

**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

**Staff's Suggestions Regarding the Motion of CassTel and
New Florence Telephone Company For Reconsideration**

COMES NOW the Staff of the Public Service Commission and, for its suggestions to the Commission regarding the motion of Cass County Telephone Company and New Florence Telephone Company for reconsideration of the Commission's order denying their motion to quash *subpoenas*, states:

1. Cass County Telephone Company, LP ("Cass County") and New Florence Telephone Company ("New Florence") seek for the Commission to reconsider its order denying their motion to quash the Commission *subpoenas* served on them.

2. In a footnote to their motion Cass County and New Florence state: "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." In footnote 2 of their joint motion seeking to quash the subpoenas, Cass County and New Florence stated, "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 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." The assumption by Cass County is correct. The subpoena served on Cass County is directed to seeking workpapers related to Cass County, not New Florence. While not an issue, clarifying in a Commission

order that the auditor workpapers sought from Cass County are those that pertain to Cass County would reduce possible confusion in the event of a circuit court proceeding seeking to enforce the Commission's subpoena directed to Cass County.

3. Early in their motion they state:

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.

4. The first issue Cass County and New Florence raise is that the Commission's Staff did not file suggestions to the Commission regarding the motion to quash until twenty-eight days after they filed their motion to quash the subpoenas. They argue this violates Commission Rule 4 CSR 240-2.080 which, in subpart (15) provides: "Parties shall be allowed not more than ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission." They attempt to draw adverse inferences to assertions made by the Staff based on the length of the time that passed before the Staff provided its suggestions; however, Cass County and New Florence assert no prejudice to them from any delay. The Staff fails to see how they could be prejudiced since even now neither Cass County nor New Florence has provided the external auditor workpapers that are the subjects of the subpoenas.

5. Further, and perhaps more tellingly, the Staff points out that in the suggestions to the Commission it filed in this case on April 18, 2005 the Staff, at paragraph 17, stated:

The Staff is still researching and preparing suggestions regarding the *subpoenas* issued to Cass County and New Florence for external auditor workpapers—the issue of the accountant-client privilege protecting a utility from being required to disclose them to the Commission in an investigation being significant, but unsettled. The Staff hopes to file those suggestions with the Commission before April 22, 2005.

In their response to those suggestions filed May 3, 2005, Cass County and New Florence raised no issue regarding the date by which the Staff proposed for having its suggestions filed with the Commission.

6. Additionally, although the Commission issued subpoenas to Cass County and New Florence the day after the Staff filed its recommendation to the Commission in pleading format that it issue the subpoenas, neither Cass County nor New Florence raised as an issue in their motion to quash the subpoenas, or any other pleading, that they were deprived of an opportunity afforded by 4 CSR 240-2.080 to make a response to the Staff's recommendation before the Commission issued the subpoenas.

7. Rule 4 CSR 240-2.015 provides that "[a] rule in this chapter may be waived by the commission for good cause." To the extent that 4 CSR 240-2.080 applies, the clear implication of the Commission's order is that it found good cause to waive the rule. Like Cass County, New Florence and Local Exchange Company, LLC, the Staff also must allocate its resources based on priorities and workload, including matters other than this case. The Staff provided its suggestions to the Commission regarding quashing the subpoenas in a timely fashion under the circumstances.

8. The Commission has reached the correct result in denying the motion to quash the subpoenas. While they now assert in their motion for reconsideration that "the individual auditors involved are licensees under Chapter 326," neither Cass County nor New Florence have shown that any of the individuals at the firms that performed certified public accounting services for them are a "licensee" within the meaning of that term as defined in §326.256(10) RSMo Supp. 2004.

9. As the Staff suggested in its response to the motion to quash the subpoenas, Missouri courts construe statutorily created privileges narrowly.

Statutes creating privileges are strictly construed. *State v. Kurtz*, 564 S.W.2d 856, 860 (Mo. banc 1978). Claims of privilege are "impediments to discovery of truth," "present an exception to the usual rules of evidence," and "are carefully scrutinized." *Chandra*, 678 S.W.2d at 807. Statutes creating privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980), quoting *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1688 (1960) (Frankfurter, J., dissenting).

State ex rel. Health Midwest Development Group, Inc. v. Daugherty, 965 S.W.2d 841, 844 (Mo. Banc 1998).

