

**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.)	

**LEGAL MEMORANDUM IN SUPPORT OF STAFF'S MOTION FOR
SUMMARY DISPOSITION**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), and for its Legal Memorandum in Support of Motion for Summary Disposition pursuant to Missouri Public Service Commission (Commission) Rule 4 CSR 240-2.117, respectfully submits as follows:

1. On April 8, 2005, Staff filed its Complaint against Cass County Telephone Company Limited Partnership (CassTel) and Local Exchange Company LLC (LEC).¹
2. On May 13, 2005, CassTel filed its Answer.
3. On May 23, 2005, Staff filed its Reply to CassTel's Answer.
4. Staff submits that Summary Disposition is appropriate in this case for the reasons set out in this Legal Memorandum and the attached Motion for Summary Disposition.

¹ On June 28, 2005, the Commission dismissed LEC from this Complaint.

LEGAL STANDARD FOR SUMMARY DISPOSITION

Summary Disposition of a contested case before the Commission is governed by Commission Rule 4 CSR 240-2.117. This Rule specifies the particulars regarding a Motion for Summary Disposition. Commission Rule 4 CSR 240-2.117 was promulgated pursuant to Section 386.410 RSMo. The Commission may grant Summary Disposition if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. Commission Rule 4 CSR 240-2.117(1)(E).

Staff first notes that there is no genuine issue as to the following Paragraphs of Staff's Complaint: 1, 2, 3, 4, 5, 7, 10, 11, 12, 18, 22, 27, 30, 34, 35, 36, 37, 38, 40, 41, and 42 (A). Each of these paragraphs involves a reference to one or more of the following: a Missouri state statute, a state rule, Missouri caselaw, records of the Missouri Secretary of State, FCC Rules, and/or a record of the Commission. Agencies can take official notice of all matters of which the courts make take judicial notice. Section 536.070(6). It is appropriate for the Commission to take Administrative Notice of the cited Missouri state statutes,² Missouri rules,³ Missouri caselaw,⁴ records of the Missouri Secretary of State,⁵ and FCC rules⁶. The Commission may

² Missouri courts take judicial notice of state law including constitutional provisions and statutes. *State ex rel State Highway Commission v. Allison*, 296 S.W.2d 104, 106 (Mo. Banc 1956).

³ The Courts of this state shall take judicial notice, without proof, of the contents of the Code of State Regulations. Section 536.031.5 RSMo.

⁴ Missouri courts take judicial notice of state law including appellate decisions. *In re Estate of Danforth*, 705 S.W.2d 609,610 (Mo. App. SD 1986).

⁵ Copies of all papers on file in the office of the Secretary of State, or any matter recorded in said office, certified under the seal of the office, shall be evidence in all courts of this state. Section 490.180 RSMo.

⁶ Missouri courts take judicial notice of rules and regulations promulgated by federal agencies. *Fredrick v. Benson Aircraft Corporation*, 436 S.W.2d 765, 769-770 (Mo. App. 1968).

take official notice of its records and documents.⁷ Pursuant to Section 490.130 RSMo., certified records of a United States Federal Court are entitled to full faith and credit. Staff has electronically filed copies of certified copies of all of the documents referred to in the Complaint, Staff's Motion for Summary Disposition and Legal Memorandum. Staff has retained certified paper copies. Accordingly, there is no genuine issue regarding these paragraphs and the Commission should grant summary disposition to these matters.

Staff further notes that there is no genuine issue as to the following Paragraphs of Staff's Complaint: 6, 8, 9, 11, 13, 16 (CassTel admits that Mr. Matzdorff was an officer of CassTel), and 43 (CassTel admits that Mr. Matzdorff was President of CassTel on April 29, 2004). Accordingly, there is no genuine issue regarding these paragraphs and the Commission should grant summary disposition to these matters.

