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THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT FILED  
BY PRAIRIEWAVE TELECOMMUNICATIONS, INC. CT05-007  
AGAINST AT&T COMMUNICATIONS OF THE  
MIDWEST, INC., REGARDING ACCESS CHARGES

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Transcript of Proceedings  
August 8, 2006

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BEFORE THE PUC COMMISSION

Chairman Robert Sahr  
Vice-Chair Dusty Johnson  
Commissioner Gary Hanson

COMMISSION STAFF

John Smith  
Sara Greff

**ORIGINAL**

APPEARANCES

WILLIAM P. HEASTON,  
General Counsel, PrairieWave Telecommunications,  
5100 South Broadband Lane, Sioux Falls,  
South Dakota 57108,  
appearing on behalf of PrairieWave Telecommunications;

REBECCA B. DECOOK,  
HOLLAND & HART, Attorneys at Law,  
8390 E. Crescent Parkway, Suite 400,  
Greenwood Village, Colorado 80111,  
appearing on behalf of AT&T Communications of the  
Midwest, Inc.

WILLIAM M. VAN CAMP,  
OLINGER, LOVALD, MCCAHERN & REIMERS, Attorneys  
at Law, P.O. Box 66, Pierre, South Dakota 57501,  
appearing on behalf of AT&T Communications of the  
Midwest, Inc.

1 TUESDAY, AUGUST 8, 2006

2 CHAIRMAN SAHR: We will take up number three under  
3 consumer complaints, CT05-007, in the matter of the complaint  
4 filed by PrairieWave Telecommunications, Inc., against AT&T  
5 Communications of the Midwest, Inc., regarding access charges.  
6 And the question today is, shall the commission grant  
7 PrairieWave's motion to dismiss AT&T's counterclaim, and shall  
8 the commission grant in whole or in part PrairieWave's motion  
9 for summary judgment on its complaint? We are taking a record  
10 on this one, so if everyone please remember we do have a court  
11 reporter here and if you are on the phone line, please speak  
12 clearly and slowly. With that, good afternoon, Mr. Heaston.

13 MR. HEASTON: Thank you, Mr. Chairman. My name is  
14 Bill Heaston, I'm in-house counsel for PrairieWave  
15 Communications. I think I got a year older today waiting for  
16 this to happen. Last year in '05 or even before that in '04  
17 PrairieWave filed a cost study for PrairieWave  
18 Telecommunications, Inc., which is its competitive local  
19 exchange company in South Dakota. We filed that cost study  
20 pursuant to the commission's rules, which were promulgated back  
21 in 1993 when Commissioner Johnson was probably still in high  
22 school, and these rules have been in effect and have been  
23 operational and have been applied by this state, applied by the  
24 staff, applied by the commissioners throughout in a consistent,  
25 uniform manner. There has been nothing to cause any change to

1 those rules.

2 There have been numerous dockets today that involve  
3 those rules and the application of those rules. I even saw one  
4 where we went back and reopened a docket for an 11 cent rate  
5 and approved that without refund. That was fine. We took a  
6 look at a 2005 test year and said let's preserve that test year  
7 for these companies because they are continuing to invest and  
8 they want to be able to preserve that.

9 Now, PrairieWave Telecommunications did not have to  
10 file a cost study prior to it becoming PrairieWave when it was  
11 part of McLeod, it did not, it just mirrored the Qwest rate and  
12 the Qwest rate, based upon a 2001 docket, was over six cents a  
13 minute, .060905, and why do I know that? Because I was  
14 representing US West when we went through that whole long  
15 ordeal to get that rate established, and it went to court a  
16 couple of times and we ended up with an agreement to phase in a  
17 rate up to that .060905, and I know Harlan Best and Greg Rislov  
18 remember that because they were part of that. They know these  
19 costs, they know the cost studies, they know the rules and they  
20 know how to apply them. They know how to review those rules  
21 when a company like PrairieWave comes in and files its costs,  
22 so that when they are done with their review and they come to  
23 you as a commission and say that these rates are fair and  
24 reasonable and reflect the cost to the company, you know they  
25 have done a thorough job and that's what those rates are and

1 what they should be, that those rates are fair and reasonable,  
2 and under South Dakota statute, when you approved PrairieWave  
3 Telecommunications rates in December of 2004, those were fair  
4 and reasonable rates.

5 Now, through that entire process, AT&T has been  
6 around. AT&T participated in the rule making back in '93.  
7 They know all about this. They could have intervened in any  
8 one of these dockets. They could have intervened in the  
9 PrairieWave Telecommunications docket. They didn't. Those  
10 rates were set. The three-year rule has been discussed here,  
11 that you have a rule that says that we have to come in at least  
12 every three years and file a cost study to make sure that our  
13 rates are fair and reasonable. That gives you a review. That  
14 does a couple of things. It gives us rate stability, but it  
15 gives the customer rate stability. The customer knows what the  
16 rate is going to be. It isn't constantly changing. And if it  
17 is going to change, it isn't going to change without the review  
18 of the experts on your staff with your review and your order.

19 Now, the statutes take care of this. All of this can  
20 be lumped under one term really, the filed rate doctrine.  
21 That's why you have this, that's why you have these rules,  
22 that's why you have statutes like 49-31-18, 49-31-19 and the  
23 whole series in 49-31-12. That is the filed rate docket. We  
24 have to come to you, the commission, file our tariffs for  
25 access rates, you have to review them, you have to approve

1 them, and that's what happened in December of 2004. Those  
2 rates went into effect at the end of December of 2004. AT&T  
3 paid those rates until May of 2005, then stopped paying  
4 completely, didn't pay us a dime in telecommunications and  
5 hasn't paid us a dime since.

6 Now, if you read -- if you have read my briefs, if you  
7 understand the filed rate doctrine at all, if you have looked  
8 at even the FCC order I cited to you in my initial motion for  
9 summary judgment, you know that refusal to pay a rate that is  
10 presumed fair and reasonable and therefore lawful is not  
11 lawful. You can't do that. A company cannot decide it isn't  
12 going to pay. It has to pay the rate. That rate is presumed  
13 to be the lawful rate under that doctrine and they have not  
14 paid us a dime toward those rates and that's wrong, it's  
15 unlawful.

16 So when we filed the complaint in November of 2005 and  
17 they filed their response in December of 2005, they filed a  
18 counterclaim saying, oh, no, the rate is not fair, it's not  
19 reasonable. Well, why isn't it fair, not fair or not  
20 reasonable? Well, it's different than US West's rate or  
21 Qwest's rate. It's different than the Qwest rate. That's the  
22 only factual allegation in the whole pleading. The only one.  
23 They can't tell you why. They say, well, it's unfair and  
24 unreasonable, but they can't tell you why. They don't say the  
25 staff screwed up and didn't review our rates and that they

1 mistook what we filed as our cost study and the rate base that  
2 we used the rate year of 2003, that that was wrong. They  
3 didn't say that you screwed up by listening to your staff. So  
4 that rate is fair. We should be paid.

