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October 1, 2001

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Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED²

OCT 01 2001

Missouri Public
Service Commission

RE: Case No. TM-2001-669

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 ORDER DIRECTING FILING**.

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,

Marc D. Poston
Senior Counsel
(573) 751-8701
(573) 751-9285 (Fax)

MP/lb
Enclosure
cc: Counsel of Record

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

FILED²
OCT 01 2001

Missouri Public
Service Commission

In the Matter of the 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. TM-2001-669

STAFF'S RESPONSE TO ORDER DIRECTING FILING

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and states:

1. On June 7, 2001, Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC filed an application with the Missouri Public Service Commission for approval of a stock transfer. The Staff filed a motion to dismiss the application for lack of jurisdiction on July 3, 2001. On August 30, 2001, the Commission issued its Order Directing Filing and directed the Staff to provide further information concerning the Commission's jurisdiction in this case. The Commission ordered the Staff to identify the facts it relied upon, explain how the status of the regulated telecommunications company is affected by the proposed transaction, and to explain how the Staff applies the jurisdictional statutes to the facts. The Staff was also ordered to explain the legal harm if the Commission assumes jurisdiction over the matter and to file a recommendation in the event the Commission assumes jurisdiction.

2. Claricom Networks, Inc. (Claricom) is organized and existing under the laws of Delaware, but is subject to the jurisdiction of the Commission by virtue of its certificate to provide interexchange telecommunications services in Missouri. Under this certificate, Claricom meets the following definition of a telecommunications company as defined in Section 386.020(51) RSMo 2000:

"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.

Claricom is a corporation that owns, operates, controls and manages facilities used to provide telecommunications service within Missouri, and therefore, meets the definition of a telecommunications company. The proposed transaction will not affect the status of the regulated company (Claricom) other than to convert Claricom from a corporation to a limited liability company. Claricom will continue to hold the certificate and tariff, and provide telecommunications service to its customers.

3. Claricom Holdings, Inc. (Seller) is a Delaware corporation, but is not a telecommunications company because it does not meet the Section 386.020(51) RSMo 2000 definition. Seller does not own, operate, control or manage facilities used to provide telecommunications service within Missouri. Seller's only connection to Missouri for purposes of this proceeding is its status as the owner of 100% of the stock of Claricom.

4. Stacom Holdings, LLC (Buyer) is a Delaware corporation, but is not a telecommunications company because it does not meet the Section 386.020(51) RSMo 2000 definition. Buyer does not own, operate, control or manage facilities used to provide telecommunications service within Missouri. Buyer's only connection to Missouri for purposes of this proceeding is its status as the buyer of 100% of the stock of Claricom.

5. The statute relied upon by the Staff in its Motion to Dismiss for Lack of Jurisdiction is Section 392.300 RSMo 2000. Under subsection 1 of the statute, no telecommunications company shall "sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system" without Commission

approval. Under the same subsection, no telecommunications company shall "merge or consolidate such line or system, or franchises, or any part thereof, with any other corporation" without Commission approval. The transfer under consideration does not involve the franchise, facilities or system of Claricom; rather, it involves the outstanding capital stock of Claricom. Therefore, subsection 1 of Section 392.300 RSMo 2000 does not apply to this transfer.

6. The relevant portion of subsection 2 of Section 392.300 RSMo states:

...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...

A breakdown of this language and the facts relied upon by the Staff will hopefully help explain how the Staff's Motion to Dismiss applies the Commission's jurisdiction to the facts of this case. Subsection 2 first establishes that it applies to stock purchases made by non-telecommunications companies. As explained above in paragraph 4, Buyer is not a telecommunications company under the applicable definition found in Section 386.020(51) RSMo 2000. Buyer is "a holding company organized for the purpose of holding the ownership interests of Claricom Networks, Inc." as explained in the application. Subsection 2 also establishes that it applies to Missouri corporations and foreign corporations that are purchasing the stock of a telecommunications company. Exhibit 3 of the application shows that Buyer is a Delaware corporation. To this point in the analysis, Subsection 2 would appear to apply to the present application. However, Subsection 2 further states that consent of the Commission is required when the purchase is for "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." The telecommunications company in question, Claricom, must be organized or existing under or by virtue of the laws of

Missouri before Commission consent is required for the transfer. The Commission is aided in its interpretation of this language by the Missouri Supreme Court decision in Public Service Commission v. Union Pacific Railroad Company, 197 S.W. 39 (Mo. banc 1917). In *Union Pacific* the Supreme Court held that the phrase "organized and existing or hereafter incorporated, under or by virtue of the laws of the state of Missouri" applies to domestic corporations and not foreign corporations. Although the *Union Pacific* case is dated to 1917 and involves a railroad statute, the language being interpreted is essentially the same and the Supreme Court's decision has not been overturned. Claricom is a foreign Delaware corporation and not a domestic corporation, and as such, is not required to receive Commission consent before the stock transfer.¹

