BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

An Investigation of the Fiscal and Operational Reliability of Cass County Telephone Company and New Florence Telephone Company, and Related Matters of Illegal Activity.	))))	Case No. TO-2005-0237

MOTION FOR RECONSIDERATION

COME NOW Cass County Telephone Company ("CassTel") and New Florence Telephone Company ("New Florence") (collectively, the "Companies"), and pursuant to 4 CSR 240-2.080 and 4 CSR 240-2.160(2), respectfully apply to the Public Service Commission of the State of Missouri (the "Commission") to reconsider the Commission's *Order Denying Motion to Quash* issued in the above-captioned case on May 5, 2005, to be effective May 5, 2005 (the "*Order*").

The *Order*, at best, demonstrates confusion on the part of the Commission, and, at worst, demonstrates a complete lack of understanding regarding the nature of the workpapers being sought, the privilege being asserted, and the applicable law. The *Order* is unlawful, unjust, and unreasonable, in the particulars hereinafter stated and for the following reasons and in the following respects.

I. INTRODUCTION

Subpoenas were requested by the Staff of the Commission ("Staff"), and those subpoenas were served upon the registered agents for CassTel and New Florence on March 17 and 18, 2005, by the Commission. With regard to (1) Warinner, Gesinger & Associates, LLC, and (2) Mize, Houser & Company, the Commission sought by subpoena "audit workpapers that support each independent auditor's report for the financial statements" of the Companies.[1] Regardless of

[1] The subpoena served on CassTel actually requests workpapers related to the financial statements of New Florence Telephone Company. CassTel assumes this is a scrivener's error.

the broad scope of this investigatory case, the information requested in the subpoenas is protected from discovery in this proceeding. The workpapers of the independent auditors are protected from disclosure under the statutory accountant-client privilege provided for in RSMo. §326.322. In addition, the subpoena requests are overly broad and seek the production of information which is not relevant to this investigatory proceeding.

Consequently, on March 25, 2005, the Companies filed a Motion to Quash with regard to the subpoenas. On April 22, 2005, Staff filed a response opposing the Motion to Quash, and on May 5, 2005, the Commission issued its *Order* denying the Companies' Motion to Quash. In its *Order*, the Commission erroneously states the following in support of its decision: (1) RSMo. §326.322 "serves to protect the client," but only allows the accountant – not the client -- to assert the statutory privilege; (2) the Companies failed to cite a case indicating that the privilege is available to a regulated company when the Commission seeks information; and (3) the subpoenas are not overbroad because the scope of this investigatory case is "quite broad."

II. DISCUSSION

The Commission should reconsider its decision pursuant to 4 CSR 240-2.160(2), because the *Order* is unlawful, unjust, and unreasonable. First, contrary to Commission Rule 4 CSR 240-2.080, the Staff took nearly 30 days to file its Response to the Companies' Motion to Quash. Staff did not seek leave of the Commission to file out of time. The *Order* fails to address or even acknowledge this fact, and the Companies are concerned that they would not have been afforded the same "courtesy" if the Companies had failed to comply with a Commission rule. More importantly, the fact that it took Staff nearly 30 days to articulate a response belies the validity of Staff's subpoena requests. Staff's delay certainly refutes Staff's argument that Staff is trying to

obtain necessary information, while the Companies are trying to frustrate the process and cause delay.

A. The Privilege Stated in RSMo. §326.322 May be Claimed by the Companies

The *Order* is internally inconsistent and demonstrates a lack of understanding on the part of the Commission. On one hand, the Commission acknowledges that the statute "serves to protect the client," but then the Commission holds that only the accountant – not the client -- may assert the statutory privilege. The accountant-client privilege is provided for by statute, and the Companies are entitled to the protection afforded thereby.

The attorney-client and physician-patient privileges are analogous to the accountant-client privilege at issue in this case. Much like the statutory language of the accountant-client privilege, an attorney is incompetent to testify concerning communications made to the attorney by the client without consent of the client. It is clearly established that the attorney-client privilege belongs to the client. *State v. Carter*, 641 S.W.2d 54 (Mo. banc 1982); *Johnson v. Schmidt*, 719 S.W.2d 825 (Mo.App. 1986). The same is true for the physician-patient privilege. *Randolph v. Supreme Liberty Life Insurance Company*, 221 S.W.2d 155 (1949). As was noted in the Companies' Motion to Quash, the statutory accountant-client privilege should be accorded the same discovery treatment as the statutory physician-patient privilege. *State ex rel. Southwestern Bell Publications v. Ryan*, 754 S.W.2d 30, 32 (Mo.App. E.D. 1988).

