

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

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

RESPONSE OF HYPERCUBE, LLC AND KMC DATA LLC

Hypercube, LLC (“Hypercube”) and KMC Data LLC (“KMC Data”) (together “Applicants”), through their undersigned counsel, respond to the Commission’s Order Directing Filing issued on January 26, 2006 in this Case. The Commission requests that the parties explain how the proposed transaction does not fall within the portion of Section 392.300.1 that “gives the Commission authority over sales or mergers of telecommunications companies ‘by any means, direct or indirect.’” In addition, the Commission requests that the parties explain how the proposed transaction is similar to transactions in other cases where the Commission has dismissed an application for lack of jurisdiction. Finally, the Commission requests information about any Certificate of Service Authority (“Certificate”) issued by the Commission to KMC Data’s parent companies.

I. APPLICABILITY OF SECTION 392.300.1

Applicants filed their application for approval under Section 392.300.1 out of an abundance of caution in case the Commission determined that the statute applied to their transaction. Whether the Commission ultimately determines that it does have jurisdiction over this transaction is not Applicant's primary concern. Instead, Applicants are primarily concerned that such a decision is made promptly and if approval is necessary that it be granted in an expedited fashion so that Applicants can complete their transaction in the next month. Applicants currently expect to have the necessary approval from all jurisdictions by March 22, 2006.

Under Section 392.300.1, the Commission must approve the sale of "any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public" or any, direct or indirect, merger of such line or system, or franchise, or any part thereof, with any corporation, person or public utility. On its face, however, Section 392.300.1 does not appear to apply to the transfer of merely an ownership interest in a company. This section would clearly apply to the transfer of assets of a telecommunications company or the merger of a telecommunications company with another entity. Neither of these types of transactions, however, is implicated by Applicants' proposed transaction, an acquisition of the membership interest in a telecommunications company.¹

The Commission has, under Section 392.300.2, jurisdiction over transactions similar to Applicants' proposed transaction. Specifically, Section 392.300.2 requires approval for the transfer of control (equal to 10% of the capital stock in a company) of a telecommunications

¹ As described in the Application, the proposed transaction involves the acquisition by Hypercube of all the membership interests of KMC Data in exchange for a promissory note and assumption of certain liabilities. This acquisition of the membership interest in a limited liability corporation is equivalent to a stock purchase in a corporation.

company organized or existing under or by virtue of the laws of Missouri. Since this Section appears to apply to transfers in ownership of a telecommunications company through the acquisition of stock (not through a merger), the application of Section 392.300.1 to such a transfer in ownership would be duplicative. The Commission has waived Section 392.300.2 for KMC Data² and, therefore, no approval should be necessary for the transaction proposed by Applicants.

II. THE COMMISSION HAS DISMISSED FOR LACK OF JURISDICTION APPLICATIONS FOR APPROVAL OF SIMILAR TRANSACTIONS

The Commission asked that the parties explain how Applicants' proposed transaction is similar to those cited in Staff's Motion to Dismiss³ and in footnote 1 in the Commission's Order Directing Filing.⁴ Before Applicants address those cases, Applicants discuss a case that involved a transaction more similar to the proposed transaction. Specifically, in Case No. LM-2004-0063, *In the Matter of the Application of D2R2, Inc., for Authority to Acquire all of the Outstanding Stock of ExOp of Missouri, Inc., or in the Alternative a Request for Finding that the Requirement for Approval has been Waived* (hereinafter *ExOp*), a transaction involving the acquisition of all of the outstanding stock of a certificated entity, the Commission agreed with Staff that Section

² Applicant's note that the waivers in KMC Data's Certificates of Service Authority both refer to Section 392.300.2 as applying to the acquisition of stock.

³ *In re 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) (hereinafter *NEXTLINK*); *In re Application of SBC Long Distance, Inc., and SBC Telecom, Inc., for Authority to Transfer Stock of SBC Long Distance, Inc., to SBC Telecom, Inc., and Convert SBC Long Distance, Inc. to a Limited Liability Company*, 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) (hereinafter *SBC Long Distance*).

⁴ *In re Merger of SBC Communications, Inc. and Ameritech Corporation*, Case No. TM-99-76, Report and Order (Oct. 8, 1998) (hereinafter *SBC-Ameritech*).

392.300.1 does not apply to the sale of stock of corporation that holds a Certificate in Missouri. Specifically, the Commission stated that “Section 392.300.1 does not apply to this proposed transaction because the sale of stock is not contemplated in those actions requiring Commission approval.” *Id.* Applicants have proposed an almost identical transaction, the acquisition by a company (Hypercube) of all of the outstanding membership interest in a limited liability company that holds a Certificate in Missouri (KMC Data). Based on the precedent of *ExOp*, and cases like it,⁵ the Commission should dismiss Applicants’ Application for lack of jurisdiction.

