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October 10, 2001

FILED²

OCT 10 2001

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Re: Case No. TM-2001-669

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case, please find the original and 8 copies of the **Suggestions of the Office of the Public Counsel in Support of the PSC's Jurisdiction**. I have on this date mailed, faxed, and/or hand-delivered the appropriate number of copies to parties of record. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Very truly yours,

Michael F. Dandino
Senior Public Counsel

MFD:kh

cc: Counsel of Record

Enclosure

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

FILED²

OCT 10 2001

Missouri Public
Service Commission

In the matter of the Joint Application of)
Claricom Networks, inc., Claricom Holdings,)
Inc., Staples, Inc, Stacom Holdings, LLC,) Case No. TM-2001-669
and Platinum Equity, LLC for approval of)
the transfer of stock in Claricom Holdings,)
Inc. to Stacom Holdings, Inc.)

**SUGGESTIONS OF THE OFFICE OF PUBLIC COUNSEL IN
SUPPORT OF THE PSC'S JURISDICTION**

COMES NOW the Office of the Public Counsel and respectfully suggests the following to the Missouri Public Service Commission in support of the Commission exercising its jurisdiction in the proposed transfer of stock involving a telecommunications company doing business in Missouri under a certificate of authority granted by this Commission.

1. Public Counsel suggests that the Commission has jurisdiction pursuant to Sections 386.250(2), 386.320, and 392.300, RSMo 2000.
2. Section 386.250 gives the Commission jurisdiction over all telecommunications facilities, telecommunication services, and telecommunications companies.
3. Section 386.320.1 gives the Commission general supervision over all telephone corporations and telephone lines and the manner in which their lines and property are owned, leased, controlled or operated not only with respect to adequacy, security and accommodation offered by those services, but also with respect to their compliance with all provisions of law, orders, decisions of the Commission and charter and franchise requirements.

4. Public Counsel submits that under Section 386.610 and case law, Chapter 386 should be construed broadly with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. Section 392.185, RSMo provides the framework that should guide the Commission's consideration of its jurisdiction.
5. Sec 386.020(51) "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.
6. Holding companies that acquire control of telecommunications companies that do business in Missouri under a certificate issued by the PSC should not be able to structure the corporate form of ownership in such a way as to defeat the Commission's jurisdiction. In *Re: Central Vermont Public Service Corporation*, 84 PUR 4th 213 (FERC 1987), the Commission rejected the form of the transaction over the substance of the transaction to find jurisdiction:

“ the purposes behind the FPA may be frustrated were we to adhere to corporate form in reviewing the instant. . . transactions. In a recent proceeding involving a corporate merger and reorganization, we indicated that we are not bound to examine such transactions as they are presented

and, furthermore, that our jurisdiction may not necessarily be avoided by [the] structuring [of] a transaction. . . .”

7. Staff reasons that Section 392.300 do not apply to this proposed stock transfer as it is not a transfer of facilities or systems.
8. Public Counsel suggests that Section 392.300.1 could provide a basis for PSC jurisdiction in this transfer of ownership. That subsection requires PSC approval of the sale, assignment, lease or transfer of franchises, facilities or systems of Missouri regulated telecommunication companies, and for a merger or consolidation, direct or indirect, of the lines, systems or franchises of Missouri regulated telecommunication companies.
9. Section 392.300.1, provides, in pertinent part:

“1. 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.” (Emphasis supplied)

10. The limitation on this jurisdiction is set out in the same subsection:

“Nothing in this subsection contained shall be construed to prevent the sale, lease or other disposition by any telecommunications company of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such company shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.” This limitation does not apply to this transfer.

