

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

In the Matter of Kansas City Power & Light)
Company's Request for Authority to Implement)
A General Rate Increase for Electric Service.)
Case No. ER-2012-0174
Tracking No. YE-2012-0404

and

In the Matter of KCP&L Greater Missouri)
Operations Company's Request for Authority)
To Implement a General Rate Increase for)
Electric Service.)
Case No. ER-2012-0175
Tracking No. YE-2012-0405

**MOTION FOR FULL COMMISSION RECONSIDERATION OF DISCOVERY
ORDER OF SPECIAL MASTER REGARDING ACCOUNTANT-CLIENT PRIVILEGE**

COME NOW the Staff of the Missouri Public Service Commission ("Staff") and The Office of the Public Counsel ("OPC")(collectively the "Movants"), through the undersigned counsel, and for their Motion for Full Commission Reconsideration of Discovery Order of Special Master Regarding Accountant-Client Privilege respectfully state as follows:

1. On October 3, 2012, the Commission issued an Order Appointing Special Master to rule on certain discovery objections in these cases. More specifically, Kansas City Power & Light Company ("KCPL") had objected to providing certain documents to Staff based on claims of attorney-client privilege, attorney work product privilege, and/or accountant-client privilege.

2. On October 16, 2012, the Special Master issued a Discovery Order¹ in which he ruled in favor of KCPL on its claims of attorney-client privilege and attorney

¹ Footnote 3 of the Discovery Order seems to state that the parties agreed to have a Special Master rule on all objections to the subpoena [*i.e.*, claims of documents being privileged]; technically this is incorrect, as Staff, in its prior pleadings herein, only suggested that a small portion of the documents at issue be referred to a Special Master, and not as to objections based on the claim of accountant-client privilege.

work product privilege.² Regarding the accountant-client privilege, the Special Master ruled that such privilege is applicable to the specific facts of this case; however, he ruled that in this instance KCPL had waived the privilege, so in regard to documents where the sole objection was the accountant-client privilege KCPL was ordered to provide the documents to Staff. According to the Order Consolidating Cases for Hearing and Setting Procedural Schedule, and Amended Notice of Hearing issued herein on April 26, 2012, motions for reconsideration of discovery rulings are due five business days after issuance of the ruling.

3. Obviously Movants do not take issue with the ruling that the documents should be provided to Staff. However, Movants request the full Commission reconsider the Special Master's ruling that the accountant-client privilege is available at all, given the importance of the issue and the fact that the ruling was made by a regulatory law judge sitting as a Special Master rather than by the full Commission for the following reasons, each of which is discussed in further detail in the body of this Motion:

(1) The ruling of the Special Master that the accountant-client privilege is available (absent waiver) to this situation effectively changes course from that which has been followed by past Commissions, as reflected in the attached order which was issued after a unanimous Commission vote. This prior unanimous Commission order clearly found that the accountant-client privilege is not available to regulated companies when the regulator seeks information from the regulated companies. It was not limited

However, for purposes of the Discovery Order and this Motion, whether or not the parties agreed is irrelevant; Staff only points this out so the Commission does not think Staff is somehow "going back" on a prior agreement by filing this Motion.

² By this Motion, Movants are not seeking reconsideration of the Special Master's rulings regarding attorney-client privilege and attorney work product privilege; however, this should not necessarily be interpreted as agreement by Movants with all of the Special Master's rulings on those privileges.

to situations involving “small telephone companies whose only auditors may have been non-employees” or to “investigatory” dockets.³ Movants respectfully submit that such a complete change in course from that which has been previously followed and reflected by order issued after unanimous Commission vote should not be accomplished by order of a regulatory law judge sitting as Special Master, absent full Commission reconsideration, particularly given that allowing the order of the Special Master to stand will (i) impair Staff’s ability to effectively audit the companies which the Commission regulates (since external auditor material is frequently requested from the regulated companies during a rate case) and (ii) in essence, since Staff’s authority is derived from the Commission, limit the Commission’s regulatory authority over the companies it regulates, as compared to past practice.

