

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

IN THE MATTER OF THE) ESTABLISHMENT OF SWITCHED) ACCESS REVENUE REQUIREMENT) FOR MIDSTATE COMMUNICATIONS,) INC.)))	FINAL DECISION AND ORDER GRANTING MOTION TO DISMISS ON SUMMARY DISPOSITION; NOTICE OF ENTRY TC02-067
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On June 19, 2002, Midstate Communications, Inc. (Company) filed for approval by the Public Utilities Commission (Commission) its 2001 Intrastate Switched Access Cost Study. On June 20, 2002, the Commission electronically transmitted notice of the filing and the intervention deadline of July 5, 2002, to interested individuals and entities. On July 5, 2002, the Commission received a Petition to Intervene from S&S Communications (S&S). At its regularly scheduled meeting of July 9, 2002, the Commission granted intervention to S&S.

On July 11, 2003, Company filed a Motion to Dismiss and Motion for Extension of Time to Respond to Second Discovery Request (Company Motions). On July 24, 2003, S&S filed a Brief in Resistance to Motion to Dismiss and Motion for Extension of Time.

At its regular meeting on August 4, 2003, the Commission considered the Company Motions and voted unanimously to serve notice on the parties that S&S's Motion to Dismiss would be considered alternatively as a motion for summary judgment or as a motion to dismiss and to schedule the matter for hearing at the Commission's next regularly scheduled meeting on August 19, 2003. The Commission further voted unanimously to extend the time for Company's response to S&S's pending discovery requests until after decision on Company's Motion to Dismiss and the further order of the Commission. On August 8, 2003, the Commission issued a Notice of Intent to Consider Motion as One for Summary Judgment, Order for and Notice of Hearing; Order Extending Time for Response (Notice and Order) requesting the parties to file any affidavits or other proof demonstrating that a genuine issue of material fact exists or does not exist as to S&S's continuing interest in this proceeding sufficient to maintain party status, setting the matter for consideration and/or hearing on August 19, 2003, at 1:30 p.m. CDT at the Ramada Inn in Aberdeen, South Dakota, and extending the Company's time for response to discovery until after the issue of S&S's standing to maintain status as party is finally decided.

In response to the Commission's Notice and Order, on August 14, 2003, S&S filed an Affidavit of Les S. Sumption (Affidavit). On August 18, 2003, Company filed a Response of Companies Named in Above Dockets to Affidavit of Les S. Sumption. On August 19, 2003, the Commission, after hearing and considering the parties' filings and the arguments of counsel, voted unanimously (i) to decide that the assertions contained in the Affidavit were not sufficient to raise a genuine issue of material fact as to whether S&S continues to have an interest peculiar to it as opposed to an interest common to the public or the taxpayers in general and (ii) to grant Company's Motion to Dismiss. Accordingly, as its Final Decision on the Company's Motion to Dismiss and the Notice and Order, the Commission considering the Affidavit and the other documents and evidentiary showings in the record in the light most favorable to S&S, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. On July 5, 2002, S&S filed a Petition to Intervene (Petition) with the Commission. At its regular meeting on July 9, 2002, the Commission voted unanimously to grant S&S's Motion to Intervene, and on July 26, 2002, the Commission issued an Order Granting Petition to Intervene. S&S has been a party to this proceeding since then.

2. The standards for intervention as a party in a proceeding before the Commission are set forth in SDCL 1-26-17.1 as follows:

A person who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency's order made upon the hearing may become a party to the hearing by intervention, if timely application therefor is made.

and in ARSD 20:10:01:15.05 as follows:

that by the outcome of the proceeding the petitioner will be bound and affected either favorably or adversely with respect to an interest peculiar to the petitioner as distinguished from an interest common to the public or to the taxpayers in general.

