

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

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

APPLICATION FOR REHEARING

Comes now New Florence Telephone Company ("New Florence" or "Company") and for its Application for Rehearing of the Missouri Public Service Commission's ("Commission") Order Establishing Investigation Case ("Order") in this proceeding states to the Commission as follows:

1. On January 14, 2005, the Commission issued its Order Establishing Investigation Case in which it directed its Staff to investigate the "financial and operational status of any certificated company in which Mr. Kenneth Matzdorff has any ownership interest or any operational control or influence"

2. Tiger Telephone, Inc. ("Tiger Telephone") holds 100 percent of the stock of New Florence, and Mr. Matzdorff holds a one-third interest in Tiger Telephone, Inc.

3. The Commission's Order is unlawful, unjust and unreasonable when it directs its Staff to investigate the financial and operational status of New Florence merely because Mr. Matzdorff has an indirect ownership interest in New Florence. As a practical matter, the Commission's Staff has been conducting an investigation of New Florence for several months, and as a part of that investigation, New Florence has answered numerous data requests as well as met with the Staff to discuss its concerns. New Florence has been forthcoming with the Staff and has

provided all of the information available to the Company.

In the responses to the data requests and at the meeting with Staff, New Florence told the Staff of its efforts to remove Mr. Matzdorff from any financial or managerial control of New Florence. On August 12, 2004, Mr. Matzdorff voluntarily resigned as a director and an officer of both Tiger Telephone and New Florence. At that time, the articles of incorporation of New Florence were amended so that the corporation only has one director and one officer. Mr. Robert Williams now serves as the sole director and officer of New Florence. New Florence has also apprised the Staff of its efforts to move all administrative and billing functions away from LEC, LLC, another company associated with Mr. Matzdorff. As of January 1, 2005, all billing and administrative functions for the Company are being provided by new vendors, and the Company no longer has any association with either Cass County Telephone or LEC, LLC, other companies also associated with Mr. Matzdorff.

More importantly, the Commission indicated in its letter to the Federal Communications Commission ("FCC") declining to certify New Florence for receipt of federal Universal Service Fund ("USF") monies that it was awaiting a third-party audit of the company before making a final decision as to certification. That audit was provided to the Commission on December 23, 2004, and, with one minor exception unrelated to the receipt of USF monies, there were no significant problems identified in that audit.

Despite a thorough federal investigation of the activities of Mr. Matzdorff, New Florence is not named in the federal indictment or in any of the documents surrounding the guilty pleas of Mr. Matzdorff, and the Commission does not cite any alleged wrongdoing of New Florence in its Order. To assume, as the Commission has done, that New Florence must be investigated merely

because Mr. Matzdorff holds an ownership interest in New Florence's parent company is unlawful, unjust and unreasonable.

The Commission states in its Order that the Staff is directed to "investigate any matters pertaining to the Universal Service Fund and report any irregularities to the Commission." As was stated above, there have been no allegations that New Florence obtained any USF funds by fraud or that it has used any of these funds inappropriately. New Florence submitted the same information to the Commission certifying its use of the USF monies as all the other small local exchange companies. New Florence met the Staff's algorithms for showing that the USF funds were being spent appropriately. Despite the fact that the Company met the same test as the companies that were certified, the Commission declined to certify New Florence. Its letter to the FCC stated that it was awaiting the results of a third-party audit that has now been received. Yet, instead of certifying the company, the Commission has now instructed its Staff to launch a further investigation.

As a result of the Commission's failure to certify New Florence for the receipt of USF funds for calendar year 2005, in September of 2004 the FCC started withholding funds due the company for 2004 for which it had already been certified. New Florence is currently pursuing an appeal of that decision before the FCC and as part of that appeal has alleged that 1) the FCC erred in immediately terminating USF support for 2004, 2) that the Commission had no basis for withholding certification of New Florence for 2005 USF support, 3) that the FCC and the Commission have combined to deprive New Florence of a property right without due process, and 4) that withholding high cost support while finding New Florence eligible to continue to

receive low income support is arbitrary, capricious and an abuse of discretion.¹

In these Comments, New Florence points out that the Commission's decision to not certify the company for 2005 was not based upon any allegations of specific wrong doing or the misuse of funds on the part of New Florence, but rather was based solely on the indirect common ownership between New Florence and Cass County Telephone. As was set out above, New Florence has taken all the steps within its power to neutralize the effect of that common ownership, and, at this time, Mr. Matzdorff holds no decisionmaking authority for that company. And, as of January 1, 2005, there are no affiliated transactions with either Cass County Telephone or LEC, LLC.

New Florence does not believe it is necessary for the Commission to open a formal investigation of the company at this time, and, in light of the information already provided to the Commission Staff, believes that the Company's actions have already been sufficiently reviewed to determine that there was no wrongdoing on the part of this Company. However, since the Commission seems to feel that it must pursue an additional investigation of New Florence including "any matters pertaining to the Universal Service Fund," New Florence believes that this shows that at this point there is not sufficient basis for the Commission to refuse to certify the Company for USF support. At the very least, the Commission should certify the Company for 2005 USF support during the pendency of any investigation.

The Commission states that one of the purposes of its investigation is to "protect the customers of the telephone companies" (Order at 4), that the "primary concern of the

¹See, Reply Comments of New Florence Telephone Company filed January 18, 2005, CC Docket No. 96-45, Public Notice DA 04-3948.