7. The Commission ordered the Staff to explain the "legal harm or the expense, burden, or other detriment if the Commission accepts jurisdiction over the matter presented." If the Commission assumes jurisdiction, it will expand its jurisdiction beyond what was expressly conferred upon the Commission by statute. The General Assembly limited the Commission's jurisdiction over stock transfers to the stock of domestic corporations, and the Commission cannot lawfully expand that jurisdiction. Section 386.040 RSMo 2000; State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard, 168 S.W.2d 1044 (Mo. banc 1943). *See also State ex rel. Utility Consumer Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979). Even if the parties consented to the Commission's jurisdiction over the

¹ Although Claricom is subject to the Commission's jurisdiction as a provider of telecommunications services in Missouri, Claricom is not organized under Missouri law. Claricom was formed under Delaware law as shown in Exhibit 3 to the application. Furthermore, the corporate existence of a corporation in Missouri "shall date from the time of filing its articles of incorporation by the secretary of state" under Section 351.075 RSMo 2000. Claricom's incorporation under Delaware law does not satisfy this statute.

transaction, the Commission would not have jurisdiction. Heinle v. K & R Express Systems, Inc., 923 S.W.2d 461 (Mo.App. E.D. 1996). The *Heinle* court held:

The parties cannot confer subject matter jurisdiction upon a court by their actions or agreements, where such jurisdiction does not otherwise exist. The only power the court has when it lacks subject matter jurisdiction is to dismiss the action; any other actions or proceedings of the court are null and void. *Id.* at 464

Although the *Heinle* opinion is addressing the jurisdiction of a court of law and not an administrative agency, the analysis is the same in that neither a court of law nor the Commission can expand its jurisdiction *sua sponte*. In fact, the Missouri Court of Appeals for the Western District held:

A basic tenet of administrative law provides that an administrative agency has only such jurisdiction or authority as may be granted by the legislature. ... If an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction. ... The agency's subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.²

8. If the Commission assumed jurisdiction, it would be a departure from several Commission orders under nearly identical facts where the Commission concluded that it did not have jurisdiction. Although the Commission is not bound by its past decisions, the Staff believes it is important that the Commission should consider its recent orders issued under similar circumstances. In Case No. TM-2000-146, the Staff filed a nearly identical Motion to Dismiss under nearly identical facts.³ The Commission concluded in its October 19, 1999 *Order Dismissing Application for Lack of Jurisdiction* that it does not have jurisdiction. The Commission found "the second subsection of Section 392.300 clearly does not apply because the subsidiaries to be acquired are not Missouri corporations and therefore are not organized or

² Livingston Manor, Inc. v. Department of Social Services, Division of Family Services, 809 S.W.2d 153, 156 (Mo.App. 1991).

³ In the Matter of the Joint Application of Feist Long Distance Service, Inc., Telecom Resources, Inc. d/b/a TRINetwork, Inc., and Advanced Communications Group, Inc., for Approval of Transfers of Control.

existing under or by virtue of the laws of Missouri.” The Commission’s conclusions in Case No. TM-2000-146 are consistent with the Staff’s recommendation in the present case and are also consistent with the Commission’s conclusions in several other cases with similar facts.⁴ If the Commission were to assume jurisdiction over the present stock transfer, the Commission would depart from these past decisions.

9. The Commission directed the Staff to “file its recommendation regarding the merger in the event the Commission assumes jurisdiction.” The Staff’s Recommendation is attached and labeled Appendix A. The Staff recommends that if the Commission assumes jurisdiction, it should require Claricom to comply with the Commission’s June 18, 2001 *Order Directing Filing* before approving the application. In the *Order*, the Commission directed Claricom to correct deficiencies in its application as follows:

The Commission will require Claricom to file a supplemental pleading which must include (1) a statement indicting whether Claricom has any pending action or final unsatisfied judgments or decisions against it from any state or federal agency or court which involve customer service or rates, which action, judgment, or decision has occurred within three years of the date of the application; and (2) a statement that Claricom has no annual report or assessment fees that are overdue.

In addition to the deficiencies identified by the Commission, the Staff was unable to find a statement of the impact the sale will have on the tax revenues of political subdivisions as required under 4 CSR 240-2.060(7)(F). So long as the Application remains deficient, the Staff does not recommend approval of the application.

