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January 19, 2006

FILED⁴

JAN 19 2006

The Honorable Cully Dale
Secretary/Chief Regulatory Law Judge
Public Service Commission
Governor's Office Building
Madison & E. Capitol
Jefferson City, MO 65101

Missouri Public
Service Commission

RE: *Public Service Commission Staff, Complainant v. Cass County Telephone Company,
Limited Partnership, Case No. TC-2005-0357*

Dear Judge Dale:

Enclosed for filing in the above-referenced case are the original and 8 copies of the State of Missouri's Reply to Casstel's Opposition to the State's Application to Intervene. Thank you for your attention to this matter.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

Ronald Molteni
Assistant Attorney General

Enclosures

cc: All Parties on the Service List

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED⁴

JAN 19 2006

Staff of the Public Service Commission

Complainant,

v.

Cass County Telephone Company,
Limited Partnership,

Respondent,

Missouri Public
Service Commission

Case No. TC-2005-0357

STATE OF MISSOURI'S
REPLY TO CASSTEL'S OPPOSITION TO
THE STATE'S
APPLICATION TO INTERVENE

Respondent Casstel filed suggestions to oppose the State of Missouri's intervention. It argues four points against the State. The State replies to Casstel's suggestions opposing its intervention seriatim as follows:

First, Casstel claims that the State has no standing to intervene. In that regard Casstel claims that no state agency represented by the Attorney General is a Casstel client because it only services the Department of Conservation and that Conservation "is not represented by the AGO but, rather, by its own General Counsel." Casstel fails to inform the Commission that the Department of Social Services – an agency the Attorney General

does represent – maintains an office at 2500 East Mechanic in Harrisonville, Cass County, Missouri. That is within the Casstel's service area.¹

Moreover, if the State places any calls to Casstel customers – and it most certainly does – Casstel charges a termination fee for the transport of those calls. Those fees are not absorbed by the local exchange carrier where the call originates. Rather, they are factored into rates and passed on to the caller. While on a per call basis the termination fees may be small, in the aggregate they are not. And, this Commission does not have a dollar threshold below which customers of utility service will not have standing. It should not impose one in any case, and most certainly not in this one.

The State has another pecuniary interest – that being its Public School Fund. The penalty this Commission would impose is paid into the Public School Fund. Agreeing to a penalty and collecting it are two different animals. If the proposed stipulation is weak on enforcement terms (and it is) and fails to identify the source of financing the penalty (and it does), the State's interest in seeing \$1,000,000 warrants its intervention to ensure that the fine benefits the Public School Fund. A helpful analogy to demonstrating the State's interest in the penalty is the standing of a third party beneficiary to a contract. It is

¹ While it is not material to the Commission's assessment of the State's standing to intervene, the Attorney General has on occasion represented the interests of the Department of Conservation in legal proceedings and turned over to that Department penalties collected for violations of environmental laws.

a well-settled principle of law that a contract between parties upon a valid consideration may be enforced by a third party when entered into for his benefit even though he is not named in the contract nor privy to the consideration. *Beattie Mfg. Company v. Gerardi*, 166 Mo. 142, 65 S.W. 1035 (1901). *Crone v. Stinde*, 156 Mo. 262, 55 S.W. 863 (1900) (adopted by court in banc, 156 Mo. 262, 56 S.W. 907 (Mo.banc 1900)); *Bank of Corning v. Consolidated School District No. 6 of Atchison County*, 225 Mo. App. 821, 37 S.W.2d 982 (1931); *Black and White Cabs of St. Louis, Inc. v. Smith*, 370 S.W.2d 669 (Mo. App.1963). Cited in *State ex rel. McHarevo Development Corp. v. Lasky*, 569 S.W.2d 273 (Mo. App. St. Louis 1978). Of course, the proposed stipulation does name the State's Public School Fund.²

Second, Casstel asserts that intervention is untimely, but the very rule it cites undermines its own argument. Regarding the timeliness of intervention, regulation 4 CSR 240-2.075, cited by Casstel at page 3 of its suggestions states:

(1) An application to intervene shall comply with these rules and shall be filed within thirty (30) after the commission issues its order giving notice of the case, **unless otherwise ordered by the commission.** [emphasis added].

² The State's pecuniary interests distinguishes and renders moot Casstel's discussion of *State ex rel. McKittrick v. Public Service Commission*, 175 S.W. 2d 857 (Mo. banc 1943).

In other words, the timeliness of an application to intervene is set by the discretion of the Commission. In this case, no testimony has been filed. Rather, the parties asked the Commission to allow them time to discuss settlement. No substantive action was taken until the Staff and Casstel filed the proposed stipulation on December 29, 2005. That document first raised the need for the State to intervene in this case. That is not to say that standing did not always exist. It did. But before the filed stipulation, no party pretended to (a) extinguish the rights of third parties; (b) impose a fine on a public utility without clearly identifying the funding source the utility would use to pay the fine; (c) cause a public utility to incur a \$1,000,000 liability without a guaranty that it would not pass that on, directly or indirectly, to ratepayers; or (d) have this Commission endorse Casstel's application to the FCC for Universal Service Funds even though, as of the date of the on-the-record presentation of the proposed stipulation, persons who pled guilty in federal court to defrauding that fund of millions of dollars, still own Casstel.³ The State's response to the filing was within two days of the Commission's January 9, 2006 order to hold a hearing January 12, 2006 on the proposed stipulation and within a day of its order rescheduling the hearing to January 11, 2006. That is a reasonable response time.

