

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office
in Jefferson City on the 6th day
of November, 2008.

In the matter of the Application of Inmate Calling)	
Solutions, LLC, d/b/a ICSolutions, LLC and Michael R.)	
Smith and Group, LLC To Authorize Michael R. Smith)	Case No. XM-2009-0121
Group, LLC To Acquire the Equity Interest of Inmate)	
Calling Solutions, d/b/a ICSolutions, LLC.)	

**DECISION
Dismissing Application for Lack of Subject Matter Jurisdiction**

Issue Date: November 6, 2008

Effective Date: November 16, 2008

The Missouri Public Service Commission ("Commission") dismisses the application ("the application") filed by Inmate Calling Solutions, LLC ("ICS") and Michael R. Smith Group, LLC ("Smith Group") because the Commission lacks jurisdiction over the application's subject matter.

Procedure

On October 2, 2008, ICS and Smith Group ("applicants") jointly filed the application seeking approval for a transfer of equity ("the transaction") with expedited treatment. The application is verified. On October 7, the Commission issued an order setting a deadline for applications to intervene from any person at October 21, 2008. As of the date of this decision, no person has filed an application to intervene. On October 27, 2008, the Commission's staff ("Staff") filed its recommendation. The recommendation argues that the Commission should dismiss the application for lack of subject matter jurisdiction.

The recommendation constitutes a motion to dismiss. On the Commission's own motion, if the application does not state a claim for relief, the Commission may also dismiss the application.¹ Further, the Commission may dismiss the application for good cause on ten days' notice.² Not more than ten days from the date of its filing, applicants may ordinarily respond to such a motion.³ But the Commission may waive such response time and notice for good cause.⁴ Good cause finds support in the applicant's request for expedited treatment and the absence of prejudice to applicants in our ruling.

Our ruling on a motion to dismiss follows the facts that we find upon the preponderance of the evidence.⁵ The only evidence before us is the verified application's content, which Staff's recommendation does not dispute. The application establishes the following facts.

Findings of Fact

1. ICS is a California limited liability company. ICS holds a certificate to provide interexchange telephone services in the State of Missouri. ICS's equity is, in part, in the possession of The Billing Resource ("TBR").

2. TBR is a California corporation that operates as a billing clearinghouse. TBR voluntarily filed for bankruptcy under Chapter 11 of the U.S. bankruptcy laws. In the course of bankruptcy, TBR proposed to sell its equity in ICS to Smith Group.

3. Smith Group is a Texas limited liability company that operates as an investment consortium created for the purpose of acquiring ICS.

¹ 4 CSR 240-2.070(6).

² 4 CSR 240-2.116(4).

³ 4 CSR 15-240.080(15).

⁴ 4 CSR 15-2.015(1).

⁵ *Missouri Soybean Ass'n v. Missouri Clean Water Com'n*, 102 S.W.3d 10, 22 (Mo., 2003).

4. On September 4, 2008, the bankruptcy court approved the transaction subject to all required regulatory approvals.

5. The terms of the transaction, as approved by the bankruptcy court, are:

- a. Smith Group will be majority owner and controller of ICS.
- b. ICS will remain a separate entity.
- c. ICS will continue to operate in Missouri under the name ICSolutions.⁶

The transaction is the subject of the application.

Conclusions of Law

1. Staff argues that the Commission lacks jurisdiction. Without jurisdiction, any agency action is void.⁷ So if the Commission lacks jurisdiction over a matter, it can only exercise its inherent authority to dispense with matters it cannot decide,⁸ without reaching the merits.⁹

2. Applicants filed the application under subsection 2 of § 392.300:¹⁰

Any person seeking any order under this subsection authorizing the sale, assignment, lease, transfer, merger, consolidation, or other disposition, direct or indirect, of **any telecommunications company** shall, at the time of application for any such order, file with the commission [certain information.¹¹]

Though the emphasized language appears to subject “any telecommunications company” to Commission jurisdiction, the sentence as a whole requires an application only for an “order under this subsection [.]”

⁶ No application for recognition of a name change under 4 CSR 240-2.060(5) is pending before the Commission, but ICS is not using its new name yet.

⁷ *New Madrid County Health Center v. Poore*, 801 S.W.2d 739, 741 (Mo. App., S.D. 1990).

⁸ *Oberreiter v. Fullbright Trucking*, 24 S.W.3d 727, 729 (Mo. App., E.D. 2000) (citations omitted).

⁹ *Moore v. Missouri Highway & Transp. Com'n*, 169 S.W.3d 595, 599 (Mo. App. S.D., 2005).

¹⁰ Sections are in the 2000 Revised Statutes of Missouri except as otherwise noted.

¹¹ Emphasis added.

3. “An order under this subsection” grants the Commission’s consent only for the following transactions:

[N]o **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**[.] Every contract, assignment, transfer or agreement for transfer of any **stock** by or through any person or corporation to any corporation in violation of any provision of this chapter [392, RSMo] shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such telecommunications company, or shall be recognized as effective for any purpose. [¹²]

Under that language, the Commission’s consent is necessary only if a stock corporation purchases stock in a Missouri entity. No Missouri entity, no stock purchase, and no stock corporation purchaser are part of the transaction. In the transaction, a limited liability company is buying equity in a California entity. Such equity is not stock because ICS is a California limited liability company. A California limited liability company issues no stock, only membership.¹³

4. Further, subsection 1 of § 392.300 does not apply:

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. [¹⁴]

¹² Section 392.300.2 (emphasis added).

¹³ *Allied Investments v. Lee Pacific, LLC*, 2007 WL 4395689, 6 (Cal.App. 4 Dist., 2007) (citing *Marks v. Minnesota Mining & Manuf. Co.*, 187 Cal.App.3d 1429, 1436 (Cal. App. 1 Dist, 1986)).

¹⁴ Emphasis added.

That statute does not apply to TBR because nothing in the record shows that TBR is a “telecommunications company.” A telecommunications company is an entity that provides telephone service.¹⁵ That definition applies to ICS, but ICS is taking no action requiring the Commission’s “order authorizing it so to do.” Therefore, § 392.300.1 does not apply to the transaction.

5. The verified application shows that no Commission authorization or consent under any statute is necessary for the transaction. Such a transaction is not within this Commission’s jurisdiction to grant or deny, so the application states no claim for relief, and good cause exists to dismiss the application. For that reason, the Commission dismisses the application.

THE COMMISSION ORDERS THAT:

1. The application of Inmate Calling Solutions, LLC, and Michael R. Smith Group, LLC, to transfer equity in Inmate Calling Solutions, LLC, filed on October 2, 2008, is dismissed.
2. This order is effective on November 16, 2008.
3. The Commission shall close this case on November 17, 2008.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Jarrett, and Gunn, CC., concur;
Clayton, C., dissents.

Jordan, Regulatory Law Judge

¹⁵ Sections 386.020(52), RSMo Supp. 2008, and 392.180.