5 Now, you did do the rate -- the rule making in 1993  
6 and you put a three-year rule in there, again to give stability  
7 to not only the company but to the customers. So you know what  
8 the fair and reasonable rate is and you know what you need to  
9 pay. Now, I'm not saying AT&T can't file a complaint against a  
10 rate, but they have got to allege more than it's just different  
11 than somebody else's rate. As a matter of fact, our rate,  
12 which is under seven cents, is closer to the Qwest rate than it  
13 is to anybody else's rate in the state, by a big margin. So if  
14 there's anything, any hint that it would be unreasonable, it's  
15 not there. It's not there. And so that's why we believe this  
16 is a legitimate motion for summary judgment.

17 We are due to come back in next year under the  
18 three-year rule with a 2006 study year, refile that cost study.  
19 That's what we plan to do. We could come in and mirror Qwest.  
20 Qwest hasn't filed a cost study in over six years. It didn't  
21 file one last time, it just wanted to ride on the rates it was  
22 with, and as I remember the filing, the one reason was is  
23 because their new cost study actually showed a higher rate than  
24 they were charging now and they didn't want to do that.

25 So we believe this should be a judgment in our favor,

1 a summary judgment. There are no disputed facts. The law is  
2 the filed rate doctrine, they are supposed to pay that rate.  
3 There's no reason to go to any kind of hearing here because you  
4 have a three-year rule and they had an opportunity to operate  
5 by that and they have alleged absolutely nothing that would  
6 indicate that that rate is not fair and not reasonable as you  
7 ordered in December of 2004.

8 So we would ask the commission to dismiss AT&T's  
9 counterclaim and to give us a summary judgment on our complaint  
10 and order AT&T to pay us. Right now we are out almost  
11 \$170,000. We are not the size of AT&T and \$170,000 is a lot of  
12 money to us. And we need to have that money paid by AT&T.  
13 Every other carrier like them, and there are 51 of them that  
14 could be one plus picked in our switch, pay the rate but AT&T.  
15 I'm open for questions.

16 CHAIRMAN SAHR: Thank you very much. Commissioner  
17 Johnson, did you want to ask a question now?

18 VICE-CHAIR JOHNSON: I wanted to make a comment. I  
19 appreciate Mr. Heaston's historical perspective for those of us  
20 that are a little bit younger and I'm particularly interested  
21 in your comments because I know you were able to study with the  
22 great Alexander Graham Bell. I appreciate your comments.

23 CHAIRMAN SAHR: AT&T.

24 MS. DECOOK: Good afternoon, can you hear me?

25 CHAIRMAN SAHR: Yes, we can, and you have your local

1 counsel here at the mike as well in Pierre, and I'll just ask  
2 you we do have a court reporter here, if you both make  
3 appearances, we would appreciate that, thank you.

4 MR. VAN CAMP: This is Bill Van Camp, I'm in state  
5 counsel for AT&T. Rebecca DeCook of Holland and Hart will be  
6 making the presentation, but we both will be available for  
7 questions of the commission.

8 CHAIRMAN SAHR: Thank you very much. Ms. Cook.

9 MS. DECOOK: It's DeCook, D-E-C-O-O-K. Good  
10 afternoon, Chairman Sahr, commissioners. I know by having  
11 listened some of the morning that you will let me know if you  
12 can't hear me and I appreciate you letting me appear by phone.

13 I'd like to frame the issues here a little more  
14 carefully. I think the issues have been a bit blurred by  
15 PrairieWave. There are two motions before the commission for  
16 consideration today. The first is a motion for summary  
17 judgment on PrairieWave's complaint, and the second is a motion  
18 to dismiss AT&T's counterclaim, and they each present very  
19 separate matters for consideration by the commission and so we  
20 need to look at them separately and determine what the standard  
21 of review is and whether that standard of review has been met  
22 by PrairieWave in this case.

23 Based upon the law AT&T cited in its brief and the law  
24 cited by staff in its brief, motions to dismiss in civil  
25 actions are generally disfavored and are rarely granted. A



1 motion to dismiss can only be granted if it appears beyond a  
2 doubt that the complainant can prove no set of facts in support  
3 of his claim which would entitle him to relief. Thus, a motion  
4 to dismiss tests the law of a plaintiff's claim, not the facts  
5 which support it. And it's the facts that PrairieWave has  
6 really focused on in this case, not the law. Therefore, it's  
7 kind of turned the standard for a motion to dismiss on its  
8 head.

9 In addition, the Fenske case that's cited by staff  
10 states that the material allegations of a complaint must be  
11 accepted as true as well as any inferences reasonably drawn  
12 from those facts. Those allegations must be viewed in the  
13 light most favorable to the pleader and in order to determine  
14 whether the allegations state a claim on any possible theory,  
15 that is, legal theory. So again it's a test of the law, not  
16 the facts that are alleged in a complaint. And this is  
17 consistent with South Dakota law, which requires nothing more  
18 than notice pleading when you file a complaint or a  
19 counterclaim, and that's SDCL 15-6-8(a).

20 Now, PrairieWave acknowledges all these legal  
21 predicates, but in its reply and in its argument here today, it  
22 ignores them and instead focuses entirely on the facts pled by  
23 AT&T, not the law. PrairieWave appears to contend that AT&T  
24 has not pled enough facts or the right facts to support its  
25 claim. But that's really not the issue. The issue is, is

1 there a set of facts that could be presented to the trier of  
2 fact, in this case you, the commission, that would support a  
3 claim for relief under South Dakota law. And AT&T's complaint  
4 surely satisfies this requirement.

5 AT&T's counterclaim charges that PrairieWave's rates  
6 are unjust, unreasonable, discriminatory and undermine  
7 competition. The counterclaim asserts that there is a  
8 difference between Qwest and PrairieWave's intrastate switched  
9 access rate and that difference is unjustified. South Dakota  
10 law is pretty clear that AT&T doesn't have to prove its case in  
11 its complaint, as PrairieWave suggests it must do. The pleader  
12 merely has to assert sufficient facts that, if proven, would  
13 state a cognizable legal claim. AT&T has done so.

14 South Dakota law 49-31-11 prohibits unjust and  
15 unreasonable discrimination in the rates or prices charged for  
16 telecommunications services. South Dakota law 49-31-1.4  
17 obligates the commission to establish fair and reasonable  
18 prices. AT&T has called into question whether PrairieWave's  
19 rates satisfies these statutes. So it's met the requirements  
20 that would withstand a motion to dismiss. It has established a  
21 claim for relief under these statutes.

22 In its initial filing, PrairieWave asserts that rule  
23 20:10:27:07 and the commission's prior review of its rates  
24 shields its access rates from any challenge for three years,  
25 and therefore, AT&T cannot state a legal claim for relief. It

1 also seems to suggest in its argument today that the filed rate  
2 doctrine as a result would protect its rates from any challenge  
3 and would require payment irrespective of a challenge.

4           There is nothing in South Dakota law or the commission  
5 rules that insulate PrairieWave switched access rates from  
6 review by complaint or a commission initiated investigation at  
7 any time, and our brief cites to the various provisions of  
8 South Dakota law which provides for complaints and which gives  
9 the commission ample statutory authority to conduct a review  
10 that's requested in AT&T's counterclaim.

