

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

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

**STAFF’S RESPONSE IN OPPOSITION TO THE ATTORNEY GENERAL’S
APPLICATION TO INTERVENE**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), and respectfully submits that the Attorney General’s Application to Intervene should be denied for the reasons set out below.

SUMMARY

1. The primary reason that the Attorney General’s Motion to Intervene should be denied is that granting it is contrary to the public interest¹ in that all of the benefits of the Stipulation and Agreement, most notably the \$1 million payment to the school fund, most likely will be lost.

2. The purpose of the negotiations between the parties was to resolve this complaint. The parties also wanted to arrange for a new owner of CassTel which would remove LEC from

¹ Under Commission Rule 4 CSR 240-2.075, the Commission may grant intervention if: 1) The proposed intervenor has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case, or 2) Granting the proposed intervention would serve the public interest. The Attorney General’s Motion to Intervene fails under both standards.

ownership of this Company, clean up the books of the Company which would also entice a new buyer, find a new owner, and deal with the overearnings component of this matter. Since the on-the-record presentation on January 11, things have progressed. An Application to sell CassTel has been filed (TM-2006-0306) and the parties are working on an Agreement to settle the overearnings matter. The Stipulation and Agreement in this case should be approved.

3. In addition, the Attorney General's Application to Intervene should be denied because the four grounds urged by the Attorney General are without substantial merit. First, Staff advises the Commission that there is no realistic possibility that any amount of the \$1,000,000 civil penalty will ever be collected from subscribers in rates. Second, the breadth of the enforcement waiver contained in the proposed Stipulation and Agreement is not a matter for concern because it waives only other actions that the Commission itself could bring. Third, the waiver of third-party claims contained in the Stipulation and Agreement simply duplicates the *res judicata* effect of a judgment for penalties in the Circuit Court. Fourth, the recertification of Respondent's assets for federal USF purposes is not a realistic matter of concern because a sale of Respondent is in the offing (TM-2006-0306) and there is no reason why a new owner, with clean hands, should not participate in the USF.

4. Finally, it is Staff's considered opinion that the proposed Stipulation and Agreement will result in a greater benefit for the people of the State of Missouri than is likely to be obtained otherwise. Permitting the intervention by the Attorney General will almost certainly result in the loss of the proposed settlement.

5. The Attorney General expressed his concerns at the recent on-the-record presentation and through his pleadings. Although invited by telephone on Friday, January 20, 2006, the Attorney General did not appear to meet with the parties' representatives on January

23, 2006, to discuss his concerns and explore options to resolve them. Additionally, the Attorney General's Application is untimely and it does not meet the requirements for intervention under Commission Rule 4 CSR 240-2.075.

6. Because the statute of limitation period is near an end, this case must be litigated to a prompt conclusion if the proposed Stipulation and Agreement is not approved. Section 516.390, RSMo, provides a two-year limitations period if the penalty is given in whole or in part to the state. Section 516.103, RSMo, provides that the limitations period is not tolled by the filing or pendency or of any administrative complaint. In the Joint Motion for Suspension of Procedural Schedule filed on September 23, 2005, CassTel agreed, if the procedural schedule were suspended, to waive the tolling of any applicable statute of limitations until January 1, 2006. The Statute of Limitations is again running and the last act alleged occurred in July, 2004. Furthermore, the statute of limitations on Count IV could expire as early as July 28, 2006. Accordingly, time is of the essence. The Staff urges the Commission to resolve this issue as expeditiously as possible by denying the Attorney General's Application.

**GRANTING INTERVENTION IS CONTRARY TO THE PUBLIC
INTEREST IN THAT THE BENEFITS OF THE STIPULATION
MOST LIKELY WILL BE LOST**

7. Granting the last-minute intervention request of the Attorney General is contrary to the public interest. The existing parties have settled a case via a Stipulation and Agreement that is in the public interest and have sought approval from the Commission. The Attorney General knew or should have known about the complaint for over 9 months and the Commission's General Counsel made the Attorney General aware of the activity in this matter well before the Stipulation was filed.

