

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 23rd day  
of February, 2006.

Joint Application of Hypercube, LLC and KMC Data	)	
LLC for Grant of the Authority to Complete a Series	)	<b><u>Case No. TM-2006-0289</u></b>
of Transactions Resulting in the Transfer of Control	)	
of an Authorized Carrier	)	

**ORDER DISMISSING JOINT APPLICATION**

Issue Date: February 23, 2006

Effective Date: March 5, 2006

**Syllabus:** This order dismisses the Joint Application filed by Hypercube, LLC and KMC Data LLC due to a lack of jurisdiction.

On January 6, 2006, Hypercube, LLC, and KMC Data LLC filed an Application in which they asked the Commission for authority to transfer control of KMC Data from KMC Telecom Holdings, Inc., to Hypercube. Hypercube was recently formed to acquire KMC Data, and is run by KMC Data's former senior management team. Neither KMC Telecom nor Hypercube is certificated in Missouri. KMC Data is certificated in Missouri as an interexchange, local exchange, and basic local exchange telecommunications company. The proposed transaction would not affect KMC Data's assets or operations, and the applicants describe the proposed transaction as being *pro forma*.

The Staff of the Commission filed a Motion to Dismiss Application for Lack of Jurisdiction, which it later supplemented with its Staff Response to Order Directing Filing. Staff says that Section 393.300.2, RSMo does not apply to this transaction because KMC Data is a Delaware corporation, and the statute applies only to Missouri corporations. Staff states that Section 392.300.1, RSMo does not apply to this transaction because the

parties do not propose the transfer of assets. The applicants do not ask to directly merge or consolidate KMC Data or its franchise, facilities or system with any other entity. Moreover, they do not ask to indirectly merge KMC Data's franchise, facilities or system, because Hypercube, the new owner pending Commission approval, is not a telecommunications company, and therefore has no franchise, facilities or system to merge with KMC Data. KMC Data and Hypercube concur, and state that the Commission previously ruled that Section 392.300.1 does not apply to the transfer of stock,<sup>1</sup> and that the pending transaction, a transfer of ownership interests of a limited liability corporation, is akin to a stock transfer.

Section 393.300.2 states that no stock corporation, other than a telecommunications company, may buy more than ten percent of the stock of a telecommunications company organized or existing under the laws of this state without first obtaining the Commission's consent. Hypercube, the applicant to buy KMC Data, is not a stock corporation, but is a limited liability corporation. KMC Data, the telecommunications company to be purchased, does not have stock, but instead is a limited liability corporation that issues membership interests. Hypercube was not organized under Missouri law, but is a Delaware corporation. And the Commission explicitly waived Section 392.200.2 for KMC Data in its certificate cases. Therefore, Section 392.300.2 does not give the Commission jurisdiction over this transaction.

Section 392.300.1 states that no telecommunications company shall sell or otherwise dispose of its franchise, facilities or system, or merge or consolidate its system or

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<sup>1</sup> See *In re D2R2, Inc.*, Commission Case No. LM-2004-0063, Order Granting Motion to Dismiss for Lack of Jurisdiction (September 18, 2003); see also *In re NEXTLINK*, Commission Case No. TM-2000-524, Order Granting Staff's Motion to Dismiss for Lack of Jurisdiction (March 31, 2000) (in which the Commission declined jurisdiction over a *pro forma* transaction).

franchise without first having Commission authority to do so. If the Commission approves this transaction, KMC Data will retain all of its assets, and will simply be owned by a different holding company. KMC Data is therefore not disposing of its franchise, facilities or system. Also, Hypercube is a holding company, not a telecommunications company, and it has no franchise, facilities or system to merge with KMC Data. Therefore, Section 392.300.1 does not apply to this transaction. This result is in line with other Commission orders dismissing similar applications for the sale of telecommunications companies.<sup>2</sup>

**IT IS ORDERED THAT:**

1. The Joint Application filed by Hypercube, LLC, and KMC Data LLC on January 6, 2006, is dismissed for a lack of jurisdiction.
2. This order shall become effective on March 5, 2006.

( S E A L )

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

Davis, Chm., Murray, and Appling,  
CC., concur.  
Gaw, C., dissents, with separate  
dissenting opinion to follow.  
Clayton, C., dissents.

Pridgin, Regulatory Law Judge

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<sup>2</sup> See *id.*; see also *In re SBC*, Commission Case No. TM-99-76, Report and Order (October 8, 1998), *In re SBC*, Commission Case No. XM-2005-0219, Order Approving the Merger of SBC DataComm into SBC Long Distance, and Finding No Jurisdiction to Review the Transfer of SBC Long Distance's Stock (March 1, 2005).