11           In its reply, PrairieWave seems to admit that AT&T has  
12 a right to file a complaint and to challenge a rate in a filed  
13 tariff. It then, however, asserts that AT&T hasn't pled the  
14 right facts or enough facts. And as I discussed before, that's  
15 simply not sufficient to satisfy the standards for a motion to  
16 dismiss. There is law that provides AT&T a claim for relief.  
17 AT&T has provided sufficient notice of what its claim is with  
18 respect to that law, so PrairieWave's motion to dismiss, in our  
19 view, should be denied.

20           Similarly, the filed rate doctrine that was mentioned  
21 by Mr. Heaston doesn't provide any recourse here. The filed  
22 rate doctrine simply doesn't apply. The filed rate doctrine  
23 prohibits a regulated entity from charging rates other than  
24 those that are tariffed. It does not in any way prohibit the  
25 legal challenge of the existing rates. And as I discussed

1 earlier, the commission is vested with clear authority to  
2 review and revise switched access rates at any time.  
3 Therefore, AT&T's counterclaim is simply not barred by the  
4 filed rate doctrine.

5 PrairieWave also suggested that AT&T's counterclaim is  
6 barred by the doctrine of res judicata. It appears that  
7 PrairieWave has abandoned that argument, so I won't restate our  
8 defense to that assertion. As a result, I think based on all  
9 of this, it's clear that AT&T's counterclaim is sufficiently  
10 pled and should survive any motion to dismiss, based on South  
11 Dakota law, and therefore, we would urge the commission to deny  
12 PrairieWave's motion to dismiss.

13 As for the motion for summary judgment, there are  
14 really two facets to the motion for PrairieWave's complaint.  
15 The first facet appears to be the payments that were due up  
16 until the time that PrairieWave filed its complaint, and as I  
17 indicated in the pleading I filed on behalf of AT&T, AT&T has  
18 agreed to pay those amounts and AT&T informed PrairieWave that  
19 it would agree to pay these amounts by e-mail dated May 15th,  
20 2006, and we sent PrairieWave a chart depicting the amount that  
21 AT&T has determined it owed PrairieWave, in order to obtain  
22 PrairieWave's concurrence that we had properly calculated the  
23 amounts.

24 PrairieWave ultimately concurred in the chart, but  
25 noted a discrepancy which AT&T then proceeded to investigate.

1 AT&T was unable to confirm the discrepancy but has agreed to  
2 pay and has authorized a payment and payment should reach  
3 PrairieWave on both the past due amounts, which are being paid  
4 in total up through the date of the counterclaim and the  
5 undisputed portion of the bill that has accrued since the  
6 filing of the counterclaim. In total, PrairieWave should  
7 receive a payment by August 14th of approximately \$130,000, and  
8 that's a rough number, but it's roughly that amount. And at  
9 this point the amount that's in dispute is approximately \$8,000  
10 and that's through the 7-1 billing period, 7-1-06 billing  
11 period.

12 As a result, we believe that PrairieWave's complaint  
13 is moot up through the point in which AT&T filed a  
14 counterclaim. We believe that AT&T's counterclaim, however,  
15 puts at issue the validity and reasonableness of PrairieWave's  
16 rate and that, therefore, any motion to dismiss that would  
17 affect the period following the filing of the counterclaim  
18 should be denied. And I'm open to any questions if you have  
19 any.

20 CHAIRMAN SAHR: Thank you very much. And you did come  
21 through loudly and clearly, so we thank you for that. What we  
22 are going to do is we will hear from staff and then we will see  
23 if commissioners have questions, but if you would stay on the  
24 line, we would appreciate it. Thank you. Staff.

25 MS. GREFF: Thank you, Chairman Sahr, and just so

1 Commissioner Johnson doesn't feel like he's the only one being  
2 picked on, I, too, was in high school in 1993. But just to  
3 keep this brief and move it along, staff would rest on its  
4 brief for its arguments and would echo AT&T's comments as to  
5 the motion to dismiss. Staff does not believe that res  
6 judicata or the filed rate doctrine prohibit AT&T from filing a  
7 counterclaim.

8 As to the summary judgment motion, it is clear that  
9 the standard of review for summary judgment is that if any --  
10 if there's any showing of material fact that is different, the  
11 party is not entitled to summary judgment as a matter of law.  
12 And it is clear that we have two different stories here. We  
13 have PrairieWave saying that no payment has been offered or  
14 tendered or received and now we have AT&T saying that payment  
15 is going to be coming for past rates due on August 14th. I  
16 think it would take some ferreting out of those issues and some  
17 evidence to make sure that that issue is taken care of before  
18 we summarily dismiss the past due payment issues. And with  
19 that, I guess staff would rest on its brief.

20 CHAIRMAN SAHR: Thank you very much. Mr. Heaston, why  
21 don't we give you an opportunity to respond and we will see if  
22 the commissioners have questions.

23 MR. HEASTON: In addressing what AT&T has discussed,  
24 if you look at the Schlosser case, which is the case that AT&T  
25 relied on, Judge Kean had to go beyond the pleading to

1 additional elements that had been introduced as a part of the  
2 pleading and that was a contract. AT&T hasn't done anything  
3 like that. If you read the statute that talks about summary  
4 judgment, it is the same thing, you are to consider everything  
5 that could be introduced and the only thing that's been  
6 introduced is an assertion that there's a difference in rates.  
7 That's the only thing.

8           Sure, there's a difference in rates, no company has  
9 the same rate. No company has the same cost characteristic,  
10 exactly the same. So when you do the cost study, things are  
11 going to come out differently for each company. So rates are  
12 going to be different for each company. So that proves  
13 nothing. There's nothing in anything that they have pled, and  
14 Judge Kean uses the words well pled, and that lead you to  
15 believe that they would be successful in any complaint.  
16 There's nothing. There's no doubt that they couldn't be  
17 successful, to the mere fact there are two different rates  
18 proves nothing, establishes nothing, raises no issue.

19           Now, the fact that they haven't paid, that certainly  
20 calls into question the filed rate doctrine. Once you have  
21 established a filed rate, the customer is under a legal  
22 obligation to pay that rate and AT&T didn't do that and to  
23 allow them to get away with that seems to be unconscionable.  
24 They flouted your statutes, they flouted your findings, they  
25 have declared them to be practically inconsequential and they

1 don't have to follow them. They can do whatever they darn well  
2 please because they are AT&T. And that's the attitude that  
3 comes across in their pleadings, that's the attitude that came  
4 across when we discussed this with them for months trying to  
5 get payment.

6 So if you want to engender that kind of conduct, if  
7 you want to encourage that kind of conduct, if you want to  
8 encourage complaints that just by someone saying, I think the  
9 rate is unfair, therefore, commission, you have got to go back  
10 and take a look again, without anything more, and again the  
11 Schlosser case makes that very clear. You have to have  
12 something, something that shows you are going to be kind of  
13 successful at this complaint and there's nothing here.