In *NEXTLINK*, a *pro forma* transfer of control was accomplished by the merger of the parent company of a certificated entity into a new entity, with the new entity surviving. The new entity was owned by the same company that owned the parent of the certificated entity and, therefore, the transaction was *pro forma*. Although the Commission did not provide a discussion of why it dismissed the application for lack of jurisdiction, the Commission apparently agreed with Staff that “Section 392.300.1, RSMo, [did] not apply because Applicants [were] not selling, assigning, leasing, transferring, consolidating, transferring, merging, encumbering, or otherwise disposing of any part of their duties to the public.” Instead, the transaction only involved a transfer of control of a certificate entity resulting from the merger of the parent company. While the mechanics of Applicants’ proposed transaction are different, the result is the same – a transfer of control of a certificate entity. The only difference with the proposed transaction is that the

⁵ See *In re the Joint Application of Feist Long Distance Services, 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, Order Dismissing Application for Lack of Jurisdiction (Oct. 19, 1999) (cited in Case No. LM-2004-0063); *In re Joint Application of Matrix Telecom, Inc., AvTel Communications, Inc. and Matrix Acquisition Holdings Corp. for Approval of a Stock Purchase Agreement and Related Transaction*, Case No. TM-2000-247, Order Granting Motion to Dismiss for Lack of Jurisdiction (May 30, 2000).

NEXTLINK transaction appears to have been between affiliates. Applicants, however, believe that this difference does not affect the analysis.

In *SBC Long Distance*, the stock of a certificated entity was transferred from a parent company to an affiliate. In addition, the certificated entity merged with an unregulated affiliate. The Commission determined that it did not have jurisdiction over the transfer of stock of the certificated but that it would approve the merger. Again, the proposed transaction is similar in that it involves the transfer of an ownership interest in a certificated entity to another party. The only difference with the proposed transaction is that the *SBC Long Distance* transaction appears to be between affiliates. Applicants believe that this difference does not affect the analysis for the proposed transaction.

In *SBC-Ameritech*, the Commission considered whether it had jurisdiction over the merger of two non-regulated parent corporations of two certificated entities. The Commission determined that it did not have jurisdiction under the statute. While the *SBC-Ameritech* transaction involved the merger of parent companies, it still resulted in the transfer of control of certificated entities. The transfer of control in *SBC-Ameritech* did not affect the operations of the certificated entities. Again, while the mechanism for the transfer of control may be different in Applicants' proposed transaction, the result is the same: new ownership of a certificated entity without any change in the operations of the certificate entity.

All of the cases cited by Applicants, Staff and the Commission conclude that transfers of control not affecting the operations of the certificated entity are outside the jurisdiction of the Commission under Section 392.300.1. The Commission, therefore, should similarly dismiss Applicants' Application for lack of jurisdiction.

III. CERTIFICATES OF KMC DATA LLC AND PARENT COMPANIES

As stated in the Application, KMC Data currently is an indirect wholly owned subsidiary of KMC Telecom Holdings, Inc. (“KMC Holdings”). KMC Holdings does not have a Certificate from this Commission or any other regulatory agency. The intermediate holdings companies between KMC Data and KMC Holdings – KMC Data Sub Holdings IV LLC, KMC Data Holdco Sub LLC, and KMC Data Holdco LLC – also do not hold a Certificate from this Commission or any other regulatory agency. Therefore, this Commission does not regulate any parent company of KMC Data.

KMC Data has affiliates, KMC Telecom III LLC (“KMC-III”) and KMC Telecom V Inc. (“KMC-V”), that have held Certificates issued by this Commission. KMC-III was issued a Certificate to provide interexchange and nonswitched local exchange services in Case No. TA-99-576. That Certificate, however, was canceled in Case No. TD-2006-0078. KMC-V was issued a Certificate to provide intrastate interexchange and nonswitched local exchange services in Case No. TA-2000-785 and basic local telecommunications services in Case No. CA-2004-0173. Regardless, these two affiliates are not involved in the transaction proposed by the Applicants.

IV CONCLUSION

Applicants respectfully submit that the Commission should grant Staff's Motion to Dismiss for Lack of Jurisdiction. In the alternative, the Commission should promptly approve the Application. Regardless, Applicants respectfully request expedited treatment to permit Applicants to consummate the proposed transactions on or prior to March 22, 2006.

Respectfully submitted,

Jean L. Kiddoo
Brett P. Ferencak
SWIDLER BERLIN LLP
3000 K Street, NW, Suite 300
Washington, DC 20007-5116
(202) 424-7500 (Tel)
(202) 424-7645 (Fax)

By: /s/ Mark W. Comley
Mark W. Comley (#28847)
NEWMAN, COMLEY & RUTH P.C.
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102
(573) 634-2266 (Tel)
(573) 636-3306 (Fax)

COUNSEL FOR APPLICANTS

Dated: February 6, 2006

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 6th day of February, 2006, to General Counsel's Office at gencounsel@psc.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov.

/s/ Mark W. Comley