Staff further notes that there is no genuine issue as to paragraphs 14 and 15 of Staff's Complaint. Paragraph 14 of Staff's Complaint specifies that Mr. Kenneth Matzdorff appeared in the United States District Court, Western District of Missouri on January 18, 2005 and admitted the allegations in Exhibit 4 (Exhibit 4 attached hereto and incorporated by reference is a certified copy of the Amended Information charging Mr. Matzdorff with wire fraud and mail fraud). Mr. Matzdorff consented to the filing of the Amended Information (Exhibit 5, p. 3) and admitted allegations in Exhibit 4 (Exhibit 5 is the transcript of Mr. Matzdorff's guilty plea in the United States District Court, Western District of Missouri on January 18, 2005 and incorporated by reference herein). CassTel's denial of Paragraph 14 is wrong. Paragraph 14 is conclusively shown by Exhibit 4. Accordingly, there is no genuine issue as to Paragraph 14. Paragraph 15 is conclusively proven by Exhibit 5, which shows that Mr. Matzdorff did plead guilty to the crimes

⁷ Records and documents of the agency which are to be considered in the case shall be offered in evidence so as to become a part of the record, the same as any other evidence, but the records and documents may be considered as a part of the record by reference thereto when so offered. Section 536.070 (5) RSMo. An agency taking official notice of its records is tantamount to compliance with this statute. *Missouri State Highway Patrol v. Robertson*, 648 S.W.2d 644, 645 (Mo. App. WD 1983).

in the amended information (Exhibit 5). Accordingly, there is no genuine issue as to Paragraph 15 of Staff's Complaint.

Staff submits that there is no genuine issue as to Paragraph 16 of the Complaint. CassTel admits that Mr. Matzdorff was an officer of CassTel and has no problem discerning the relevant time periods for that admission (Answer at 4, paragraph 16). However, CassTel denies knowing whether Mr. Matzdorff was President of CassTel and/or in charge of the operations of CassTel and/or LEC during the same time period (Answer at 4, paragraph 16). Staff's allegations in Paragraph 16 are proven by Exhibits 4 and 5. In Exhibit 5, Mr. Matzdorff admitted to his crimes that he committed while an officer of CassTel including being President (Exhibit 5 at p. 10-13). Accordingly, there is no genuine issue as to Paragraph 16 of Staff's Complaint.

Staff submits that there is no genuine issue as to Paragraph 17 of the Complaint. CassTel admits that Mr. Matzdorff was an officer of CassTel and has no trouble determining the relevant times that he was an officer of CassTel (Answer at p. 4, paragraph 17). However, CassTel has problems admitting that Mr. Matzdorff was also an agent of CassTel (Answer at page 4, paragraph 17). CassTel completely ignores the issue of whether Mr. Matzdorff was an employee of CassTel (Answer at page 4, paragraph 17). This issue is conclusively proven since Mr. Matzdorff admitted to being President of CassTel and essentially running CassTel while committing his crimes utilizing CassTel (Exhibit 5, pages 10-13). Accordingly, there is no genuine issue as to Paragraph 17 of Staff's Complaint.

Staff submits that there is no genuine issue as to Paragraph 19 of the Complaint. While CassTel denies the clearly documented crimes of Mr. Matzdorff, this matter is conclusively proven because Mr. Matzdorff pled guilty to federal charges of conspiracy to commit mail and wire fraud (Exhibits 4 and 5). Mr. Matzdorff admitted his role in defrauding USAC and NECA by including as expenses of Cass County Telephone Company Limited Partnership payments

made to ODC on falsified or fictitious invoices. These expenses, based on falsified or fictitious invoices, were then used to qualify for unwarranted disbursements of subsidies from USAC and revenue distributions from NECA (Exhibits 4 and 5). Since these documents clearly prove the allegations, then there is no genuine issue as to Paragraph 19 of Staff's Complaint.

