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October 22, 2001

FILED

OCT 22 2001

Missouri Public
Service Commission

VIA HAND DELIVERY

Mr. Dale Roberts
Executive Secretary
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, Missouri 65101

Re: Joint Application of Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC and Platinum Equity, LLC for Approval of the Transfer of Stock in Claricom Holdings, Inc. to Stacom Holdings, Inc.
Case No. ~~TA~~-2001-669

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Dear Mr. Roberts:

Enclosed for filing with the Commission are nine copies of each of the Applicants' Response to the Office of the Public Counsel's Suggestions in Support of the PSC's Jurisdiction and Applicants' Supplementary Pleading and Response to Orders Directing Filing. Please return to me one filed copy of each in the enclosed envelope.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,



Trina R. LeRiche

TRL/lsc

Enclosures

cc : Office of Public Counsel
Office of General Counsel
Marc D. Poston, Esq.

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED²

OCT 22 2001

Joint Application of)
Claricom Networks, Inc., Claricom)
Holdings, Inc., Staples, Inc., Stacom)
Holdings, LLC, and)
Platinum Equity, LLC for Approval of)
the Transfer of Stock in Claricom)
Holdings, Inc. to Stacom Holdings, Inc.)

Missouri Public
Service Commission

Case No. TM-2001-669

**APPLICANTS' RESPONSE TO THE OFFICE OF THE PUBLIC COUNSEL'S
SUGGESTIONS IN SUPPORT OF THE PSC'S JURISDICTION**

COMES NOW Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Plaitnum Equity, LLC ("Applicants") and suggests the following to the Missouri Public Service Commission ("Commission") in opposition of the Commission exercising jurisdiction over the proposed transfer of Claricom Networks, Inc. stock from Claricom Holdings, Inc. to Stacom Holdings, LLC.

1. On June 7, 2001, Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC ("Applicants") filed an application with the Commission for approval of a stock transfer.

2. Applicants believed that such filing was unnecessary because the Commission lacked jurisdiction over the stock transfer, but filed an application with the Commission out of an abundance of caution.

3. As the Staff of the Commission argued in its Response to Order Directing Filing, Mo. Rev. Stat. § 392.300 does not grant the Commission jurisdiction over the transfer of Claricom Networks, Inc. stock from Claricom Holdings, Inc. to Stacom Holdings, LLC.

4. Extending jurisdiction to the Commission as Public Counsel suggests would expand the Commission's jurisdiction. The Commission cannot lawfully expand its jurisdiction.

State ex rel. Kansas City Power & Light Co. v. Buzard, 168 S.W.2d 1044, 1046 (Mo. banc 1943). The Commission's jurisdiction is limited to that expressly conferred upon it by the legislature. Id.; see also Mo. Rev. Stat. §§ 386.040, 386.300.

5. Section 386.320.1 confers "general supervision" on the Commission over:

all telegraph corporations or telephone corporations, and telegraph and telephone lines, . . . , and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property, owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all the provisions of law, orders and decisions of the commission and charter and franchise requirements.

Mo. Rev. Stat. § 386.320.1. Public Counsel argues that this section confers the Commission with jurisdiction over the transfer of Claricom Network's stock. Section 386.320.1 has never been interpreted as extending jurisdiction to the Commission over sales of telecommunications stock. Public Counsel attempts to reason that the "general supervision" power of § 386.320.1 should be given an expansive interpretation. Public Counsel's argument, if accepted, would give the Commission unlimited jurisdiction over all sales and transfers of telecommunications companies' assets and stock. This interpretation would render § 392.300 wholly unnecessary because the Commission would already have jurisdiction over all sales and transfers. Statutory construction dictates that a statute cannot be read to render another statute unnecessary absent a clear legislative intent to do so. In re Riverside Sewer Co., 36 B.R. 171, 174 (Bankr. E.D. Mo. 1983) (citing Columbia Nat'l Bank v. Davis, 284 S.W. 464 (1926)). No evidence indicates that the legislature intended § 392.300 to be unnecessary. Public counsel's argument, therefore, should fail.

6. Section 392.300.1 states in pertinent part:

[n]o telecommunications company shall hereafter sell, assign, lease, transfer, mortgage, or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system necessary or useful in the performance of its duties to the public, . . . , without having first secured from the commission an order authorizing it so to do.

Mo. Rev. Stat. § 392.300.1. Section 392.300.1, therefore, confers on the Commission jurisdiction to approve a (a) sale, (b) by a telecommunications company, (c) of necessary or useful, (d) portions of its franchise, facilities or system. If one of these four requirements is missing, the Commission lacks jurisdiction over the proposed disposition. Although the transfer of Claricom Networks, Inc. stock from Claricom Holdings, Inc. ("Seller") to Stacom Holdings ("Buyer"), LLC meets the sale requirement of the statute, the remaining three requirements are lacking.

7. Seller is not a telecommunications company. A telecommunications company is any

telephone corporations as that term is used in the statutes of this state and every corporation, company, association, joint stock company or association, partnership and person, their lessees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any facilities used to provide telecommunications service for hire, sale, or resale within [Missouri].

Mo. Rev. Stat. § 386.020(51). Seller does not qualify as a telecommunications company under this definition. It does not own, operate, control or manage facilities used to provide telecommunications services within Missouri. Rather, its only connection to telecommunications services in Missouri is its 100% ownership of Claricom Network stock. Section 392.300.1 does not confer jurisdiction simply because the seller does not meet the definition of a telecommunications company.

