

**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)	Case No. TO-2005-0237
Related Matters of Illegal Activity.)	

**CASS COUNTY TELEPHONE COMPANY'S
AND NEW FLORENCE TELEPHONE COMPANY'S
MOTION TO QUASH SUBPOENA**

COMES NOW Cass County Telephone Company ("CassTel") and New Florence Telephone Company ("New Florence")(collectively "Companies"), by and through counsel, and hereby move to quash, pursuant to 4 CSR 240-2.100(3), the subpoenas served upon the registered agents for CassTel and New Florence on March 17 and 18, 2005, by the Missouri Public Service Commission (the "Commission").

As is noted in Staff's Recommendation to Subpoena Documents From New Florence Telephone Company and From Cass County Telephone Company LP ("Staff's Recommendation"), CassTel and New Florence have provided much of the information that the Staff of the Commission ("Staff") has requested.¹ Additionally, CassTel and New Florence intend to continue to cooperate with Staff and intend to produce documents which are relevant to this investigative proceeding, are not protected from disclosure, and are within their possession and control. The scope of the subpoenas, however, requires CassTel and New Florence to file this Motion to Quash. CassTel and New Florence are hopeful that discussions with Staff and legal counsel for the Commission will result in an agreement regarding other documents or information to be produced which is satisfactory

¹In fact, to date, New Florence has provided all the information within its possession and control that has been requested of it.

to the Commission and to the Companies. In support of this Motion to Quash, CassTel and New Florence respectfully state to the Commission as follows:

1. With regard to (1) Warinner, Gesinger & Associates, LLC, and (2) Mize, Houser & Company, the Commission has sought by subpoena “audit workpapers that support each independent auditor’s report for the financial statements” of the Companies.² Such information, however, is protected from discovery in this proceeding. The workpapers of the independent auditors are protected from disclosure under the statutory accountant-client privilege. In addition, the subpoena requests are overly broad and seek the production of information which is not relevant to this investigatory proceeding.

2. The subpoenas seek the production of workpapers protected from disclosure under the statutory accountant-client privilege provided for in RSMo. §326.322. Subsection two of that statute reads as follows:

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 capacity as a licensee. **This privilege shall exist in all cases** except when material to the defense of an action against a licensee.

RSMo. §326.322.2 (emphasis added).

² 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.

In Staff's Recommendation, and citing to the first sentence of the statutory subsection, Staff asserts that the statutory privilege only applies to judicial proceedings. This, however, is contrary to the express language of the statute regarding the privilege applying in *all* cases. Additionally, and of great significance, is the fact that the Commission's own rule requires that "discovery may be obtained by the same means and **under the same conditions as in civil actions in the circuit court.**" 4 CSR 240-2.090(1) (emphasis added).

Warinner, Gesinger & Associates, LLC and Mize, Houser & Company are certified public accounting firms hired by the Companies to perform auditing services. As such, the auditors fall squarely within the scope of the language of §326.322.2. Furthermore, the auditors' clients, CassTel and New Florence, have not consented to the production of the workpapers and have objected to Staff's efforts to obtain the same. The Commission cannot by unilateral decree expand the scope of its authority beyond those powers expressly granted by its enabling legislation. *State ex rel. Kansas City Transit, Inc. v. Public Service Commission*, 406 S.W.2d 5 (Mo. 1966). The undersigned legal counsel is unaware of any statute, rule, or court decision which would allow the Commission to ignore the accountant-client privilege created by statute.

The statutory accountant-client privilege contained in §326.322 (formerly RSMo. §326.151) has been the subject of federal court decisions and state appellate decisions. These cases, however, do not address the issue of the privilege applying in a Missouri administrative proceeding. The majority of these cases deal with the privilege not being applicable when a suit has been filed against the accountant or when federal law is applicable to the case.³ It is interesting to note, however, that

³ There is not a federal statute which is similar to Missouri's statute which created the accountant-client privilege in this state.

while addressing a different issue than the issue at hand, the court in *State ex rel. Southwestern Bell Publications v. Ryan*, held that the statutory accountant-client privilege should be accorded the same discovery treatment as the statutory physician-patient privilege. 754 S.W.2d 30, 32 (Mo.App. E.D. 1988).