Other states have also addressed the issue of who may assert the statutory accountant-client privilege. Pennsylvania has created an accountant-client statutory privilege, and that statute states that except by permission of the client engaging the accountant, a licensee or a person employed by a licensee shall not be required to, and shall not voluntarily, disclose or divulge information. The United States District Court for the Eastern District of Pennsylvania

has held that **the privilege may only be waived by the client "because the privilege belongs to the client."** *Sansom Refining Company v. Bache Halsey Stuart Shields, Inc.*, 92 F.R.D. 440 (1981) (emphasis added). "Pennsylvania's accountant-client privilege belongs to the client, not to the accountant." *Emtec, Inc. v. Condor Technology Solutions, Inc.*, 1998 U.S. Dist. Lexis 6775 (1998). *See also Kuhn and Kogan v. Jeffrey C. Mensh & Associations, Inc.*, 77 F.Supp. 2d 52 (1999) (where applicable, the accountant-client privilege attaches to the client); *First Interstate Credit Alliance, Inc. v. Arthur Anderson & Co.*, 1988 N.Y. Misc. Lexis 850 (1988) (protective order granted pursuant to statutory accountant-client privilege).

Warinner, Gesinger & Associates, LLC and Mize, Houser & Company are certified public accounting firms hired by the Companies to perform auditing services, the individual auditors involved are licensees under Chapter 326, and the subpoenas request the workpapers that support each independent auditor's report. As stated above, the privilege is the clients to assert, and the auditors' clients, CassTel and New Florence, have not consented to the production of the workpapers and have objected to Staff's efforts to obtain the same. The information requested from the licensed auditors falls squarely within the scope of §326.322.2.

It should also be noted that, pursuant to RSMo. 326.325, the workpapers being sought are the property of the licensed accounting firms – the workpapers are not part of the books and records of the regulated utility. The workpapers were created by the licensed accountants in the course of preparing their reports on the Companies. The workpapers reflect the notes, opinions and mental impressions of the accountants, and the workpapers are the result of confidential communications between the accountants and their clients.

Although not addressed by the Commission in its *Order*, Staff argued that the statutory privilege cannot apply in administrative proceedings. This argument is contrary to the express

language of the statute which reads that the privilege "shall exist in all cases except when material to the defense of an action against a licensee." This investigatory docket is not an action against a Chapter 326 licensee. Additionally, and of great significance, is the fact that the Commission's own rule requires that "discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." 4 CSR 240-2.090(1). Presumably, then, the same privileges which apply in civil actions apply in proceedings before the Commission.

In addition to the express language of the statute that the privilege *shall* apply in *all* cases and the Commission rule regarding discovery being obtained under the same conditions as in civil actions in the circuit court, there is the well-established principle that the Commission acts in a quasi-judicial capacity. Members of the Commission, occupying quasi-judicial positions, are bound by the same high standards as judicial officers. *Union Electric Company v. Public Service Commission*, 591 S.W.2d 134 (Mo.App. 1979); *see also Central Missouri Plumbing Co. v. Heart of America Chapter of Assoc. Builders*, 908 S.W.2d 366 (Mo.App. W.D. 1995) (the members of the Labor and Industrial Relations Commission, like the members of the Public Service Commission, occupy quasi-judicial positions; as quasi-judicial officers, they must strive to apply the law and uphold the Constitution and the laws of the state); *Howlett v. State Social Security Commission*, 149 S.W.2d 806 (Mo. banc 1941) (the Social Security Commission, like the Public Service Commission, exercises quasi-judicial powers).

The statutory privilege applies in the case at hand, and the statutory privilege may be asserted by the Companies. As the Commission acknowledged in its *Order*, the privilege serves to protect the client, not the accountant. Therefore, the Commission is simply wrong when it states that the statute allows only the accountant (or licensee) to assert the privilege. The

privilege belongs to the Companies, and the Companies are entitled to the protection afforded thereby. The undersigned counsel is unaware of any statute, rule, or court decision which would allow the Commission to ignore the accountant-client privilege created by statute.