8. A contemplation of the status of the Stipulation if intervention is granted is necessary. It is apparent that pursuant to 4 CSR 240-2.115(D and E), that the unanimous aspect of the Stipulation is lost and pursuant to part D no Party is bound by it and all issues remain for determination after a hearing. While the parties might negotiate with the Attorney General if intervention is granted, that is anything but certain. The Attorney General has been silent on what happens if the parties don't negotiate by choice or can't reach an agreement. The answer is all of the benefits of the Stipulation are gone and litigation of the Complaint on its merits proceeds. If the Commission grants intervention to the Attorney General, the Stipulation becomes nonunanimous and all issues remain for determination.²

9. If the Stipulation is gone, then everything starts anew in litigation. Litigation could result in a substantially lesser penalty, could result in the expiration of the Statute of Limitations prior to getting to Circuit Court, could forestall a sale of CassTel's assets, could scuttle an agreement about overearnings, and could forestall the resumption of federal Universal Service Fund disbursements that help to keep rates affordable. More importantly, any of these potential results would be detrimental to the public interest.

10. Then the benefits of the Stipulation including the penalty most likely would be lost. The public interest would not be served if all of the benefits of the Stipulation and Agreement are lost.

INTERVENTION RULE-INSUFFICIENT BASIS FOR INTERVENTION

11. On January 11, 2006, the Commission held an on-the-record presentation regarding the Stipulation. The Attorney General appeared for the first time and sought intervention. The Commission allowed the Attorney General to participate provisionally and to

² See Commission Rule 4 CSR 240-2.115(2) (D); and *Fischer v. Public Service Commission*, 645 S.W. 2d 39 (Mo. App. W.D. 1982).

file a written application to intervene. The Attorney General filed his Application to Intervene (Motion) on January 11, 2006.

12. The Attorney General relies on Section 27.060 RSMo as the basis for its intervention. (Attorney General Motion at 1). Neither the Attorney General nor Section 27.060 asserts that the Attorney General can fail to comply with applicable rules of procedure.

13. Commission Rule 4 CSR 240-2.075 provides as follows:

(2) An application to intervene shall state the proposed intervenor's interest in the case and reasons for seeking intervention, and shall state whether the proposed intervenor supports or opposes the relief sought or that the proposed intervenor is unsure of the position it will take.

* * *

(4) The commission may on application permit any person to intervene on a showing that

(A) The proposed intervenor has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or

(B) Granting the proposed intervention would serve the public interest.

14. The Attorney General seeks intervention because: a) the State is a consumer of telephone services throughout the State of Missouri (Attorney General Motion at 2); b) at the State of Missouri has a significant interest in this matter, in addition to and apart from the general public (Attorney General Motion at 2); and c) the State of Missouri's interest cannot be protected adequately by any other party. (Attorney General Motion at 2).

15. The Staff first notes the Attorney General did not expressly allege that any state agency represented by the Attorney General is actually a customer of CassTel. This is also true of the Attorney General's Reply to CassTel.

16. Furthermore, Public Counsel is statutorily charged with representing the public and has stated no objection to the Stipulation and Agreement. Section 386.710 RSMo.

17. The Attorney General's four points, which are noticeably devoid of any legal or factual support, should be rejected for these reasons:

(a) The Attorney General suggests that ratepayers may eventually pay the penalty provided for in the Stipulation. As Mr. Schallenberg, director of the Commission's Utilities Services Division and a Certified Public Accountant, explained at the on-the-record presentation, penalties are recorded "below the line," meaning that a company does not recover penalties from its ratepayers unless the company requests, and the Commission approves, the recovery. Likewise, it is unlikely that this penalty could be recovered as an acquisition adjustment in a future rate case by a new owner. Mr. Schallenberg explained that it has been the policy of the Commission to disallow positive acquisition adjustments in rate cases. The ratepayers have the same guarantee that they will not finance the penalties provided for in this settlement as they would have in a judgment for penalties awarded by a court: the Commission would have to approve recovery of the penalties from the ratepayers.

