

**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,)	

**RESPONSE TO STATE OF MISSOURI'S
REPLY TO CASSTEL'S OPPOSITION TO THE STATE'S
APPLICATION TO INTERVENE**

On January 19, 2006, the Office of the Attorney General (the "AGO") purportedly on behalf of the State of Missouri, filed a reply to CassTel's opposition to the State's application to intervene in the above captioned proceeding (the "Reply"). The State's Reply fails to remedy the deficiencies in the original Application to Intervene noted in CassTel's Opposition.

**The AGO's Reply Fails to Establish that it Represents any Agency of the
State that is a Customer of CassTel**

1. In its Reply, the AGO argues that one of its clients, the Missouri Department of Social Services, maintains an office in Harrisonville, Missouri. This may be so, but Harrisonville is an exchange served by Sprint, not CassTel. As such, the AGO still has not established minimal standing as a customer of CassTel.

2. Also, the AGO attempts to bootstrap standing in this case by arguing that representatives of the State place calls to customers of CassTel with

respect to which termination (access) fees are paid. The problem with this argument is that termination fees would not be paid not by the State but rather, by the long distance company that terminates the call. This would not make the State a customer of CassTel. To the contrary, the State's long distance provider would be the access customer of CassTel. The AGO does not represent the State's presubscribed long distance carrier and, consequently, has no statutory authority to assert itself in this case on that carrier's behalf.

3. The AGO also asserts that it sometimes represents the Missouri Department of Conservation in tangential legal proceedings but admits that this status is "not material to the Commission's assessment of the State's standing to intervene."¹ CassTel agrees the observation is immaterial to the matter at hand.

The AGO's Reply Fails to State a Legitimate Interest in the Case

4. The AGO suggests that it should be allowed to intervene to make sure that the money that would be paid into the Public School Fund if the settlement is approved is paid into the Public School Fund. Since the Stipulation and Agreement in this case does not provide for any other repository of payment, the AGO's intervention could hardly be helpful in this regard. As a matter of fact, payment into the Public School Fund is mandated by statute. See, §386.600 RSMo 2000. The AGO does not dispute that the Public School Fund is the appropriate recipient of the penalty payment. If the Stipulation and Agreement is approved by the Commission and payment for some reason is not made to the Public School Fund as agreed to, the remedy would be for an aggrieved party to file a complaint with the Commission to seek enforcement of its order. The

¹ Reply, ftnt. #1.

anticipatory enforcement of an order not yet issued by the Commission is not a proper matter in this case. To the contrary, it is in violation of the Commission's rules of practice and violates CassTel's due process rights.

5. The AGO likens the State's interest to that of the third party beneficiary to a contract but none of the cases, which are cited by the AGO stand for the proposition that the State stands as a third party beneficiary in circumstances such as those presented in this case. In fact, in not one case cited by the AGO is the State even a named party. As such, there is no legal support for the AGO's claim of derivative standing for the State. Even if the State were in a position to claim third-party beneficiary status with respect to the terms of the Stipulation and Agreement, it only would have the right to pursue an action to enforce the terms of the agreement or to pursue legal remedies for a breach of the terms of the agreement.² In this case, however, the stated purpose of the State's intervention is to prevent performance in accordance with the terms of the Stipulation and Agreement and, because the Commission has not yet approved the settlement, there is nothing that can be enforced.

The AGO's Reply Fails to Provide Good Cause for its Untimely Application

6. The AGO argues the Commission can permit a late intervention but that observation does not remedy the AGO's problem that it has provided no good cause for its dilatory request. It is significant that the AGO does not deny in its Reply that it was aware of the Staff's investigation as early as March of 2005 and the likelihood of a complaint proceeding (or even the fact that the Complaint

² *Peters v. Employers Mutual Casualty Co.*, 853 S.W.2d 300, 301 (Mo. banc 1987); *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co.*, 75 S.W.3d 247, 260 (Mo. banc 2002).

had been filed by the Staff on April 8, 2005). As such, the AGO has failed to provide good cause to intervene out of time. The AGO does not come before the Commission with clean hands.

The AGO Admits that the State's Intervention will Delay Consideration of the Proposed Settlement

7. The AGO concedes that its intervention is likely to delay the payment of the stipulated penalty into the Public School Fund but argues, in essence, that delay is good. This is a remarkable and revealing admission.