B. The Arkansas Power & Light Case is Directly on Point

In its *Order*, the Commission argues that the privilege is not available because the Companies have not cited a case which indicates that the "privilege is available to regulated companies when the regulator seeks (from the regulated companies) the information asserted to be privileged." First, case law on point most certainly is not required before one may rely upon a plain, unambiguous reading of a statute. Second, although there does not appear to be any Missouri appellate law directly on point, the Companies did, in fact, cite to a case in which the Circuit Court of Cole County held that the statutory accountant-client privilege is available to a regulated company when the Commission seeks privileged information from that regulated company.

Although the Circuit Court's opinion in *Ex rel. Arkansas Power & Light Company v. Public Service Commission*, Case No. CV186-147CC, is not binding on this Commission, it is instructive. The statute has been moved within the Chapter and amended to be gender-neutral, but the language of the statute was otherwise the same, and the exact same issue as is at issue here was considered in the Circuit Court case. In that case, Staff sought production of the workpapers of a company which performed auditing services for Arkansas Power & Light. In the Court's Order of April 22, 1986, **the Court held that the Commission was prohibited from compelling the utility company to disclose the workpapers of its auditors.** The Circuit Court of Cole County clearly found that the statutory privilege is applicable to administrative

proceedings, that the Commission is bound by the statute, and that regulated companies are entitled to assert the privilege.

C. The Subpoena Requests are Overbroad and Seek Irrelevant Information

The Companies do not dispute that the Commission is authorized to investigate certain actions of telecommunications companies. However, the scope of the case may not outweigh and supplant a statutorily-created privilege, and the scope of the case may not outweigh and supplant the traditional rules of discovery, the doctrines of waiver and estoppel, and the periods of limitation imposed by statute. The Commission was created by statute and has only such powers as are expressly conferred by statute and are reasonably incidental thereto. *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 181 (Mo.App. 1960).

The subpoenas seek the production of certain workpapers prepared by Warinner, Gesinger & Associates, LLC and Mize, Houser & Company, without specifying any particular time period. By not limiting the subpoena requests as to time, the requests are overly broad and unduly burdensome and seek irrelevant information. CassTel and New Florence are unaware of any event in 1996 which could possibly form the basis of a Commission action in 2005. Additionally, Staff has failed to articulate any "need" for the workpapers. Production of the privileged material will simply make Staff's job easier. Staff should not need the auditors' workpapers in order for Staff to perform its own audit. As stated previously, if Staff needs assistance interpreting an audit entry or tracing a certain expense, this could be accomplished in a much more reasonable and limited fashion without infringing upon the privilege.

Regardless of Staff's and the Commission's intentions and desires, the workpapers of the independent auditors are protected from disclosure under the statutory accountant-client privilege, and the subpoena requests are overly broad and seek the production of information

which is not relevant to this investigatory proceeding – and which could not be relevant to any future proceeding against CassTel or New Florence. The Commission cannot by unilateral decree expand the scope of its authority beyond those powers expressly granted by its enabling legislation. *State ex rel. Kansas City Transit, Inc. v. Public Service Commission*, 406 S.W.2d 5 (Mo. 1966).

D. The Subpoenas are Not Self-Enforcing

Lastly, the subpoenas in question are not self-enforcing. In its *Order*, the Commission directs the Companies to "forthwith produce the information sought." The Companies, however, are not willing to voluntarily waive the accountant-client privilege provided for in RSMo. §326.322, and the Companies are not willing to waive their rights to object to the scope of the subpoenas. Pursuant to Commission Rule 4 CSR 240-2.100, enforcement of a subpoena, after an objection or motion to quash has been ruled upon, is by application to the Circuit Court by the party seeking enforcement. This procedure is also required by RSMo. §536.077. Accordingly, the Commission's directive in its *Order* is beyond the scope of the Commission's authority.

WHEREFORE, for the reasons set forth in the Companies' Motion to Quash, the Companies' Reply to Staff's Response, and for the good cause shown above, the Companies are entitled to an order granting their Motion to Quash, and the Companies respectfully request that the Commission reconsider its May 5, 2005 *Order Denying Motion to Quash*, and, upon reconsideration, that errors of the Commission be corrected and thereafter a new order be issued consistent with the applicable law as more fully set forth above in this pleading.

Respectfully submitted,

W.R. England, III #23975
Sondra B. Morgan #35482
Diana C. Carter #50527
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65101-0456
(573) 635-7166
(573) 634-7431 (fax)
Trip@brydonlaw.com (e-mail)

Attorneys for CassTel and New Florence

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, hand-delivered, or sent by electronic transmission on the 13th day of May, 2005, to the following:

Nathan Williams
Senior Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Michael F. Dandino
Senior Public Counsel
Office of Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

W.R. England, III