

SPENCER FANE

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File No. 3356500-14

May 4, 2004

Via Federal Express

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
200 Madison Street
Jefferson City, MO 65101

FILED⁴

MAY 05 2004

Missouri Public
Service Commission

Re: Case No. TC-2004-0397

Dear Mr. Roberts:

Enclosed please find an original and eight copies of News-Press & Gazette Company's Motion to Set Aside Default and/or Application for Rehearing and For Leave to File Answer. Please file stamp the enclosed extra receipt copy and return to me in the enclosed envelope for my records.

If you have any questions concerning this matter, then please do not hesitate to contact me. Thank you very much for your attention to this matter.

Very truly yours,


Michael L. McCann

MLM/drh
Enclosures

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Kansas City, Missouri 64106-2140
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WA 757156.1

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED⁴

MAY 05 2004

Missouri Public
Service Commission

The Staff of the Missouri Public Service)
Commission,)
)
Complainant,)
)
v.)
)
News-Press & Gazette Company d/b/a St.)
Joseph Cablevision,)
)
Respondent.)
)

Case No. TC-2004-0397

**MOTION TO SET ASIDE DEFAULT, AND/OR APPLICATION FOR REHEARING,
AND FOR LEAVE TO FILE ANSWER**

COMES NOW News-Press & Gazette Company d/b/a St. Joseph Cablevision (“NPG”), by and through its undersigned counsel, and, expressly and specially reserving its objections to service of process, personal jurisdiction, and subject matter jurisdiction, moves the Commission to Set Aside the Order Granting Default, Set the Matter for a Hearing on the Merits, and Grant it Leave to File an Answer (the “Motion”). In support of the Motion, NPG hereby states as follows to the Missouri Public Service Commission (the “Commission”):

1. On February 13, 2004, the Staff of the Commission filed a complaint with the Commission against NPG (the “Complaint”). On February 17, 2004, the Commission issued a Notice of Complaint indicating that NPG had 30 days from the date of the Notice to file an answer. The Complaint was purportedly sent by mail, hand-delivery, facsimile or electronic mail to the following persons and addresses:

St. Joseph Cablevision
825 Edmond St.
St. Joseph, MO 64501

NPG Cable, Inc. (Registered Agent)
825 Edmond St.
St. Joseph, MO 64501

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

2. On February 20, 2004, Paula Deets, a mail services clerk working for a related, but different entity, signed a certified mail receipt for a letter sent by the Secretary of the Commission. The Complaint and Notice of Complaint were not received by an officer, partner, managing or general agent of NPG or by anyone in charge of any NPG office.

3. Because the required officers and agents of NPG did not receive the Complaint or Notice of Complaint, NPG was not timely aware of the Complaint and did not file an answer.

4. On April 6, 2004, the Commission issued an Order Granting Default (the "Order"), stating that the Order would become effective on April 13, 2004.

5. Neither NPG nor NPG's registered agent was served, either personally or by mail, with a copy of the Order.

IMPROPER SERVICE OF COMPLAINT

6. Section 386.390.3, RSMo. (2000) provides that "[u]pon the filing of a complaint, the commission shall cause a copy thereof to be served upon the public utility, corporation or person complained of."

7. Section 386.390.4, RSMo. (2000) provides that "[s]ervice in all hearings, investigations and proceedings pending before the commission may be made upon any person upon whom summons may be served in accordance with the provisions of the code of civil procedure of this state, and may be made personally or by mailing in a sealed envelope with postage prepaid." R.S.Mo. (2000) § 386.390.4.

8. Missouri's Code of Civil Procedure, in turn, provides that a summons may be served upon a corporation "by delivering a copy of the summons and petition to an officer, partner, or managing or general agent, or by leaving the copies at any business office of the defendant with the person having charge thereof or by delivering copies to its registered agent or to any other agent

authorized by appointment or required by law to receive service of process.” Mo. R. Civ. P. 54.13(b)(3); RSMo. § 506.150.3, RSMo. (2000).

9. “The terms ‘managing or general agent’ as used in Rule 54.13 have a technical meaning.” *Howell v. Autobody Color Co., Inc.*, 710 S.W.2d 902, 905 (Mo.App. 1986).

10. Paula Deets, the person who received and signed for the service, was not an officer, partner, managing or general agent or otherwise a person having charge of any business office of NPG. See Affidavit of Paula Deets attached hereto as Exhibit A; *Howell v. Autobody Color Co., Inc.*, *Id.* at 905.