(2) The ruling of the Special Master misinterprets the statute which creates the accountant-client privilege in at least two respects. The applicable statute, Section 326.322.2 RSMo, begins by stating “A *licensee* [the accountant/external auditor] *shall not be examined by judicial process or proceedings* without the consent of the licensee's client [KCPL] . . .” (emphasis added)

(A) In the current situation, Staff sought the documents at issue directly from the utility which the Commission regulates (the “client” in the quoted statute) and not from an external auditor (the “licensee” in the quoted statute – Staff is not and was not seeking to examine *the licensee*); therefore, the statute should not and does not apply.

³ These distinctions appear in the Discovery Order, not in the cited case order. Any inference derived from the Discovery Order that the cited case, Case No. TO-2005-0237, was simply some insignificant “small company” case would be incorrect. That case was initiated as a result of concerns regarding allegations contained in a federal arrest warrant issued for a company part-owner/operator, including allegations of organized crime connections. That case led to three additional cases which resulted in \$1 million in penalties, \$4.1 million in refunds, and the sale of the company. See Case Nos. TC-2005-0357, TM-2006-0306, and IR-2006-0374.

(B) Furthermore, the quoted statute only applies to “judicial process or proceedings;” that the Courts and Legislature distinguish between judicial process or proceedings and *administrative* process or proceedings (such as those before the Commission) should be beyond question; therefore, the statute should not and does not apply.

Finally, the Courts have clearly stated that statutory privileges such as the one at issue here are to be *strictly construed* against a finding of privilege. The Special Master did not strictly construe the statute against a finding of privilege, but read the wording of the statute expansively to apply the privilege.

(3) On public policy considerations alone, the Commission should find the accountant-client privilege is not available to regulated companies when the regulator seeks information from the regulated companies. Finding otherwise – as the Special Master did in the Discovery Order – would effectively limit the Commission’s regulatory authority over the companies it regulates, and result in a diminution of that authority as compared to past practice, since Staff’s authority is derived from the Commission. If the accountant-client privilege is (absent waiver) available to KCPL in this situation, this one privilege would, at the very least, impair Staff’s (and the Commission’s) ability to effectively audit the companies which the Commission regulates (since external auditor material is frequently requested from the regulated companies during a rate case), and could effectively bring the utility regulatory process to a grinding halt by enabling regulated companies to hide virtually all financial information from the regulator.

4. **Cass County Case**

The Commission has previously found that the accountant-client privilege is not available to regulated companies when the regulator seeks from the regulated companies the information asserted to be privileged. *An Investigation of the Fiscal and Operational Reliability of Cass County Telephone Company and New Florence Telephone Company, and Related Matters of Illegal Activity*, Case No. TO-2005-0237, 2005 WL 1076329 (Mo.P.S.C.), *Order Denying Motion to Quash*, issued May 5, 2005. (copy attached) As discussed in the *Cass County* case, this privilege applies, if at all, when a party seeks to obtain information about another party directly from the other party's external auditor.

In the *Cass County* case, when confronted with a claim by utilities which it regulates that the accountant-client privilege allows such utilities to thwart the disclosure of information, the Commission stated:

The statute cited by the Companies (Section 326.322 RSMo 2000) allows an accountant (a licensee) to assert privilege. Specifically, it provides that **an accountant cannot be required to divulge a client's information** without the client's consent. The accountant-client privilege serves to protect the client, not the accountant. It is simply not applicable here. The subpoenas do not seek to obtain information from the accountants that performed the audits of CassTel and New Florence, but from CassTel and New Florence. The accountants have not asserted the privilege; CassTel and New Florence themselves assert the privilege. Furthermore, the statute would not allow their accountants to assert the privilege if CassTel and New Florence consented to the disclosure of the information. **CassTel and New Florence cite no cases that indicate the privilege is available to regulated companies when the regulator seeks (from the regulated companies) the information asserted to be privileged. The Commission finds that it is not available.** (emphasis added)

In this case, Staff sought information directly from KCPL, *i.e.*, the regulated company (the "client"), and the privilege should not and does not apply.