14 And the comfort you can take in dismissing this  
15 complaint is, number one, you got a very experienced staff that  
16 reviews these dockets and approves the cost studies after very  
17 thorough and detailed review, and you have got the fact that  
18 PrairieWave is going to have to do it again next year. And so  
19 PrairieWave just does not see any purpose in this complaint.  
20 The complaint should be dismissed. PrairieWave does not see  
21 any reason why we should not have summary judgment on this, and  
22 the filed rate doctrine plays a part, I'm sorry, you cannot  
23 separate that under either dismissing the complaint or granting  
24 the motion for summary judgment. That's what the law is, that  
25 you approve rates as fair and reasonable and they are presumed



1 fair and reasonable and the customer is supposed to pay that  
2 rate and we can only charge that rate, and that's all we have  
3 done, is follow the law. AT&T has not, and I guess that's what  
4 you really need to do.

5 CHAIRMAN SAHR: Thank you. I do have a couple  
6 questions, Mr. Heaston. One, certainly in a situation like  
7 this, there may be some value with allowing discovery to go  
8 forward. This isn't your typical case where all the facts may  
9 be readily at hand or ascertainable, which sometimes may be the  
10 case, and at some point in time, then, certainly if AT&T is  
11 unable to make some sort of offer of proof or affidavit going  
12 forward, certainly I would think that at that point in time it  
13 might be something the commission could look at and consider  
14 dismissing the case or granting summary judgment. But is there  
15 not some value to going forward?

16 The challenges they may have in this case, I'm not  
17 going to put words in their mouth, but you are dealing with  
18 information that may be confidential or difficult to receive  
19 and is there not some value in letting this go forward at least  
20 a little ways, seeing if they can come forward with some type  
21 of offer of proof at that point in time and then dealing with  
22 your motions at that point in time?

23 MR. HEASTON: Quite frankly, I see no value. As I  
24 said, we are going to file this again next year on this year's  
25 test period. They have had all kinds of time to make those

1 kinds of requests under the umbrella of this docket. I have  
2 received no requests for any information from them, no  
3 discovery. They could have filed for discovery. They have  
4 done nothing. Now to suggest something to them and to give  
5 them additional leeway that's going to take us all the way into  
6 probably now all the way into 2007, how difficult was it to get  
7 just this oral argument on the docket in August, and because of  
8 problems with the commission and the commission's docket going  
9 forward, then if we do a hearing and I get those rates  
10 approved -- and by the way, AT&T is completely wrong about  
11 December 15th, the filing of their counterclaim somehow  
12 stopping what rates they have to pay.

13 That's not the filed rate doctrine. As Ms. Greff  
14 pointed out in her brief, that rates are prospective in nature  
15 and the rates are the rates until they are changed and so they  
16 need to pay our rates until they are changed. That's the way  
17 the filed rate doctrine works, they are prospective, you don't  
18 go back in retroactive rate making and say somehow because they  
19 filed a complaint. Now, those of you who are familiar with,  
20 and your staff is very familiar with the rate making process,  
21 what you used to do and what you did and why one of the  
22 companies came in today to reopen its docket from 2003 using a  
23 2001 test year was to do away with rates subject to refund.  
24 Well, when you ordered our rates into effect, it was not  
25 subject to refund. Those rates are the rates until you change

1 them. December 15th is no magic date.

2 Now, we have agreed to allow them to pay something  
3 less than the protested amount because that was the only way we  
4 were going to get our money, some money. It's the same thing  
5 we agreed to in Minnesota when they were ordered to pay us  
6 under the same complaint. You cannot let an interexchange  
7 carrier decide who it's going to pay, when and where when you  
8 have a filed rate -- you have a tariff and you have laws that  
9 require that tariff. And we are required to file and we are  
10 required to do all this and then to make us jump through those  
11 hoops again, that seems to be patently unfair to have to go  
12 through this now at this late date when we are coming up on the  
13 three years and when there's been no protests from any other  
14 company and they would not have filed -- I guess I could have  
15 filed a complaint and just -- they wouldn't have complained  
16 about the rates because I didn't complain. They just would  
17 have not paid. You are rewarding that misconduct is what you  
18 are doing.

19 CHAIRMAN SAHR: I haven't done anything yet.

20 MR. HEASTON: That's what you would do. You would  
21 reward that misconduct.

22 CHAIRMAN SAHR: Back to the issue of payment, I don't  
23 know if you have been following the case or not, but there's  
24 been a case involving Western Wireless and some of the  
25 telephone cooperatives and in that case we have a situation

1 where Western Wireless is claiming that they are entitled to  
2 payment or refund. Have you been following that situation at  
3 all?

4 MR. HEASTON: No, I have not.

5 CHAIRMAN SAHR: I may see if there's any sort of  
6 analogy to this situation to what's happened in that case, and  
7 I don't want to be making apples to oranges comparison, but I  
8 do think the commission is mindful if something is owed and  
9 it's not within the range of dispute, that certainly we feel it  
10 should be paid, and if it's not paid, then certainly the party  
11 in question is taking the chance that they will be asked to pay  
12 interest and any other appropriate penalties. So I guess I'll  
13 ask Mr. Smith, is there anything we can draw from that other  
14 case?

15 MR. SMITH: Well, again without wanting to, in case it  
16 becomes an issue, it is an issue in another case and the  
17 commission has decided in another case that interest is in fact  
18 payable on monetary damages in South Dakota, period. And to  
19 the best of our -- again, that's the ruling we made in another  
20 case and somebody cannot do something else here. There used to  
21 be a distinction in South Dakota between liquidated and  
22 unliquidated amounts and all that and that's been abrogated at  
23 this point. The only thing where interest is not recoverable  
24 under South Dakota law are damages in the nature of punitive  
25 damages and then a few other specific exceptions.

1           CHAIRMAN SAHR: Any other commissioner questions for  
2 Mr. Heaston?

3           MS. DECOOK: Chairman Sahr.

4           CHAIRMAN SAHR: Ms. DeCook, we will come back around  
5 to AT&T and I do have a question for you. I am going to see if  
6 we can finish up here with Mr. Heaston and we will give you or  
7 your in-state counsel an opportunity to respond.

8           MS. DECOOK: Great.

9           CHAIRMAN SAHR: Do you want me to --

10          MR. SMITH: I thought Commissioner Johnson was ready  
11 to ask a question.

12          VICE-CHAIR JOHNSON: I always look thoughtful like  
13 that, Mr. Smith.

14          CHAIRMAN SAHR: Do you have questions for Mr. Heaston?

15          MR. SMITH: I guess with respect to your summary  
16 judgment motion, the rule, rule 15-6-56 seems to say that this  
17 motion for summary judgment can be made with or without  
18 affidavit. I note that you did submit an affidavit. Do you  
19 have any thoughts -- am I wrong in that AT&T did not submit any  
20 kind of affidavit that would oppose your motion?

21          MR. HEASTON: There is nothing other than the bare  
22 pleading.

23          MR. SMITH: Okay, and would it be your position that  
24 in the absence of an affidavit or some kind of offer of proof,  
25 is that relevant here?