11. The FERC found it had jurisdiction in *Re: Central Vermont Public Service Corporation*, 84 PUR 4th 213 (FERC 1987) where 100% of the stock in the electric public utility was transferred to a newly created holding company. It reasoned that as a wholly-owned subsidiary of a holding company, the direct control of the public utility passed from the shareholders to the board of directors of the holding company. The FERC ruled:

“We conclude that the transfer of ownership and control of Central Vermont's jurisdictional facilities, from Central Vermont's existing shareholders to the newly created holding company, constitutes a disposition of jurisdictional facilities requiring prior Commission approval under section 203. After the reorganization the jurisdictional facilities of the public utility will be controlled through the parent's ownership of the utility's common stock by virtue of the parent's ability to name Central Vermont's board of directors. Although the current stockholders of the public utility will own stock in the holding company after the reorganization is completed, they will no longer have a proprietary interest in, or direct control over, the jurisdictional facilities. The substance of the transaction, therefore, is a "disposition" of facilities via the transfer of all direct control. This analysis is consistent with our prior determinations to focus on the substance rather than the form of corporate transactions and relationships when making jurisdictional determinations.”

12. The Staff suggests that Section 392.300.2, RSMo does not apply on the sole ground that the holding companies which are the sellers and the buyers are not Missouri corporations, but rather foreign corporations beyond the PSC's authority to review and approve or deny the transaction.
13. Section 392.300.2 provides:

2. Except where stock shall be transferred or held for the purpose of collateral security, 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, except that a corporation now lawfully holding a majority of the capital stock of any telecommunications company may, without the consent of the commission, acquire and hold the remainder of the capital stock of such telecommunications company, or any portion thereof. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent, upon the surrender or exchange of such stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. 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 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.** (Emphasis supplied).

14. The Staff relies upon *Public Service Commission v. Union Pacific Railroad Company*, 197 SW 39 (Mo banc 1917) as authority to deny the PSC's jurisdiction in stock transfers of Missouri certificated telecommunications companies between holding companies incorporated in other states. That reliance is misplaced. The Union Pacific case involved the authority to govern the issuance of stock by a foreign corporation. The Court reasoned that since the state reserved the control of stock issued by domestic corporations to itself, it could regulate the issuance of stock by domestic railroad companies as a "special privilege" through PSC approval. But there was no grant of corporate authority from

Missouri to foreign corporations and, thus, no basis to control stock issuance. The Court said it must look at the "mischief" to be prevented by the statute as a guide for PSC jurisdiction.

15. Stock issuance is not the issue in this transaction. It is an transfer of stock ownership which assigns the control and operation of a telecommunications company operating in Missouri to another corporate entity. The PSC is responsible under Section 392.185 to protect the consumer and assure adequate telecommunications service at reasonable prices. PSC oversight is designed to provide scrutiny over telecommunications companies for the purpose of providing reasonable rates, security of the availability and the quality of services. The transfer of ownership and control of a telecommunications company operating in Missouri presents a potential for abuses that could be adverse to the public interest. The transfer of ownership of a regulated utility to a holding company or between holding companies that are 'citizens' of sister states is an event that falls within the purview of this Commission in its charge to protect the public in the provision of safe and adequate utility services at just and reasonable and affordable prices. The PSC should act with foresight and a keen eye on the vital duty the General Assembly gave it to oversee the telecommunications industry in the state for the benefit of the public. "Regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and to be effective must possess the power of intelligent visitation and the plenary supervision of


every business feature to be finally (however invisibly) reflected in rates and quality of service.” *May Department Stores v. Union Electric Power and Light Co.*, 107 SW2d 41, 48 (Mo. 1937).

16. If the PSC declines jurisdiction solely on the basis of the holding companies being foreign corporations, Public Counsel suggests that the PSC seek amendment of that subsection in the next session of the General Assembly to rectify that perceived loophole that allows the structure of a business combination or transaction to defeat this Commission’s jurisdiction to protect the consumer and the public.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

BY:



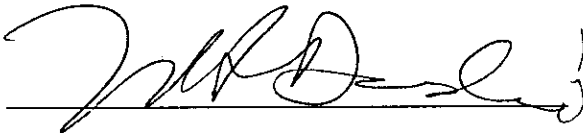
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed or hand delivered this 10th day of October, 2001 to the following counsel of record:

Marc D. Poston
Senior Counsel
Missouri Public Service Commission
P. O. Box 360
Jefferson City MO 65102

Trina R. LeRiche, Esq.
Sonnenschein Nath & Rosenthal
4520 Main Street, Suite 1100
Kansas City, MO 64111

A handwritten signature in black ink, appearing to read "M. D. Poston", is written over a horizontal line.