5. **Application and Interpretation of Statute**

The “accountant-client” privilege is a statutory privilege, codified in Section 326.322 RSMo, as follows:

Client confidentiality rules

326.322. 1. Except by permission of the client for whom a licensee performs services or the heirs, successors or personal representatives of such client, a licensee pursuant to this chapter shall not voluntarily disclose information communicated to the licensee by the client relating to and in connection with services rendered to the client by the licensee. The information shall be privileged and confidential, provided, however, that nothing herein shall be construed as prohibiting the disclosure of information required to be disclosed by the standards of the public accounting profession in reporting on the examination of financial statements or as prohibiting disclosures in investigations, in ethical investigations conducted by private professional organizations, or in the course of peer reviews, or to other persons active in the organization performing services for that client on a need-to-know basis or to persons in the entity who need this information for the sole purpose of assuring quality control.

2. *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 her capacity as a licensee. This privilege shall exist in all cases except when material to the defense of an action against a licensee. (emphasis added)

Movants emphasize that in this case Staff sought the information directly from the utility which the Commission regulates (the “client” in the statutes quoted above) and not directly from an external auditor (the “licensee” in the statutes quoted above – Staff is not and was not attempting to examine *the licensee*); in other words, it was the utility which the Commission regulates who claimed the accountant-client privilege in an effort

to thwart disclosure of information to the Commission and Staff, not the accountant(s). By its express terms, the statute should not and does not apply in this situation.

Administrative Proceedings

As quoted above in Section 326.322.2 RSMo, the accountant-client privilege only applies in *judicial process or proceedings*. By its express terms, the accountant-client privilege statute should not and does not apply to Commission proceedings. That the Courts and Legislature distinguish administrative proceedings and administrative process from judicial proceedings and judicial process should be beyond question. In *Davis v. Board of Education of the City of St. Louis*, 963 S.W.2d 679, 686 (Mo. App. 1998), the Court recognized the difference between judicial and administrative proceedings when it stated the following regarding actions for malicious prosecution:

This element [commencement of an earlier suit against the plaintiff] can only be satisfied if a malicious prosecution claim can be based on an administrative proceeding. The parties agree that no Missouri court has recognized a claim for malicious prosecution premised on an administrative proceeding. The verdict-directing instruction for malicious prosecution is limited to the instigation of a judicial proceeding.

Further, in cases discussing the Jones-Munger Act, Missouri courts have stated that the Legislature replaced judicial proceedings with administrative proceedings as the method for foreclosing tax liens. See *Stadium West Properties, L.L.C. v. Johnson*, fn. 6, 133 S.W.3d 128 (Mo. App. 2004).

The Legislature, with H.B. 613 in 2003, amended §510.120 to include “administrative proceedings” as matters in which a continuance may be granted when members of the general assembly are representing clients and certain legislative-related events are taking place. The Legislature has made it a crime to tamper with a “judicial proceeding,” §575.260 and it has made it a crime to disturb a “judicial

proceeding,” §575.250. The Legislature has recognized “judicial process” in §100.520 stating that in certain circumstances certain property will be “exempt from levy and sale by virtue of an execution, and no execution or other judicial process shall issue against the same” It has also used the terms “process” and “judicial proceedings” in §532.430 regarding *habeas corpus* relief stating, “If it appear that the prisoner is in custody by virtue of process from any court legally constituted, or issued by any officer in the service of judicial proceedings before him,” Any reference to Commission Rule 4 CSR 240-2.090(1) that “Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court” is misplaced, as the Commission’s authority to seek information through subpoenas (as in the instant case) is found in Section 386.440 RSMo and Section 393.140 RSMo, and the Commission’s rule pertaining to subpoenas is 4 CSR 240-2.100.

Statutory Privileges Strictly Construed

In *State ex rel. Southwestern Bell Publications v. Ryan*, 754 S.W.2d 30, 31 (Mo. App. 1988), the Court stated, regarding a predecessor statute to the one at issue here:

No accountant-client privilege existed at common law. In Missouri the privilege was created by the 1967 legislative enactment of section 326.151. A claim of privilege, because it presents an exception to the usual rules of evidence and may constitute an impediment to the discovery of truth, is subject to careful scrutiny. *State ex rel. Chandra v. Sprinkle*, 678 S.W.2d 804, 807 (Mo. banc 1984).

In the foregoing case the Court held that by putting its financial condition in issue, the plaintiff had waived the privilege with regard to discovery. Similarly, in the case *State ex rel. Schott v. Foley*, 741 S.W.2d 111 (Mo. App. 1987), the Court held that the privilege codified in § 326.151 did not bar discovery of a prior accountant’s communications

when they might be material to the defenses of comparative negligence and assumption raised by a defendant accountant.