Staff submits that there is no genuine issue as to Paragraph 20 of the Complaint. Paragraph 20 initially merely states that Mr. Matzdorff ran CassTel (Complaint at page 7). CassTel's Answer does not address this issue when it admits that Mr. Matzdorff was an officer of CassTel (Answer page 4, paragraph 20). The transcript of Mr. Matzdorff's guilty plea shows that Mr. Matzdorff admitted running CassTel. The Assistant United States Attorney, Mr. Becker, stated that Mr. Matzdorff: "...was the president at certain times and essentially ran the Cass County Telephone Company" and Mr. Matzdorff, under oath, agreed with these facts (Exhibit 5, page 10, lines 10-12 and page 12, lines 23-24). CassTel's protestations of lack of knowledge are conclusively refuted by the proof in Exhibit 5. Accordingly, there is no genuine issue as to Paragraph 20 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 21 of the Complaint. CassTel admits that Mr. Matzdorff was an officer of CassTel between 1998 and July, 2004 (CassTel Answer at page 5, paragraph 21). Exhibit 4 shows that Mr. Matzdorff was charged by the United States with wire and mail fraud and conspiracy between 1998 and July 2004 (Exhibit 4 at page 4). Mr. Matzdorff pled guilty to these crimes and agreed with Mr. Becker's explanation of his crimes (Exhibit 5, page 10-13). Just as Paragraph 21 of the Complaint alleges Mr. Matzdorff ran the day-to-day operations of Cass County Telephone Company Limited Partnership when the false or fictitious invoices were created and when CassTel included them in the expenses used by CassTel to qualify for unwarranted disbursements of subsidies and revenue distributions from 1998 through about July, 2004 (Exhibit 5, pages 10-13). A good explanation is that the money

went in a circle. CassTel paid ODC for work not performed, and then Overland Data paid LEC for work not performed, the money came back to CassTel, the expense was put on their report to NECA and USAC, which caused the higher rate of subsidy (Exhibit 5 at page 12). These facts conclusively refute CassTel's denial. Accordingly, there is no genuine issue as to Paragraph 21 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 22 of the Complaint. Paragraph 22 of the Complaint merely makes the clear legal point that, pursuant to Section 386.570.3, Mr. Matzdorff's criminal actions are the actions of CassTel. There is no question that Mr. Matzdorff was acting in his official capacity of running CassTel when he committed his crimes and therefore, his actions are the actions of CassTel and CassTel is subject to penalties under 386.570. Accordingly, there is no genuine issue as to Paragraph 22 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 23 of the Complaint. There is no question that Kenneth Matzdorff committed wire fraud, mail fraud and conspiracy to defraud USAF and NECA as proven by Exhibits 4 and 5. There is no question that pursuant to Section 386.570.2 that each day of these crimes constitutes a separate and distinct offense subject to a penalty under Section 386.570.1. Section 386.570, provides, in relevant part:

1. Any corporation, person or public utility which violates or fails to comply with ...any other law...in which a penalty has not herein been provided for such corporation...is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense...
2. Every violation of the provisions of this or any other law...by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

As CassTel reiterated multiple times in its Answer, statutes speak for themselves. In view of the foregoing, Staff submits that there is no genuine issue regarding Paragraph 23 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 24 of the Complaint. CassTel denies Paragraph 24 of the Complaint because CassTel claims to be “without sufficient information or belief to enable CassTel to answer.” (Answer page 5, paragraph 24). To the contrary, CassTel has clear irrefutable evidence of the crimes of Daniel Martino as found in Exhibits 6, 7, and 8 of the Complaint. Daniel D. Martino admitted that he committed the offenses charged, specifically conspiracy to commit mail and wire fraud (Exhibits 6, 7, and 8). Daniel D. Martino was the president of F.S.E. Consulting Corp., which controlled the finances of ODC. Exhibits 6, 7 and 8 spell out essentially the same scheme as does the irrefutable evidence against Mr. Matzdorff. Accordingly, Staff submits that there is no genuine issue as to Paragraph 24.

