



Bob Sahr, Chair
Dustin Johnson, Vice-Chair
Gary Hanson, Commissioner

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
www.puc.sd.gov

Capitol Office
(605) 773-3201
(605) 773-3809 fax

Transportation/Warehouse
(605) 773-5280
(605) 773-3225 fax

Consumer Hotline
1-800-332-1782

June 20, 2006

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

Mr. William Van Camp
Attorney at Law
Olinger, Lovald, McCahren & Reimers, P.C.
P. O. Box 66
Pierre, SD 57501-0066

Re: In the Matter of the Complaint filed by PrairieWave
Telecommunications, Inc. against AT&T Communications
of the Midwest, Inc. Regarding Access Charges
Docket CT05-007

Dear Counsel:

Enclosed each of you will find a copy of Staff's Response to PrairieWave's Motion to Dismiss AT&T's Counterclaim and for PrairieWave's Motion for Summary Judgment. This is intended as service upon you by mail.

Very truly yours,


Sara B. Greff
Staff Attorney

Enc.

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE COMPLAINT FILED)	STAFF'S RESPONSE TO
BY PRAIRIEWAVE TELECOMMUNICATIONS,)	PRAIRIEWAVE'S MOTION
INC. AGAINST AT&T COMMUNICATIONS OF)	TO DISMISS AT&T'S
THE MIDWEST, INC. REGARDING ACCESS)	COUNTERCLAIM AND FOR
CHARGES)	PRAIRIEWAVE'S MOTION
)	FOR SUMMARY JUDGMENT
)	CT05-007

COMES NOW Commission Staff, by and through one of its attorneys, and hereby responds to the Motion to Dismiss of AT&T's (AT&T) Counterclaim by PrairieWave (PrairieWave) and the Motion for Summary Judgment on PrairieWave's Complaint filed on April 12, 2006. PrairieWave has moved for dismissal of AT&T's counterclaim and also has asked the South Dakota Public Utilities Commission (Commission) to grant its motion for summary judgment.

FACTS

Both parties have extensively briefed the facts surrounding these issues. Therefore, Staff will give a brief procedural recap.

PrairieWave filed a Complaint against AT&T on November 21, 2005. The Complaint alleges that AT&T failed to pay access rates for a period of time. AT&T filed an answer to PrairieWave's Complaint on December 19, 2005, and asserts several affirmative defenses and a counterclaim asking for an investigation into PrairieWave's intrastate switched access rates. On January 3, 2006, PrairieWave filed its response to the counterclaim made by AT&T.

On April 12, 2006, PrairieWave filed a Motion to Dismiss AT&T's Counterclaim and a Motion for Summary Judgment on PrairieWave's Complaint. AT&T filed a response to PrairieWave's Motion to Dismiss and Motion for Summary Judgment on May 15, 2006.

ANALYSIS

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

In reviewing a motion to dismiss, the Commission must look at and accept the material allegations as true and view them in the light most favorable to the complainant. Fenske Media

Corp. v. Banta Corp., 676 NW2d 390, 393 (SD 2004) citing Schlosser v. Norwest Bank South Dakota, N.A., 506 NW2d 416, 418 (SD 1993). “[P]leadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action as this is a matter of proof, not pleadings. The rules of procedure favor the resolution of cases upon the merits by trial or summary judgment rather than on failed or inartful accusations.” *Fenske*, 676 NW2d at 393 (citing *Thompson v. Summers*, 1997 SD 103 ¶6, 567 NW2d 387, 390. It is important for the court to look at the complaint to determine if any possible theory exists on which to provide relief for. *Id.* Motions to dismiss are looked at with disfavor and rarely granted. *Id.*

PrairieWave is demanding this Commission to dismiss AT&T’s counterclaim because it fails to state a claim for relief. PrairieWave also claims that the filed tariff doctrine and the doctrine of res judicata bars AT&T from bringing its counterclaim forward.