A fuller explanation of how statutory privileges are to be viewed is found in the case *State ex rel. Health Midwest Development Group, Inc. v. Daugherty*, 965 S.W.2d 841, 843-45 (Mo. Banc 1998). In that case it was claimed that health care peer review committee documents were privileged from discovery under section 537.035.4 RSMo and the Missouri Supreme Court said:

At common law, there is no privilege for documents of peer review committees. *State ex rel. Chandra v. Sprinkle*, 678 S.W.2d 804, 807 (Mo. Banc 1984). In order not to be subject to discovery, the disputed documents must fall within a statutory privilege.

* * * *

Such narrower interpretations contradict the general principles that govern privileges. **Statutes creating privileges are strictly construed.** *State v. Kurtz*, 564S.W.2d 856, 860 (Mo. banc 1978). Claims of privilege are "impediments to discovery of truth," "present an exception to the usual rules of evidence," and "are carefully scrutinized." *Chandra*, 678 S.W.2d at 807. Statutes creating privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980), quoting *Elkins v. United States*, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1688 (1960) (Frankfurter, J., dissenting). In cases with the statutory subject matter, the legislature has determined that relevant evidence should not be excluded. Since **privileges are impediments to the truth, and statutes creating them are strictly construed**, the peer review privilege in section 537.035 does not apply at all when an entity is sued for actions of its peer review committee that restrict staff privileges. Here, at least the Executive Medical Committee acted to restrict Dr. Vajaranant's privileges. Therefore, subsection 4 does not apply in this case, and the trial court's order does not violate any peer review privilege. (emphasis added)

Similarly, the Western District Court of Appeals, in reviewing a claim of error in a criminal case for excluding evidence on the basis it was a privileged communication to

“clergy” protected by section 491.060(4) RSMo, stated “Statutes creating ‘testimonial privileges are to be strictly construed against the privilege.’” *State v. Gerhart*, 129 S.W.3d 893 (Mo. App. 2004) quoting from *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61-62 (Mo. banc 1999).

“The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.’ *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1998). When construing a statute, the Court considers the object the legislature seeks to accomplish and aims to resolve the problems addressed therein. *Gott v. Director of Revenue*, 5 S.W.3d 155, 159 (Mo. banc 1999).” *Nixon v. QuikTrip Corporation*, 133 S.W.3d 33, 37 (Mo. Banc 2004).

6. **Public Policy**

The Legislature has set out in Section 326.253 RSMo the policy of the state and purposes of Chapter 326, which includes the statute creating the “accountant-client” privilege, as follows:

Policy statement, purpose clause

326.253. It is the policy of this state and the purpose of this chapter to promote the reliability of information that is used for guidance in financial transactions or for accounting for or assessing the financial status or performance of commercial, noncommercial and governmental enterprises. The protection of the public interest requires that persons professing special competence in accountancy or offering assurance as to the reliability or fairness of presentation of such information shall have demonstrated their qualifications to do so, and that persons who have not demonstrated and maintained such qualifications not be permitted to represent themselves as having such special competence or to offer such assurance; that the conduct of persons licensed as having special competence in accountancy be regulated in all aspects of their professional work; that a public authority competent to prescribe and assess the qualifications and to regulate the conduct of certified public

accountants be established; and that the use of titles that have a capacity or tendency to deceive the public as to the status or competence of the persons using such titles be prohibited.

While stated in the context of a dispute over the extension of an electric transmission line in 1930, the statements made by and statutes cited by the Missouri Supreme Court sitting *en banc* that follow are still applicable with regard to the Public Service Commission today:

Section 10412, Rev. St. Mo. 1919 [now §386.040] provides that "a public service commission is hereby created and established, which said public service commission shall be vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter."

The Public Service Commission Act provides a complete system for the regulation of public utilities by the commission. *State ex inf. v. Gas Co.*, 254 Mo. 515, 534, 163 S. W. 854, 857; *State ex rel. Public Service Commission v. Mo. Southern Ry. Co.*, 279 Mo. 455, 464, 214 S. W. 381, 384. Without lengthening this opinion with a summary of all statutes which vest authority in the Public Service Commission to regulate public utilities and their activities, we refer the reader to sections 10410 to 10434 and sections 10476 to 10494, Rev. St. Mo. 1919.