Although there does not appear to be any Missouri appellate law directly on point, the same issue was considered by the Circuit Court of Cole County in *Ex rel. Arkansas Power & Light Company v. Public Service Commission*, Case No. CV186-147CC. In that case, Staff sought production of the workpapers of DH&S, a company which performed auditing services for Arkansas Power & Light. In the Court's Order of April 22, 1986, the Court ruled as follows:

The Court hereby determines that its Preliminary Order in Prohibition, entered February 10, 1986, should be, and is hereby modified as follows:

- 1) Respondent is hereby prohibited from compelling relator to disclose to respondent, its Staff or any other person, the DH&S workpapers; and
- 2) Respondent and its Staff are further prohibited from commencing, instituting, authorizing or entertaining any action, administrative or judicial, against relator pursuant to Sections 386.360 or 386.570, RSMo., or any other provision, for or on account of, or arising out of, relator's refusal to produce the DH&S workpapers;

until further order of the Court.

The Circuit Court of Cole County clearly found that the privilege was applicable to administrative proceedings and that the Commission did not have the authority to ignore the statute.

3. The subpoena seeks the production of certain workpapers prepared by Warinner, Gesinger & Associates, LLC and Mize, Houser & Company, without specifying any particular time period. Warinner, Gesinger & Associates, LLC provided independent auditing services for the Companies

for 2003. Mize, Houser & Company provided independent auditing services for the Companies for the years 1996 through 2002 (for CassTel) and 1998 through 2002 (for New Florence). By not limiting the subpoena requests as to time, the requests are overly broad and unduly burdensome and seek irrelevant information.

It is a common principle of utility regulation that rates may not be changed retroactively. As such, whatever may be discovered in the workpapers from years past cannot be used to alter the rates charged during those periods. Estoppel, waiver, and the statute of limitations also come into play. Information is being requested back to 1996, and CassTel and New Florence are unaware of an event in 1996 which could possibly form the basis of a Commission action in 2005. Information from as far back as 1996 most certainly bears no relevance to the current rates being charged Missouri customers.

Whether or not the Commission finds that the subpoena should be quashed on the basis of privilege, the subpoena should be quashed to the extent it seeks production of documents related to matters occurring as far back as 1996.

In Staff's Recommendation, it is stated that the workpapers are being sought to assist Staff in evaluating the independence of the outside auditors' reports, to help Staff understand how the auditors arrived at the amounts that appear in the financial statements, and to help Staff investigate the accuracy and validity of the expenses of the Companies. First, it is not Staff's duty to evaluate the "independence" of the auditors. Second, Staff should not need the auditors' workpapers in order for Staff to perform its own audit. Surely Staff does not want to simply rely upon the auditors' calculations. If Staff does need some assistance interpreting an audit entry or tracing a certain expense, this could be accomplished in a much more reasonable and limited fashion without

infringing upon the privilege. The lack of a legitimate purpose for requesting the workpapers is further evidence that the subpoena requests are overly broad and seek irrelevant information.

WHEREFORE, for the good cause shown above, the Company respectfully requests an order of this Commission quashing the subpoenas served upon the registered agents for CassTel and New Florence on March 17 and 18, 2005, and such other and further relief as the Commission deems just and proper under the circumstances.

Respectfully submitted,

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

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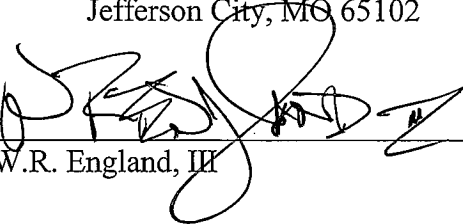
Attorneys for CassTel Telephone Company and
New Florence Telephone Company

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, hand-delivered or sent by electronic transmission on this 25th day of March, 2005, to the following parties:

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