

**BEFORE THE PUBLIC SERVICE COMMISSION
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 Cass County Telephone Company ("CassTel" or "Company"), by and through the undersigned counsel, and pursuant to RSMo. §386.500, 4 CSR 240-2.080, and 4 CSR 240-2.160, respectfully applies to the Public Service Commission of the State of Missouri (the "Commission") to grant rehearing with respect to the Commission's *Order Establishing Investigation Case* issued in the above-captioned case on January 14, 2005, to be effective January 28, 2005 (the "*Order*").

For the reasons stated herein, the *Order* is unlawful, unjust, unreasonable, arbitrary, capricious, confiscatory, involves an abuse of discretion, is unsupported by competent and substantial evidence upon the whole record, is in excess of statutory authority, is made upon unlawful procedure, is inadequately explained, and is unconstitutional, all in material matters of fact and law, individually or cumulatively, or both, in the particulars hereinafter stated and for the reasons set out below.

No Negative Impact on Customers

The Commission's Order is unlawful, unjust and unreasonable when it directs its Staff to further investigate the financial and operational status of CassTel. As a practical matter, the Staff has been conducting an investigation of CassTel for over five (5) months, and the Company has

answered numerous data requests and counsel for the Company has had meetings with the Staff to discuss the status of both the Commission's investigation into the affairs of the company as well as the status of the federal investigations involving Mr. Kenneth Matzdorff. While it is understandable that the Commission is concerned about the federal pleas entered by Mr. Matzdorff, there is no evidence that service has been affected in any way or that there is need for the Commission to be concerned about the Company's ability to provide safe and reliable telecommunications service to its customers.

In fact, the reality is directly to the contrary. CassTel took over operations from GTE in April of 1996. At that time, customers were served primarily through 1961-1963 vintage step-by-step (XY) switches. Over 2,500 of the access lines were 4-party lines. In a span of four years, CassTel replaced the existing Central Office Equipment (COE) with digital switching equipment. CassTel installed Siemens switches and today these switches are equipped with the latest software release. At the time of acquisition, CassTel's customers could not order vertical services, CLASS features or equal access services as they do today. All of the switches are Communications Assistance for Law Enforcement Act ("CALEA") compliant and have Signaling System 7 ("SS7") available. Also at the time of acquisition CassTel assisted the counties it serves in the financing of E-911 efforts. CassTel now serves approximately 8,100 access lines, all single-party service. CassTel has also reinforced and replaced much of the cable plant with jell-filled, buried cable and fiber optic cable. To date, CassTel has invested over \$22 million in new plant facilities to meet the needs of one of the state's fastest growing counties. It has deployed DSL service capability to over 90% of its customer base. CassTel employs either directly or indirectly approximately 46 full-time employees, and it has established a local business office in Peculiar, Missouri, where customers may

come in and talk face-to-face with a Company representative.

All of these efforts and expenditures have been made without any increase in rates to customers. In fact, in August of 1999, the Company filed revised tariffs to expand MCA service to customers in the Creighton exchange which resulted in a substantial loss of revenue to the Company. Up until May of 2004, the rates the Company charged its customers were the same as those charged by GTE in 1996 at the time of the sale. Of particular significance is the fact that up until May of 2004, the rates which CassTel was authorized to charge its customers were not based on any costs which CassTel actually incurred in providing service to its customers. In May of 2004, the Company reduced its rates by approximately \$320,000 annually as a result of a stipulation with Staff. As can be seen from the above summary, CassTel's customers are receiving superior service at rates less than they were paying in 1996 for four-party service with no advanced features or Internet access. Finally, and most significantly, since CassTel took control of these properties in 1996, it has met or exceeded every quality of service criterion contained in the Commission's rules and regulations. Consequently, there is absolutely no evidence that service to CassTel subscribers has been negatively impacted.

