

**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, and	)	
Local Exchange Company, LLC,	)	
	)	
Respondents.	)	

**LOCAL EXCHANGE COMPANY’S MOTION TO DISMISS, AND ALTERNATIVE  
MOTION FOR EXTENSION OF TIME, WITH SUPPORTING MEMORANDUM**

COMES NOW Local Exchange Company, LLC (“LEC”) and, pursuant to Rule 4 CSR 240-2.116(4) and Rule 4 CSR 240-2.117(2), hereby moves to be dismissed from the above-captioned complaint case because the Commission does not have jurisdiction to hear this complaint case against LEC and because the Staff’s Complaint fails to state a claim upon which relief can be granted against LEC. Alternatively, LEC seeks an enlargement of time to answer the Complaint if the Commission denies LEC’s motion to dismiss. In further support of its motion, LEC offers the following memorandum of law.

**Introduction**

1. LEC should be dismissed from this complaint case for two fundamental reasons: the Missouri Public Service Commission (the “Commission”) does not have jurisdiction over LEC; and, even if it did, the Staff does not seek any relief against LEC, nor allege that LEC is responsible for any of the alleged violations, in the Complaint.

2. The Complaint’s silence on the latter point mandates that LEC be dismissed from this case. The Commission’s rules require that a complainant plead a basis for relief, and state a claim

upon which relief may be granted, against each respondent. The Complaint here fails on both counts with respect to LEC.

3. The jurisdictional basis for dismissal is equally straight-forward. The Missouri General Assembly has delegated specific, limited jurisdiction to the Commission over “public utilities,” including “telecommunications companies.” Telecommunications companies are defined as entities that own, operate, control, or manage the facilities, i.e., the equipment and real property, used to provide telecommunications service within Missouri. The Commission’s jurisdiction over telecommunications companies does not, however, extend to holding companies that conduct telecommunications businesses only through certificated affiliates. LEC is such a holding company. It is not, and never has been, a provider of telecommunications services or an owner or operator of telecommunications facilities. Accordingly, the Commission should dismiss LEC from this case. The Staff has essentially conceded this jurisdictional point by failing to allege any facts in the Complaint that would indicate that LEC is subject to the Commission’s jurisdiction.

4. On these bases, as set forth in greater detail below, LEC respectfully requests that the Commission enter an order dismissing it from this case.

**THE COMMISSION DOES NOT HAVE JURISDICTION OVER LEC AND LEC SHOULD THUS BE DISMISSED FROM THIS COMPLAINT CASE.**

**The Commission’s Jurisdiction Over Complaint Cases Seeking Authorization for Penalty Actions is Limited to Claims Against Public Utilities.**

5. “The Public Service Commission is an administrative agency or committee of the Legislature, and as such is vested with only such powers as are conferred upon it by the Public Service Commission Law, by which it was created.” State ex rel. Laundry, Inc. v. Public Service Comm’n, 34 S.W.2d 37, 43 (Mo. 1931). See also, Livingston Manor, Inc. v. D.S.S., 809 S.W.2d 153, 156 (Mo. App. 1991) (“A basic tenet of administrative law provides that ‘an administrative

agency has only such jurisdiction or authority as may be granted by the legislature.”); Bodenhausen v. Missouri Bd. of Healing Arts, 900 S.W.2d 621 (Mo. banc 1995).

6. A complainant must affirmatively plead and establish a record proving that the Commission has jurisdiction over its complaint. State ex rel. Wilson Chevrolet v. Wilson, 332 S.W.2d 867, 871 (Mo. 1960). The Commission’s jurisdiction over the Staff’s Complaint here is governed and defined by Section 386.250. In relevant part, that statute provides that “[t]he jurisdiction . . . of the public service commission . . . shall extend under this chapter” to:

. . . all telecommunications facilities, telecommunications services and to all telecommunications companies so far as such telecommunications facilities are operated or utilized by a telecommunications company to offer or provide telecommunications service between one point and another within this state or so far as such telecommunications services are offered or provided by a telecommunications company between one point and another within this state . . . .

