

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

Joint Application of Hypercube, LLC and)
KMC Data LLC for Grant of the)
Authority to Complete a Series of)
Transactions Resulting in the Transfer of)
Control of an Authorized Carrier)

Case No. TM-2006-0289

STAFF RESPONSE TO ORDER DIRECTING FILING

COMES NOW the Staff of the Missouri Public Service Commission and for its response states:

1. By Order dated January 26, 2006, the Commission directed the parties to explain whether the proposed transaction is a merger, to explain how the proposed transaction is similar to previously cited transactions, and to address whether the Commission regulates any of KMC Data's parent companies.

2. The proposed transaction is not a direct or indirect merger.

Section 392.300.1 RSMo provides, in relevant part, that no telecommunications company shall sell, assign, lease, transfer, mortgage or otherwise dispose of 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, without first having secured from the commission an order authorizing it to do so.

The Joint Application proposes a change in ownership of the telecommunications company, KMC Data. The Joint Application proposes that Hypercube LLC will directly acquire all of the outstanding ownership interests of KMC Data. (Joint Application, paragraph 10). The Joint Application does not propose to directly merge or consolidate KMC Data or its franchise, facilities or system with any other entity. KMC Data will continue to operate and provide

services to its customers and “will retain the assets used in the provision of these services.” (Joint Application, paragraph 14). Nor does the Joint Application propose to indirectly merge or consolidate KMC Data’s franchise, facilities or systems. Because Hypercube LLC is not a telecommunications company, it has no franchise, facilities or system to merge with KMC Data’s franchise, facilities or system.

3. The proposed transaction is similar to applications that the Commission has dismissed.

Section 392.300.2 RSMo provides, in relevant part, that no stock corporation, domestic or foreign, 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.”¹

In Case No. TM-2000-524, *In the Matter of NEXTLINK Missouri, Inc., and NEXTLINK Long Distance Services, Inc.*, two Missouri regulated telecommunications companies applied for approval of a transfer of their stock from one corporation to a second corporation into which the first corporation was being merged. Both telecommunications companies were incorporated in the state of Washington. The Staff moved to dismiss for lack of jurisdiction because Section 392.300.2 RSMo does not apply when the applicants are not incorporated under Missouri law. The Commission granted the Staff’s motion. Similarly, in Case No. XM-2005-0219, *In the Matter of the Application of SBC Long Distance, Inc., and SBC Telecom, Inc.*, the Commission found that it had no jurisdiction to approve or disapprove the transfer of the stock of a Delaware corporation certificated in Missouri as a telecommunications company. The proposed

¹ In *Public Service Commission v. Union Pacific Railroad Company*, 197 S.W. 39 (Mo. 1917), the Court held that the term “corporation organized or existing, or hereafter incorporated under or by laws of the State of Missouri” did not apply to a railroad company incorporated under the laws of the State of Utah.

transaction is similar to the cited cases because KMC Data, as a limited liability company formed under the laws under the state of Delaware, is not incorporated under Missouri law.

4. The Commission's Electronic Filing and Information System does not list any of KMC Data's parent companies as certificated to provide telecommunications service in Missouri.

WHEREFORE, the Staff moves the Commission to dismiss the Joint Application for lack of jurisdiction.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6th day of February 2006.

/s/ William K. Haas

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