Failure to State a Claim

PrairieWave suggests that since they have followed the Commission’s laws and rules regarding switched access rates and those rates have been approved and AT&T did not intervene in those matters, AT&T has no standing to suggest those rates are unreasonable today. See SDCL 46-31-19 and ARSD 20:10:27. The Commission’s rules provide 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.” ARSD 20:10:27:07.

PrairieWave filed a switched access cost study with the Commission on June 29, 2004. See Commission Docket TC04-115. The Commission approved PrairieWave’s filed cost study on December 29, 2004. *Id.* At no time did AT&T petition to intervene in the review of PrairieWave’s switched access cost study. PrairieWave is now arguing that because of AT&T’s failure to intervene back in 2004, there can be no further review of the rates until PrairieWave files another cost study with the commission which would be at the earliest in 2007.

Staff submits that there is no Commission rule or law that would prohibit AT&T from filing a complaint against PrairieWave asking for a review of PrairieWave's switched access rates. In fact the Commission's laws and rules allow for a company's rates and prices to be changed or revised as circumstances require. See SDCL 49-31-12. SDCL 49-31-12 allows for the Commission to "change and revise such rates or prices as circumstances require." *Id.*

The rule that PrairieWave argues should prohibit AT&T from filing this complaint, ARSD 20:10:27:07 does not act as a bar to AT&T from filing its counterclaim, it merely acts as a guide as to how often a provider is required to file cost data support. Therefore AT&T's counterclaim does not fail to state a claim of relief and the Commission should proceed to hearing on the merits of that claim.

Filed Rate Doctrine

PrairieWave also contends that AT&T's counterclaim should be dismissed because the filed rate doctrine preempts this complaint that seeks to alter the conditions provided for in its tariff. AT&T claims that its counterclaim is lawful and they are not prohibited from challenging the rate of a regulated entity with the appropriate agency.

The filed rate doctrine, "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate . . . authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 US 571, 101 SCt 2925, 69 Led2d 856 (1981).

The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act, and has been extended across the spectrum of regulated utilities. "The considerations underlying the doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." (citations omitted).

Id. at 578.

Staff would offer that the filed rate doctrine is there to protect the consumers from regulated companies charging something other than the rate that has been approved for them. The doctrine does not prohibit someone with a legal right to challenge the prospective reasonableness of a rate.

In the matter at hand, AT&T is challenging the reasonableness of PrairieWave's rate, not whether the rate it is charging is in fact different from the rate it has on file with the Commission.

As discussed previously, Staff believes AT&T has a legal right to challenge the reasonableness of PrairieWave's rate. AT&T in its memorandum to PrairieWave's motion suggests that it is challenging the reasonableness of PrairieWave's rate on a prospective basis. That fact seems to be in dispute. However, the Commission should not bar AT&T's counterclaim as to the prospective reasonableness of PrairieWave's switched access rates.

Res Judicata

Finally, PrairieWave argues that the doctrine of res judicata acts as a bar against AT&T's counterclaim. PrairieWave claims that since its current switched access rates were fully reviewed and approved in Commission Docket TC04-115 and AT&T chose not to intervene in the matter, AT&T is now barred from bringing further action. AT&T disputes this assertion.

'Res judicata serves as a bar to the relitigation of claims pursued and litigated in prior proceedings.' Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc., 336 NW2d 153, 157. The doctrine acts as a mechanism to ensure parties aren't subject to the litigation of issues more than once as the finality of legal matters best serves public policy. *Id.*

Staff believes the doctrine of res judicata should not be extended to AT&T's counterclaim. Extending the doctrine of res judicata to the circumstances surrounding AT&T's counterclaim would prevent anyone in the future from filing an action against a telecommunications carrier challenging its existing rates. PrairieWave's argument suggests that the only forum for a party to challenge switched access rates is in ARSD 20:10:27:07 compliance filings. This is simply not the legislative intent behind the Commission's laws. The legislature has given the Commission the authority to "change and revise such rates or prices as circumstances require." SDCL 59-31-12. Therefore, the doctrine of res judicata should not act as a bar to AT&T's counterclaim.