R.S.Mo. §386.250(2).<sup>1</sup>

7. The Commission’s relevant jurisdiction extends to “telecommunications companies” and other kinds of “public utilities” not at issue here. A “telecommunications company” is defined to include entities “owning, operating, controlling or managing any facilities used to provide telecommunications services for hire, sale or resale within this state. . . .” R.S.Mo. §386.020(51). “Telecommunications facilities” are defined, in turn, to include the equipment (“lines, conduits, ducts, poles, wires, cables,” etc.) and real property (“real estate, easements,” etc.) used to facilitate services. R.S.Mo. §386.020(52).

8. Based upon these statutory definitions, the Commission’s jurisdiction does not extend to LEC. LEC is a holding company that owns and operates telecommunications businesses through

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<sup>1</sup> Unless otherwise noted, all citations to statute are to the Revised Statutes of Missouri, 2000 (hereafter “R.S.Mo.”).

its affiliated “telecommunication companies.” This Commission “has consistently found that the Commission does not have jurisdiction over” conduct that takes place “at the holding company level.” In re: Joint Application of Advanced TelCom, Inc., et al., 2004 WL 2673104 (Mo. P.S.C., Nov. 18, 2004) (rejecting jurisdiction over stock sale between holding companies, and citing In re: Merger of SBC Comms., Inc., 7 Mo.P.S.C.3d 528, 532 (1998)).

9. The Illinois Court of Appeals concluded that holding companies are not subject to regulatory jurisdiction in People’s Energy Corp. v. Illinois Commerce Comm’n, 492 N.E.2d 551, 558 (Ill. Ct. App. 1986). That court construed an Illinois statute that defined the regulated entities within that agency’s jurisdiction in a manner similar to, but broader than, the Missouri statute’s definition of “telecommunications company.” Despite a broader grant of jurisdiction, the court held that the Illinois agency lacked jurisdiction over holding companies. The Illinois statute defined “Public Utility” to include every entity “that owns, controls, operates or manages,” either “directly or indirectly,” any “plant, equipment or property used . . . in” providing enumerated utility services. Id. (quoting Ill. Rev.Stat. 1981, Ch. 111 2/3, par. 10.3). Even faced with a statute that expressly included indirect control of facilities, the court held this definition is not “so expansive that it encompasses a non-operating holding company . . . .” Id. The Illinois decision is persuasive authority here.

10. As Staff concedes, LEC is a holding company – it was formed to “engage in ownership and operation of local telephone companies.” Complaint at ¶10. LEC is thus not itself a “telecommunications company” that is subject to this Commission’s jurisdiction. The Commission should dismiss LEC.

**The Staff's Complaint Fails Even to Allege That LEC Is A "Telecommunications Company" or That It Otherwise Is Subject to Commission Jurisdiction.**

11. Staff makes no jurisdictional allegations regarding LEC anywhere in its 23-page Complaint. In sharp contrast, the Staff expressly alleges that CassTel provides telecommunications services to Missouri consumers, Complaint at ¶¶8, and based upon that allegation, that CassTel "is subject to the Commission's jurisdiction." *Id.* at ¶¶9. The absence of such allegations regarding LEC is conspicuous and telling. The Staff has failed to allege any jurisdictional basis against LEC with good reason: the facts do not support Commission jurisdiction over LEC. LEC is simply outside the Commission's carefully circumscribed statutory jurisdiction. Accordingly, LEC respectfully requests that the Commission dismiss it from this complaint case.

