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December 14, 1999

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DANA K. JOYCE  
General Counsel

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

RE: Case No. TM-2000247

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of a **MOTION TO DISMISS APPLICATION**.

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,

Nathan Williams  
Assistant General Counsel  
(573) 751-8702  
(573) 751-9285 (Fax)

NW/mm  
Enclosure  
cc: Counsel of Record

FILED<sup>2</sup>

DEC 14 1999

Missouri Public  
Service Commission

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

**FILED<sup>2</sup>**

DEC 14 1999

Missouri Public  
Service Commission

In the Matter of the Joint Application of )  
Matrix Telecom, Inc., AvTel )  
Communications, Inc., and Matrix )  
Acquisition Holdings Corp. for Approval )  
of a Stock Purchase Agreement and )  
Related Transactions. )

Case No. TM-2000-247

**MOTION TO DISMISS APPLICATION**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by counsel,  
and for its Motion to Dismiss Application states:

1. The Applicants have asked for expedited treatment requesting in paragraph 16 of their Application that the Commission act as soon as possible in order to permit the Applicants to consummate their agreement no later than December 31, 1999.
2. The Application states that Matrix Telecom, Inc. (Matrix) is a Texas Corporation wholly-owned by AvTel Communications, Inc. (AvTel), a Delaware Corporation.
3. The Application states that Matrix Acquisition Holdings Corporation (Matrix Holdings) is a Delaware Corporation that is wholly-owned by Energy TRACS Acquisition Corporation (TRACS) which in turn is wholly-owned by Platinum Equity Holdings, LLC (Platinum).
4. Attached to the Application as Exhibit 4 is a stock purchase agreement between AvTel and TRACS whereby AvTel is to sell all the stock of Matrix to TRACS.

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5. Attached to the Application as Exhibit 3 is AvTel's consent to assignment to Matrix Holdings of TRACS' rights under the foregoing stock purchase agreement.
6. Under section 6.2.2 of the stock purchase agreement Matrix Holdings is to transfer the business customers of Matrix to AvTel after AvTel has obtained the required regulatory approval for such a transfer.
7. Section 392.300.1, RSMo. 1994, in part, provides:

No 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, nor by any means, direct or indirect, merge or consolidate such line or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

Section 386.020 (51), RSMo. Supp. 1998, defines "telecommunications Company" as follows:

"Telecommunications company" includes 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, trustees 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 this state.

In *Public Service Commission v. Union Pac. R. Co.*, 197 S.W. 39, 40-42 (Mo. banc 1917), the Missouri Supreme Court construed the same statutory language found in § 392.300.1, RSMo. 1994, but applicable to railroads and common carriers, and held that the language "was evidently intended to provide against a disposition of their property by steam and street railroads and common carriers, charged with duties to the public . . ." *Id.* at 41. (Emphasis added).

8. Matrix is operating in Missouri under a tariff for resold interexchange telecommunications services. The immediate transaction entails the transfer of ownership of Matrix from AvTel to Matrix Holdings. At some indeterminate future date, business customers of Matrix--not franchise, facilities or system (property)--are to be transferred to AvTel after it obtains all necessary regulatory agency approval for the transfer. The staff has found nothing indicating AvTel is presently providing any telecommunications services in the State of Missouri although Applicants' counsel has related that AvTel is providing telecommunications services in other states. This proposed transaction is similar to that in *In the Matter of the Application of Feist Long Distance, Inc. Telecom Resources, Inc. d/b/a TRINetwork, Inc., and Advanced Communications Group, Inc. for Approval of Transfers of Control*, Case No. TM-2000-146, wherein the Commission determined it did not have jurisdiction. There, as is proposed here, the stock of a foreign telecommunications company was transferred from one foreign corporation to another. This transaction does not fall within the ambit of the foregoing statutory provision.

9. Section 392.300.2, RSMo. 1994, in part, provides:

Except where stock shall be transferred or held for the purpose of collateral security, 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 . . . .

10. As was the case with § 392.300.1, RSMo. 1994, § 392.300.2, RSMo. 1994, is also inapplicable. Section 392.300.2, RSMo. 1994, is inapplicable because Matrix is

not a telecommunications company that is "organized or existing under or by virtue of the laws of this state" as it is not a Missouri domestic corporation. See *Public Service Commission v. Union Pacific Railroad Company*, 197 S.W. 39, 41 (Mo. Banc 1917) (Same statutory language regarding Commission jurisdiction over railroads construed to mean Missouri domestic corporations); see also Case No. TM-2000-146.

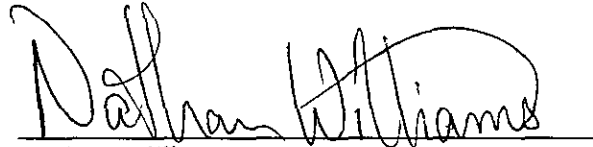
11. In reviewing Cases Nos. TA-91-237 and TO-96-240 regarding Matrix Telecom, as discussed in more detail in the paragraph following, the Staff was unable to locate a Commission Order granting Matrix Telecom, Inc. a certificate of service authority to provide interexchange telecommunications services. This issue was raised to Applicants' counsel and Matrix Telecom, Inc. was also unable to locate a certificate. On December 9, 1999, in Case No. TA-2000-361, Matrix Telecom, Inc. filed an application seeking such service authority. The Staff has found nothing in the Commission's records that indicate misfeasance in the corporation's failure to already have a certificate of service authority.
12. The Staff determined the following facts from reviewing the Commission's files for Cases Nos. TA-91-237 and TO-96-240. By Order dated October 22, 1991, in Case No. TA-91-237 the Commission granted a certificate of authority to a Texas partnership named Matrix Telecom for the provisioning of interexchange telecommunications services effective upon the filing of its tariff. The Commission approved that tariff on December 13, 1991, with an effective date of December 15, 1991. In the file for that same case also appears an adoption notice filed January 1, 1994, whereby the Texas corporation Matrix Telecom, Inc. adopts

the tariff filed by the Matrix Telecom partnership that was approved on December 13, 1991. With that filing also appears a letter from a Texas attorney and a certificate of authority to conduct business in Missouri issued by the Missouri Secretary of State. The letter apparently erroneously refers to the certificate issued by the Secretary of State as the certificate of service authority for the Texas corporation. As stated above, neither Staff nor Matrix Telecom, Inc. could locate an Order granting a certificate of service authority to the corporation Matrix Telecom, Inc. for these services. In the other case file—TO-96-240—the Staff found a tariff filing to implement a name change from Matrix Telecom to Matrix Telecom, Inc. and to implement new tariff rates (Tariff File No. 9600471). The Staff found no other Commission files relating to Matrix Telecom.

WHEREFORE, for all the foregoing reasons, the Staff prays the Commission to dismiss the Joint Application of Matrix Telecom, Inc., AvTel Communications, Inc., and Matrix Acquisition Holdings Corp. for Approval of a Stock Purchase Agreement and Related Transactions.

Respectfully submitted,

DANA K. JOYCE  
General Counsel

A handwritten signature in cursive script, reading "Nathan Williams", written over a horizontal line.

Nathan Williams  
Assistant General Counsel  
Missouri Bar No. 35512

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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 14th day of December, 1999.

A handwritten signature in cursive script, reading "Nathan Williams", written over a horizontal line.

**Service List for  
Case No. TM-2000-247  
December 14, 1999**

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