Cirese v. Ridge*, 138 S.W.2d 1012 (Mo.banc 1940). If the Commission determines after a contested hearing that the Company

failed, omitted, or neglected to file its annual report and/or pay its annual assessments, the Commission may then authorize its General Counsel to bring a penalty action in the circuit court as provided in Section 386.600.

COUNT ONE

5. Section 392.210.1 states that telecommunications companies must “file an annual report with the Commission at a time and covering the yearly period fixed by the commission.”

6. Commission Rule 4 CSR 240-3.540(1) requires all telecommunications companies to file their annual reports on or before April 15 of each year.

7. On February 3, 2003, the Executive Director of the Commission sent all regulated utilities, including K.C. Fibernet, a letter notifying them of the requirement to file an annual report covering the calendar year 2002, together with the appropriate form for the Company to complete and return to the Commission and instructions on how the Company may complete its filing electronically. The letter was sent to the address that was current in the Commission’s Electronic Filing and Information System (“EFIS”) at that time, and the letter was not returned.

8. The Company never returned a completed form, nor did it file its annual report electronically; and as of the date of this pleading, has not filed its 2002 Annual Report. See Affidavit of Janis Fischer, attached to this Complaint as Exhibit A.

9. Section 392.210.1 provides that “[i]f 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, such company shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report... .”

COUNT TWO

10. Section 386.370 authorizes the Commission to determine the amount of an annual assessment for expenses of the Commission to be collected from public utilities operating in this state. This statute provides that the public utility shall pay the amount assessed by July 15 or may at its election pay the assessment in four equal installments not later than July 15, October 15, January 15 and April 15.

11. Pursuant to Section 386.370, the Commission promulgated its *Assessment Order for Fiscal Year 2004* in Case No. AO-2003-0573, "In the Matter of the Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2003."

12. As called for by the *Assessment Order* in Case No. AO-2003-0573, the Budget and Fiscal Services Department calculated the amount of the 2004 Fiscal Year annual assessment for the Company and the Commission's Director of Administration rendered the statement of its assessment on behalf of the Commission by letter on June 27, 2003.

13. Also in the *Assessment Order*, the Commission directed "[t]hat each public utility shall pay its assessment as set forth herein."

14. If the Company elected to pay on a quarterly basis, quarterly installments were due on July 15, 2003; October 15, 2003; and January 15, 2004. Thus, the Company is delinquent on at least the first three-quarters of its 2004 annual assessment.

15. On October 29, 2003, the Executive Director of the Commission sent a letter to an address that the Company had provided and that was contained in the EFIS system, informing the Company of its unpaid assessment for Fiscal Year 2004.

16. The Company, as of the date of this pleading, has not paid its Fiscal Year 2004 assessment and therefore has not complied with the Commission's *Assessment Order*. See Affidavit of Helen Davis, attached to this Complaint as Exhibit B.

COUNT THREE

17. Section 386.370 authorizes the Commission to determine the amount of an annual assessment for expenses of the Commission to be collected from public utilities operating in this state. This statute provides that the public utility shall pay the amount assessed by July 15 or may at its election pay the assessment in four equal installments not later than July 15, October 15, January 15 and April 15.

18. Pursuant to Section 386.370, the Commission promulgated its *Assessment Order for Fiscal Year 2003* in Case No. AO-2002-1156, "In the Matter of the Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2002."

19. As called for by the *Assessment Order* in Case No. AO-2002-1156, the Budget and Fiscal Services Department calculated the amount of the 2003 Fiscal Year annual assessment for the Company and the Commission's Director of Administration rendered the statement of its assessment on behalf of the Commission by letter on June 26, 2002.

20. Also in the *Assessment Order*, the Commission directed "[t]hat each public utility shall pay its assessment as set forth herein."

21. On January 29, 2003, the Executive Director of the Commission sent a letter to an address that the Company had provided and that was contained in the EFIS system, informing the Company of its unpaid assessment for Fiscal Year 2003.

22. The Company, as of the date of this pleading, has not paid its Fiscal Year 2003 assessment or its Fiscal Year 2004 (as pled in COUNT TWO) and therefore has not complied with the Commission's *Assessment Orders for Fiscal Years 2003 and 2004*. See Affidavit of Helen Davis, attached to this Complaint as Exhibit B.