8. The transfer does not involve necessary or useful portions of Claricom Network's franchise, facilities or system. Facilities are defined as "lines, conduits, ducts, poles, wires, cables, crossarms, receivers, transmitters, instruments, machines, appliances and all devices, real estate, easements, apparatus, property; and routes used, operated, controlled or owned by any telecommunications company to facilitate the provisions of telecommunications service." Mo.

Rev. Stat. § 386.020(52). Although franchise and system are not defined, the “cardinal rule of statutory construction” provides definitions for them because words not defined should be given their “plain and ordinary meaning.” Missouri ex rel. May Dep’t Stores Co. v. Koupal, 835 S.W.2d 318, 320 (Mo. 1992) (citations omitted). A franchise is “[a] special privilege to do certain things conferred by government, . . . , and which does not belong to citizens generally of common right.” Black’s Law Dictionary 658 (6th ed. 1990). In this proceeding, Claricom Network’s franchise would be the privileges bestowed upon it by virtue of its certificate to provide interexchange telecommunications services in Missouri. A system is an “[o]rderly combination or arrangement, as of particulars, parts, or elements into a whole.” Black’s Law Dictionary 1451 (6th ed. 1990). Claricom Network’s system, presumably, would be its facilities arranged into a working telecommunications service provider. Capital stock does not fall under any of these three definitions. The Commission, therefore, does not have jurisdiction over the stock sale.

9. Public Counsel argues that a sale of capital stock should be included in the Commission’s jurisdiction under § 392.300.1 and relies on a decision of the Federal Energy Regulatory Commission (“FERC”) under 16 U.S.C. § 824b(a). See Re: Central Vermont Public Serv. Corp., 84 PUR 4th 213 (FERC 1987). The FERC’s interpretation of federal law is not binding on the Commission. See generally Pacesetter Corp. v. Labor & Indus. Relations Comm’n, 884 S.W.2d 295, 298 (Mo. Ct. App. 1994). Additionally, the FERC’s interpretation is not supported by previous Commission decisions or statutory construction. The Commission has previously held that it lacks jurisdiction under § 392.300.1 to examine a stock transfer between two foreign non-telecommunications companies. See e.g. In the Matter of the Joint Application of Matrix Telecom, Inc., Case No. TM-2000-247, *Order Dismissing for Lack of Jurisdiction*, May 30, 2000.

10. Adopting the holding in Central Vermont and interpreting § 392.300.1 as conferring jurisdiction over this matter would render § 392.300.2 unnecessary. Under Public Counsel’s argument, § 392.300.2 would serve no purpose because the Commission would already have jurisdiction over all stock transfers under § 392.300.1. The language of § 392.300.1

which limits the Commission's jurisdiction to certain stock transfers, see infra discussion ¶ 11, would be moot. Statutory construction does not permit the interpretation of a statute to make another statute unnecessary absent a clear legislative intent to do so. Riverside Sewer Co., 36 B.R. at 174 (citing Columbia Nat'l Bank v. Davis, 284 S.W. 464 (1926)). Public Counsel points to no legislative intent to make § 392.300.2 unnecessary. Public Counsel's argument, therefore, should fail.

11. Section 392.300.2 states in pertinent part:

no stock corporation, domestic or foreign, other than a telecommunications company, shall, without the consent of the commission, purchase or acquire, take or hold, more than ten percent of the total capital stock issued by any telecommunications company organized or existing under or by virtue of the laws of this state

Mo. Rev. Stat. § 392.300.2. Section 392.300.2, therefore, confers the Commission with jurisdiction to approve a (a) stock purchase by a company that is not a telecommunications company, (b) of more than ten percent of the total capital stock, (c) of a telecommunications company organized or existing under Missouri law. The stock transfer meets the first two requirements because Stacom Holdings, LLC is not a telecommunications company and it will purchase all of the outstanding capital stock of Claricom Networks, Inc. The stock transfer does not meet the third requirement, however, because Claricom Networks, Inc. is a telecommunications company organized and existing under the laws of Delaware, not Missouri.

12. Public Counsel has offered no explanation for the "organized or existing under Missouri law" language, and in fact, advocates ignoring the language altogether. The language of § 392.300.2 unambiguously limits the Commission's jurisdiction to purchases of stock in telecommunications companies organized and existing under Missouri law. The Commission must give unambiguous statutory language the effect of the legislature's language even if the Commission prefers another policy. See American Standard Ins. Co. v. Hargrave, 34 S.W.3d 88, 90 (Mo. 2000). Additionally, the Supreme Court held that similar language refers to domestic

corporations and not foreign corporations. Public Serv. Comm'n v. Union Pacific R.R. Co., 197 S.W. 39, 40-41 (Mo. 1917). For these reasons, § 392.300.2 does not give the Commission jurisdiction over Claricom Holding's, Inc. stock to Stacom Holdings, Inc.

WHEREFORE, Applicants respectfully request that the Commission enter an order denying jurisdiction over this matter.

Respectfully Submitted,

SONNENSCHN NATH & ROSENTHAL



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ATTORNEYS FOR PLATINUM EQUITY, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of October, 2001, two true and correct copies of the above and foregoing was mailed, postage prepaid, to:

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With one copy being mailed postage prepaid, on the same date to:

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