10. Rather than construing the language, "This privilege shall exist in all cases except when material to the defense of an action against a licensee," to describe the type of "judicial process or proceedings" in which the privilege can be invoked, an appropriate narrow construction, Cass County and New Florence argue a broad construction of the phrase "all cases" that would include administrative cases. Their argument trips on the foregoing directions of the appellate courts of this state that such statutorily created privileges are to be narrowly construed, as well as the plain meaning of the sentence when viewed in the context of the full statute:

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 media of books of account and financial records, or the licensee's advice, reports or working papers given or made thereon in the course of professional employment, nor shall a secretary, stenographer, clerk or assistant of a licensee, or a public accountant, be examined, without the consent of the client concerned, regarding any fact the knowledge of which he or she has acquired in his or her capacity as a licensee. This privilege shall exist in all cases except when material to the defense of an action against a licensee. (Emphasis added.)

Section 326.322.2 RSMo Supp. 2004.

11. Moreover, the Legislature and Courts of this state clearly distinguish between administrative process and proceedings, and judicial process and proceedings. For example, the Legislature, with H.B. 613 in 2003, amended §510.120 to include “administrative proceedings” as matters in which a continuance may be granted when members of the general assembly are representing clients and certain legislative-related events are taking place. And the Eastern District Court of Appeals, in *Davis v. Board of Education of the City of St. Louis*, 963 S.W.2d 679, 686 (Mo. App. 1998), recognized the difference between judicial and administrative proceedings when it stated the following regarding actions for malicious prosecution:

This element [commencement of an earlier suit against the plaintiff] can only be satisfied if a malicious prosecution claim can be based on an administrative proceeding. The parties agree that no Missouri court has recognized a claim for malicious prosecution premised on an administrative proceeding. The verdict-directing instruction for malicious prosecution is limited to the instigation of a judicial proceeding.

12. As the Staff stated in its suggestions to the Commission filed April 22, 2005, “‘The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.’ *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1998). When construing a statute, the Court considers the object the legislature seeks to accomplish and aims to resolve the problems addressed therein. *Gott v. Director of Revenue*, 5 S.W.3d 155, 159 (Mo. banc 1999).” *Nixon v. QuikTrip Corp.* Slip Op. SC 85399 (Mo. Banc March 30, 2004).

13. The object the Legislature seeks to accomplish in the chapter that includes the accountant-client privilege is found in §326.253 RSMo Supp. 2004:

It is the policy of this state and the purpose of this chapter to promote the reliability of information that is used for guidance in financial transactions or for accounting for or assessing the financial status or performance of commercial, noncommercial and governmental enterprises. (Emphasis added.)

The protection of the public interest requires that persons professing special competence in accountancy or offering assurance as to the reliability or fairness of presentation of such information shall have demonstrated their qualifications to do so, and that persons who have not demonstrated and maintained such qualifications not be permitted to represent themselves as having such special competence or to offer such assurance; that the conduct of persons licensed as having special competence in accountancy be regulated in all aspects of their professional work; that a public authority competent to prescribe and assess the qualifications and to regulate the conduct of certified public accountants be established; and that the use of titles that have a capacity or tendency to deceive the public as to the status or competence of the persons using such titles be prohibited.

14. The object of using regulation as a surrogate for competition that the Legislature seeks to accomplish through the Public Service Commission and the broad powers granted to accomplish that object have been described by the Missouri Supreme Court as follows:

Section 10412, Rev. St. Mo. 1919 [now §386.040] provides that "a public service commission is hereby created and established, which said public service commission shall be vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter." (Italics ours.)

The Public Service Commission Act provides a complete system for the regulation of public utilities by the commission. *State ex inf. v. Gas Co.*, 254 Mo. 515, 534, 163 S. W. 854, 857; *State ex rel. Public Service Commission v. Mo. Southern Ry. Co.*, 279 Mo. 455, 464, 214 S. W. 381, 384. Without lengthening this opinion with a summary of all statutes which vest authority in the Public Service Commission to regulate public utilities and their activities, we refer the reader to sections 10410 to 10434 and sections 10476 to 10494, Rev. St. Mo. 1919.

In the two cases above cited the Public Service Commission Act is reviewed and construed. In *State ex inf. v. Gas Co.* we said: "That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to wit: That a public utility * * * is in its nature a monopoly; that competition is inadequate to represent the public, and, if it exists, it is likely to become an economic waste; [325 Mo. 1224] that state regulation takes the place of and stands for competition; that such regulation, to

command respect from patron or utility owner, must be in the name of the overlord, the state, and, to be effective, must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock, or bond, or note issued as surely is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust. Willy nilly."

