

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 24th day of
October, 2006.

In the Matter of the Application for Approval of the)
Transfer of Control of DSLnet Communications, LLC)
to MDS Acquisition, Inc.)
Case No. LO-2007-0133

ORDER DISMISSING JOINT APPLICATION

Issue Date: October 24, 2006

Effective Date: November 3, 2006

Syllabus: This order dismisses the Joint Application filed by DSLnet Communications, LLC (“DSLnet”) and MDS Acquisition, Inc. (“MDSAI”) due to a lack of jurisdiction.

DSLnet is a Commission-regulated telecommunications company which was granted interexchange and non-switched local exchange certificates of authority in Case No. TA-99-395.¹ MDSAI is a wholly-owned acquisition subsidiary of MegaPath, Inc. (“MegaPath”), which was formed for the purpose of acquiring and holding a majority of the voting securities of DSL.net, Inc.²

On September 28, 2006, DSLnet and MDSAI jointly filed an application seeking the Commission’s approval of certain transactions whereby direct control of DSLnet would be transferred from DSL.net, Inc. to MDSAI. According to the Joint Application, DSL.net, Inc.,

¹ DSLnet is a Delaware limited liability company which is duly authorized to do business in Missouri as a foreign limited liability company. *Joint Application* at 2. DSLnet’s sole member and managing entity is DSL.net, Inc., which holds no regulatory licenses from the Commission or any other regulatory authority. *Id.* at 3 & n.2.

² *Joint Application* at 3, 4.

will ultimately be merged into MDSAI, with MDSAI surviving and the other stockholders of DSL.net, Inc. receiving a cash payment for their shares.³

Although the Joint Application is being submitted pursuant to sections 386.320.1, 392.290, and 392.300, RSMo 2000, it is evident that none of those statutes vest the Commission with jurisdiction over the transactions discussed therein.

Section 386.320.1 states that the Commission “shall have the general supervision” of all telephone corporations and their lines, and shall also “keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property . . . are managed, conducted and operated[.]” Section 386.320.1 simply does not apply here, as nowhere does it authorize or require Commission approval of the types of transactions discussed in the Joint Application. Furthermore, the Joint Application also indicates that transferring control of DSLnet from DSL.net, Inc. to MDSAI “will not involve a change . . . in the manner in which DSLnet currently offers service in Missouri” and that “[i]mmediately following the transfer of control, DSLnet will continue to offer the services it currently offers with no change in the rates or terms and conditions of service.”⁴

Section 392.290.1 provides that “[t]he power of telecommunications companies to issue stocks, bonds, notes and other evidence of indebtedness and to create liens upon their property situated in this state is a special privilege” subject to the Commission’s “right of supervision, regulation, restriction and control” as provided by law and administrative rule. However, DSLnet is not proposing to issue stocks, bonds, notes, or other evidence of indebtedness, or to create liens on its property situated in Missouri. Moreover, section

³ *Joint Application* at 5-6.

⁴ *Joint Application* at 6.

392.290.2 provides that, notwithstanding any other provision of Chapter 392 to the contrary, “no telecommunications company operating in Missouri and one or more other states shall be required to obtain authorization from the commission to issue stocks, bonds, notes or any other evidence of indebtedness” or “to encumber the whole or any part of its franchise[,] line or system.” Finally, the Commission granted DSLnet a waiver from the requirements of section 392.290 in Case No. TA-99-395.⁵

Section 392.300.1 forbids a telecommunications company from selling, assigning, leasing, transferring, mortgaging or otherwise disposing of or encumbering the whole or any part of its franchise, facilities or systems without having first secured from the Commission an order authorizing it so to do. It also provides that no telecommunications company may directly or indirectly merge or consolidate its “line or system, or franchises, or any part thereof” with any other corporation, person, or public utility without first obtaining permission from the Commission. However, the Joint Application makes it plain that although it will become controlled by a different holding company after this transaction, DSLnet will retain all of its existing assets and customers and is not disposing of, encumbering, or merging all or any part of its assets. Indeed, the “Commission has consistently found that the Commission does not have jurisdiction over transactions at the holding company level[.]”⁶

Meanwhile, section 392.300.2 generally provides that no domestic or foreign stock corporation, other than a telecommunications company, shall “purchase or acquire, take or

⁵ See Order Approving Interexchange and Non-Switched Local Exchange Certificates of Service Authority and Order Approving Tariff, Case No. TA-99-395 (June 7, 1999).

⁶ Order Closing Case, *In the Matter of the Proposed Merger of Verizon Communications, Inc. and MCI, Inc.*, Case No. TM-2005-0370 (May 3, 2005), at 1.

hold more than ten percent of the total capital stock issued by any telecommunications company organized or existing under or by the virtue of the laws of this state” without the consent of the Commission. However, DSL.net, Inc., is incorporated in the state of Delaware and its headquarters are in the state of Connecticut. Likewise, MDSAI is incorporated in Delaware, with its headquarters in California. Accordingly, section 392.300.2 is inapplicable and does not give the Commission jurisdiction over this transaction since it does not involve the purchase, acquisition, taking, or holding of any of the capital stock issued by a telecommunications company organized or existing under or by virtue of the laws of Missouri. In addition, when originally certificating DSLnet to provide interexchange and non-switched local exchange telephone service in Missouri in June 1999, the Commission waived the application of section 392.300.2 as to DSLnet.⁷ Finally, the Commission has previously and recently dismissed a number of similar applications for lack of jurisdiction on similar grounds.⁸

For all of these reasons, on October 13, 2006, the Staff of the Commission recommended that the Commission issue an order dismissing the Joint Application on the ground that the Commission does not have jurisdiction over the transactions outlined therein.⁹

Because sections 386.320, 392.290, and 392.300, RSMo 2000, do not give the Commission jurisdiction, the Commission will dismiss the application.

⁷ See Order Approving Interexchange and Non-Switched Local Exchange Certificates of Service Authority and Order Approving Tariff, Case No. TA-99-395 (June 7, 1999).

⁸ See Order Dismissing Joint Application, *In the Matter of the Joint Application of Integra Telecom Holdings, Inc., and Electric Lightwave, LLC, for Approval of a Transfer of Control of Electric Lightwave, LLC*, Case No. TM-2006-0362 (May 2, 2006); Order Dismissing Joint Application, *In the Matter of the Joint Application of Level 3 Communications, Inc. and TelCove, Inc. for Approval of a Transfer of Control of TelCove Operations, Inc. and Related Transactions*, Case No. TM-2006-0433 (June 13, 2006).

⁹ This was the stated position of the joint applicants as well, who explained that they sought Commission approval of the transaction “out of an abundance of caution should the Commission determine otherwise.” *Joint Application* at 1 n.1.

IT IS ORDERED THAT:

1. The Joint Application filed by DSLnet Communications, LLC and MDS Acquisition, Inc., on September 28, 2006, is dismissed for lack of jurisdiction.
2. This order shall become effective on November 3, 2006.
3. This case shall be closed on November 6, 2006.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

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

Lane, Regulatory Law Judge