8. First, the AGO suggests that any delay will be caused by the Commission's inability to rule, not the State's intervention *per se*. In other words, the AGO is saying that if the Commission grants the State's Application to Intervene, the *Commission* will be responsible for any failure of the settlement or delay in the payment of the stipulated penalty, not the State.

9. Second, the Commission should when considering this revelation consider whether the AGO's effort to defeat or delay the settlement agreement likely will result in the collection of a greater penalty than already has been agreed to and, if so, whether that speculative greater amount is likely to offset the time value of money during the period of the delay that will be occasioned by granting the Application to Intervene. In this regard, the Commission should also keep in mind that the Stipulation and Agreement has been presented to the Commission as an integrated whole. Either party has reserved the right to walk away from the agreement if it is not approved as proposed. Finally, the Commission should consider whether the delay or defeat of the proposed

settlement will frustrate the objective of the resolution of pending regulatory enforcement actions necessary to facilitate a change of company ownership.

The Concerns Set Forth in the AGO's Application to Intervene do not Provide any Grounds for the Commission to Conclude the Terms of the Stipulation and Agreement would be Detrimental to the Public Interest

10. In its Application to Intervene, the AGO enumerates four (4) public policy concerns.³ None of the stated concerns provide any grounds to justify its intervention in the case or to disapprove the Stipulation and Agreement.

11. The AGO asserts the Stipulation and Agreement does not contain any language that guarantees the stipulated penalty will not be included in cost of service in the future. CassTel will pay the penalty out of cash reserves and, consequently, there will be no ratepayer contribution at the time the penalty is paid. Moreover, the Commission has pending before it a Joint Application for approval for CassTel to sell its regulated Missouri telecom assets to FairPoint Communications Inc.⁴ Presumably, the Joint Application will be approved by the Commission in the near future. CassTel has no plans to file a rate increase case in the interim so the AGO's first "policy concern" raises an implausible scenario.⁵ Notwithstanding the fact that there is no likelihood of ratepayer impact, CassTel states that it would have no objection to an order approving the Stipulation and Agreement that also provides that none of the penalty shall be recovered from CassTel's ratepayers.

³ Application to Intervene, ¶8.

⁴ Case No. TM-2006-0306.

⁵ Even if CassTel were to file a rate increase case calculated to recover the penalty, it would need to identify the reasons justifying an increase, including the desire to pass the cost to ratepayers. CassTel cannot envision a situation in which the Commission would approve any such request.

12. The AGO has registered a concern about the breadth of the enforcement waiver contained in the Stipulation and Agreement. This second “policy concern” is both vague and without merit. The Commission is being asked to approve a settlement that is both limited in scope and reasonable in the circumstances. There is no over-reach in the language of release embodied in the settlement agreement. The company’s agreement to pay a substantial monetary penalty into the Public School Fund “represents a full and comprehensive settlement of the Complaint” and any other “Potential Enforcement Complaints”⁶, a term defined as encompassing those complaints that might arise out of the Staff’s formal investigation in Case No. TO-2005-0237 and the informal investigations that preceded the filing of that case and that were instituted subsequent to its termination by the Commission.⁷ These informal and formal investigations are defined, collectively, as the “Investigation”.⁸ As such, the parties have agreed to language that will protect CassTel, its successors in interest and its owners, officers, agents, managers and employees (and, to the extent the Commission has jurisdiction over LEC, LLC, a parallel release) from any further punitive adverse actions associated with the matters alleged in the Complaint or which have been examined in the Investigation arising under or by virtue of the terms of the Public Service Commission Law (the “Act”). The effect of this language is to allow CassTel to put this entire matter behind it so it can concentrate on providing customer service in the near term and, in the longer term, to be sold to a new ownership group. It is important to note that the

⁶ See, §III.B.2., cl. 1.

⁷ See, §III.A.

⁸ *Id.*

language of release is narrowly tailored to the matters contained in the Complaint and the companion informal investigations. It does not protect the company if CassTel has made any material misrepresentation of fact to Staff.⁹ Also, it does not immunize the company from complaints premised on alleged wrongful conduct post-dating the matters addressed in the Complaint or the Investigation. The terms of the Stipulation and Agreement are exacting, reasonable and narrowly tailored to the matter at hand.

