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May 15, 2006

Via Facsimile and U. S. Mail

Patty VanGerpen (605)773-3809
Executive Director
Public Utilities Commission
500 E Capitol
Pierre SD 57501

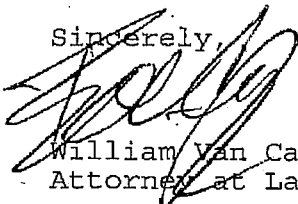
William P. Heaston (605)965-9365
Prairie Wave Telecommunications, Inc.
5100 S Broadband Lane
Sioux Falls SD 57108

Re: Docket CT05-007 PrairieWave Telecommunications v AT&T

Dear Ms. VanGerpen and Mr. Heaston:

Enclosed please find the Response of AT & T to Prairewave's Motion to Dismiss AT & T's Counterclaim and Motion for Summary Judgment relating to the aforementioned docket. If you have any questions or need further information, please let me know.

Sincerely,



William Van Camp
Attorney at Law

WVC:lrd

enclosures

cc: Letty S.D. Friesen w/enc
Rebecca DeCook w/enc
Sara Greff w/enc via fax

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE
COMPLAINT OF PRAIRIEWAVE
TELECOMMUNICATIONS, INC.
AGAINST AT&T CORP.

DOCKET NO. CT05-007

**AT&T'S RESPONSE TO PRAIRIEWAVE'S MOTION TO DISMISS
AT&T'S COUNTERCLAIM AND MOTION FOR SUMMARY JUDGMENT
ON PRAIRIEWAVE'S COMPLAINT**

AT&T Communications of the Midwest, Inc., by and through its undersigned counsel, hereby submits this response to PrairieWave's Motion to Dismiss AT&T's Counterclaim and Motion for Summary Judgment on its Complaint ("Motion").

BACKGROUND

On November 21, 2005, PrairieWave filed a Complaint against AT&T, alleging that AT&T had failed to pay access rates for some unspecified period of time up to the date of the Complaint.

On December 19, 2006, AT&T filed its Answer, Affirmative Defenses and Counterclaim. As relevant here, AT&T's counterclaim asserts that PrairieWave's intrastate switched access rates are excessive and they are unjust, unreasonable, discriminatory and undermine competition. AT&T requested that the Commission, pursuant to ARSD 20:10:27:02, investigate PrairieWave's intrastate switched access rates.

On April 11, 2006, PrairieWave filed a Motion to Dismiss AT&T's Counterclaim and For Summary Judgment of PrairieWave's Complaint on the following grounds; 1) AT&T's counterclaim fails to state a claim of any violation of South Dakota law or regulation; 2) AT&T is required to pay PrairieWave's intrastate access rates under the filed rate doctrine; and 3) PrairieWave's approved tariff rates are res judicata to AT&T.

I. Standard of Review

PrairieWave has filed a Motion to Dismiss AT&T's counterclaim and a Motion for Summary Judgment on its Complaint. To prevail on either Motion, PrairieWave must meet the following standards.

A motion to dismiss challenges the legal sufficiency of a complaint. *Vitek v. Bon Homme County Board of Commissioners*, 650 N.W.2d 513, 516 (S.D. 2002); *Schlosser v. Norwest Bank South Dakota*, 506 N.W.2d 416, 418 (S.D. 1993). A motion to dismiss under SDCL §15-6-12(b)(5) tests the law of a plaintiff's claim, not the facts which support it. *Thompson v. Summers*, 567 N.W.2d 387, 390 (S.D. 1997). A court may grant a motion to dismiss under SDCL 15-6-12(b)(5) only if it appears beyond a doubt that the complaint sets forth no facts to support a claim for relief. *Schlosser*, 506 N.W.2d at 418. Fact allegations must be viewed in a light most favorable to the petitioner. *Id.* Motions to dismiss in civil actions are generally disfavored and is rarely granted. *Thompson*, 567 N.W.2d at 390 (S.D. 1997).