³ This latter concern is what Casstel might characterize as a "public policy concern," but no statute, case, or order prohibits parties who otherwise have standing before the Commission – even parties other than the Public Counsel – from making public policy arguments.

Third, Casstel argues that the State's intervention will prejudice the other parties to the case and delay its resolution. That is not completely true. Upon reflection, the State concedes that its intervention could delay this case's resolution, but even that is not entirely precise. It is not the State's intervention per se that would delay the case. It is the Commission's ruling on the State's arguments that could have an affect on the date upon which this case is resolved. That is not a bad thing, and in fact, if more time means the Commission makes the right ruling, it is a very good thing.

Moreover, the State's intervention does not "prejudice" other parties. In *Blando v. Reid*, 886 S.W.2d 60, 64-65 [2,4] (Mo. App.1994), the court stated:

"Prejudice is the attitude of personal enmity towards the party or in favor of the adverse party to the other party's detriment. It is not the mere possession of views regarding the law or the conduct of a party. Prejudice is in the personal sense rather than in the judicial sense and refers to a mental attitude or a disposition of the judge towards a party. In order for the alleged bias and prejudice to be disqualifying, it must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from participation in the case[.]" *Cited in In re C.N.H.*, 998 S.W.2d 553, 560 (Mo. App. S.D.1999).

The concept of prejudice does not come into play here. The State's intervention invokes no extrajudicial source and does not put the Commission into the position of issuing an opinion on the merits on some basis other than what the Commissioners learn from participation in the case. Excluding the State's intervention because Casstel does not want it to affect the Commission's determination would be like excluding damaging testimony or calling it "prejudicial" on the grounds that it will affect the jurist's decision. That is not prejudice; that is jurisprudence.

The argument that Casstel makes about the parties "labor[ing] so long in the reasonable belief that all parties with a proper interest in the case had participated in the settlement discussions" is (1) irrelevant to the State's standing to intervene; and (2) belied by the fact that the document expressly contains terms – enforceable or not – contrived to deprive third parties of their rights vis-à-vis Casstel.

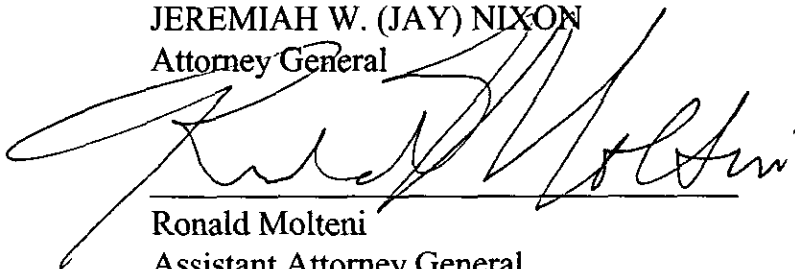
Finally, Casstel argues that the State is not prejudiced by denial of its application to intervene because the Public Counsel represents the interest of the general public before the Commission. The State's interests would be compromised by the denial of its intervention. That the Public Counsel can make public policy arguments – even the same arguments that another party might make – does not deprive the State of the standing it has asserted in its application to intervene and further explained in this document. Public Counsel did not raise the same concerns that the State raised at the

January 11, 2006 on-the-record presentation. That at least suggests that the State has an interest separate and apart from the interest represented by Public Counsel and that cannot be protected adequately by any other parties to this proceeding. That the Commission allowed the State to express some of its concerns about the proposed stipulation at the on-the-record presentation is irrelevant to whether the State has standing, but if anything, cuts in favor of allowing the intervention rather than denying it.

WHEREFORE, the State of Missouri respectfully reiterates its request that the Commission grant its application to intervene.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

A large, stylized handwritten signature in black ink, likely belonging to Ronald Molteni, is written over a horizontal line.

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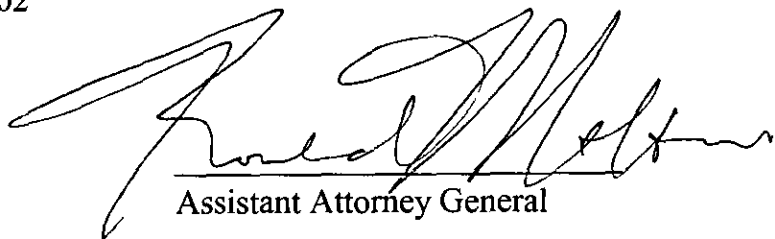
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, or hand-delivered, this 19th day of January, 2006, to the parties listed below and those on the attached list:

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