1           MR. HEASTON: I think it's relevant. They had the  
2 opportunity to supplement the record as part of the summary  
3 judgment process and they chose not to do that. They relied  
4 solely on just the bare pleading, which just says that the  
5 Qwest rate is different than the PrairieWave rate. Just if you  
6 read the Schlosser case, Judge Kean makes a distinction between  
7 facts and conclusions, and yes, we are stuck with the facts,  
8 but we are not stuck with conclusions. The fact is, yeah, the  
9 rate is different. That's a fact. The conclusion is that it's  
10 unfair. That's not a fact and the trier of fact doesn't have  
11 to accept -- the entity ruling on the motion doesn't have to  
12 accept that, because it is a conclusion, it's not a fact. So  
13 the only fact we have in here of any relevance is the fact that  
14 the Qwest rate is less than six cents and the PrairieWave rate  
15 is less than seven cents. That's it. Now, how that -- I think  
16 it's beyond a doubt that that doesn't prove anything and I  
17 think under the statutes of civil procedure and under the  
18 Schlosser case, I think that decides the matter in  
19 PrairieWave's favor.

20           MR. SMITH: Commissioners, do you have any other  
21 questions?

22           VICE-CHAIR JOHNSON: I do not.

23           MR. SMITH: Can you clarify for me, from PrairieWave's  
24 standpoint, Mr. Heaston, what the -- I've read all of the  
25 briefs, et cetera, but what is the current status of payment

1 now, I guess? Have they paid -- what have they paid?

2 MR. HEASTON: Ms. DeCook described that accurately,  
3 they have paid nothing. They have --

4 MR. SMITH: They have paid nothing?

5 MR. HEASTON: They have paid nothing. They are in the  
6 process of paying and we should see something by August 14th.  
7 There was one minor discrepancy, and I don't know what that  
8 was. I know we thought they had paid something, we had given  
9 them a credit and they couldn't find it. I don't know if that  
10 was the discrepancy that she talks about, but whatever it was,  
11 it was very minor. They haven't paid anything and we are about  
12 to get, I guess, a check somewhere in the vicinity of \$130,000.  
13 The brief they filed where they said they were going to pay  
14 goes back a few months.

15 MR. SMITH: Is that payment -- is there a written  
16 agreement between the parties relative to that payment?

17 MR. HEASTON: No, there is not.

18 MR. SMITH: Is there -- why do you think you are  
19 going -- what's the basis, is this just a rumor or is it a  
20 gentleman's agreement or where are we at?

21 MR. HEASTON: No, we have had -- we had, as Ms. DeCook  
22 described, AT&T sent us a worksheet, a spread sheet, an Excel  
23 spread sheet where they said these were the amounts and then we  
24 had to, do you agree with these amounts, and then we looked at  
25 them and sent them back and I think we pretty much agreed with

1 what they sent us. We are not disputing the number of minutes  
2 that they owe on, we are not disputing what the rate is that's  
3 applied to those minutes. We just -- we got a spread sheet  
4 pretty much like we sent them earlier back showing the month,  
5 the number of minutes, and then the various rates, and they  
6 verified, we both verified the spread sheet amounts and now we  
7 are going to get a check that takes us up full payment, I  
8 assume, through December 15th and then partial payments after  
9 December 15th based on their claim that somehow the filed rate  
10 doctrine stopped on December 15th with their claim.

11 MR. SMITH: And is there -- in terms of the post  
12 December 15th period, what's the basis for the rate that AT&T  
13 has agreed to pay?

14 MR. HEASTON: Qwest, the Qwest rate, post December  
15 15th it's the Qwest rate, as I understand it, yes.

16 MR. SMITH: Thank you.

17 MS. GREFF: Mr. Smith, to staff's knowledge, we have  
18 not seen the e-mail or the e-mail conversations or the spread  
19 sheets or the corrections to the spread sheets that these guys  
20 are referring to.

21 MR. SMITH: You would agree, right, at the point when  
22 at least -- your complaint is partially satisfied at the point  
23 when that payment is made.

24 MR. HEASTON: Assuming -- yes, it's partially  
25 satisfied for the amounts that they paid in full.



1 MR. SMITH: Other questions.

2 CHAIRMAN SAHR: Not of Mr. Heaston. I do have a  
3 question of AT&T. Good afternoon. Mr. Van Camp is at the  
4 microphone here in Pierre, and Ms. DeCook, I assume you are  
5 still on the line, are you in Colorado?

6 MS. DECOOK: I am.

7 CHAIRMAN SAHR: The question I would have is sort of  
8 the flip question or flip side of what I asked of Mr. Heaston,  
9 and that is, going forward, do you intend to go through a  
10 discovery process, try to get some information out there where  
11 you are going to be able to hopefully I guess, from your  
12 perspective perhaps, present a little more factual evidence and  
13 kind of open up the similar line of questioning that I had for  
14 Mr. Heaston?

15 MS. DECOOK: We would, Mr. Chairman, and in fact we  
16 have already served discovery on PrairieWave for South Dakota.  
17 We have gotten some partial answers, but notably they refused  
18 to provide the cost study, which is really a key piece of  
19 evidence, and to demonstrate why that's key is we filed  
20 testimony in a similar case in Minnesota in which we used the  
21 cost study to demonstrate why the rates were unreasonable and  
22 unjust. And so Mr. Heaston's claim that we haven't served  
23 discovery is completely erroneous and in fact we have, but we  
24 haven't been provided with all of the relevant information that  
25 we think we need to build a case.

1           Just a couple of other comments on his argument. You  
2 know, we are in not a normal summary judgment stance in this  
3 case because there has been no discovery, there has been no  
4 opportunity to elicit additional evidence that's key to our  
5 case. And the cost study is considered confidential, so we  
6 have not been provided access to it, except in the Minnesota  
7 case where we are prevented from using it except for purposes  
8 of that case, the standard protective order type situation. So  
9 we are not in a position where we can present responsive  
10 evidence in response to a summary judgment motion that's posed  
11 at the front end of the case.

12           And in addition to that, we filed a counterclaim that  
13 asserts our own claim concerning the ongoing validity of  
14 PrairieWave's rates, and Mr. Heaston would have you, the  
15 commission, determine the merits of that case at the front end  
16 by ruling on his summary judgment motion, which is completely  
17 inappropriate. The cases in South Dakota have been clear that  
18 pleadings should not be dismissed merely because the court  
19 entertains doubts as to whether the pleader will prevail in the  
20 action, and this is the same standard that's applied in the  
21 summary judgment type of situation.

22           There must be clear and convincing evidence that  
23 there's no claim for relief that could be stated on any set of  
24 facts in order for a motion to dismiss to be granted, and the  
25 corollary for the summary judgment motion is that the trier of

1 facts must be clear that there are no issues of material fact  
2 in order to grant a summary judgment motion. And we would  
3 contend that based upon the claims that we have made in our  
4 counterclaim, we should be given the opportunity to present the  
5 evidence that we presented in Minnesota in South Dakota. We  
6 believe that we can present a case as to why PrairieWave's  
7 South Dakota rates are not just and reasonable and are not  
8 consistent with South Dakota law.