11. The agent identified by the Staff for service in the Complaint is not the agent for the service of process registered by NPG with the Missouri Secretary of State, nor is it any of the other persons “upon whom summons may be served.” Instead, the registered agent of NPG, as stated in the records of the Missouri Secretary of State, is Henry H. Bradley, 825 Edmond St., St. Joseph, MO, 64501. Mr. Bradley did not receive service of the summons, personally or by mail.

12. Accordingly, the Complaint and Notice of Complaint was not received by an officer, partner or managing or general agent of NPG or its registered agent, as required for effective service of process. Mo. R. Civ. P. 54.13(b)(3).

13. Service of process must strictly comply with specific statutory requirements; even actual notice by a defendant is insufficient to confer proper jurisdiction. *Community Trust Bank v. Anderson*, 87 S.W.3d 58 (Mo.App. 2002). Hence, while an employee of a related NPG entity did receive a letter from the Staff, the Staff’s failure to comply with the specific requirements of the service statute renders the Order defective.

14. “Valid service of process is a prerequisite to *in personam* jurisdiction.” *Grooms v. Grange Mutual Casualty Co.*, 32 S.W.3d 618, 621 (Mo.App.E.D. 2000); *Jones v. Fliteline Motors*,

Inc., 809 S.W.2d 179, 181 (Mo.App. W.D. 1991). “When a court enters judgment when no valid personal jurisdiction has been obtained over the defendant, the judgment is void.” *Id.*

15. Defective service of the complaint requires that the Order be set aside as void. *Id.*

16. Moreover, even if the Commission somehow found that NPG was properly served, NPG’s failure to timely file an answer is not due to any disregard for the Commission or its procedure, but solely the result of an unintentional mishandling of the document by a lower-level employee, not sensitive to the urgency of the document and who did not, therefore, route the document in a timely and proper manner.

17. Due to the sensitivity of the nature of summons, Missouri law sets forth a limited group of individuals who may be served.

18. Justice would be better served by the Commission’s consideration of the matters alleged in the Complaint on the merits, rather than the entry of a default order.

IMPROPER SERVICE OF ORDER

19. Independently, even if service of the initial Complaint was somehow deemed proper, the Order was not even purportedly served in a proper manner. Therefore, the required seven days to set aside has not yet expired.

20. Section 386.490.1, RSMo., (2000) provides that “[e]very order of the commission must be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof in a sealed package with postage prepaid, to the person to be affected thereby, or, in the case of a corporation, to any officer or agent thereof upon whom a summons may be served in accordance with the provisions of the code of civil procedure.” The rules of practice of the Commission also provide that “[e]very order of the

commission shall be served by mailing a certified copy, with postage prepaid, to all parties of record.” 4 CSR § 240.150.3.

21. NPG, its registered agent and its attorney of record (as set forth in Case No. TA-1995-0217), were never served with a copy of the Order. As such, NPG received neither timely or proper statutory notice of the Order.

22. Although 4 CSR § 240-2.070.9 provides that a respondent may file a motion to set aside an order of default within 7 days from the issue date of the order granting default, the seven-day time period could not begin until the Order was properly served upon NPG. Because it never received a copy of the Order due to a failure of service, the required 7 days has not lapsed and the instant motion to set aside is timely.

23. Even if the Commission finds that the Complaint and Order were properly served upon NPG, NPG has demonstrated excusable neglect for its failure to file the Motion within 7 days.

MERITORIOUS DEFENSES AND PROPOSED ANSWER


24. NPG respectfully requests that the Order be set aside for the reasons herein stated. Expressly reserving, and without waiving, its procedural defenses, including the defective service of process, NPG states it has numerous substantive defenses on the merits including, but not limited to the fact that NPG did not provide telecommunications services during the applicable time period. Additional legal defenses include: the governing 1-year statute of limitations lapsed prior to the filing of the instant Complaint; the commission lacks subject matter jurisdiction; NPG does not fall within the scope of the requirement to file; limits on penalties preclude the claim; and the Complaint fails to state a claim.

25. A copy of NPG's proposed Answer is attached hereto as Exhibit B.

WHEREFORE, NPG prays for an order setting aside the Order granting it leave to file a Answer, and setting this matter for a contested hearing on the merits.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP



Michael L. McCann, Mo. Bar #41166
Patrick J. Whalen, Mo. Bar #45594
Kristine M. Becker, Mo. Bar #51702
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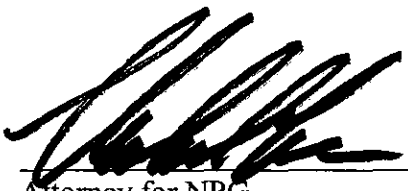
ATTORNEY FOR NEWS-PRESS &
GAZETTE COMPANY

Certificate of Service

On this 4th day of May, 2004, a true and correct copy of the above document was served upon each of the parties set forth below via overnight, express delivery.

