

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission )  
On Its Own Motion )  
-vs- )  
MTCO Communications, Inc. ) Docket No. 05-0201  
Removal of Carriers from List of )  
Telecommunications Carriers for failure )  
To file tariffs for the provision of local )  
Exchange telecommunications services )

**MOTION TO DISMISS**

NOW COMES MTCO Communications, Inc. (“MTCO”) Inc., by and through its attorneys, Troy A. Fodor and E.M. Fulton Jr., respectfully requests that this proceeding against MTCO be dismissed, and in support thereof states as follows:

1. On March 23, 2005, the Commission entered a citation order, based on a report from its Staff, requesting MTCO and other named respondents to show cause, if any, why the Commission should not rescind their Certificates of Service Authority and take other action because they had failed to file any tariffs for local exchange telecommunications service or not otherwise exercised their authority.

2. MTCO received its Certificate of Exchange Service Authority to provide competitive local exchange telecommunication service on or about December 16, 1998 in ICC Docket 98-0638.

3. Section 13-401(a) of the Public Utilities Act provides in relevant part, that:

“Unless **exercised** within a period of two years from the issuance thereof, authority conferred by a Certificate of Service Authority shall be null and void. 220 ILCS 5/13-401(a) (Emphasis added).

4. Section 13-501 of the Act further provides that:

“No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided”.  
220 ILCS 5/13-501.

5. “Exercised” is the active word in the relevant statute. “Exercise” when used as a noun, means “the discharge of an official function or professional occupation.” “Exercise” when used as a transitive verb means, “to bring to bear, to use repeatedly in order to strengthen or develop.” Webster’s Seventh New Collegiate Dictionary, G & C Merriam Co., 1966, p. 291. MTCO has repeatedly exercised the authority from its certificate by transacting business in Illinois.

6. MTCO’s certificate of authority authorized doing business in the State of Illinois. Section 5/13-401(a) of the Public Utilities Act provides in part:

“No telecommunications carrier not possessing a certificate of public convenience and necessity or certificate of authority from the Commission at the time this Article goes into effect shall transact any business in this State until it shall have obtained a certificate of service authority from the Commission pursuant to the provisions of this Article” Emphasis added, 220 ILCS 5/13-401(a).

7. MTCO’s certificate of competitive service authority authorizes the provision of competitive local exchange telecommunications service. Section 5/13-401(a) of the Public Utilities Act provides in part:

“No telecommunications carrier offering or providing, or seeking to offer or provide, any local exchange telecommunications service shall do so until it has applied for and received a Certificate of Exchange Service Authority pursuant to the provisions of Section 13-405”.Emphasis added, 220 ILCS5/13-401(a)

8. As will be shown, MTCO has been exercising its certificate by lawfully transacting business in the state, pursuant to its certificate, since December 16, 1998 but has not provided regulated local exchange telecommunications service or filed tariffs. To date, the services which MTCO has provided to its numerous customers over its facilities have been unregulated communications or information services.

9. The Commission's Order on page two expresses the Staff of the Illinois commerce Commission's belief that the failure to file tariffs is evidence of a failure "to lawfully exercise the certificates."

10. MTCO believes it has lawfully exercised the authority conferred by its certificate of service authority and has done so within two years from December 16, 1998 by constructing facilities, interconnecting, discharging official functions, and conducting business.

### **CONSTRUCTION OF FACILITIES**

1. MTCO has "exercised" its authority conferred by its Certificate by constructing facilities. MTCO contracted for placement of its communications network equipment in Pekin, Illinois in September of 1999 and in Morton, Illinois in August of 2000. The equipment installation was completed in August 2000. MTCO installed its first SDSL internet service in November of 1999 and continued to provide internet services to additional customers throughout the year 2000.

2. Cable construction commenced in November 1999 within two years of the granting of the Certificate on December 16, 1998.

3. MTCO conducted many official business transactions, which "exercised" its authority conferred on it by its certificate of authority from the Commission. As the

Appellate Court, First District said, “under the authority of the Certificates issued pursuant to the Act, Bell and other telephone companies have the right to erect facilities for the purpose of delivering authorized services.... “Radio Relay Corp. V. Illinois Commerce commission, 43 Ill. App. 3d 719, 357N.E.2d 144, 148 (1976).