Summary judgment is appropriate when no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law. *Behrens v. Wedmore*, 698 N.W.2d 555, 565 (S.D. 2005); *Jerauld County v. Huron Regional Medical Center*, 685 N.W.2d 140, 142 (S.D. 2004); *Braun v. New Hope Township*, 646 N.W.2d 737, 739 (S.D. 2002). As the court noted in *Jerauld*:

Our standard of review on summary judgment is well-settled. In *Thiewes*, we noted the guiding principles in determining whether a grant or denial of summary judgment is appropriate:

(1) the evidence must be viewed most favorable to the nonmoving part; (2) The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (3) Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists; (4) A surmise that a party will not prevail upon a trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it would be futile to try them; (5) Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubt touching the existence of a genuine issue as to material fact should be resolved against the movant; and (6) Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

Jerauld, 685 N.W.2d at 142 (citing *Department of Revenue v. Thiewes*, 448 N.W.2d 1, 2 (S.D. 1989)).

For the reasons set forth below, PrairieWave has utterly failed to meet either standard and, as a consequence, both Motions must be dismissed.

II. AT&T's Counterclaim Should Not be Dismissed.

A. AT&T's Counterclaim Asserts Facts That, If Proven, Would Establish Violations of South Dakota Law and/or Commission Rules.

PrairieWave claims that AT&T's counterclaim should be dismissed because AT&T's counterclaim fails to state a claim of a violation of state law or regulation. PrairieWave contends that because it has properly followed the state and Commission rules by filing its switched access rates, submitting a cost study to support those rates, and obtaining Commission approval of its rates, pursuant to ARSD 20:10:27:07, no review of its switched access rates may be conducted for three years. Motion at 2-5. In effect, PrairieWave argues that ARSD 20:10:27:07 shields its switched access rates from any challenge for three years. That is not the case. ARSD 20:10:27:07 simply limits how often a provider can be required to file cost support. The rule states that "a carrier's carrier or association shall file cost data in support of its switched access service tariff no less than once every three years." There is nothing in this rule or in any other South Dakota law or Commission rule that insulates PrairieWave's switched access rates from review by complaint or Commission-initiated investigation, at any time. In fact, the very same rule PrairieWave cites to support its insulation argument provides that "the commission may change or revise any switched access rate or price in accordance with SDCL 49-31-12 and 49-31-12.4."

Further, SDCL 49-31-12 provides that the commission shall "change and revise such rates or prices as circumstances require." In addition, SDCL 49-31-3 provides that the commission has general supervision and control of all telecommunications carriers and "shall inquire into any complaints, unjust discrimination, neglect or violation of the laws of the state governing such companies." SDCL 49-31-3 also states that the "commission may exercise powers necessary to properly supervise and control such companies." Finally, SDCL 49-31-4 directs the Commission to ensure that rates for telecommunications services "shall be fair and reasonable." Thus, all that ARSD 20:10:27:07 suggests is that if an investigation occurs, it is done based upon the cost study on file at the time.

In addition, SDCL 49-13-1 permits the filing of complaints. It places no restriction on the scope or timing of any complaint filed with the Commission.

AT&T's counterclaim charges that PrairieWave's rates are unjust, unreasonable, discriminatory and undermine competition. SDCL 49-31-11 prohibits unjust and unreasonable discrimination in the rates or prices charged for telecommunications services. In addition, pursuant to SDCL 49-31-1.4, it is the Commission's obligation, through price regulation, to establish fair and reasonable prices. AT&T's counterclaim asserts that there is a material difference between Qwest's and PrairieWave's intrastate switched access rates which is unjustified. The claims AT&T has made are based upon this difference and the material questions of fact and law that this difference raises as to the lawful basis of PrairieWave's switched access rates and whether PrairieWave is

complying with Commission regulations, such as those governing the allocation of costs. If, for example, PrairieWave is not properly allocating costs, then PrairieWave's rates are not fair and reasonable, are discriminatory and would impede competition if not corrected. For these reasons, AT&T's counterclaim sets forth a sufficient basis to support its claims and to justify Commission review of PrairieWave's switched access. PrairieWave's Motion should be denied.

B The Filed Rate Doctrine Provides No Defense to AT&T's Counterclaim.