In the two cases above cited the Public Service Commission Act is reviewed and construed. In *State ex inf. v. Gas Co.* we said: "That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to wit: That a public utility * * * is in its nature a monopoly; that competition is inadequate to represent the public, and, if it exists, it is likely to become an economic waste; [325 Mo. 1224] that state regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and, to be effective, must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock, or bond, or note issued as surely is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust. Willy nilly."

In *State ex rel. Public Service Commission v. Missouri Southern Ry. Co.*, supra, we said: "The act adds to the powers expressly given to the commission all others necessary to the full and effectual exercise of those powers. [See §386.250(7)] All rates, fares, facilities, service, and equipment, and changes therein, fall within the authority of the commission. Adequate service and facilities are expressly required to be furnished. Questions relative to these things are to be determined by the commission."

Public Service Commission v. Kansas City Power & Light Co., 325 Mo. 1217, 31 S.W.2d 67, 69-70 (banc 1930). Further, in Section 386.450 RSMo the Legislature has empowered the Commission to require of a "corporation," "person" or "public utility" the production of "books, account, papers or records" and in Section 393.140(8) and (9) RSMo given the Commission the "power to examine the accounts, books, contracts, records, documents and papers" of electrical corporations and "power to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents, memoranda and papers."

In reviewing the accountant-client privilege of §326.322 with respect to an inquiry by the Missouri Public Service Commission, the Legislative policy and purpose of Chapter 326 "to promote the reliability of information that is used for guidance in financial transactions or for accounting for or assessing the financial status or performance of commercial, noncommercial and governmental enterprises" must be viewed against the purpose of the Public Service Commission Act to take the place of competition. This substitution for competition includes commanding respect from utility owners and requires "the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service." Further, effectively substituting for competition includes recognition "that every expenditure, every dereliction, every share of stock, or bond, or note issued as surely is

finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust, willy-nilly.”

In fact, the Legislature has determined that it is so important that the Commission (from whom Staff derives its authority) have full and complete access to information, it has granted statutory immunity from prosecution to witnesses who testify or produce documents before the Commission under order by the Commission. Section 386.470 RSMo provides as follows:

Immunity of witnesses to prosecution.

386.470. No person shall be excused from testifying or from producing any books or papers in any investigation or inquiry by or upon any hearing before the commission or any commissioner, when ordered to do so by the commission, upon the ground that the testimony or evidence, books or documents required of him may tend to incriminate him or subject him to penalty or forfeiture, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained is intended to give, or shall be construed as in any manner giving unto any corporation immunity of any kind. (emphasis added)

By its terms, the foregoing statute applies to both investigations *and* hearings (contested cases) and does not distinguish between the two as the Special Master did in the Discovery Order. If the Legislature deemed the purpose of the Commission to be so important that witnesses are granted statutory immunity from prosecution so as not to be able to assert their right against self-incrimination, surely the Legislature did not intend to allow the companies which the Commission regulates to withhold documents based on accountant-client privilege. The Commission should not effectively limit its own regulatory authority by finding that the public policy behind the accountant-client

privilege trumps the public policy behind its own enabling statutes, as the Discovery Order does.

Courts in other jurisdictions that have statutory accountant-client privileges have characterized them as ensuring privacy, or preventing public disclosure, of information passed between the accountant and his client. See e.g. *Ernst & Ernst v. Underwriters National Assurance Company*, 178 Ind. App. 77, 381 N.E.2d 897, 903 (Ind. App. 1978). To the extent that is a purpose of the privilege in Missouri, allowing the Commission to access information passed between the accountant and his client will not automatically make that information public. Section 386.480 RSMo provides:

No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, RSMo, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. The public counsel shall have full and complete access to public service commission files and records. Any officer or employee of the commission or the public counsel or any employee of the public counsel who, in violation of the provisions of this section, divulges any such information shall be guilty of a misdemeanor.