13. The AGO has registered a concern about “the extinguishing of third party rights.” This, too, fails to present a justification for the AGO’s intervention. The language of release contained in the Stipulation and Agreement is intended to provide a “full and comprehensive” release from further punitive adverse action by the Commission in exchange for a significant penalty payment whether such matters are pursued by Staff or any other person or entity. It would not be reasonable to expect CassTel to settle this matter without express assurance that unnamed persons will not be permitted to pursue a complaint before the Commission on the very same matters the Complaint and the Investigation have addressed. Were it otherwise, the case would not truly be settled. CassTel would remain subject to the enforcement action(s) filed with the Commission by others (including the AGO) concerning the same alleged conduct with the possibility of being required to pay additional/duplicative penalties into the Public School Fund.¹⁰ It is not unreasonable for CassTel to be given assurance this will

⁹ See, §IV.A.

¹⁰ While CassTel would have legal and equitable defenses and claims to set-off in such an event, such defenses and claims are not unassailable and, in any event, would represent a significant drain on the time and money resources of the company to defend.

not happen if the Commission approves the proposed settlement. Significantly, the AGO presents no explanation why it (or anybody else) should be allowed to request the Commission to file a complaint against CassTel to seek penalties for the very same circumstances or conduct alleged in Staff's Complaint after CassTel already has filed a substantial penalty to settle the Complaint. As noted above, the scope of the release is reasonable and narrowly tailored to the matter at hand.

14. Finally, the AGO incorrectly states the Stipulation and Agreement seeks a commitment that the Commission certify CassTel for receipt of USF funding. This is not true. The agreement includes a commitment that the Commission's Staff recommend certification by the Commission and although CassTel is hopeful the Commission will follow its Staff's recommendation, the Commission ultimately retains the power to decide the matter. Also, Staff's recommendation is expressly premised on continuing, independent third-party management of CassTel by GVNW which effectively insulates it from day to day control by LEC.¹¹ CassTel also would note this Staff recommendation will not occur in a vacuum. As pointed out above, the Commission has before it a Joint Application that, if approved, will result in a legal ownership change in the near future. This filing was expressly anticipated in the terms of the Stipulation and Agreement.¹²

¹¹ The AGO is aware of this arrangement because Mr. Molteni was provided with a copy of the Management Services Agreement by the undersigned under cover of letter dated March 31, 2005.

¹² In §III.E., the signatories state "[t]he Agreement will facilitate sale of CassTel's assets and in fact, the Agreement is predicated on an understanding that the present CassTel owners will promptly present such a sale to the Commission for its approval."

The AGO's Application to Intervene should be Denied

15. In summary, the AGO's Reply provides no additional grounds (indeed, no grounds at all) that would justify granting its intervention in this case. None of the agencies of the State that the AGO represents are customers of CassTel, the AGO has no standing to intervene as a public advocate (a responsibility reserved exclusively to the Office of the Public Counsel), the AGO has provided no showing that its interests are not adequately represented by the Office of the Public Counsel and it has offered no good cause to excuse its untimely filing. Finally, its four "policy concerns" do not present grounds that would justify denying the Stipulation and Agreement.

WHEREFORE, CassTel reiterates its opposition to the State's Application to Intervene in this case for the reasons set forth above and in its earlier Opposition.

Respectfully submitted,



W. R. England, III MO Bar #23975
Brydon, Swearingen & England, P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102-0456

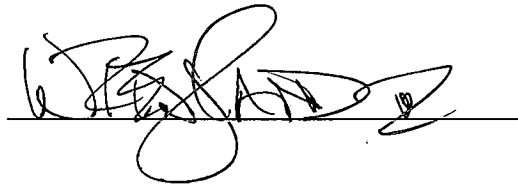
Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record on this 27th of January, 2006.

Robert Franson
Missouri Public Service Commission
Governor Office Building
200 Madison Street
Jefferson City, MO 65101

Michael Dandino
Office of Public Counsel
Governor Office Building
200 Madison Street
Jefferson City, MO 65101

Ronald Molteni
Assistant Attorney General
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, MO 65102

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