PrairieWave next claims that AT&T's counterclaim should be dismissed because the filed rate doctrine "preempt(s) those suits or actions that seek to alter the terms or conditions provided for in the tariff." Motion at 5. The cases cited by PrairieWave do not establish that the review sought by AT&T would be preempted under the filed rate doctrine. Rather, the cases cited by PrairieWave stand only for the proposition that state law claims, including breach of contract or tort claims, challenging filed rates are preempted by the filed rate doctrine.¹ In contrast, AT&T's claim is a lawful and permitted challenge to the rate of a regulated entity with the appropriate agency.

Under the filed rate doctrine, courts have concluded that the exclusive review of rates and terms of interstate services that the Federal Communications Commission ("FCC") is afforded under the Communications Act preempts state

¹ See *AT&T v. Central Office Telephone*, 524 U.S. 214, 221-26 (1998); *Hill v. BellSouth Telecommunications, Inc.*, 364 F.2d 1308 (11th Cir. 2004) (case actually did not involve a filed rate, but representations made by BellSouth regarding its FUSF charge on its bills; *Hill v. MCI WorldCom Communications, Inc.*, 141 F.Supp.2d 1205 (S.D.IA 2001).

law claims that seek to challenge the terms or conditions and rates of such service that are set forth in tariffs approved by the FCC.² In *Central Office Telephone*, the Supreme Court determined that filed and approved rates are presumptively lawful and can be a bar to state breach of contract or tort claims, even if the carrier intentionally misrepresents its rate and the customer relies upon that misrepresentation.³ Courts have noted that the filed rate doctrine may be harsh in some circumstances, but its application is necessary to prevent carriers from intentionally misquoting rates as a means of offering discounts or other discriminatory or preferential treatment, the very evil the filing requirement seeks to prevent.

Courts have recognized that the nondiscrimination principle explains why the filed rate doctrine bars any challenge that, if successful, would have the effect of changing the filed tariff. A successful challenge would afford the party challenging the rate, and not all customers, the very preference that the nondiscrimination requirement seeks to prevent. *See Hill*, 364 F.2d at 1316; *Hill* 141 F.Supp.2d at 1215.

Nonetheless, the filed rate doctrine does not preempt the rate review sought by AT&T in this case – a review of existing rates under state laws and rules governing such rates, initiated pursuant to a complaint or Commission-initiated investigation by the agency charged with regulating such rates. In fact, in *Central Office Telephone*, the Supreme Court states that to the extent the

² See cases cited in footnote 1.

³ However, the Courts have recognized that the filed rate doctrine is not a shield to all state law claims. In *Hill*, the Court concluded that claims that related to matters outside of the scope of the tariff are not barred by the filed rate doctrine. *Hill*, 141 F.Supp.2d at 1214-15.

claimant in that case “is asserting discriminatory treatment, its remedy is to bring suit under § 202 of the Communications Act” – a claim that would be heard by the FCC, the agency that regulated the rates and service that were at issue in the case, or the Court.⁴ In either case, a successful challenge would effect a change in the tariff for all customers, not just those that filed a state law claim – thus eliminating the concern regarding a discriminatory result. The same result would attach here. As discussed above, the Commission is vested with clear authority to review and revise the switched access rates at issue here at any time, either in connection with a filed complaint or on its own motion. Any conclusion reached by the Commission in this case would effect PrairieWave’s tariff as a whole, not just the tariff’s application to AT&T, and would apply to all access customers. The discrimination concerns the filed rate doctrine was developed to address are simply not present here. Therefore, AT&T’s counterclaim is not barred by the filed rate doctrine. PrairieWave has failed to meet its burden and its Motion must be dismissed.

C. AT&T’s Counterclaim is Not Barred by Res Judicata.

PrairieWave claims that res judicata acts as a bar to AT&T’s counterclaim because its switched access rates were considered and approved by the Commission in Docket TC04-115, and AT&T had a full and fair opportunity to participate in the docket. Motion at 6. AT&T disputes this assertion.

⁴ *Central Office Telephone*, 524 U.S. at 226.