**THE STAFF SEEKS NO RELIEF FROM LEC AND LEC SHOULD THUS BE DISMISSED FROM THIS COMPLAINT CASE.**

12. This Commission's rules require that the Staff allege the relief it requests from each respondent. Rule 4 CSR 240-2.070(5)(D). In each of the Complaint's four counts, Staff requests specific findings that CassTel violated specific statutes or regulations and requests that CassTel be found responsible for the maximum penalties allowed by law for the alleged violations. Nowhere in Staff's 23-page, four count Complaint does it seek any relief from LEC. Because the Staff has failed to identify any relief that it seeks from LEC, the Commission should dismiss LEC on this independent basis also.

**THE STAFF ALSO FAILS TO ALLEGE ANY FACTS THAT COULD SUPPORT A CLAIM FOR RELIEF AGAINST LEC.**

13. In each count of the Complaint, Staff focuses on the alleged criminal conduct of Kenneth Matzdorff and attempts to impute his conduct to CassTel (but not LEC). Staff bases each of its claims on the language of Section 386.570.3, which provides in relevant part that: "the act . . . of any officer, agent or employee of any . . . public utility, acting within the scope of his official

duties of employment, shall in every case be . . . deemed to be the act . . . of such . . . public utility.” R.S.Mo. §386.570.3. Staff expressly alleges that the conduct of Mr. Matzdorff at issue in every count of the Complaint is imputable to CassTel. See Complaint at ¶¶ 22 (Count I: the alleged actions “were within the scope of his official duties as an officer and/or agent and/or employee and, therefore, are the actions of CassTel”); 29 (Count II: alleged violations “are the acts of CassTel”); 37-38 (Count III: alleged false entries made by Matzdorff “in the accounts . . . of CassTel” alleged to be “CassTel’s violations of” the regulation); and 44 (Count IV: statements “were made within the scope of his official duties of employment as the operator of CassTel and, therefore, are the actions of CassTel”).

14. Tellingly, the Staff makes no such express allegations regarding LEC’s responsibility for his conduct in any of the four counts. The Staff does make passing allegations in its Complaint that Mr. Matzdorff was “an employee of LEC,” e.g. Complaint at ¶16, but this allegation by itself falls far short of establishing a basis for relief against LEC directly. Unlike the Staff’s four claims against CassTel, the Staff fails to allege that Mr. Matzdorff’s alleged actions were taken “within the scope of his official duties” for LEC. Nor does the Staff allege any other basis in its Complaint to impose liability upon LEC. Because the Complaint states no basis for LEC’s liability, the Commission should also dismiss LEC on this separate basis.

**OUT OF AN ABUNDANCE OF CAUTION, LEC ALSO ALTERNATIVELY REQUESTS A BRIEF TEN-DAY ENLARGEMENT OF TIME TO ANSWER AFTER NOTICE OF A RULING ON ITS MOTION TO DISMISS.**

15. Alternatively, and only in the event that the Commission denies LEC’s motion to dismiss, LEC hereby moves, pursuant to Rule 4 CSR 240-2.050(3)(A), that it be granted an enlargement of time in which it may file its answer to the Complaint. Unlike the rules of civil procedure applicable in a Missouri circuit court, the Commission’s rules do not expressly extend the deadline to file an answer for a party whose motion to dismiss a complaint is denied. Cf.

Mo.R.Civ.P. 55.25(c) (“the responsive pleading shall be filed within ten days after notice of the court’s action” either denying a motion to dismiss or postponing decision thereon). Out of an abundance of caution, LEC requests, if the Commission should deny LEC’s motion to dismiss, that the Commission grant LEC until ten days from delivery of notice of that denial to timely file an answer to the Complaint.

### **Conclusion**

LEC does not itself own, operate, control or manage any facilities used to provide telecommunication services in Missouri. It is thus outside this Commission’s jurisdiction. Moreover, the Staff has failed to allege a legal or factual basis for imposing a penalty against LEC, nor has it sought any relief from LEC. On these bases, and for the reasons set forth more fully above, LEC respectfully requests that the Commission enter its order dismissing LEC from this complaint case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of May, 2005 a copy of the foregoing was served via e-mail on the following:

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