

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

Staff of the Public Service Commission of the State of Missouri,)	
)	
Complainant,)	
)	
v.)	
)	
Cass County Telephone Company Limited Partnership)	
)	
Respondent,)	Case No. TC-2005-0357
)	
and)	
)	
Local Exchange Company LLC,)	
)	
)	
Respondent.)	

**CASS COUNTY TELEPHONE COMPANY'S RESPONSE TO STAFF'S REPLY
TO CASS COUNTY TELEPHONE COMPANY LIMITED PARTNERSHIP**

COMES NOW Cass County Telephone Company ("CassTel") and for its response to Staff's Reply to Cass County Telephone Limited Partnership (the "Reply"), states as follows:

1. On or about May 23, 2005, Staff filed its Reply in the referenced case. The Reply contains a number of statements that reflect a misunderstanding on the part of Staff about the procedural requirements and legal effect associated with filing an answer to a complaint under the Commission's rules of practice and procedure.
2. Staff appears to have been surprised by the fact the CassTel's Answer contains a number of affirmative defenses. This should have come as no

surprise. In fact, it was to be expected. CassTel's Answer is fully consistent with the requirements of the Commission's rule governing complaint practice. Commission rule 4 CSR 240-2.070(8) states as follows:

The respondent shall file an answer to the complaint within the time provided. All grounds of defense, both of law and of fact, shall be raised in the answer. If respondent has no information or belief upon the subject sufficient to enable the respondent to answer an allegation of the complaint, the respondent may so state in the answer and assert a denial upon ground. (Emphasis added)

The language of the Commission's rule is broad enough to authorize affirmative defenses in an answer.

3. The fact that the affirmative defenses contain challenges as to the constitutionality of the statutory language upon which the Complaint is grounded, is not a legitimate ground for objection. As noted above, the language of the Commission's rule is permissive and, in an abundance of caution, CassTel included constitutional defenses to avoid the argument they had been waived by not having been included in the Answer. CassTel agrees with Staff's proposition that CassTel would not waive a constitutional defense by not raising it with the Commission. In any event, the inclusion of constitutional defenses at this stage does not prejudice Staff.

4. The balance of Staff's Reply is an *ad hoc* critique of the merits of the various affirmative defenses asserted by CassTel. Although a filing of this nature

is not prohibited by Commission rule, the Staff's Reply is merely argumentative¹ and more to the point, premature. The merits of the affirmative defenses asserted by CassTel will be capable of being determined only after the facts and circumstances established during an evidentiary hearing are known to the Commission. CassTel believes that the affirmative defenses that it has asserted are warranted by application of existing law or by legitimate argument for the extension, modification, or reversal of existing law in light of the allegations set forth in the Complaint.

5. Staff has identified a typographical error in paragraph 46(A)(2) of CassTel's Answer. (See, Reply ¶¶ 9 – 10) As Staff notes in paragraph 11 of the Reply, the correct statutory reference should have been §386.570 RSMo 2000.²

6. In paragraph 18 of the Reply, Staff disputes CassTel's reservation of the right to raise additional defenses if justified by facts now unknown to CassTel that later may come to light. This is customary practice in civil courts subject, of course, to the supervision of the judge handling the case. The Commission should not adopt a more restrictive practice absent compelling justification. Staff offers no such justification other than an overly mechanical reading of 4 CSR 240-2.070(8).

7. Staff's Reply contains a prayer that the Commission deny CassTel's affirmative defenses. There is no legal authority for summarily denying affirmative defenses before a hearing and Staff offers none. No ruling by the Commission regarding the merits of CassTel's affirmative defenses should be


¹ In truth, the Reply is in the nature of a pre-hearing brief.

² CassTel's Answer makes reference to Section 386.470 RSMo 2000. CassTel regrets any confusion this typographical error may have caused.

made until after the evidentiary record has been established in this case and all parties have been given an opportunity to file post-hearing briefs. To do otherwise would be to deny CassTel its rights of due process in violation of the constitutions of the State of Missouri and the United States.

WHEREFORE, for the reasons aforesaid, CassTel requests that the Commission deny Staff's request that CassTel's affirmative defenses be denied because the claims contained in the Reply are unjustified and/or premature.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. R. England, III", is written over a horizontal line. The signature is stylized and somewhat cursive.

W. R. England, III MO Bar 23975
Brydon, Swearingen & England, P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102-0456

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or e-mailed to all counsel of record on this 31st day of May, 2005.

Mark A. Thornhill
Peter Mirakian III
Philip W. Goodin
Barry L. Pickens
SPENCER FANE BRITTE & BROWNE LLP
1000 Walnut Street, Suite 1400
Kansas City, MO 64106-2140

Robert Franson
William K. Haas
Public Service Commission
Governor Office Building
200 Madison Street
Jefferson City, MO 65101

Office of Public Counsel
Governor Office Building
200 Madison Street
Jefferson City, MO 65101



W.R. England, III