



Missouri Public Service Commission

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September 12, 2000

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FILED 2
SEP 12 2000

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. TF-2000-428

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the STAFF'S RESPONSE TO MOTION FOR CLARIFICATION AND/OR MODIFICATION AND RECOMMENDATIONS FOR MODIFICATION ORDER.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Dennis L. Frey

Dennis L. Frey
Associate General Counsel
(573) 751-8700
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DLF/lb
Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

SEP 12 2000

Missouri Public  
Service Commission

In the Matter of the Application of Le-Ru )  
Telephone for Authority to Borrow an )  
Amount Not to Exceed \$9,164,700 from )  
the Rural Utilities Service, the Rural )  
Telephone Bank and the Federal )  
Financing Bank and in Connection )  
Therewith to Execute an Amending )  
Telephone Loan Contract Amendment, )  
Promissory Notes, and a Restated )  
Mortgage, Security Agreement and )  
Financing Statement. )

Case No. TF-2000-428

STAFF'S RESPONSE TO MOTION FOR CLARIFICATION AND/OR MODIFICATION  
AND RECOMMENDATIONS FOR MODIFICATION ORDER

COMES NOW the Staff ("Staff") of the Missouri Public Service Commission ("Commission"), and respectfully states as follows:

1. On January 18, 2000, Le-Ru Telephone Company ("Le-Ru" or "Company"), filed with the Commission, pursuant to Section 392.310 RSMo 1994 and 4 CSR 240-2.060, an Application requesting authority to borrow certain sums, not to exceed \$9,164,700 from the Rural Utilities Service ("RUS"), the Rural Telephone Bank ("RTB"), and the Federal Financing Bank ("FFB").

2. On August 15, 2000, the Commission issued its Order Approving Financing, approving Le-Ru's Application subject to a number of conditions previously agreed to by the Company. Among those conditions was a limitation on the amount of the requested financing to \$7,800,606. Under the Order, Le-Ru is required to secure further Commission authorization prior to borrowing any amount in excess of \$7,800,606, up to \$9,164,700.

3. On Aug. 22, 2000, the Company filed its Motion for Clarification and/or Modification, wherein it seeks Commission clarification and/or modification of the Order

Approving Financing, specifically with respect to "ordered" paragraph 11, which reads as follows: "That this order shall be effective until such time as the financing authorized is exhausted or is canceled by the Commission."

4. In its Motion the Company requested that the Commission "make clear that the approval granted by the Commission cannot be canceled until such time as the authorized financing has been utilized by the (Company)." Le-Ru expressed two concerns: a) that if the authority conferred by the Order is subject to cancellation before the Company has exhausted the funds, Le-Ru's counsel may not be able to provide the lenders, particularly RUS and RTB, with the necessary assurances that "all authorizations from regulatory bodies required in connection with the execution and delivery of the Loan Documents have been obtained"; and b) that RUS and RTB may simply refuse to accept that the Order, as currently written, constitutes the necessary authorization, thereby causing further delay in the Company's being able to obtain the needed financing.

5. Le-Ru offered its interpretation of the Commission's use of the term "canceled" in the paragraph 11 of the Order; namely, that the Commission intended that the term apply to the funds in excess of the \$7,800,606 draw-down ceiling authorized by the Order. The Company then suggested that "ordered" paragraphs 2 and 3 of the Order render unnecessary the language in paragraph 11 regarding cancellation. Paragraphs 2 and 3 specifically establish said draw-down ceiling and require the Company to seek Commission approval before borrowing any amounts in excess of that ceiling.

6. The Company's Motion also requested that the Commission make an additional finding, pursuant to Section 392.310 RSMo. 1994, which requires that the Commission "recite that in the opinion of the commission the money, property or labor procured or to be procured or

paid for by such issue or its proceeds has been or is reasonably required for the purposes specified in the order...”.