Staff submits that there is no genuine issue regarding Paragraph 25 of Staff’s Complaint. CassTel denies Paragraph 25 of the Complaint because CassTel claims to be “without sufficient information or belief to enable CassTel to answer.” (Answer page 5, paragraph 24). To the contrary, CassTel has clear irrefutable evidence of the crimes of Richard Martino as found in Exhibits 6, 7, 8 and 9 of the Complaint. Daniel D. Martino admitted that he committed the offenses charged, specifically conspiracy to commit mail and wire fraud (Exhibits 6, 7, and 8). Daniel D. Martino was the president of F.S.E. Consulting Corp., which controlled the finances of ODC. Exhibits 6, 7, and 9 spell out essentially the same scheme as does the irrefutable evidence against Mr. Matzdorff. Accordingly, Staff submits that there is no genuine issue as to Paragraph 25.

In view of the foregoing, the Commission should grant Staff summary disposition on Count I.

COUNT II

Staff submits that there is no genuine issue regarding Paragraph 28 of Staff’s Complaint.

CassTel admits that Mr. Matzdorff was an officer of CassTel between 1998 and July, 2004 (CassTel Answer at page 5, paragraph 21). Exhibit 4 shows that Mr. Matzdorff was charged by the United States with wire and mail fraud and conspiracy between 1998 and July 2004 (Exhibit 4 at page 4). Mr. Matzdorff pled guilty to these crimes and agreed with Mr. Becker's explanation of his crimes (Exhibit 5, pages 10-13). Mr. Matzdorff ran the day-to-day operations of Cass County Telephone Company Limited Partnership when the false or fictitious invoices were created and when CassTel included them in the expenses used by CassTel to qualify for unwarranted disbursements of subsidies and revenue distributions from 1998 through about July, 2004 (Exhibit 5, pages 10-13). A good explanation is that the money went in a circle. CassTel paid ODC for work not performed, and then Overland Data paid LEC for work not performed, the money came back to CassTel, the expense was put on their report to NECA and USAC, which caused the higher rate of subsidy (Exhibit 5 at page 12). These facts conclusively refute CassTel's denial. Accordingly, there is no genuine issue as to Paragraph 28 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 29 of the Complaint. Paragraph 29 of the Complaint merely makes the clear legal point that pursuant to Section 386.570.3, that Mr. Matzdorff's criminal actions are the actions of CassTel. There is no question that Mr. Matzdorff was acting in his official capacity of running CassTel when he committed his crimes and therefore, his actions are the actions of CassTel and CassTel is subject to penalties under 386.570. Accordingly, there is no genuine issue as to Paragraph 29 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 31 of the Complaint. There is no question that Kenneth Matzdorff committed wire fraud, mail fraud and conspiracy to defraud USAF and NECA as proven by Exhibits 4 and 5. There is no question that pursuant to Section 386.570.2 that each day of these crimes constitutes a separate and distinct offense subject to a

penalty under section 386.570.1. Accordingly, there is no genuine issue as to Paragraph 31 of the Complaint.

In view of the foregoing, the Commission should grant Staff summary disposition on Count II.

COUNT III

Staff submits that there is no genuine issue as to Paragraph 33 of the Complaint. CassTel claims to be without knowledge of what Staff relied on with respect to Staff's review of CassTel's accounts, books of account and records in Case No. IR-2004-0354 (Answer at pages 6-7, paragraph 33). The Affidavit of David Winter, Staff Accountant, attached hereto and incorporated by reference as Exhibit 11 establishes that Staff, in determining the revenue requirement of CassTel and entering into the unanimous stipulation and agreement that the Commission approved in Case No. IR-2004-0354 that was designed to reduce CassTel's gross intrastate revenues by about \$320 thousand per year, the Staff relied on the accounts, books of account and records of CassTel that included the aforesaid false entries. Accordingly, there is no genuine issue as to Paragraph 33 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 34 of the Complaint. CassTel claims that no admission or denial is required. Staff submits that Commission Rule 4 CSR 240-30.040 was promulgated under the authority of Section 393.210.2. The Rule and Statute are self-evident and speak for themselves. Accordingly, there is no genuine issue as to Paragraph 34 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 37 of the Complaint. The parts of Paragraph 37 dealing with rules and statutes are dealt with above. The other allegation is that Kenneth Matzdorff willfully made false entries in the accounts, books of account or memoranda of CassTel in violation of Commission Rule 4 CSR 240-30.040. This is consistent