⁴ In the Matter of the Joint Application of Matrix Telecom, Inc., AvTel Communications, Inc., and Matrix Acquisition Holdings Corporation for Approval of a Stock Purchase Agreement and Related Transactions, Case No. TM-2000-247, *Order Granting Motion to Dismiss for Lack of Jurisdiction*, April 30, 2000; In the Matter of the Joint Application for Approval of a Transfer of Control of Eclipse Telecommunications, Inc., IXC Communications Services, Inc., and Telecom One, Inc. to Cincinnati Bell, Inc., Case No. TM-2000-85, *Order Dismissing Application for Lack of Jurisdiction*, November 9, 1999; In the Matter of the Joint Application of Nextlink Missouri, Inc. and Nextlink Long Distance Services, Inc. for Approval of the Pro Forma Transfers of Control of Nextlink Missouri, Inc. and Nextlink Long Distance Services, Inc. from Nextlink Communications, Inc. to NM Acquisition Corp., Case No. TM-2000-524, *Order Granting Staff’s Motion to Dismiss for Lack of Jurisdiction*, March 31, 2000; In the

10. The Staff also notes that Claricom's application states that the Claricom will be converted to a limited liability company. This conversion will change the name of Claricom from Claricom Networks, Inc. to Claricom Networks, LLC. Under 4 CSR 240-2.060(16), a name change may be accomplished by filing an application with the Commission that includes evidence of registration of the name change with the Secretary of State and a revised tariff.

WHEREFORE, the Staff responds to the Commission's Order Directing Filing and recommends that the Commission enter an order finding that Section 392.300 RSMo 2000 does not grant the Commission jurisdiction over this transaction, and therefore the Application should be dismissed.

Respectfully submitted,

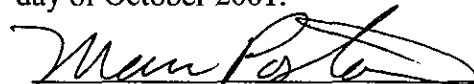
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Certificate of Service

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 1st day of October 2001.



Matter of the Application of Operator Service Company and of Billing Concepts, Corp. for Authority to Transfer Control, Case No. TM-2001-43, Order Dismissing Case, October 19, 2000.

Memorandum

To: Missouri Public Service Commission Official Case File

Case No. TM-2001-669

Company: Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC

From: Sara Buyak, Telecommunications Department

Bu Vajt 9-28-01
Utility Operations Division/Date

Man Boston 10-1-01
General Counsel's Office/Date

Subject: Staff Recommendation Regarding Application

Date: September 28, 2001

Staff Recommendation for Application Seeking Commission Approval of Competitive Company Transaction

Staff recommends the Commission (check, as applicable):

☐ Approve (circle appropriate transaction) Sale of assets Merger Consolidation
Transfer of Stock

☐ Cancel Certificate(s) & Tariff(s)
(as shown below)

Companies (Print entire legal name of company/applicant)	Affected Customers Served By (as indicated by check mark)		Cancel (if applicable)		Grant /Approve (if applicable)	
	Pre- transaction	Post- transaction	All Certificates (identify by type: IXC, local, or basic local)	All Tariffs (identify PSC MO tariff number)	Grant Certificate (identify by type: IXC, local or basic local)	Approve Tariff (identify PSC MO tariff number)
Claricom Holdings, Inc.						
Stacom Holding, Inc.						

09-28-01P01:37 RCVD

Administrative Considerations:

- ☒ Application solely involves competitively classified companies.
☒ No applications to intervene filed.

Noteworthy Application Requirements of 4 CSR 240-2.060(1):

- ☐ Will have no impact on tax revenues pursuant to 4 CSR 240-2.060(7)(F) or 4 CSR 240-2.060(8)(F)
☒ Appropriate Secretary of State authorization has been submitted for any applicant (or if previously submitted, reference to prior case number). Case No. _____
Missouri corporations: A Certificate of Good Standing.
Foreign corporations: Authorization to do business in Missouri.
If business conducted under a fictitious name: A copy of registration of the fictitious name.
☐ No pending or final judgments/decisions described in 4 CSR 240-2.060(1)(K).
☐ A statement that no annual report or assessment fees are overdue for any applicant.

Will customers experience rate increases? ☐ Yes ☒ No

If yes, will customers be notified 10 days in advance of transaction taking effect? ☐ Yes ☐ No

Are there additional recommendations or special considerations? ☐ No ☒ Yes If yes, explain in an attachment.

Claricom will be converted to a limited liability company and all of the outstanding stock in Claricom will be transferred from Seller to Buyer. As a result of this transfer, Claricom will become a wholly-owned subsidiary of Buyer, whose ultimate parent company is Platinum. Claricom will remain a separate operating company. The application states the proposed transaction will have no impact on the customers of Claricom.

On June 18, 2001, in the Order Directing Filing, requests the applicant file a supplementary pleading to comply with Commission Rule 4 CSR 240-2.060 (1)(K). To date, the applicant has not filed a supplementary pleading.

Additional Staff Comments:

According to 4 CSR 240-2.060(3), competitively classified companies are exempt from providing certain information such as public interest information in applications to merge, consolidate or sell/transfer assets. Based on the limited information provided to Staff, Staff does not believe the transaction will be detrimental to the public interest. Any transaction, solely involving competitively classified companies, is not detrimental to the public interest since a customer can freely switch to another provider.

Service List for
Case No. TM-2001-669
Verified: October 1, 2001 (lb)

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