Additionally, Mr. Matzdorff has relinquished all financial control of CassTel. The Company is working to put in place new independent, third-party management at which time Mr. Matzdorff will be completely removed from the management of CassTel. A copy of the correspondence to Mr. Dan Joyce, General Counsel to the Commission, outlining these changes is attached as Exhibit A. This letter explains that CassTel cannot arrange for its own sale, and, as a practical matter, so long as the company is subject to a Commission investigation and unable to receive federal USF support it will not be marketable. In the meantime, the Company shares the Commission goal of continuing

to provide safe, reliable telecommunications services to its customers. CassTel believes that further investigation by the Commission at this point will not achieve this goal and, further, is unlawful, unjust and unreasonable.

Investigation of USF Support

In addition to the investigation of all matters pertaining to the operation of the company, the Commission's Order directs its Staff to complete "a financial review concerning the receipt and disbursement of Universal Service Funds." (Order at 5) In September of 2004 the Commission declined to certify CassTel as eligible to receive federal USF support for the period beginning January 1, 2005. After the Commission declined to certify the company, the Federal Communications Commission ("FCC") withdrew support for 2004, a period for which CassTel had previously been certified. CassTel submitted the same information to the Commission certifying its use of USF funds as all the other small local exchange companies. CassTel 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 CassTel and now directs its Staff to further investigate the company's receipt and disbursement of USF funds.

The Commission's decision to further investigate the company's receipt and disbursement of USF funds is unlawful, unjust and unreasonable because the only role the Commission has in the disbursement of federal USF support is the certification process. The Commission has already declined to certify CassTel for the receipt of 2005 monies. CassTel has been subject to audit by the Universal Service Administration Company ("USAC"). There is no need for the Commission to conduct its own investigation. Further, the Commission's decision to investigate CassTel's "receipt

and disbursement" of USF funds at this point is curious in that it has already made its decision as to certification. This shows that there was not a sufficient basis for the Commission to refuse to certify the company for USF support in September, and, at the very least, the Commission should certify the company for 2005 USF support during the pendency of any investigation.

Contested Case Issue and Ex Parte Rule

The Commission's decision to further investigate CassTel 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."¹ 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

¹In 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.

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.² 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.³

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

²Section 536.010(2), RSMo 2000.

³*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).

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 CassTel's due process rights.⁴ 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

⁴See *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).

as an uncontested case and allow the Commission to continue to have *ex parte* contact with its Staff is a violation of CassTel's due process rights and thus is unlawful, unjust and unreasonable.

Misinterpretation of Statutes

The Commission's decision is unlawful, unjust and unreasonable for the further reasons that the Commission's interpretation of and reliance on various statutes is in error. First, the Commission directs its Staff to investigate whether CassTel has suffered a financial loss or other damage stemming from illegal acts, and then states that any "such loss, along with attorneys fees and punitive damages, should be recoverable by the company pursuant to Section 392.350." Section 392.350 deals with loss, damage, or injury caused by a telecommunications company and the right of "the person or corporation affected thereby" to recover damages. The statute does not contemplate actions by and against the telecommunication company itself, nor does it give the Commission or its Staff "standing" to pursue a remedy.

On pages 6 and 7 of the *Order*, the Commission, citing §392.470, RSMo, finds and concludes that it may "impose any condition or conditions that it deems reasonable and necessary upon any company providing telecommunications service" and "modify such certificate to impose any reasonable and necessary conditions." This first portion of §392.470.1 deals exclusively with the issuance of new certificates, and the second portion of the section deals with certificates issued prior to September 28, 1987. CassTel is not seeking a new certificate, and CassTel obtained its existing certificate in July of 1995, Case No. TM-95-163. Therefore these statutory provisions cannot apply to provide justification for the Commission to establish an investigation or to impose sanctions on the Company.

WHEREFORE, Cass County Telephone Company respectfully requests that the Missouri Public Service Commission grant rehearing with respect to its January 14, 2005, *Order Establishing Investigation Case*, as requested herein, and upon rehearing, 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,


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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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