3. In the Petition, S&S based its assertion that its interest met these tests on the facts that "S&S is a switch-based interexchange carrier" that "provides both intra and interstate message telecommunications services to its subscribers" (Petition, ¶ 1), that to provide intrastate telecommunications services, S&S "requires . . . switched access services from the Rural Local Exchange Carriers in South Dakota" which include Company (Petition, ¶ 2), and that "[b]ecause S&S Communications purchases switched access services from [Company] any increase in the rates of such services will directly and immediately affect the pecuniary interests of S&S Communications as it will naturally affect S&S Communications' operating expenses." (Petition, ¶ 3).

4. On July 11, 2003, Company filed a Motion to Dismiss asserting that S&S no longer meets the standards for intervention set forth in SDCL 1-26-17.1 and ARSD 20:10:01:15.05 and therefore lacks standing to be a party in this case. The Company's basis for its motion is the Commission's decision in Docket No. TC02-166 to revoke S&S's certificate of authority to provide telecommunications services in South Dakota.

5. On August 8, 2003, the Commission issued a Notice of Intent to Consider Motion as One for Summary Judgment, Order for and Notice of Hearing; Order Extending Time for Response (Notice and Order) requesting the parties to file any affidavits or other proof demonstrating that a genuine issue of material fact exists or does not exist as to S&S's continuing interest in this proceeding sufficient to maintain intervenor party status.

6. The Commission takes official notice of the following matters of record in the Commission's files. On June 16, 2003, the Commission issued an Order to Show Cause and Notice of Hearing in Docket No. TC02-166 requiring S&S to appear and show cause as to why, *inter alia*, its certificate of authority to provide telecommunications services in South Dakota should not be revoked. On June 30 and July 2, 2003, the Commission held a contested case hearing on the Order to Show Cause. On July 2, 2003, following the conclusion of the evidentiary hearing and the arguments of the parties, the Commission unanimously voted to revoke S&S's certificate of authority to provide telecommunications services in South Dakota. On August 28, 2003, the Commission issued its Findings of Fact; Conclusions of Law; Notice of Entry of Order in Docket No. TC02-166 (TC02-166

Order). The TC02-166 Order was transmitted to S&S on August 29, 2003. In the TC02-166 Order, the Commission ordered *inter alia* that S&S's certificate of authority is revoked.

7. The Company's Motion to Dismiss and the Notice and Order provided sufficient notice to S&S of the Company's assertion of the Commission's action in Docket No. TC02-166 as a basis for the Commission's decision on the Motion to Dismiss to afford S&S a reasonable opportunity to refute the facts of record officially noticed in Finding 6 as provided for in SDCL 1-26-19(3).

8. The revocation of S&S's certificate of authority to provide intrastate interexchange services in the TC02-166 Order precludes S&S from utilizing the Company's switched access services to provide intrastate interexchange telecommunications services in South Dakota.

9. At the August 4, 2003 meeting at which the Company's Motion to Dismiss was first before the Commission, S&S stated that they were no longer paying for switched access services from Company.

10. In the Affidavit, Mr. Sumption states on behalf of S&S that "over the past several weeks several individuals and/or entities have expressed an interest in purchasing S&S Communications and/or its assets" (Affidavit, ¶ 5), that "S&S Communications is presently in negotiations to sell its business and/or assets" (Affidavit, ¶ 6) and that S&S's pecuniary interests will be directly and immediately affected by the Commission's decision in this matter "for the following reasons:

- (A) Subsequent to the sale, S&S Communications, regardless of the name by which it will do business, will have to purchase switched access services;
- (B) The individual and/or entity interested in purchasing S&S Communications and/or its assets has expressed some reluctance in following through with the purchase as a result of the rates presently charged for switched access services in South Dakota;
- (C) If the individual and/or entity interested in purchasing S&S Communications and/or its assets fails to follow through with the purchase, S&S Communications will be divested of a substantial amount of revenue that would have been directed to creditors and/or subscribers that lost service." (Affidavit, ¶ 7).