Further, the information at issue in this case may be designated by KCPL as Highly Confidential, which limits public disclosure of information filed in this case. If the accountant-client privilege is available (absent waiver) in Commission cases when the regulator seeks information from the regulated companies, this one privilege would, at the very least, impair Staff's (and the Commission's) ability to effectively audit the companies which the Commission regulates (since external auditor material is frequently requested from the regulated companies during a rate case) and, at worst, effectively eviscerate the utility regulatory process by enabling regulated companies to hide virtually all financial information from the regulator. On public policy considerations

alone the Commission should find that the accountant-client privilege is simply not applicable.

WHEREFORE, for the reasons set forth above, due to the importance of the issue at hand⁴, the Movants respectfully request that the full Commission reconsider the order of the Special Master regarding the accountant-client privilege and find that the privilege is not applicable or available to regulated companies in Commission proceedings when information is sought from the regulated companies, even in the absence of a waiver of the privilege by the regulated companies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **23rd day of October, 2012**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Jeffrey A. Keevil

⁴ As stated above, in regard to documents where the sole objection was the accountant-client privilege, the Special Master ordered KCPL to provide the documents to Staff based on his finding that KCPL had waived the privilege; however, Movants feel compelled to file this Motion due to what they believe to be the importance of this issue.

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 5th day of May, 2005.

An Investigation of the Fiscal and)
Operational Reliability of Cass County)
Telephone Company and New Florence)
Telephone Company, and Related Matters)
of Illegal Activity)

Case No. TO-2005-0237

ORDER DENYING MOTION TO QUASH

Syllabus: The Commission determines that the claim of privilege asserted by Cass County Telephone Company and New Florence Telephone Company is invalid, that the scope of the subpoenas is not overbroad, and therefore denies the motion to quash.

On March 25, 2005, Cass County Telephone Company and New Florence Telephone Company (referred to as "CassTel and New Florence" or "the Companies") filed a motion to quash subpoenas. The subpoenas at issue are two subpoenas duces tecum requested by the Staff of the Commission. The Companies ask that the Commission quash the subpoenas because they seek information protected by privilege and that their scope is overbroad.

The privilege asserted is codified in Section 326.322 RSMo 2000:

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

On April 22, 2005, Staff filed a response opposing the motion to quash. Staff argues that the statute cited by the Companies does not apply because it deals only with individuals, not accounting firms like the ones whose workpapers are sought here. Similarly, Staff argues that the statute does not apply in an administrative proceeding, but only in judicial proceedings. Staff states that court decisions concerning the scope of privileges have held that statutes creating testimonial privileges are to be strictly construed against the party asserting the privilege. Staff asserts that public policy, and the broad authority of the Commission over regulated utilities, argue against allowing the Companies to assert the privilege.

The statute cited by the Companies (Section 326.322 RSMo 2000) allows an accountant (a licensee) to assert privilege. Specifically, it provides that an accountant cannot be required to divulge a client's information without the client's consent. The accountant-client privilege serves to protect the client, not the accountant. It is simply not applicable here. The subpoenas do not seek to obtain information from the accountants that performed the audits of CassTel and New Florence, but from CassTel and New Florence. The accountants have not asserted the privilege; CassTel and New Florence themselves assert the privilege. Furthermore, the statute would not allow their accountants to assert the privilege if CassTel and New Florence consented to the disclosure of the information. CassTel and New Florence cite no cases that indicate the privilege is available to regulated companies when the regulator seeks (from the regulated companies) the information asserted to be privileged. The Commission finds that it is not available.

The Companies also argue that the subpoenas are overbroad in that they are not limited by date. But they also point out that, although no date is specified, the information sought only goes back to 1996. They do not allege that information from 1996 is beyond the scope of this case; they simply assert that seeking information from the last nine years must be overbroad. The Commission finds that the subpoenas, which seek information dating to 1996, are not overbroad. The circumstances that led to the creation of this case are extraordinary, and the scope of this case is quite broad. The Commission does not agree with the Companies that seeking information dating back to 1996 is by definition overbroad.

Because the asserted privilege is not applicable, and because the scope of the subpoenas is not overbroad, the Commission will deny the motion to quash.

IT IS THEREFORE ORDERED:

1. That the motion to quash subpoenas filed by Cass County Telephone Company and New Florence Telephone Company on March 25, 2005, is denied, and Cass County Telephone Company and New Florence Telephone Company shall forthwith produce the information sought.
2. That this order shall become effective on May 5, 2005.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Mills, Deputy Chief Regulatory Law Judge