9 Now, I would also note that PrairieWave's tariff in  
10 South Dakota permits AT&T to dispute a bill, which AT&T has  
11 done. It disputed the bill, as Mr. Heaston noted, back to  
12 2005. And that is a common industry practice, that when you  
13 dispute a bill, you withhold what you believe to be the  
14 inappropriate billing. In 2005 we couldn't figure out what  
15 PrairieWave was billing and there is a number of e-mails going  
16 back and forth between the parties concerning what the -- how  
17 PrairieWave was billing and what basis it was billing its rates  
18 at.

19 The tariff also has a provision in it that provides  
20 for late payment charges in the event of a dispute and a  
21 withholding situation, so the tariff really covers the  
22 situation presented by PrairieWave. AT&T filed a dispute. It  
23 disputed the rates informally up until the time that it filed  
24 its counterclaim. Now it's disputing them formally. So I  
25 think it's highly appropriate, frankly, for AT&T to pay what it

1 believes is the reasonable amount, put the remainder in escrow,  
2 the disputed portion in escrow to be dealt with once the  
3 commission resolves the legitimacy of PrairieWave's rates.

4           And I will say that there are -- PrairieWave is an  
5 outliner in terms of not following either the LECA rates or the  
6 Qwest rates. Most CLECs in South Dakota are charging one or  
7 the other, so the fact that PrairieWave has raised its rates  
8 above the Qwest rates is indeed cause for alarm, and I will  
9 also note that the ILEC rate in the territory in which a CLEC  
10 is is the appropriate rates that the FCC has determined in the  
11 CLEC access charge order to be the appropriate rate to be  
12 charged by CLECs for interstate services. So that's the basis  
13 for AT&T in setting the reasonable rate at the Qwest rate.  
14 Long-winded answer.

15           MR. VAN CAMP: I'd like to add, this is Bill Van Camp,  
16 Ms. DeCook was not party to a scheduling conference that was  
17 held between AT&T, PrairieWave staff and the commission and  
18 it's not reflected in the pleadings, but it was agreed at that  
19 point that we were not going to set a procedural schedule in  
20 this matter, rather we were going to hear this motion for  
21 summary judgment and dismissal as brought by PrairieWave. It's  
22 only because of the congestion on the commission docket, I  
23 believe, that this has been pushed back as far as it was. The  
24 original idea, as I understand it, and Ms. Greff or Mr. Smith  
25 can concur in this, as can Mr. Heaston, that we were going to

1 set a procedural schedule if this motion was not successful.

2 MR. SMITH: I think that does accurately reflect our  
3 discussions. Therefore, I would caution that I don't know that  
4 a party ought to be penalized with respect to discovery at this  
5 point, although you can stand up here and criticize me if I'm  
6 wrong, Bill, but this thing has really been drug out and I  
7 think everybody was thinking that depending on how the motions  
8 came out, they wouldn't waste each other's money and time with  
9 too much. Can I just ask either Bill or Ms. DeCook, I guess I  
10 can't say Bill, Mr. Van Camp or Ms. DeCook, okay, let me ask  
11 you this.

12 With respect to the switched access rates, I guess,  
13 would it be your position, then, that a week after the  
14 commission approved the tariff as filed, that you could have  
15 come in here then and opened up a proceeding and challenged  
16 that rather than proceeded through intervention and involvement  
17 in that case? I'm not presuming the answer, I'm just asking  
18 you if that's the position, is that at any time you could just  
19 collaterally challenge that through a complaint.

20 MS. DECOOK: This is Rebecca DeCook. I think as a  
21 legal matter, you could assert a complaint. As a practical  
22 matter, whether that complaint would be heard by the commission  
23 may be a different story. But there's nothing in the law that  
24 would prevent that.

25 MR. SMITH: In terms of --

1 MS. DECOOK: That certainly isn't the case here. So  
2 it's kind of a hypothetical that doesn't apply.

3 MR. SMITH: I'm not sure -- again, you may have made a  
4 good point here, Ms. DeCook, with respect to a motion to  
5 dismiss as opposed to a motion for summary judgment. Can I ask  
6 you, maybe you are not prepared to answer this, but can you  
7 tell me what -- maybe it's just that I don't remember the  
8 complaint, but other than the fact that PrairieWave's rate is a  
9 little bit higher than Qwest's rate, it's also dramatically  
10 lower than many of the other of the rural LECs. What is it  
11 that gives you some kind of reasonable basis to believe that  
12 the cost study that was filed and reviewed by staff -- I mean,  
13 what is it that AT&T thinks is improper about the cost study  
14 and the rate? Maybe you can't answer that, but if you give  
15 us --

16 MS. DECOOK: I don't think I can because I think I'm  
17 foreclosed from providing details on the cost study by virtue  
18 of the protective order in Minnesota.

19 MR. VAN CAMP: And as South Dakota counsel, we have  
20 not been able to see the cost study as filed.

21 MS. DECOOK: I guess the other point, I am assuming  
22 that the cost study used in Minnesota is the same cost study or  
23 methodology used in South Dakota, and I don't know that without  
24 having seen the South Dakota study.

25 MR. SMITH: Thank you. Mr. Heaston, did you have a

1 couple last comments?

2 MR. HEASTON: I have a comment on that. South Dakota  
3 is entirely different than Minnesota. You have rules, very  
4 specific rules on how everything, how you account for the  
5 costs, how you allocate, how it goes into various accounts,  
6 it's based on the FCC's part 3669 rules. You can ask Harlan or  
7 Greg, they work with these. Minnesota doesn't have that.  
8 Minnesota just says they have to be forward looking costs.  
9 That's not what you have here in South Dakota. It's an  
10 entirely different regime, entirely different. So there's no  
11 way looking at a Minnesota FLECS study, forward looking  
12 economic cost study that we filed in Minnesota, that you can  
13 come and see what's in South Dakota. And vice versa, there's  
14 no way that -- it's a whole different cost methodology. The  
15 cost methodology in South Dakota is historic. In Minnesota  
16 it's forward looking. That's why you made the rules, was to  
17 give some structure and reasonableness to this and so you could  
18 measure what the costs are and so you could be assured that the  
19 rates that are filed are fair and reasonable and that you  
20 require being filed under tariff. That's why you did it.

21 VICE-CHAIR JOHNSON: I have a question for Ms. Greff  
22 or Mr. Smith or Ms. Wiest. I'm trying to get some idea of  
23 which standards or rules of thumb I should be using. On one  
24 hand, and I'm speaking with regard to PrairieWave's motion to  
25 dismiss AT&T's counterclaim. On one hand, I wouldn't want

1 to -- I understand that a telecommunications company would have  
2 a right to protest a rate, to want to open up a cost study and  
3 review that rate. I don't quite know when that starts. Your  
4 question about could they do it one week after the cost study  
5 is done I thought was a good one, Mr. Smith. I'm not saying  
6 that AT&T is doing that, but what is to preclude a company from  
7 essentially going on a fishing expedition after six months  
8 passes? Is there a particular standard or rule of thumb I  
9 should be looking at here?