A final judgment on the merits is a bar to any future action between the same parties or their privies upon the same cause of action. *Gottschalk, v. South Dakota State Real Estate Commission*, 264 N.W.2d 905, 911 (SD. 1978); *Keith v. Willers Truck Service*, 266 N.W. 256. Res judicata prevents the re-litigation of ultimate facts actually litigated or which could have been properly raised and determined therein. *Gottschalk*, 264 N.W.2d at 908.

PrairieWave's claim that res judicata applies as a bar to AT&T's counterclaim must be rejected for several reasons. First, while res judicata has been applied to contested case proceedings of administrative agencies (*Gottschalk*, 264 N.W.2d 907-08), the underlying administrative proceeding in Docket TC04-115 was not a contested case proceeding. Res judicata has not been applied to administrative proceedings, except where the Commission is acting in a judicial capacity in a contested case proceeding. *Gottschalk* at 907. In Docket TC04-115, no testimony was filed, no discovery conducted, no evidentiary presentation made through a formal hearing that afforded the due process rights to cross examination, and no factual or legal arguments were presented.

Second, AT&T was not a party to the underlying proceeding. PrairieWave cites two cases that it claims support the application of res judicata to AT&T's counterclaim because AT&T "could have participated" in the earlier docket and chose not to intervene. Motion at 7.⁵ Neither case supports PrairieWave's assertion. In *Black Hills*, the Court concluded that the appellants were barred

⁵ *Black Hills Jewelry Mfg. Co. v Felco Jewel Indus.*, 336 N.W. 153, 157 (S.D 1982); *Nite Owl Corp. v. Management Services, Inc.*, 173 N.W.2d 77, 79 (S.D. 1999).

from re-litigating claims against a prior party to an earlier litigation on the same issues, but also against other defendants on the same issues they have already litigated and lost. *Black Hills* at 158. In *Nite Owl*, a case involving a insurance company garnishee's effort to reopen the issue of the underlying liability of the insured after the insured's liability had already been established in a proceeding the garnishee was not a party to, the Court acknowledged the general principle that res judicata does not bind strangers to a judgment, and simply noted that the application of res judicata to persons liable over and persons derivatively responsible has been applied to indemnitors and other persons responsible for the acts or obligations of others. Neither case remotely addresses the situation here, nor compels the conclusion PrairieWave suggests. AT&T was neither a party, in privity with a party, or derivatively responsible to a party in Docket TC04-115. Thus, the cases cited by PrairieWave do not support its argument.

If the Commission were to follow PrairieWave's unfounded extension of res judicata, no customer could ever file a complaint relating to a tariff, because it could be argued that they could have participated in the underlying tariff approval proceeding. PrairieWave's argument is contrary to law and reason.

Finally, PrairieWave's switched access rates were not fully litigated before the Commission in Docket TC04-115. PrairieWave filed its proposed rates, worked off line with Staff to address Staff's issues, entered into an agreement with Staff to address their issues and then, upon the Staff's recommendation, the Commission approved the rates. As discussed above, there was no testimony filed, no discovery and no presentation of evidence that was

subject to cross examination in a formal hearing, as would normally be the case in a contested case proceeding. In short, this matter was never litigated, let alone fully litigated. As a result, the Commission cannot conclude that the same claim was presented in an earlier docket that would bar AT&T's counterclaim. Accordingly, there is no relitigation of any issue here.

For all these reasons, PrairieWave fails to provide any legal basis to support its motion to dismiss AT&T's counterclaim. The Motion should be denied.

IV. PrairieWave's Complaint is Moot and Should be Dismissed. Summary Judgment is Not Appropriate.

PrairieWave's Complaint alleges that AT&T failed to pay its tariffed rates through the date of the filing of the Complaint and seeks payment of all past due amounts. AT&T has agreed to pay PrairieWave all amounts owed up to the point of the filing of AT&T's counterclaim in this case, December 19, 2006. In addition, AT&T has agreed to pay PrairieWave the rate that it believes to be the reasonable rate from December 19, 2006 forward and to informally escrow the disputed amount during the pendency of this proceeding. This was the process PrairieWave agreed to in a similar complaint proceeding brought against AT&T by PrairieWave in Minnesota.⁶ Since AT&T has agreed to pay all intrastate

⁶ See Attachment A, *In the Matter of the Complaint of PrairieWave Telecommunications, Inc. Against AT&T Communications of the Midwest*, Order Finding Failure to Pay Tariffed Rate, Requiring Filing, and Notice and Order for Hearing, Docket No. P-442/C-05-1842, February 8, 2006, p. 2.

switched access charges due PrairieWave prior to the filing of AT&T's counterclaim, Prairie Wave's Motion for Summary Judgment should be denied as Moot.

