

**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	)	Case No. TO-2005-0237
Related Matters of Illegal Activity.	)	

**REPLY TO STAFF'S RESPONSE**  
**TO CASS COUNTY TELEPHONE COMPANY AND NEW FLORENCE**  
**TELEPHONE COMPANY'S MOTION TO QUASH SUBPOENA**

COME NOW Cass County Telephone Company ("CassTel") and New Florence Telephone Company ("New Florence")(collectively, "Companies"), by and through counsel, and in reply to Staff's Response to the Companies' Motion to Quash, state as follows to the Missouri Public Service Commission (the "Commission").

**I. Introduction**

1. 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. Additionally, and, more importantly, Staff has failed to provide legitimate grounds for denying the Companies' Motion to Quash. On the basis of either or both of these points, the Companies urge the Commission to enter an order granting the Companies' Motion to Quash and relieving the Companies of the obligation to comply with the subpoenas served upon the registered agents for CassTel and New Florence on March 17 and 18, 2005.

2. In paragraph two of Staff's Response, Staff argues that the Companies are "claiming the accountant-client privilege in an effort to thwart disclosure of information." It is true that the Companies are seeking the protection of the statutory accountant-client privilege provided for in RSMo. §326.322. The Companies, however, are not seeking such protection simply to frustrate the process. If Staff was seeking work papers of the undersigned legal counsel, surely Staff would not

argue that asserting the attorney-client privilege was simply an effort to thwart disclosure of relevant information. The accountant-client privilege is provided for by statute, and the Companies are entitled to the protection afforded thereby. Additionally, if the Companies were to waive the privilege in this instance, Staff would be able to argue that the Companies had waived the privilege entirely.

3. In the course of this investigatory proceeding, and as of April 29, 2005, production of documents and other information has been requested through approximately 175 data requests issued by Staff to CassTel and New Florence. As of April 29, 2005, CassTel and New Florence have responded to 143 of these data requests. This investigatory case has been pending for three months, and countless hours have been spent responding to the Staff's requests for information. Twenty three-ring binders of information have been delivered to Staff, employees responsible for answering these data requests have logged an average of 156 hours per week replying to Staff's data requests, Staff's data requests continue to pour in, and the Companies continue to provide responses. It is clear that the Companies are not trying to frustrate the process. As was stated in the Companies' Motion to Quash, CassTel and New Florence intend to continue to cooperate with Staff and intend to produce documents which are relevant to this investigative proceeding, are not protected from disclosure, and are within the Companies' possession and control. The nature and scope of the subpoenas, however, warrant the granting of the Companies' Motion to Quash.

## **II. The Privilege Stated in RSMo. §326.322 Applies to the Subject Auditors**

4. The Commission has sought by subpoena "audit workpapers that support each independent auditor's report for the financial statements" of the Companies.<sup>1</sup> The subpoenas, however, seek the production of workpapers protected from disclosure under the statutory accountant-client privilege provided for in RSMo. §326.322.<sup>2</sup>

5. It is true that the statute states that a *licensee* shall not be examined, that a licensee is defined in RSMo. §326.256 as the holder of a license, that a license is issued to a person meeting certain qualifications, and that the workpapers being sought were produced by employees of certified public accounting firms. Staff asserts that the statutory privilege should not apply on this basis. This argument simply does not make sense. An individual licensee may not be examined, but a group of licensees may be examined?

6. 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. Furthermore, 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. As such, the information requested from the licensed auditors falls squarely within the scope of §326.322.2. The undersigned counsel is unaware

---

<sup>1</sup> 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 and, as stated previously, is not objecting to the subpoena on the basis that it requests documents which are not in the possession of or under the authority or control of the subject Company.

<sup>2</sup> Additionally, the subpoena requests are overly broad and seek the production of information which is not relevant to this investigatory proceeding.

of any statute, rule, or court decision which would allow the Commission to ignore the accountant-client privilege created by statute. There is simply no legal basis for arguing that the Commission may sidestep the privilege because the individual accountants involved are not self-employed, but instead are employed by accounting firms.

### **III. The Privilege Stated in RSMo. §326.322 Applies in the Instant Proceeding**

7. The accountant-client privilege set forth in RSMo. §326.322 applies in Commission proceedings. Subsection two of the statute reads as follows:

A licensee shall not be examined by judicial process or proceedings without the consent of the licensee's client as to any communication made by the client to the licensee in person or through . . . the licensee's . . . working papers given or made thereon in the course of professional employment . . . . This privilege shall exist in all cases except when material to the defense of an action against a licensee.

8. Staff points to the first sentence of this subsection and argues that the statutory privilege cannot apply in administrative proceedings. First, 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" (emphasis added). 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) (emphasis added). By requesting the issuance of these subpoenas, Staff sought discovery, and Staff should be required to follow the Commission's rule that discovery may be obtained under the same conditions as in civil actions. It is significant to note that Staff failed to address the applicability of this Commission rule in its Response to the Companies' Motion to Quash.

9. 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. The Companies do not dispute that Missouri courts have distinguished administrative proceedings from judicial proceedings for certain purposes, as is detailed by Staff in its Response to the Companies' Motion to Quash. Members of the Commission, however, 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).

10. To support its argument that the statute should not apply to this Commission proceeding, Staff points to the opinions in *State ex rel. Southwestern Bell Publications v. Ryan*, 754 S.W.2d 30 (Mo.App. 1988), and *State ex rel. Schott v. Foley*, 741 S.W.2d 111 (Mo.App. 1987). These two cases, however, are clearly distinguishable from the case at hand. In *Southwestern Bell*, the plaintiff company commenced litigation and sought damages for loss of profits, thereby voluntarily placing in issue its past, present, and future financial condition. These facts are clearly distinguishable from the case at hand – an investigatory proceeding initiated by the Commission and its Staff. Interestingly, the Companies cited to this same case in their Motion to Quash, noting that the court

in *Southwestern Bell* held that the statutory accountant-client privilege should be accorded the same discovery treatment as the statutory physician-patient privilege. 754 S.W.2d at 32.