with Exhibits 4, 5 and 6. Exhibit 4 shows that Mr. Matzdorff was charged by the United States with wire and mail fraud and conspiracy between 1998 and July 2004 (Exhibit 4 at page 4). Mr. Matzdorff pled guilty to these crimes and agreed with Mr. Becker's explanation of his crimes (Exhibit 5 at pages 10-13). Mr. Matzdorff ran the day-to-day operations of Cass County Telephone Company Limited Partnership when the false or fictitious invoices were created and when CassTel included them in the expenses used by CassTel to qualify for unwarranted disbursements of subsidies and revenue distributions from 1998 through about July, 2004 (Exhibit 5 at pages 10-13). A good explanation is that the money went in a circle. CassTel paid ODC for work not performed, and then Overland Data paid LEC for work not performed, the money came back to CassTel, the expense was put on their report to NECA and USAC, which caused the higher rate of subsidy (Exhibit 5 at page 12). These facts conclusively refute CassTel's denial. Accordingly, there is no genuine issue as to Paragraph 37 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 38 of the Complaint. This paragraph merely accurately quotes Section 392.360 RSMo. This statute holds CassTel responsible for its violations of Commission Rule 4 CSR 240-30.040. Accordingly, there is no genuine issue as to Paragraph 38 of the Complaint.

In view of the foregoing, the Commission should grant Staff summary disposition on Count III.

COUNT IV

Staff submits that there is no genuine issue as to Paragraph 42A of the Complaint. Staff agrees with CassTel's assertion that transcripts speak for themselves. The transcripts herein clearly show that Mr. Matzdorff knowingly lied to the Commission as alleged in Paragraph 42A of the Complaint. Accordingly, the transcripts themselves conclusively refute CassTel's denial

(Answer page 8, paragraph 42A). Accordingly, there is no genuine issue as to Paragraph 42A of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 42B of the Complaint. CassTel admits that the statements made by Mr. Matzdorff on April 19, 2004 were made pursuant Section 386.470 (Answer pages 8-9, paragraph 42B). CassTel cannot credibly deny the accurate quotation of Section 386.470 found in this paragraph of the Complaint. Accordingly, there is no genuine issue as to Paragraph 42B of the Complaint

Staff submits that there is no genuine issue as to Paragraph 43 of the Complaint. Paragraph 43 of the Complaint accurately states that Mr. Matzdorff was running CassTel when he made his statements to the Commission on April 19, 2004. This is supported by the testimony by Mr. Matzdorff in his guilty plea to the Federal District Court in January 2005. (See Exhibits 4, 5 and 6). Accordingly, there is no genuine issue as to Paragraph 43 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 44 of the Complaint. Paragraph 44 of the Complaint accurately specifies that Mr. Matzdorff's statements to the Commission on April 19, 2004 were made in the scope of his official duties of running CassTel. This is supported by Exhibits 4, 5 and 6. Accordingly, there is no genuine issue as to Paragraph 44 of the Complaint.

Staff submits that there is no genuine issue as to Paragraph 45 of the Complaint. Each of Mr. Matzdorff's false statements to the Commission is punishable as a separate and distinct offense under Section 386.570.1 and is subject to a penalty. Accordingly, there is no genuine issue as to Paragraph 45 of the Complaint.

In view of the foregoing, the Commission should grant Staff summary disposition on Count IV.

WHEREFORE, the Staff requests that the Commission grant this Motion for Summary Disposition and grant all of the relief sought by Staff in Staff's Complaint.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 30th day of August 2005.

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