23. Any public utility that fails, omits, or neglects to obey an order of the Commission "is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars" for each offense, if there is no penalty otherwise provided. Section 386.570.1. The statute further states that "in the case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense." Section 386.570.2. No penalty for failing to pay annual assessments is otherwise provided in Chapter 386 or elsewhere in the Commission's statutes.

24. Staff points out that with regard to the Company's past due assessments for Fiscal Years 2003 and 2004, Section 386.590 provides that "[a]ll penalties accruing under this chapter shall be cumulative of each other, and the suit for recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or forfeiture or be a bar to any original prosecution against any corporation, person or public utility, or any officer, director, agent or employee thereof."

25. As part of the Commission *Order* in this case, the Staff requests that the Commission formally find that it may publicly release the amounts of the overdue assessments for Fiscal Years 2004 and 2003. As the assessments are derived from statements of revenue provided by regulated utilities and thus subject to the provisions of Section 386.480 ("No information furnished to the commission by a ... public utility ... shall be open to public inspection or made public except on order of the commission ..."), Staff is concerned that in the

absence of a Commission order directing its release, the revelation of the assessment amounts in circuit court or elsewhere may be improper.

PRAYER FOR RELIEF

WHEREFORE, Staff now requests that the Commission open a complaint case pursuant to Section 386.390; and, after hearing, find that K.C. Fibernet failed, omitted, or neglected to file its 2002 Annual Report and pay its Fiscal Year 2004 and 2003 annual assessments to the Commission as required by Missouri statute and Commission orders; authorize its General Counsel to bring a penalty action against the Company in the circuit court as provided in Section 386.600, based on the statutory penalties set forth in Sections 392.210.1 (for failing to file annual reports) and 386.570 and 386.590 (for failing to pay assessments); and order that the amounts of the overdue assessments may be publicly released.

Respectfully submitted,

DANA K. JOYCE
General Counsel

/s/ Robert S. Berlin

Robert S. Berlin
Assistant General Counsel
Missouri Bar No. 51709

Attorney for the Staff of the
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
(573) 526-7779 (Telephone)
(573) 751-9285 (Fax)
bob.berlin@psc.mo.gov

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 5th day of February 2004.

/s/ Robert S. Berlin

K.C. Fibernet
1111 Main St., Ste. 300
Kansas City, MO 64105
Camden, SC 29020

K.C. Fibernet
c/o TCI of Missouri, Inc. - Owner
2232 Dell Range Blvd.
Cheyenne, WY 82009

TCI of Missouri, Inc. – Owner of K.C. Fibernet
c/o C T Corporation System
120 South Central Avenue
Clayton, MO 63105

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

AFFIDAVIT

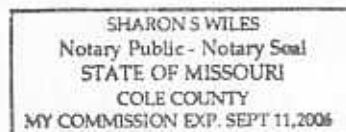
STATE OF MISSOURI)
)
COUNTY OF COLE)

I, Janis E. Fischer, Utility Regulatory Auditor IV, of the Commission's Auditing Department, first being duly sworn on my oath state that the Public Service Commission's records do not reflect the receipt of the 2002 Annual Report from K.C. Fibernet.

Janis E. Fischer
Janis E. Fischer

Subscribed and sworn to before me this 5th day of February, 2004.

Sharon S Wiles
NOTARY PUBLIC



AFFIDAVIT

STATE OF MISSOURI)
)
COUNTY OF COLE)

I, Dan Redel, Fiscal and Administrative Manager, in the Commission's Budget and Fiscal Services Department, first being duly sworn on my oath state that the Public Service Commission's records do not reflect the receipt of the Fiscal Year 2004 and Fiscal Year 2003 annual assessments from K.C. Fibernet.

Dan Redel

Dan Redel

Subscribed and sworn to before me this *5th* day of *February*, 2004.

Carla K. Schnieders

NOTARY PUBLIC

**CARLA K SCHNIEDERS
NOTARY PUBLIC STATE OF MISSOURI
COLE COUNTY
MY COMMISSION EXP. MAY 11, 2004**