II. **PrairieWave's Complaint is not Moot and Should not be Dismissed on Summary Judgment**

SDCL 1-26-18, set forth below, addresses the factors the Commission shall consider when determining whether or not to grant PrairieWave's motion for summary disposition.

1-26-18. Rights of parties at hearings on contested cases--Summary disposition of certain cases. Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. However, each agency, upon the motion of any party, may dispose of any defense or claim:

(1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law;
or

(2) At the close of the evidence offered by the proponent of the defense or claim if it determines that the evidence offered by the proponent of the defense or claim is legally insufficient to sustain the defense or claim.

A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross-examine witnesses, may present evidence in support of the party's interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence in the party's behalf. (emphasis added).

The motion for summary disposition shall be granted if PrairieWave has demonstrated through pleadings, answers to interrogatories, and admissions on file, together with affidavits, show that there is an absence of any genuine issue of material fact and that as the moving party it is entitled to summary disposition as a matter of law. See SDCL 1-26-18.

Here, PrairieWave has filed its motion along with an exhibit and a supporting brief alleging that there is no dispute over any material fact, thus PrairieWave is entitled to be paid its tariffed rates that AT&T has neglected to pay since March 2005 totaling \$124,213.10. PrairieWave insists that this entitles it, as a matter of law, to have its motion for summary disposition granted.

AT&T alleges in its Memorandum that it has agreed to pay PrairieWave's tariffed rates up until December 19, 2005, which is the date that AT&T filed its counterclaim. Therefore,

PrairieWave's Summary Judgment Motion should be denied because it is moot and the Complaint should remain viable only to the extent of issues surrounding AT&T's counterclaim.

The administrative procedure of summary disposition available to agencies and the circuit court's procedure of summary judgment are similar. Case law addressing the issue of when summary judgment may be granted is quite clear,"[I]n reviewing a grant or denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and [established] entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party, and reasonable doubts should be resolved against the moving party." Thorton v. City of Rapid City, South Dakota, 2005 SD 15 &4, ___NW2d ___, ___ (citations omitted). "[S]ummary judgment will be affirmed 'only when there are no genuine issues of material fact and the legal questions have been correctly decided.'" Olesen v. Town (City) of Hurley, 2004 SD 136 & 8, ___ NW2d ___ (citations omitted).

Here, AT&T, as the nonmoving party, is alleging that there are genuine issues of material fact as to its counterclaim. Based upon this and the fact that there is confusion as to whether or not AT&T has paid PrairieWave its tariffed access rate, it is Staff's recommendation that the Commission deny the Motion for Summary Judgment as the evidence must be viewed most favorably to the nonmoving party, and reasonable doubts should be resolved against the moving party.

CONCLUSION

Wherefore, Staff respectfully submits that AT&T's counterclaim should not be dismissed and PrairieWave's Complaint should not be summarily dismissed. The Commission should hold a hearing on the merits of both parties' claims.

Dated this 20th day of June, 2006.

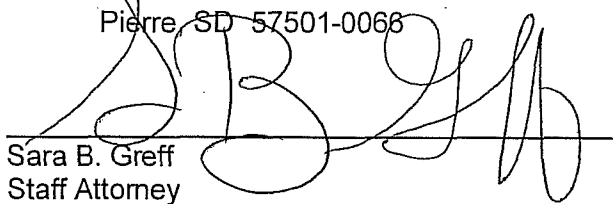
/S/ SARA B. GREFF
Sara B. Greff
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Staff's Response to PrairieWave's Motion to Dismiss AT&T's Counterclaim and for PrairieWave's Motion for Summary Judgment were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 20th day of June, 2006.

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

Mr. William Van Camp
Attorney at Law
Olinger, Lovald, McCahren & Reimers, P.C.
P.O. Box 66
Pierre, SD 57501-0066


Sara B. Greff
Staff Attorney