11. In the Affidavit, Mr. Sumption states that he is "one of the partners that owns and operates Intervenor S&S Communications." (Affidavit, ¶ 1).

12. Because S&S is a partnership, there is at least some question whether S&S could be sold to anyone as a legal entity. Furthermore, given the financial problems of S&S as documented in the TC02-166 Order and record, the Commission does not find it credible that anyone would acquire S&S as a legal entity and thereby render itself liable for S&S debts and liabilities.

13. Following revocation of its certificate of authority, S&S does not in any case have the legal right, as a matter of law, to convey to any purchaser of its assets or business either its certificate of authority or any other right to provide intrastate interexchange telecommunications services in South Dakota.

14. Following revocation of its certificate of authority, S&S does not have the legal right to continue to provide services that would involve the purchase of intrastate switched access services

from Company, and the Commission accordingly finds that the assertion stated in Affidavit, ¶ 7(A) fails as a matter of law to raise a genuine issue of material fact as to the assertion.

15. The statement in Affidavit ¶ 7(B), that "the individual and/or entity interested in purchasing S&S Communications and/or its assets has expressed some reluctance in following through with the purchase as a result of the rates presently charged for switched access services in South Dakota" is hearsay, is not legally admissible evidence and is therefore not a showing of evidence that is sufficient to raise a genuine issue of material fact as to the matter asserted. That the alleged speaker is not identified and apparently was not even identifiable as a person or entity weakens the credibility of the assertion even more.

16. Viewing the Affidavit and the other documents, admissions and evidence in the record in the light most favorable to S&S, no admissible evidence provided by or pointed to by S&S offers any concrete showing that a person or entity that has expressed interest in purchasing S&S's assets has a present intention to provide intrastate interexchange services in South Dakota and would thus incur switched access charges which could be affected by the decision in this proceeding.

17. Any person who might have an interest in purchasing the assets of S&S who is presently providing intrastate interexchange services in South Dakota has had an interest in the outcome of this proceeding that it could have asserted in a petition for intervention on its own behalf prior to now. No such petition has been filed.

18. Some concrete showing of current proximate interest is required as a condition of permitting S&S to maintain its status as an intervenor party.

19. S&S's mere assertion that it is offering telecommunications assets for sale which might possibly be sold to a person who does not now, but might desire to, provide intrastate interexchange services in South Dakota and who might theoretically have concerns about the Company's switched access revenue requirement is too speculative to meet the test for proof of standing as an intervenor and is not a sufficient showing of interest peculiar to S&S, as opposed to an interest common to the public at large, to justify S&S's intervenor party status in this proceeding.

20. Based upon the above findings, the Commission finds (i) that the Affidavit of S&S and the other documents and showings of evidence in the record in this proceeding are insufficient to demonstrate that a genuine issue of material fact is presented that would require a factual hearing as to a present interest of S&S in this proceeding that is sufficient to warrant its continued standing as an intervenor party and (ii) that after viewing all reasonable inferences to be drawn from the evidence in the record herein in favor of S&S, Company is entitled to a summary disposition as a matter of law granting Company's Motion to Dismiss S&S as an intervenor party.

21. The interests of the ultimate consumers of switched access services to be provided by Company are not peculiar to S&S as opposed to the general public and such consumer and general public interests are adequately represented in this proceeding by the Commission's Staff. Furthermore, given S&S's conduct toward the Commission and S&S's customers as set forth in the TC02-166 Order, the Commission does not find that S&S is an appropriate advocate for the interests of customers' or the general public's interests in this proceeding.

22. The evidence does not support a finding that S&S has acted in a dilatory or obstructionist manner while an intervenor party to this proceeding and such a finding has not been relied upon by the Commission in reaching its decision herein.