To the extent PrairieWave contends that any remaining claims still exist related to its Complaint, those claims can only relate to matters that have been put at issue by AT&T's counterclaim (post counterclaim payments of switched access rates). For all the reasons set forth herein, AT&T's counterclaim raises a genuine issue of material fact regarding the legal sufficiency of PrairieWave's switched access rates. AT&T disputes that PrairieWave's rates are fair and reasonable, are nondiscriminatory and do not undermine competition. AT&T has a legal right to file a complaint regarding PrairieWave's switched access and to request that the Commission investigate those rates. The Commission has broad powers under state law to investigate the rates of the companies it regulates and determine if those rates are fair and reasonable and nondiscriminatory. The filed rate doctrine does not bar such review by the agency that regulates those rates. Accordingly, under the principles set forth in *Jerauld*,⁷ PrairieWave's Motion for Summary Judgment as to its Complaint should be denied.

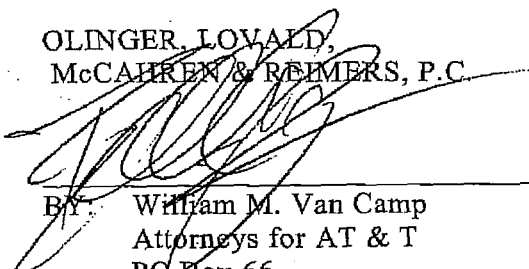
⁷ See Section I, *infra*.

CONCLUSION

For all the reasons set forth herein, PrairieWave's Motion to Dismiss AT&T's Counterclaim and its Motion for Summary Judgment should be denied.

Dated this 15th day of May, 2006.

OLINGER, LOYALD,
McCAHREN & REIMERS, P.C.



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Of Counsel:

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ATTACHMENT A

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer
Marshall Johnson
Ken Nickolai
Thomas Pugh
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint of PrairieWave
Telecommunications, Inc. Against AT&T
Communications of the Midwest

ISSUE DATE: February 8, 2006

DOCKET NO. P-442/C-05-1842

ORDER FINDING FAILURE TO PAY
TARIFFED RATE, REQUIRING FILING,
AND NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On November 21, 2005, PrairieWave Telecommunications, Inc. (PrairieWave), a competitive local exchange carrier serving customers in ten Minnesota exchanges, filed a complaint under Minn. Stat. § 237.462 against AT&T Communications of the Midwest, Inc. (AT&T), an interexchange carrier. The complaint claimed that AT&T was refusing to pay PrairieWave's tariffed rates for intrastate access services, thereby failing to meet its obligations as a telecommunications carrier under Minnesota law and inhibiting local retail competition. The complaint asked the Commission to order AT&T to pay PrairieWave's tariffed access rates.

On December 15, 2005, AT&T filed an answer and counterclaim. The answer admitted that AT&T had not paid monthly invoices submitted by PrairieWave and that it had denied PrairieWave's requests for payment. The counterclaim alleged that PrairieWave's tariffed access rates were unjust, unreasonable, discriminatory, anti-competitive, and therefore illegal and unenforceable. The counterclaim asked the Commission to dismiss the complaint, open an investigation into PrairieWave's access rates, find those rates to be unjust, unreasonable, and harmful to the public interest, and set new rates at just and reasonable levels.

On December 30, 2005, PrairieWave filed an answer to the counterclaim, denying its allegations.

On January 4, 2006, the Minnesota Department of Commerce (the Department) filed comments on the complaint and counterclaim. The Department argued that the complaint turned on legal and policy issues best resolved through argument and analysis and that the counterclaim turned on factual issues best resolved through an evidentiary proceeding.

switched access charges due PrairieWave prior to the filing of AT&T's counterclaim, Prairie Wave's Motion for Summary Judgment should be denied as Moot.