7. In its August 29, 2000, “Order Directing Filing,” the Commission made clear that the cancellation reference in paragraph 11 of its Order Approving Financing is broader in scope than that suggested by the Company in its Motion. The Commission alluded to recent experience with financing cases in which applicants either have sought a certain degree of flexibility regarding the use of the borrowed funds at issue, or have not utilized any or all of the authorized borrowings. The Commission stated that it has the authority to modify, cancel or withdraw an order “without affecting one or more transactions that previously occurred under the order, or the order could be canceled before any transaction has occurred.” Among other things, the Commission ordered the Staff to file a response to Le-Ru’s Motion by September 12, 2000. The parties were also invited, either jointly or severally, to submit a proposed Modification Order also by September 12, 2000. Accordingly, the Staff hereby: a) responds to the Commission’s August 29, 2000 Order; and b) with the express support of both the Company and the Office of the Public Counsel (“OPC”), the only other parties to this case, recommends that the Commission modify its aforementioned Order Approving Financing as discussed below.

8. First, the Staff agrees with Le-Ru that it is appropriate, under Section 392.310 RSMo. 1994, that the Commission modify its original Order by making the additional finding, as suggested in paragraph 4 of the Company’s motion. However, the Staff recommends that the language of the suggested finding be expanded to read as follows: “that the money, property and labor to be procured by said transaction is reasonably required for the purposes specified above, and that no part of the proceeds shall be reasonably chargeable to operating expenses or to income.” It is to be noted that Le-Ru suggested this expanded language and therefore agrees that

it is preferable to the language originally suggested by the Company in paragraph 4 of its aforementioned Motion for Clarification and/or Modification.

9. Second, with respect to the Commission's language regarding cancellation in "ordered" paragraph 11 of its Order Approving Financing, the Staff is persuaded by the Company's concerns about the presence of such language in the Order and its possible effect on the RUS and the RTB. In Staff's opinion, both the Company and the lenders need to feel a sense of assurance that they can rely on the authorization conveyed by a Commission order of approval. Moreover, in cases such as the instant case, involving an order authorizing a utility to enter into a series of loans, it seems likely that a cancellation would almost always occur with the concurrence or acquiescence of the particular utility. In the absence of such concurrence or acquiescence, however, due process would seem to dictate the granting of a hearing in order to provide the utility with an opportunity to challenge the proposed modification to the Commission's original authorization.

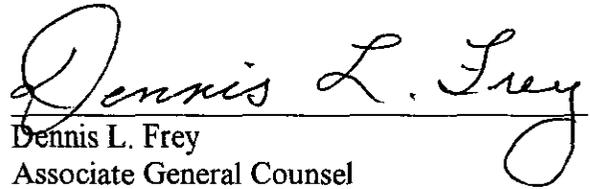
10. In general, the Commission arguably may at any time modify an order, depending upon the particular circumstances. Indeed, the courts have recognized a continuing duty on the part of the Commission to monitor the activities of the utilities it regulates on behalf of the ratepayers of this state. *State of Missouri ex rel. Capital City Water Company v. Missouri Public Service Commission*, 850 S.W.2d 903 (Mo. App. W.D. 1993). However, in the opinion of the Staff, the Commission need not and, in the interest of conveying a sense of certainty in its order of approval in this case, should not reference such power therein. Therefore, the Commission's August 15, 2000 Order Approving Financing in this case should be modified to reflect: a) the additional finding as set forth in paragraph 8 hereinabove and b) the removal of "ordered" paragraph 11 of said August 15, 2000 Order.

11. As indicated earlier, both Le-Ru and OPC, the only other parties to this case, have reviewed the two changes being recommended by Staff, and both have informed Staff counsel that they support the recommended modifications set forth herein.

**WHEREFORE**, the Staff hereby submits its Response to Le-Ru's Motion for Clarification and/or Modification and further, respectfully requests, with the support of both other parties to this case, that the Commission modify its August 15, 2000 Order Approving Financing by: a) including an additional finding as set forth in paragraph 8 hereinabove, and b) omitting "ordered" paragraph 11 contained in the August 15, 2000 Order Approving Financing.

Respectfully submitted,

DANA K. JOYCE  
General Counsel



Dennis L. Frey  
Associate General Counsel  
Missouri Bar No. 44697

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## Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 12th day of September 2000.

Dennis L. Frey

**Service List for  
Case No. TF-2000-428  
September 12, 2000**

**Office of the Public Counsel  
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