10 MS. GREFF: No, but staff would point out the  
11 opposite. Companies can also file for waivers of filing their  
12 switched access cost studies, so what's precluding PrairieWave  
13 from next year filing a waiver of filing their switched access  
14 cost study and another three years goes out and in three years  
15 they file another waiver and another waiver and then again you  
16 are stuck with the same rate and no company can come in until  
17 those switched access cost studies are filed.

18 VICE-CHAIR JOHNSON: Am I right in presuming that  
19 interested parties could petition for intervention in those  
20 waiver requests?

21 MS. GREFF: I guess they could. Again, there's  
22 nothing in our statutes, in our rules or anything prohibiting  
23 AT&T from doing what they are doing. There's nothing  
24 prohibiting them from filing the counterclaim, there's nothing  
25 prohibiting them from filing I guess a complaint. I guess



1 PrairieWave filed the complaint, AT&T filed the counterclaim.

2 VICE-CHAIR JOHNSON: Is there no standard by which the  
3 commission could ever -- is it your contention there's no  
4 standard by which the commission could ever dismiss a  
5 counterclaim, a counterclaim similar to what AT&T has put  
6 forward? All they have to do is they don't think the rate is  
7 right and regardless of whatever, what their filing says, they  
8 would have an opportunity to do that?

9 MS. GREFF: I'm saying there's nothing precluding  
10 that, and based on the arguments raised by PrairieWave being  
11 the filed rate doctrine and res judicata, those should not be a  
12 bar for AT&T filing their counterclaim.

13 VICE-CHAIR JOHNSON: Did anyone else have any  
14 thoughts, guidance for me at least?

15 MS. WIEST: I guess the one point I would make is that  
16 it would kind of be silly of a company to file a complaint a  
17 week after a rate case proceeding. In the complaint, the  
18 burden is on the complainant to proceed and to prove that the  
19 rate is unreasonable. It would make much more sense for that  
20 company to have intervened in the underlying rate case when the  
21 burden is on the company to prove that their rates are  
22 reasonable, from a practical standpoint.

23 VICE-CHAIR JOHNSON: Good point, thank you.

24 MR. SMITH: I think probably -- I'm unaware of this,  
25 but other than maybe based on some kind of equitable or claim

1 preclusion principles, I don't know that there's anything  
2 explicit in either our rules or any statute that would probably  
3 preclude filing 15 days later, as I think Ms. DeCook -- depends  
4 on -- I think Mr. Heaston is reading our rule 20:10:27:07 as  
5 implying, right, implying that there is a three-year sort of  
6 term, I guess for lack of a better term.

7 MR. HEASTON: And everybody knows that. AT&T knows  
8 that.

9 MR. SMITH: Would you agree, though, that the rule --  
10 our dilemma, if the rule just said that, it would be so much  
11 easier for us to rule that way. But it doesn't.

12 MR. HEASTON: It's like the legislature, that's what  
13 you did, you legislated it. Sometimes you just don't think of  
14 all the things that can pop up.

15 MS. DECOOK: In this case the rule specifically says  
16 in addition to the three-year limit, that the commission may  
17 change or revise any rate or price in accordance with 49-31-12  
18 and 49-31-12.4, which says that the commission may change rates  
19 as circumstances require. So to me that suggests that the  
20 commission has authority within the three-year period to change  
21 rates if it deems appropriate.

22 COMMISSIONER HANSON: Excuse me, Mr. Heaston, can you  
23 tell us for what period of time this disputed amount  
24 originally, \$138,000 approximately, when did that begin to  
25 accrue?

1 MR. HEASTON: In May of 2005 is when they stopped  
2 paying their bills.

3 COMMISSIONER HANSON: Thank you.

4 MR. HEASTON: We had the rate approved in December of  
5 2004, it went into effect right at the end of December. It  
6 wasn't until May of 2005 that I don't know what happened, all  
7 of a sudden AT&T stopped paying.

8 COMMISSIONER HANSON: It's approximately five months,  
9 less than five months or approximately five months later.

10 MR. HEASTON: I think they paid for four months and in  
11 the fifth month they didn't pay.

12 COMMISSIONER HANSON: Thank you.

13 CHAIRMAN SAHR: Any further questions, comments? Do  
14 we have a motion? Seeing none, I will make a motion. I move  
15 that the commission deny PrairieWave's motion to dismiss AT&T's  
16 counterclaim and that the commission deny PrairieWave's motion  
17 for summary judgment.

18 VICE-CHAIR JOHNSON: Second.

19 COMMISSIONER HANSON: I respectfully dissent.

20 VICE-CHAIR JOHNSON: On both?

21 COMMISSIONER HANSON: On both issues. Thank you.

22 CHAIRMAN SAHR: Thank you. Now we are back to  
23 electricity --

24 MR. HEASTON: Before you continue, Mr. Chairman, I  
25 would then like to get some idea how we are going to proceed in

1 this docket. And I would like to get some idea from the  
2 commission as to what their attitude is on AT&T's payment going  
3 forward, whether they should be paying the full amount or  
4 whether they should be paying and holding some in escrow.

5 CHAIRMAN SAHR: The second question I would direct to  
6 general counsel and see if he's comfortable with even putting  
7 forth anything. Again, it is very similar to some  
8 circumstances that we are dealing with in a pending case and  
9 I'm going to exercise some care in responding to that.

10 MR. SMITH: You know, I guess what I would hope is  
11 that we would go to the 14th date as you have discussed and  
12 that they would make the payment and at least bring that up to  
13 currency. But on this record in terms of the commission  
14 ordering them to pay, I don't think we can make such an  
15 adjudication without a complete record, especially based on the  
16 rulings that the commission just made. But again, I would  
17 prevail just from -- not only from a good faith and from a  
18 reasonableness standard, that AT&T do what as a good business  
19 person it believes to be the right thing and to get you at  
20 least paid up with undisputed amounts. But beyond that, I  
21 don't think the record is in a status here for us to order  
22 anybody to do anything.

23 MR. HEASTON: Can I ask the commission expedite the  
24 hearing on this? Can we get this on the docket as soon as we  
25 can?

1           CHAIRMAN SAHR: If you want to wait, we have one more  
2 item, then we have another hearing, we can get you in this  
3 afternoon perhaps.

4           MR. HEASTON: That's fine.

5           CHAIRMAN SAHR: No, I guess again I'll look to general  
6 counsel. I would like to add one thing to his statement,  
7 though, is that certainly with the other situation, my  
8 instructions were along those lines, that hopefully what is not  
9 in dispute, that that should be paid, and certainly I think  
10 it's something looking at it, I think it's in the realm of the  
11 commission's power to order interest and so on and so forth. I  
12 think we all, if there is an undisputed amount and there's some  
13 reason -- there's not reason why it shouldn't be paid, the  
14 commission would look at that, look at the side not paying that  
15 in not very favorable light going forward, but again I defer to  
16 Mr. Smith as far as the legal standard.