In *State ex rel. Public Service Commission v. Missouri Southern Ry. Co.*, supra, we said: "The act adds to the powers expressly given to the commission all others necessary to the full and effectual exercise of those powers. [See §386.250(7)] All rates, fares, facilities, service, and equipment, and changes therein, fall within the authority of the commission. Adequate service and facilities are expressly required to be furnished. Questions relative to these things are to be determined by the commission."

Public Service Commission v. Kansas City Power & Light Co., 325 Mo. 1217, 31 S.W.2d 67, 70-71 (banc 1930).

15. In §386.330.1 the Legislature has specifically authorized the Commission to investigate acts of telecommunications companies subject to its jurisdiction. Further, in §386.450 RSMo the legislature has empowered the Commission to require of a "corporation," "person" or "public utility" the production of "books, account, papers or records."

16. While the Staff is of the view that the Commission has reached the right result in denying the motion to quash subpoenas, the Staff does not disagree with the movants that, when properly invoked, the privilege found in §326.322 may be asserted by the client as well as the licensee. Limiting assertion of the privilege to only the licensee would allow circumvention of the privilege simply by seeking the information through the client, the client who has the express authority to waive the privilege when the information is sought from the licensee. The Staff cannot comprehend that such a result was intended by the Legislature.

17. The Legislature has stated that the purpose of chapter 326, including §326.322, is "to promote the reliability of information that is used for guidance in financial transactions or

for accounting for or assessing the financial status or performance of commercial, noncommercial and governmental enterprises.” Thus, to the extent that the accountant-client privilege serves to protect the client it does so in furtherance of the purpose of “promot[ing] the reliability of information that is used for guidance in financial transactions or for accounting for or assessing the financial status or performance of commercial, noncommercial and governmental enterprises.”

18. Although Cass County and New Florence have cited to no court cases that are binding authority on the Commission, they did cite to a judgment of the Cole County Circuit Court where a predecessor statute was reviewed by the court. The Staff addressed that case in paragraph 16 of its suggestions to the Commission. As stated there, Cass County and New Florence cited to a judgment of the Cole County Circuit Court in *Ex rel. Arkansas Power & Light Company v. Public Service Commission*, Case No. CV186-147CC made April 22, 1986 in which the Court, in a writ of prohibition case, found the predecessor statute that was the subject of the cases cited in paragraph 5 above—§ 326.151—applied to a discovery request by the Staff made for external auditor work papers and that the Commission could not seek the work papers or a penalty for violation of a Commission order for not producing them. As stated in its April 22, 2005 suggestions, it should be noted that the statute in question in that case is not the statute offered in this case. Further, as the Staff pointed out in its April 22, 2005 suggestions, the Staff argues that the Court reached a wrong result in that proceeding that regardless, does not establish a principle of law that is binding on the Commission beyond that case since it was not reviewed or sustained by a higher court.

19. The reference of Cass County and New Florence to Commission Rule 4 CSR 240-2-090(1) that “discovery may be obtained by the same means and under the same conditions as

in civil actions in the circuit court” is a red herring. The Commission’s authority to seek information through subpoenas is found in §386.440 RSMo 2000. The Commission’s rule pertaining to subpoenas is 4 CSR 240-2.100.

20. The Staff agrees with the Commission that the subpoenas are not overbroad for not being expressly limited in time and disagrees with Cass County and New Florence that they are overbroad, unduly burdensome and seek irrelevant information because they will include information back to 1996.

21. Although the issues on a review or in seeking enforcement of the subpoenas through Circuit Court are primarily legal, the Staff suggests that the Commission’s order denying the motion to quash would better withstand review if it stated, with the detail set forth above and in the Staff’s suggestions filed April 22, 2005, that: 1) by merely asserting in a motion to reconsider that the accounting firms in question have accountants that are licensees within the meaning of the applicable statute, Cass County and New Florence have failed to show they may avail themselves of the privilege codified in §326.322 if it were otherwise available to them; 2) the statutory language of §326.322, when properly construed narrowly, does not create a privilege available to Cass County or New Florence in this proceeding; and 3) requiring the production of auditor workpapers for audits performed as far back as 1996 does not of itself make the subpoenas overbroad, overburdensome or require production of irrelevant information.

WHEREFORE, for all the foregoing reasons, the Staff recommends that the Commission deny the motion to reconsider its order denying the motion quash the *subpoenas* to Cass County Telephone Company LP and New Florence Telephone Company or, alternatively, revise the order as indicated above.

Respectfully submitted,

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I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 20th day of May 2005.

/s/ Nathan Williams