4. Courts have, thus recognized the right conferred by the Certificate to “exercise” its authority by constructing facilities. This of course is the authority to “transact business in this State” under the first sentence of Section 5/13-401(a) previously cited. It seems clear that MTCO’s authority is not “null and void” because it “exercised” its authority conferred by the Certificate within two years.

### **INTERCONNECTION**

1. The Commission has previously recognized MTCO’s authority to do business in Docket No. 00-0570. On August 25, 2000, Verizon and MTCO jointly filed a petition requesting approval of an interconnection agreement. On October 4, 2002 in Docket 00-0570 the Commission approved the agreement for the provision of unbundled network elements and required Verizon to modify its tariffs to reference the negotiated agreement. Moreover, on May 13, 1999 GTE and MTCO jointly filed a petition requesting approval of an interconnection agreement dated December 22, 1998 just 6 days after MTCO received its certificate. Staff witness Julie M. Vanderlan recommended approval of the agreement in ICC Docket 99NA-102. The Commission approved this agreement on September 22, 1999 within two years of the grant of the certificate of service authority. Clearly, MTCO exercised its authority by petitioning the Commission for approval of the agreements.<sup>1</sup> MTCO thus discharged an official function, lawfully exercising their interest in the certificate as required by Section 13-401(a) of the Public

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<sup>1</sup> MTCO’s Certificate was issued December 16, 1998 in Docket No. 98-0638.

Utilities Act.<sup>2</sup> MTCO also has interconnection agreements with SBC that have been approved by the Commission.

2. The Commission recognized MTCO's certificated authority to do official business by approving the agreements in Dockets 00-0570 and 99NA-102, as well as the SBC interconnection agreement dockets.

### **FILING REPORTS**

1. MTCO repeatedly discharged an official function by filing reports, lawfully exercising the certificates as required by Section 13-401(a) of the Public Utilities Act. Such reports were filed within two years exercising the authority of the certificates as part of transacting business in the State of Illinois in the sense of 13-401(a) of the Public Utilities Act, 220ILCS13-401(a).

2. As recognized by the Commission Order in Dockets 00-0570 and 99NA-02, the authority of MTCO has not lapsed. It has made annual filings with the Commission showing its intent to continue to exercise its authority under the act. The first sentence of Section 13-401(a) has to do with transacting business and a certificate is required to do business. The filing of required ICC reports is a part of transacting business. The second part of Section 13-401(a) applies to the providing or seeking to provide local exchange telecommunication service. It has been shown that there is more than one way to fully exercise the authority conferred by a certificate within two years other than filing a tariff. Moreover, Section 13-401(a) does not require telecommunication services or filing of a tariff.

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<sup>2</sup> "Public Utility acquires an "interest" in a Certificate of public convenience and necessity granted to it by the Commerce Commission and is authorized to act according to its terms." Quantum Pipeline Co. et al. v. Illinois Commerce Commission, 304 Ill. App. 3d 310, 709 N.E. 2d 950 at 955 (1999) citing Black Hawk Motor Transit Co. v. Illinois Commerce Commission, 398 Ill. 542, 554, 76 N.E. 2d 478, 486 (1947).

3. MTCO has continued to file all the required forms exercising the authority under its certificate. It would be unfair and poor public policy to rescind MTCO's certificate under the facts of this case, over six years after its certificate was granted.

### **CHICAGO RAILWAY DISTINGUISHED**

1. Chicago Railways Company et al. V. The Commerce Commission ex rel. The Chicago Motor Coach Company, 336 Ill. 51 (1929) relied on by the Commission, may not be good law in the present competitive environment because it was predicated on facts that have changed. The Court there said "It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is, that through regulation of an established carrier occupying a given field and protection of it from competition the public will be serviced more efficiently and at a more reasonable rate than if other competing lines were authorized to render the same public service in the same territory" Chicago Railway supra 336 Ill at 76.