17           MR. SMITH: Well, in terms of scheduling, again, it's  
18 an extremely difficult thing to do to establish a procedural  
19 schedule here, not that we can't do it, but the easier normal  
20 way to do it is we do that and if there's a problem, then bring  
21 it before the commission. It depends, Bill, we got -- we are  
22 going to have a long rest of the day yet, but if that's what  
23 you want to do and that's what the commission wants to do,  
24 fine. Otherwise normally what we would do is establish that  
25 based on available dates and set up a procedural schedule and

1 get it done.

2 CHAIRMAN SAHR: Are you having the prehearing  
3 conference on the 14th or what is it?

4 MR. SMITH: On this? I don't believe --

5 CHAIRMAN SAHR: You are waiting until you --

6 MR. SMITH: Did we set any dates beyond this at this  
7 point in time? No, I don't think so.

8 CHAIRMAN SAHR: Again, I don't know what the agenda is  
9 like, I don't know what the scheduling is like and so on and so  
10 forth, but Mr. Heaston, is it possible for sometime in the next  
11 few days for the parties to get together and compare schedules  
12 and try to come up with something? Certainly we can wait until  
13 after we are done with our other business and come back to it,  
14 but normally that does not work well for all the obvious  
15 reasons of people don't have schedules before them and so on  
16 and so forth. Is it possible to try to get something hammered  
17 out that's mutually acceptable and then if you are unable to do  
18 it or if you are not happy with what the resolution is, file  
19 something before the next commission meeting and we can  
20 intervene? But I think it does normally work better if the  
21 parties, the attorneys can sit down after the fact versus us  
22 trying to pick dates that may or may not work, even for room  
23 availability and things like that.

24 MR. HEASTON: All I want to convey to the commission  
25 is the sense this has dragged out, how long it's dragged out,

1 the fact PrairieWave has been out a lot of money, maybe we are  
2 going to get paid, but we need to get this matter resolved.

3 MR. SMITH: And I agree with that. On behalf of  
4 myself, to the extent I have been responsible, and I'm not  
5 solely, but my apologies for how long it's taken, but we just  
6 have had an extremely -- you can see what it's like around  
7 here. We have had a very tough time finding dates. Hopefully  
8 we have had some things go away when we get out about a month  
9 or month and a half and hopefully we can get things on a faster  
10 track than they have been for the last seven, eight months  
11 because I will agree, we have really had a log jam. I am going  
12 to say I'm available all day tomorrow. If the parties can be  
13 on the phone or here at any time tomorrow or after -- when we  
14 are done today, let's go downstairs and get this done.

15 VICE-CHAIR JOHNSON: Let me ask this question. You  
16 may have answered this, I had a side bar conversation so I  
17 apologize. Mr. Heaston, when you talk about expediting,  
18 setting a hearing date soon, what does that mean to you? Do  
19 you want this heard by October 15th come hell or high water?  
20 Give me an idea of what you mean.

21 MR. HEASTON: That's about the time frame, would be  
22 sometime in the next 60 days. Which means compressed discovery  
23 and --

24 MR. SMITH: I think that's doable. I think that's  
25 probably doable, but again I have to defer ultimately to the

1 commissioners, who have to agree to dates that they can all be  
2 here.

3 MR. HEASTON: I want to convey --

4 MS. DECOOK: Well, a comment on that. Since we  
5 haven't received all of the relevant discovery and we may need  
6 to do additional discovery based on what we get, 60 days from  
7 our perspective to go to hearing is not doable.

8 MR. SMITH: What about the idea of compressed  
9 discovery? We have been at this for quite a long time.

10 MS. DECOOK: We haven't. We haven't been at the real  
11 litigation. We have been at the dispute over the motions. We  
12 will accommodate discovery as we can and try to expedite this  
13 if there's a way to expedite on the commission's schedule and  
14 based on our schedule. But I think it's unfair to us as the  
15 litigant who has done discovery but not been provided with  
16 answers because of the pending motions to then limit our  
17 ability to conduct discovery, further discovery. I think  
18 that's not fair to us. But I think we will accommodate the  
19 desire to expedite this as best we can while protecting our  
20 rights to do discovery.

21 MR. SMITH: I think the only workable way to deal with  
22 this is for the attorneys involved to get together, either  
23 later today, or Bill, you were shaking your head about  
24 tomorrow.

25 MR. HEASTON: I can do tomorrow.



1 MR. SMITH: Could Ms. DeCook stand in your stead?

2 Rebecca, are you available tomorrow?

3 MS. DECOOK: I'm sorry, Mr. Van camp was shaking his  
4 head or Mr. Heaston?

5 MR. SMITH: I'm sorry. Mr. Van Camp was shaking his  
6 head, but you are also counsel and --

7 MS. DECOOK: Right, I can participate by phone in the  
8 scheduling conference.

9 MR. SMITH: What time works? We are going to run out  
10 of phone here in three minutes.

11 MS. GREFF: Staff is a part of this, too.

12 MR. SMITH: I realize that, but you are leaving in a  
13 couple of days.

14 MS. GREFF: Somebody else is going to be taking this  
15 case over who has never seen it before.

16 MR. SMITH: But somebody can be there tomorrow if we  
17 need to.

18 MS. GREFF: Not me after 1 o'clock.

19 MR. SMITH: Fair enough.

20 MR. HEASTON: I'm available until three.

21 MS. DECOOK: I'm available all morning.

22 MR. SMITH: Why don't we say 10 o'clock in the  
23 morning.

24 MS. DECOOK: Your time?

25 MR. SMITH: Yes, 10 o'clock our time, central time.

1 There's an announcement about a bridge --

2 CHAIRMAN SAHR: Is there anyone on the phone line who  
3 is waiting for the FEM matter? If not, the bridge shouldn't  
4 matter; is that correct? Is there anyone --

5 MR. SMITH: It doesn't matter if there's no one on.

6 CHAIRMAN SAHR: I think the people are all here in  
7 Pierre, aren't they? Do any of you have clients or people that  
8 need to be in on the line?

9 (Whereupon, the proceedings were concluded at 1:45  
10 p.m.)

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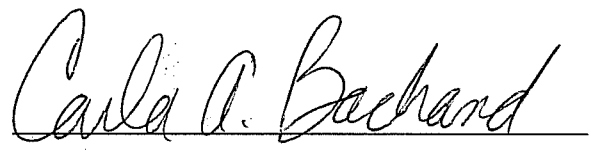
STATE OF SOUTH DAKOTA        )  
  )  SS.  
COUNTY OF HUGHES            )

I, Carla A. Bachand, RMR, CRR, Freelance Court Reporter for the State of South Dakota, residing in Pierre, South Dakota, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause;

I further certify that the foregoing pages of this transcript represents a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on this the 14th day of August 2006.



Carla A. Bachand, RMR, CRR  
Freelance Court Reporter  
Notary Public, State of South Dakota  
Residing in Pierre, South Dakota.

My commission expires: June 10, 2012.