CONCLUSIONS OF LAW

1. The Company's Motion to Dismiss was properly filed. Notice of the Commission's intention to treat the Motion to Dismiss as a motion for summary disposition was properly filed and served upon the parties in accordance with SDCL 15-6-56 and *Richards v. Lenz*, 539 N.W.2d 80 (S.D. 1995).
2. Pursuant to SDCL 49-1-11(4), 1-26-17.1, 1-26-18, 15-6-12(c) and 15-6-56 and ARSD 20:10:01:15.05, the Commission has the authority both to deny intervention as a party for failure of the petitioner to make a sufficient showing of pecuniary interest peculiar to the petitioner and also to dismiss an intervenor party under either a motion to dismiss or a summary disposition, as appropriate, if the requisite pecuniary interest of the intervening party has ceased to exist.
3. A petition to intervene and subsequent substantive pleadings and positions asserted by an intervenor in a proceeding are "defenses or claims" subject to summary disposition pursuant to SDCL 1-26-18.
4. Intrastate switched access charges are charges made by a carrier's carrier to another carrier for use of telecommunications facilities to originate or terminate calls. ARSD 20:10:27:01(6). For a telecommunications company to be a direct purchaser and user of the Company's intrastate switched access services, as distinguished from a member of the general public indirectly purchasing such services as an end user, it must be a provider of intrastate interexchange telecommunications services. ARSD 20:10:27:01(2) and 20:10:27:02. The Commission's TC02-166 Order prohibits S&S from engaging in the provision of the intrastate interexchange services in South Dakota and hence from being a purchaser or user of switched access services. S&S is not a purchaser of Company's switched access services.
5. When challenging a summary judgment, the nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation or conjecture. *The Estate of Frederis J. Elliot v. A&B Welding Supply Company*, 1999 S.D. 55, 594 N.W.2d 707 (1999).
6. SDCL 15-6-56(e) requires that an affidavit offered in support of opposition to a motion for summary judgment "shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence."
6. The assertion in the Affidavit that "the individual and/or entity interested in purchasing S&S Communications and/or its assets has expressed some reluctance in following through with the purchase as a result of the rates presently charged from switched access services in South Dakota" is hearsay and is not a fact admissible in evidence.
7. The remaining assertions in the Affidavit amount to an argument that S&S has standing to intervene due to the ownership of assets whose value might be affected by the fact that they could be used by a potential purchaser to become a provider of intrastate interexchange service in South Dakota who would thus require switched access services of Company. This argument demonstrates only a mere possibility and is not a showing of interest in the Company's switched access revenue requirement that is sufficiently proximate to justify party intervenor status.
8. The interests of the consumers of switched access services in South Dakota are represented by the Commission Staff in this proceeding, and S&S has made no showing that Commission Staff is not providing adequate representation of such interest.

9. S&S has failed to make a sufficient showing that a genuine issue of material fact is presented as to a pecuniary interest peculiar to S&S in this proceeding and the Commission concludes that a genuine issue of material fact is not presented.

10. S&S's asserted pecuniary interest arising from its ownership of assets that might be used in South Dakota by a purchaser of such assets to provide telecommunications services that would require the purchase of switched access services from Company is not proof of a sufficiently proximate interest in the outcome of this proceeding to justify intervenor party status.

11. Company is entitled to disposition in its favor as a matter of law of its Motion to Dismiss considered as a motion for summary disposition.

12. Company's Motion to Dismiss is granted.

13. Despite its dismissal as a party to this proceeding, the partners of S&S and/or the owners of its assets may request the right to appear and be heard in this proceeding as non-party participants pursuant to ARSD 20:10:01:15.06.

It is therefore

ORDERED, that the Company's Motion to Dismiss S&S Communications as an intervenor party to this proceeding is granted and S&S Communications is accordingly dismissed as an intervenor party.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 9th day of September, 2003. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 9th day of September, 2003.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Melaine Kalbo</u>
Date:	<u>9/9/03</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Robert K. Sahr
ROBERT K. SAHR, Chairman *JS*

Gary Hanson
GARY HANSON, Commissioner

James A. Burg
JAMES A. BURG, Commissioner