

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

RECEIVED

MAY 04 2005

IN THE MATTER OF THE COMPLAINT  
FILED BY ELDON LINDQUIST ON  
BEHALF OF PIERRE RADIO PAGING  
& TELEPHONE AGAINST VENTURE  
COMMUNICATIONS COOPERATIVE  
f/k/a SULLY BUTTES TELEPHONE  
COOPERATIVE, INC., REGARDING A  
BILLING DISPUTE

DOCKET NUMBER <sup>CT</sup> ~~05~~ 004

MOTION TO DISMISS  
OR ALTERNATIVELY  
MOTION TO STRIKE

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

COMES NOW Venture Communications Cooperative, f/k/a Sully Buttes Telephone Cooperative, Inc. ("Venture"), by and through Darla Pollman Rogers, of Riter, Rogers, Wattier & Brown, LLP, Pierre, South Dakota, and hereby submits this Motion to Dismiss, or alternatively, Motion to Strike the Complaint filed by Eldon Lindquist on behalf of Pierre Radio Paging & Telephone ("PRPT"), pursuant to ARSD 20:10:01:09.

1. The Complaint of PRPT fails to state a claim upon which relief can be granted, and should therefore be dismissed in its entirety.
2. Venture denies each and every matter and allegation in PRPT's Complaint unless herein specifically admitted or qualified.

MOTION TO DISMISS FOR LACK OF JURISDICTION

3. The South Dakota Public Utilities Commission ("Commission") does not have jurisdiction in this matter. Accordingly, Venture requests that the Complaint be dismissed.

A. The dispute between the parties involves interpretation of federal law, and Federal Communications Commission decisions. Specifically, PRPT is requesting

the Commission to interpret TSR Wireless LLC et al. vs. US Comm. Inc. et al., 15 FCCR 11166 (June 21, 2000) as it applies to Venture. The TSR Order addresses interconnection with one-way paging providers. This Order interprets Sections 251-252 of the Telecommunications Act of 1996.

B. The Commission does not have jurisdiction over carrier matters that are regulated by federal law. Pursuant to SDCL 49-31-3:

The Commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The Commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies. SDCL 49-31-3. (Emphases added).

Plaintiff's Complaint deals solely with application of federal law, thus jurisdiction does not lie with the Commission.

C. This matter has been incorrectly categorized by PRPT as a "consumer billing dispute." This matter is not a billing dispute because there is no allegation that the rate charged was in excess of the tariffed rate. Rather, PRPT alleges that the rate could not be charged to PRPT pursuant to FCC rules and regulations.

D. This Commission further does not have jurisdiction over Venture's local rates. SDCL 49-31-5.1. Therefore, even if this matter is properly considered a billing dispute, this Commission does not have jurisdiction.

#### MOTION TO STRIKE

4. Venture realleges Paragraphs 1 through 3D of the Motion to Dismiss.

5. Pursuant to SDCL 15-6-12(f), Venture moves to Strike the Complaint, on the following grounds:

A. Upon Motion, a party may request an order from the court that strikes from “any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” SDCL 15-6-12(f).

B. Each and every matter contained in Exhibit 1 and attachments of the Complaint improperly refers to settlement negotiations between the parties and is immaterial.

C. Settlement negotiations are not sufficient to state a claim, and are improper and inadmissible before a tribunal. SDCL 19-12-10 provides:

- (1) Furnishing or offering or promising to furnish; or
- (2) Accepting or offering or promising to accept,

a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. SDCL 19-12-10.

D. This rule forbids admission of a settlement or settlement negotiations “to prove liability or invalidity of the claim or its amount.” First Premier Bank vs. Kolcraft Enterprises, 2004 SD 92, ¶21 686 NW2d 430, 443 (citing Kjerstad v. Ravellette Publications, Inc., 517 NW2d 419, 427 (SD 1994)).

#### AFFIRMATIVE DEFENSE

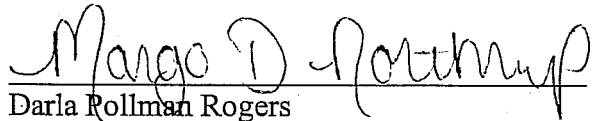
6. Venture realleges Paragraphs 1 through 5D herein.

7. As an affirmative defense, Venture alleges that PRPT’s Complaint is barred by the Statute of Limitations. PRPT is requesting damages in this matter. It is well established by court and FCC procedure that the FCC can award damages for only two years. 47 U.S.C. Section 415.

WHEREFORE, Venture respectfully requests the following:

1. That PRPT's Complaint and all claims asserted therein be dismissed with prejudice, and that PRPT recover nothing thereby or thereunder;
2. That Venture be awarded costs, disbursements, and attorneys' fees incurred herein;
3. Such other and further relief as the Commission deems just and proper.

Respectfully submitted this fourth day of May, 2005.



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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the MOTION TO DISMISS OR ALTERNATIVELY MOTION TO STRIKE was served via the method(s) indicated below, on the fourth day of May, 2005, addressed to:

Keith Senger, Staff Analyst	( )	First Class Mail
South Dakota Public Utilities Commission	(X)	Hand Delivery
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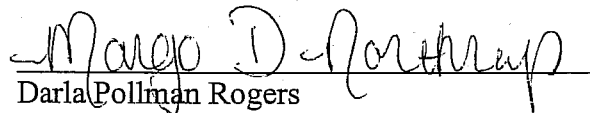
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Dated this fourth day of May, 2005.



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