Commission is the ongoing safe and reliable provision of telecommunications services to the citizens of Missouri" and "to ensure the viability of those services." (Order at 7) At this time, there has been no harm, either alleged or real, to the customers of New Florence who continue to receive the same reliable service as before. The only potential harm to the customers of New Florence is from this proceeding itself and the failure of the Commission to certify it for USF support leading to the withdrawal of 2004 support by the FCC. To that extent, the Commission's actions become a self-fulfilling prophecy, and harm to the customers may occur if the Commission's investigation is prolonged and USF support is withheld during the investigation. If the Commission's primary concern is ongoing safe and reliable service to New Florence's customers, then it should certify the company for USF support.

Further, the Commission's decision to investigate New Florence is unlawful, unjust and unreasonable in that the Order establishes a case wherein the Staff is directed, among other things, to investigate all matters pertaining to the operations of two Missouri telecommunications utilities, impose possible conditions on the certificates of those companies and bring possible penalty actions against officers and employees of those companies. The Commission states that the docket does "not meet the definition of a contested case," and that its *ex parte* rule does not apply so that Staff may meet privately with the Commissioners. Yet, on page 4 of the *Order*, the Commission states that it is "appropriate to create a docket for the formal establishment of this investigation as well as receipt of any Staff discovery problems, for the issuance of any necessary discovery orders, and in order to take additional actions found necessary to protect the customers

of the telephone companies affected by these events aforesaid."² Thus, the Commission appears to be trying to avail itself of the advantages of a contested case in dealing with the investigation and discovery issues and, at the same time, continue to allow its Staff to have informal contact with the Commissioners during the pendency of the case. The Commission cannot have it both ways. A case is either a contested case, or it is not.

A contested case is a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.³ In determining whether an administrative proceeding is a contested case, the agency's action must be measured against these elements. The label an agency places on an adjudicatory proceeding is not determinative.⁴

The Commission's Order clearly establishes a proceeding before an agency. This proceeding will determine legal rights, duties or privileges of New Florence as well as its officers and employees, and certain of those rights, duties or privileges are required by law to be

²In footnote 9 of the *Order*, the Commission states that a "determination of legal rights" and application of the "constraints of the ex parte rule" may come into play in this docket and that subpoenas may need to be issued. Section 536.077, RSMo, states that, [i]n any contested case before an agency created by the constitution or state statute, such agency shall upon request of any party issue subpoenas and shall in a proper case issue subpoenas duces tecum. (Emphasis added.) Thus, the Commission realizes that in order to issue subpoenas it must have a contested case.

³Section 536.010(2), RSMo 2000.

⁴*State ex rel. Valentine v. Board of Police Comm'rs*, 813 S.W.2d 955, 957 (Mo. App. 1991) ("The classification of a case as contested or noncontested is not left to the discretion of the agency but is to be determined as a matter of law."); *Shawnee Bend Special Road Dist. "D" v. Camden County Comm'n*, 800 S.W.2d 452, 456 (Mo. App. 1990) (proper classification is not determined by the will of the agency, but by law).

determined after hearing. The Commission lists as authority for this investigation §386.560, RSMo 2000, which can result in a felony conviction for persons willfully making false entries or falsely making statements to the Commission. This conviction carries a fine of "not less than one thousand or more than five thousand dollars" and is punishable by imprisonment of "not less than two years nor more than five years." The Commission also cites §386.570, RSMo 2000, as authority to sanction any person who violates any law or fails to obey any order of the Commission. These persons are subject to a penalty of "not less than \$100 nor more than \$2000" for each offense. "Similarly, every officer or employee who aids or abets any violation is guilty of a misdemeanor and is punishable by a fine not exceeding \$1,000 or by imprisonment in a county jail not exceeding one year, or both." (Order at 6) Staff is also directed to review the conduct of the officers and employees of the company to determine whether the company has suffered a financial loss or other damage, including loss of USF support, as a result of illegal acts. The Commission states that any such loss by the Company should be recoverable. Lastly, the Commission states that it may impose any condition or conditions that it deems reasonable and necessary upon the Company including the modification of its certificate of service authority to provide telecommunications service. A certificate of service authority may be altered or modified only "after notice and hearing." RSMo. §392.410.5. It is hard to imagine a Commission proceeding where legal rights or privileges of specific parties would be more affected than in the case established by the Commission.


Notwithstanding this fact, the Commission concludes that " this docket does not, at this time, meet the definition of a contested case as contained in Section 536.010. As such, the dictates of the Commission *ex parte* rule are not applicable." On the contrary, *ex parte* contact

between the Commission and its Staff in this proceeding will violate New Florence's due process rights.⁵ The need for a formal, contested case in which proper evidence is received is accentuated by the fact that the Commission, according to paragraphs 3, 4, and 5 the *Order*, has based many of its recent decisions on newspaper articles and other hearsay statements. The Commission cannot treat the same proceeding as both contested and noncontested. The Commission's decision to treat this proceeding as an uncontested case and allow the Commission to continue to have *ex parte* contact with its Staff is a violation of New Florence's due process rights and thus is unlawful, unjust and unreasonable.

New Florence believes that the Commission's decision to open this investigation is unlawful, unjust and unreasonable for all the reasons set out above, but it also believes that if the investigation is necessary, particularly the investigation of the Company's use of USF support, the Commission did not have adequate information or reason to deny the Company's certification in September of 2004. For that reason, the Commission should certify that New Florence is eligible to receive USF support for 2005 during the pendency of this investigation.

⁵*See Hall v. Jennings School District*, 133 S.W.3d 112 (Mo.App. E.D. 2004) (Teacher's right to due process was violated, and the appropriate remedy for the Superintendent's improper *ex parte* contacts with the Board during its deliberations is remand to the Board for reconsideration).

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent electronically, by U.S. Mail, postage prepaid, or hand-delivered on this 27th day of January, 2005, to the following parties:

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