(b) The Attorney General alleges that the Stipulation could be read as waiving a prosecutor's ability to prosecute for crimes related to the Staff's Investigation of CassTel. The Commission is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto. *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 919 (Mo. App. W.D. 2003). There is nothing in Chapters 386 or 392 RSMo to even remotely suggest that the Commission has power over prosecutors and their enforcement of the criminal laws of the State. The Attorney General also suggests that the Stipulation protects CassTel from penalties for future violations. The Attorney General is

mistaken. The Stipulation settles the matters alleged in the Complaint and all other potential complaints (the Potential Enforcement Complaints) that might arise out of the formal investigation in Case No. TO-2005-0237 and the informal investigations that both preceded the filing of Case No. TO-2005-0237 and were instituted subsequent to the termination of that case (collectively, the Investigation). The Staff has filed the initial and final reports of the Investigation in this case. Violations occurring after the time period covered by those reports are not settled by the Stipulation. Moreover, as set out in paragraph IVA on page 8 of the Stipulation and Agreement, to the extent the Commission finds that CassTel or LEC has failed to provide the Staff with material and relevant information in their possession or that either of them has misrepresented facts material and relevant to the Stipulation and Agreement, the agreement is terminated.

(c) The Attorney General alleges that the Stipulation purports to extinguish third party rights to file a subsequent action under the Public Service Commission Law related to the same subject matter. The authority to bring penalty actions under the Public Service Commission Law belongs to the Commission. Section 386.600 RSMo. Were the pending Complaint and the Potential Enforcement Complaints to proceed to judgment in the courts, the Commission would be barred by res judicata from suing for further penalties for those same violations.³ In other words, if this case were to proceed to a judgment in the courts, the Commission could not then bring a second penalty case for the same violations just because a different party (i.e., someone other than the Staff) files a second complaint asking the Commission to again authorize the Commission's General Counsel to seek penalties for those violations. Therefore, it is reasonable to include a provision in the Stipulation that the Commission will not seek further penalties for the settled violations.

³ See description of res judicata, *Sotirescu v. Sotirescu*, 52 S.W. 2d 1, 4 (Mo.App. E.D. 2001)

(d) The Attorney General objects to the recommendation for federal USF re-certification while CassTel is partly owned by persons who have plead guilty to using CassTel to defraud the USAC and NECA. The Staff has addressed this concern. In the Stipulation, the Staff agrees that although CassTel has implemented sufficient financial and managerial controls to justify its certification, the Staff will not be bound to make such a recommendation, if during the time that LEC, LLC continues to have majority ownership of the Company, the day-to-day management of CassTel no longer is being provided by a third party acceptable to Staff. Further, a sale case, TM-2006-0306 has been filed.

18. The Attorney General has failed to establish either sufficient interest to intervene or that its intervention would serve the public interest. For this reason, the Attorney General's Motion should be denied.

19. The Staff continues to support the Stipulation as being in the public interest and urges its adoption. However, if the Commission grants intervention to the Attorney General, the Staff requests a simultaneous order directing CassTel to respond to the Staff's Motion for Summary Disposition and a prompt ruling thereon. Further, if the Commission grants intervention, Staff would also urge the Commission to promptly convene all of the parties to work out a very prompt procedural schedule and to discuss the status of the case.

WHEREFORE, for the aforementioned reasons, Staff respectfully opposes the Attorney General's Application to Intervene and requests the Commission deny it.

Respectfully Submitted,

/s/ Robert Franson

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronic mail to all counsel of record and to Ron Molteni, Assistant Attorney General, on this 27th day of January, 2006.

/s/ Robert Franson