To the extent PrairieWave contends that any remaining claims still exist related to its Complaint, those claims can only relate to matters that have been put at issue by AT&T's counterclaim (post counterclaim payments of switched access rates). For all the reasons set forth herein, AT&T's counterclaim raises a genuine issue of material fact regarding the legal sufficiency of PrairieWave's switched access rates. AT&T disputes that PrairieWave's rates are fair and reasonable, are nondiscriminatory and do not undermine competition. AT&T has a legal right to file a complaint regarding PrairieWave's switched access and to request that the Commission investigate those rates. The Commission has broad powers under state law to investigate the rates of the companies it regulates and determine if those rates are fair and reasonable and nondiscriminatory. The filed rate doctrine does not bar such review by the agency that regulates those rates. Accordingly, under the principles set forth in *Jerould*,⁷ PrairieWave's Motion for Summary Judgment as to its Complaint should be denied.

⁷ See Section I, *infra*.

On January 12, 2006, the case came before the Commission. At that time AT&T admitted that it had refused to pay PrairieWave's tariffed access rates on grounds that they were excessive, had failed to pay the portion AT&T considered non-excessive for an undetermined period of time, and did not have in hand an accurate accounting of the amounts of money at issue.

After the Commission deliberated and determined, among other things, that AT&T was legally obligated to pay PrairieWave's tariffed access rates, AT&T and PrairieWave reached an agreement on the treatment of disputed billings from the filing of AT&T's counterclaim. The two parties agreed that AT&T would establish a private escrow account into which it would deposit the disputed portion of PrairieWave's access charge billings, beginning with the date on which the counterclaim was filed and continuing through the pendency of this proceeding.

FINDINGS AND CONCLUSIONS

I. Summary of Commission Action

The Commission finds that AT&T is obligated to pay PrairieWave's tariffed access rates and that it has failed to do so. The Commission rejects AT&T's contention that it was authorized to withhold payment on the basis of its belief that the tariffed rates were excessive, unjust, unreasonable, and therefore illegal.

The Commission will treat AT&T's counterclaim that PrairieWave's tariffed access rates are excessive, unjust, unreasonable, and therefore illegal, as a complaint under Minnesota Rules 7812.2210, subp. 17 and will refer it to the Office of Administrative Hearings for evidentiary development.

These actions will be explained in turn.

II. AT&T Was and Is Obligated to Pay Tariffed Access Rates

The filed rate doctrine is the longstanding regulatory principle that common carriers are bound by the terms of their tariffs; they cannot make side agreements with individual customers, and any side agreements they do make will be stricken. *Black's Law Dictionary*¹ defines the filed rate doctrine in this way:

Filed rate doctrine. Doctrine which forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority.

¹ *Black's Law Dictionary*, sixth edition.

Although state and federal policy initiatives promoting competition in the local telecommunications market now give carriers unprecedented flexibility in pricing their services, the filed rate doctrine remains intact. No matter how flexible pricing decisions may become, prices and rates must be filed with the Commission and charged uniformly throughout carriers' service areas,² including prices and rates subject to adjustment in response to unique cost, geographic, or market factors or unique customer characteristics.³

PrairieWave therefore lacked the right to accede to AT&T's request to retroactively adjust its access rates, and AT&T lacked the right to pay any rate other than the tariffed rate.

Further, AT&T had a duty to promptly pay all access charges incurred. Both the seamless telecommunications network on which the public depends and the competitive telecommunications marketplace that state and federal policymakers seek, require the prompt satisfaction of inter-carrier financial obligations.

Failing to promptly satisfy these obligations threatens the integrity of the network by creating grounds for disconnection⁴ and jeopardizes competition by depriving unpaid carriers of the funds they need to stay in business. For these reasons, the Commission has long viewed prompt payment of access charges as an integral part of providing adequate service.⁵

The Commission will therefore require AT&T to make a filing permitting the Commission, the Department, and the parties to this case to determine AT&T's unpaid access charge obligation to PrairieWave. At a minimum, this filing must set forth all amounts billed by PrairieWave since this dispute began, all amounts paid by AT&T, and the difference between the two amounts.