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

Bruce H. Bates
Office of the General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102



Attorney for NPG

EXHIBIT A

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

The Staff of the Missouri Public Service Commission,
)
)
)
 Complainant,)
)
 v.)
)
 News-Press & Gazette Company d/b/a St. Joseph Cablevision,)
)
)
 Respondent.)

Case No. TC-2004-0397

AFFIDAVIT OF PAULA DEETS

STATE OF MISSOURI)
) ss.
 COUNTY OF BUCHANAN)

I, Paula Deets, after being duly sworn upon my oath, state and aver as follows:

1. I am over 18 years of age and of sound mind. I have personal knowledge of the matters testified to herein.
2. I am an employee of NPG Newspapers, Inc., a subsidiary of News-Press & Gazette Company ("NPG") and I work as a mail services clerk at NPG's office located at 825 Edmond Street, St. Joseph, Missouri, 64501.
3. I understand that this affidavit will be used in connection with a complaint brought by the Missouri Public Service Commission against NPG.
4. I am not an officer, partner, managing agent or general agent of NPG and I am not in charge of any business office of NPG.



Paula Deets

WA 757202.1

Subscribed and sworn to before me on this 4th day of May, 2004.

Judy B. Moreno
Notary Public

My Commission expires:

6/24/04

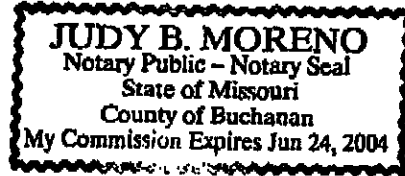


EXHIBIT B

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

The Staff of the Missouri Public Service Commission,)	
)	
Complainant,)	
)	
v.)	Case No. TC-2004-0397
)	
News-Press & Gazette Company d/b/a St. Joseph Cablevision,)	
)	
Respondent.)	
)	

**ANSWER OF NEWS-PRESS & GAZETTE COMPANY
D/B/A ST. JOSEPH CABLEVISION ("NPG")**

COMES NOW Respondent News-Press & Gazette Company d/b/a St. Joseph Cablevision ("NPG") and, pursuant to 4 C.S.R. 240-2.070, respectfully provides the following answer to the Complaint of the Staff of the Missouri Public Service Commission ("Staff").

General Allegations

1. NPG admits that it did apply and procure a Certificate of Authority to provide competitive inter-exchange intrastate telecommunications services in 1995, but denies the remaining allegations contained in paragraph 1 of the complaint, including the legal conclusions of jurisdiction and the inaccurate statement regarding NPG's registered agent.
2. NPG admits quoted language is found in Section 386.390.1.
3. NPG admits that the Commission Staff is authorized to file a complaint in appropriate circumstances.
4. The allegations in paragraph 4 solely state legal conclusions to which no response is required. To the extent a response is deemed necessary, NPG admits that a contested hearing is required before a penalty action may proceed.

Count I

5. NPG admits that Section 392.210.1 provides for the filing of annual reports by telecommunications companies.

6. Commission Rule 4 C.S.R. 240-3.540(1) speaks for itself and no response to the characterization of that rule is now necessary. To the extent a response is deemed required, NPG admits that telecommunications companies are required to file their annual reports on or before April 15th of each year barring other extenuating circumstances.

7. NPG is without sufficient information with which to admit or deny the allegations contained in paragraph 7 as to what the Executive Director of the Commission sent to third parties.

8. NPG admits that it did not file a 2002 annual report on or before April 15, 2003.

9. As the allegations in paragraph 9 solely attempt to recite the provision of a statute, no response thereto is deemed necessary. To the extent a response is deemed necessary, NPG admits that it is a partial quotation of the language in the cited statute.

Affirmative Defenses

1. The Complaint fails to state a claim upon which relief can be granted.
2. The Missouri Public Service Commission lacks jurisdiction over NPG or the subject matter of this Complaint.
3. The governing statute of limitations has lapsed on the claims.
4. Service of process was defective in this matter.
5. The penalties sought in the Complaint are unconstitutional and prohibited by public policy.
6. The Complaint fails to seek the required and appropriate remedy.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP



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Kristine M. Becker, Mo. Bar #51702
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ATTORNEY FOR NEWS-PRESS &
GAZETTE COMPANY

Certificate of Service

On this 4th day of May, 2004, a true and correct copy of the above document was served upon each of the parties set forth below via United States Mail, postage prepaid.

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

Bruce H. Bates
Office of the General Counsel
Missouri Public Service Commission
P.O. Box 360
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Attorney for NPG