11. The *Schott* case, a case against an accountant where the plaintiff alleged negligence in the rendering of professional accounting services, is also clearly distinguishable from the instant case. As the *Schott* court noted, the statute excludes enforcement of the privilege in a case against an accountant. The *Schott* court also held that it is not at liberty to construe clear, unambiguous statutory language, but must instead be guided by what the legislature said, not what others may think it meant to say. The Companies urge the Commission to follow this point, instead of falling prey to Staff's "public policy" argument. The Companies do not dispute that the Commission is authorized to investigate acts of telecommunications companies. The Companies also do not dispute that the Commission may require the production of certain books and records. The Companies do dispute, however, that any such public policy argument may outweigh and supplant a statutorily-created privilege. 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 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).

12. Staff also points to *State ex rel. Health Midwest Development Group, Inc. v. Daugherty*, 965 S.W.2d 841 (Mo. banc 1998), a case dealing with the statutory privilege for health care peer reviews. In that case, a doctor brought an action against a hospital for denial of staff privileges. Staff next points to *State v. Gerhart*, 129 S.W.3d 893 (Mo.App. 2004), a case dealing with the Rape Shield Law and the statutory privilege regarding communications with the clergy. In that case, the

defendant was found guilty of four counts of first-degree statutory rape and sentenced to four consecutive terms of 10 years. The Companies fail to see the relevance of the *Daugherty* and *Gerhart* opinions, but Staff appears to point to these cases for the principle that statutes creating privileges are to be strictly construed. The Companies are not trying to dispute this general rule. The Companies, however, urge the Commission to “construe” the applicable statute as it was drafted by the legislature. As the *Daugherty* court noted, “In order not to be subject to discovery, the disputed documents must fall within a statutory privilege.” In the case at hand, the disputed documents clearly fall within a statutory privilege, and the documents therefore are not subject to discovery.

#### **IV. The Arkansas Power & Light Case is Instructive**

13. Staff notes that the Cole County 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. As there does not appear to be any Missouri appellate law directly on point, however, the Circuit Court case should at least be viewed as instructive. Although the statute has been moved within the Chapter and amended to be gender-neutral, 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 was applicable to administrative proceedings and that the Commission was bound by the statute.

**V. The Subpoena Requests are Overly Broad and Seek the Production of Information which is not Relevant to this Investigatory Proceeding**

14. The subpoena seeks 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. In its Response to the Companies' Motion to Quash, Staff alleges that information should be produced back to "1996, or earlier." Staff points to three items to support this allegation: (1) cost of plant and depreciation of that plant are included in the cost used to set rates; (2) external audit reports will speed Staff's inquiry, to the extent Staff may comfortably rely on the reports; and (3) Staff is unable to decipher from one audit the bases for certain adjustments.

15. As to item one, the cost of plant and depreciation of that plant were not the basis used to set intrastate rates for CassTel until 2004. Additionally, the last rate case for New Florence was before 1983, so it is disingenuous at best to say New Florence's intrastate rates are based on current costs. Moreover, rates may not be changed retroactively, and whatever may be discovered in the workpapers from years past cannot be used to alter the rates charged during those periods. CassTel and New Florence are unaware of an event in 1996 which could possibly form the basis of a Commission action in 2005. Information from as far back as 1996 most certainly bears no relevance to the current rates being charged Missouri customers.

16. As to item two, Staff has received the audit reports and has otherwise engaged in extensive discovery. Staff should not need the auditors' workpapers in order for Staff to perform its own audit. Surely Staff does not want to simply rely upon the auditors' calculations. As stated



in the Motion to Quash, 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.

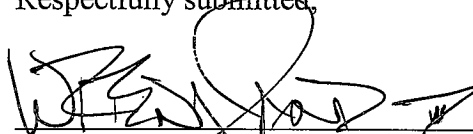
17. Staff's third reason for needing workpapers going back to 1996 or earlier is that Staff is unable to decipher a restatement regarding a 2003 audit of CassTel. This, of course, is not a reason to need all workpapers ever prepared by Warinner, Gesinger & Associates, LLC and Mize, Houser & Company. And again, if Staff needs assistance interpreting a particular entry, this could be accomplished in a much more reasonable and limited fashion without infringing upon the privilege.

18. In its Response to the Companies' Motion to Quash, Staff also sets forth the "scope of this investigation case" and Staff's sixteen recommendations regarding the Companies. Regardless of Staff's and the Commission's intentions and desires, and whether or not Staff was directed to undertake any investigation it deems appropriate, 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. 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).

WHEREFORE, for the reasons set forth in the Companies' Motion to Quash and for the good cause shown above, the Companies respectfully request an order of this Commission quashing the subpoenas served upon the registered agents for CassTel and New Florence on March 17 and 18,

2005, and for such other and further relief as the Commission deems just and proper under the circumstances.

Respectfully submitted,



W.R. England, III #23975

Sondra B. Morgan #35482

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)

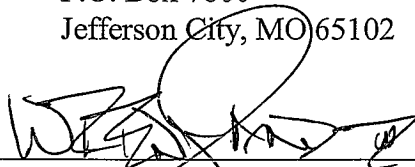
Attorneys for CassTel and New Florence

### 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 2<sup>nd</sup> 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