² Minn. Stat. § 237.074; Minn. Stat. §§ 237.07 and 237.09, applicable to telecommunications carriers under Minn. Stat. § 237.035 (e); Minnesota Rules 7812.2100, subs. 2, 3, 5, 8, and 9.

³ Minn. Stat. § 237.07, subd. 2, applicable to telecommunications carriers under Minn. Stat. § 237.035 (e); Minnesota Rules 7812.2210, subs. 2 and 5 A and B.

⁴ Disconnection requires Commission approval under Minn. Stat. §§ 237.12, subd. 2 and 237.74, subd. 6 (a) (2) and subd. 9, applicable to telecommunications carriers under Minn. Stat. § 237.035 (e) and under Minnesota Rules 7812.2210, subp. 11.

⁵ In the *Matter of Three Petitions to Discontinue Service to Access Plus*, Docket No. P-999/CI-92-1061, P-421/EM-92-999, P-3006/M-92-1032, P-478/EM-92-1031, ORDER PERMITTING DISCONTINUANCE OF SERVICE, REQUIRING 30-DAY WAIVER OF NONRECURRING CHARGES, AND REQUIRING ACCESS PLUS TO SHOW CAUSE (September 4, 1994) and ORDER ACCEPTING LATE-FILED PETITIONS, GRANTING INTERVENTION PETITION, DENYING PETITIONS FOR RECONSIDERATION, AND REVOKING CERTIFICATE OF AUTHORITY (January 14, 1993).

Pursuant to the parties' agreement, the difference between the two amounts from the date of the filing of the counterclaim through the conclusion of this proceeding will be placed in escrow by AT&T.

III. AT&T's Counterclaim Merits Investigation

The counterclaim filed by AT&T alleges that PrairieWave's intrastate access rates are excessive, unreasonable, discriminatory, anti-competitive, and harmful to the public. PrairieWave concedes that these rates are approximately 100% higher than the intrastate access rates charged by the State's largest local exchange carrier, but argues that they are not excessive in light of PrairieWave's costs and other factors.

AT&T raises serious allegations that require investigation. The Commission will therefore treat AT&T's counterclaim as a complaint under Minnesota Rules 7812.2210, subp. 17 and will refer it to the Office of Administrative Hearings for evidentiary development, as set forth below.

NOTICE AND ORDER FOR HEARING

I. Jurisdiction and Referral for Contested Case Proceedings

The Commission has jurisdiction over PrairieWave's provision of intrastate telecommunications services under the Minnesota Telecommunications Act, Minnesota Statutes Chapter 237, including the following specific grants of jurisdiction: Minn. Stat. §§ 237.035 (e), 237.16, 237.081, 237.461, 237.462, and 237.74.

The Commission finds that it cannot resolve the issues raised in the counterclaim on the basis of the record before it. Those issues turn on specific facts that are best developed in formal evidentiary hearings. The Commission will therefore refer the matter to the Office of Administrative Hearings for contested case proceedings.

II. Issues to be Addressed

The issue in this case is whether PrairieWave's intrastate access rates are unreasonable, excessive, unduly discriminatory, anti-competitive, harmful to the public, or otherwise unlawful. Minnesota Rules 7812.2210, subp. 8 authorizes the Commission to change competitive carriers' rates or take other appropriate action upon complaint and upon finding that the rate complained of:

- unreasonably restricts resale;
- is unreasonably discriminatory;
- is deceptive, misleading, fraudulent, or otherwise unlawful;
- impedes the development of fair and reasonable competition or reflects the absence of an effectively competitive market; or
- has caused or will result in substantial customer harm.

Before making these findings the Commission must conduct an investigation under Minnesota Rules 7812.2210, subp. 17. The investigation may proceed by notice and comment or by contested case proceedings, as in this case.

Minn. Stat. § 237.74, subd. 4 also authorizes the Commission to take remedial action whenever it finds that any rate charged by a telecommunications carrier is unreasonably discriminatory or that any service provided by a telecommunications carrier is inadequate or cannot be obtained.

The parties shall address the above issues in the course of contested case proceedings. They may also raise and address other issues relevant to the counterclaim.

III. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

B. Hearing Procedure

Controlling Statutes and Rules

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200, and the Commission's rules governing complaints against competitive local exchange carriers, Minnesota Rules 7812.2210, subp. 17.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

Right to Counsel and to Present Evidence

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Kevin O'Grady, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 201-2218; or Lisa Crum, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 297-5945.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are AT&T, PrairieWave, and the Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be scheduled by the Administrative Law Judge. The Office of Administrative Hearings will inform the parties of its time and place.

Parties and persons intending to intervene in the matter should attend the conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, settlement prospects, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

E. Time Constraints

Both PrairieWave and AT&T emphasized their need for prompt resolution of this dispute. AT&T is harmed by uncertainty regarding its financial obligations, and PrairieWave is harmed by uncertainty regarding its revenue stream.

The Commission asks the Office of Administrative Hearings to conduct contested case proceedings in light of these concerns and requests that the Administrative Law Judge submit his final report as expeditiously as possible.

IV. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 *et seq.*, may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

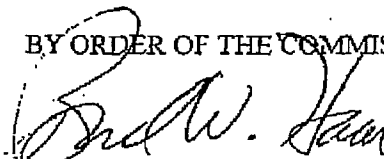
V. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. AT&T shall promptly make a filing permitting the Commission, the Department, and the parties to this case to determine AT&T's unpaid access charge obligation to PrairieWave. At a minimum, the filing must set forth all amounts billed by PrairieWave since this dispute began, all amounts paid by AT&T, and the difference between the two amounts.
2. The Commission hereby refers the issues raised in AT&T's counterclaim to the Office of Administrative Hearings for contested case proceedings, as set forth above.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION


Burl W. Haar
Executive Secretary

(SEAL)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 201-2202 (voice) or 1-800-627-3529 (MN relay service).

STATE OF MINNESOTA)
)SS
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, Margie DeLaHunt, being first duly sworn, deposes and says:

That on the 8th day of February, 2006 she served the attached

ORDER FINDING FAILURE TO PAY TARIFFED RATE, REQUIRING FILING, AND NOTICE AND ORDER FOR HEARING.

MNPUC Docket Number: P-442/C-05-1842

XX By depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid

XX By personal service

XX By inter-office mail

to all persons at the addresses indicated below or on the attached list:

- Commissioners
- Carol Casebolt
- Peter Brown
- Eric Witte
- Marcia Johnson
- Mark Oberlander
- AG
- Roger Moy
- Kevin O'Grady
- Mary Swoboda
- Jessie Schmoker
- Linda Chavez - DOC
- Julia Anderson - OAG
- Curt Nelson - OAG

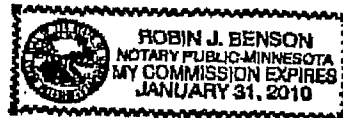
Margie DeLaHunt

Subscribed and sworn to before me,

a notary public, this 8 day of

February, 2006

Robin J. Benson
Notary Public



BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE
COMPLAINT OF PRAIRIEWAVE
TELECOMMUNICATIONS, INC.
AGAINST AT & T CORP.

DOCKET CT05-007

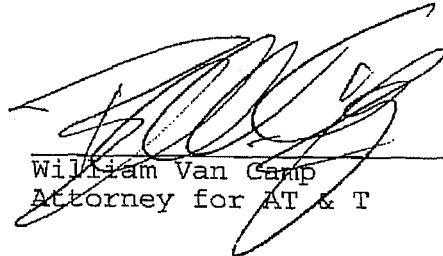
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Response of AT & T to Prairiewave's Motion to Dismiss AT & T's Counterclaim and Motion for Summary Judgment was FAXED to the following persons on May 15, 2006, with hard copies to follow by first class mail

Sara Greff
Staff Attorney
SD Public Utilities Commission
500 E Capitol
Pierre SD 57501

William P. Heaston
General Counsel
PrairieWave Telecommunications, Inc.
5100 S Broadband Lane
Sioux Falls SD 57108

Patty VanGerpen
SD Public Utilities Commission
500 E Capitol
Pierre SD 57501



William Van Camp
Attorney for AT & T