2. The new law effective in 1986 has changed the policy to a competition friendly telecommunications regulation. Sections 13-102(e) (f) and (g) of the Public Utilities Act provides:

(e) it is in the immediate interest of the People of the State of Illinois for the State to exercise its rights within the new framework of federal telecommunications policy to ensure that the economic benefits of competition in all telecommunications service markets are realized as effectively as possible;

(f) the competitive offering of all telecommunications service will increase innovation and efficiency in the provision of telecommunications services and may lead to reduced prices for consumers, increased investment in communications infrastructure,

the creation of new jobs, and the attraction of new businesses to Illinois; and

(g) protection of the public interest requires changes in the regulation of telecommunications carriers and services to ensure, to the maximum feasible extent, the reasonable and timely development of effective competition in all telecommunications service markets. 220ILCS5/13-102(e) (f) (g).

3. This obvious shift in emphasis detracts from the importance of the anticompetitive language in the Chicago Railways case. Chicago Railways was cited by the Commission in this docket as its authority for the position that “failure to lawfully exercise the certificates as evidenced by the failure to file tariffs, has caused the authorities to lapse as a matter of law. No revocation is necessary to revoke the certificate.” However, the Commission seemingly recognized the shift to a competitive friendly market by allowing MTCO “to adduce evidence with respect to matters stated hereinabove and to show cause, if any there be, why the Commission should not rescind the certificates of service authority...” ICC Order Docket 05-0201.

4. As previously shown, and as apparently recognized in the Order in Docket 05-0201, there is more than one way to exercise the authority granted by a certificate of service authority.

5. But assuming that the 1929 Chicago Railways case still has viability, there are some significant distinguishing aspects. First, the Supreme Court found there were no facts to support the certificate of convenience and necessity and the Commission’s Order “is therefore void” Chicago Railways, supra 336/Ill. at 66. Second, the Commission amended Chicago Railway’s certificate to grant authority in the territory where they were competing with Chicago Motor Coach Company without notice to Chicago Motor Coach Company. “They were entitled to notice before the amendment

was made, and since none was given, the order making the amendment was void.” Chicago Railways, supra, 336 Ill. at 67. The Court went on to say that where two routes are authorized by a Certificate “the service of motor buses carrying passengers on one street or by one route is a different service from .... carrying passengers on another street by another route...” Chicago Railways 336 Ill. at 69. The Court concluded that failure to use the other route caused the certificate for that route to be null and void even though they had used the first route.

6. There are several distinguishing characteristics, which make the strict interpretation of Chicago Railways inapplicable to MTCO:

A. There is a difference between telecommunication certificates and ones for railways and buses.

B. MTCO has constructed facilities for their single “route” within two year.

C. MTCO’s interconnection cases Dockets 00-0570 and 99NA-102 were an exercise of the authority under their certificate and recognition of such exercise by the Commission.

D. MTCO has continued to transact business in exercise of its authority under its certificate by filing Annual Reports, tax forms, and agent designation forms with the Commission.

E. Chicago Railway supra 336 Ill. 51 (1929) was decided at a time when it was not the policy of the Public Utilities Act to promote competition, but the policy has changed to competitive friendly regulation. Moreover, MTCO is

certificated for competitive local exchange telecommunications service in the entire state except areas of its affiliates. See ICC Order in Docket 99-0020 at p.6.

F. MTCO was given a certificate to do what the Chicago Railway case said they could not do, i.e. compete with the first carriers in the field except rural telephone companies. Chicago Railway supra 336 Ill. at 77.; Sec 220 ILCS 5/13-103(b).

WHEREFORE, MTCO respectfully requests that the proceeding against it be dismissed.

Respectfully submitted,

MTCO Communications, Inc.

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Service List Entries: 72

STATE OF ILLINOIS        )  
  ) SS  
COUNTY OF WOODFORD )

VERIFICATION

The undersigned, Ann E. Dickerson, being first duly sworn on oath, deposes and states that she is the Chief Financial Officer of MTCO Communications Inc.; that she has read the above and foregoing Motion and has knowledge of the statements of fact contained therein; and that the contents of said Motion are true and correct to the best of her knowledge, information and belief.

*Ann E. Dickerson*  
Ann E. Dickerson

Subscribed and sworn to before me

this 26<sup>th</sup> day of April, 2005

*Susan J. Wernsman*  
Notary Public

