

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

In the Matter of the Complaint of WWC License LLC against VENTURE COMMUNICATIONS COOPERATIVE))))))	DOCKET NO. CT05 - 002 WWC's BRIEF IN SUPPORT OF MOTION FOR DISMISSAL OF COUNTERCLAIMS PURSUANT TO SDCL § 15-6-41(b) OR, IN THE ALTERNATIVE, SDCL § 15-11-11
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WWC License LLC, (hereinafter "WWC"), hereby submits this Brief in Support of its Motion for Dismissal of Venture Communications Cooperative's Counterclaims.¹

FACTUAL BACKGROUND

This action was commenced by the filing of a Complaint by WWC on March 18, 2005. That Complaint sought relief from Venture Communications Cooperative's (hereinafter "Venture") refusal to make refunds for overpayments made in good faith by WWC pending arbitration and negotiations of a new Interconnection Agreement. Venture took the position it did not need to refund these overpayments but could credit the over payments against monthly charges. *See* WWC Complaint

In response to the complaint, Venture filed an Answer and Counterclaims. The counterclaims made various assertions that WWC had an obligation to pay additional funds for interMTA traffic. *See* Venture's Answer and Counterclaim dated April 11 2005; Affidavit of Talbot J. Wieczorek ¶ 3 (hereinafter "Aff.>").

In response to the Answer and Counterclaim, WWC filed an Answer to the Counterclaim on July 8, 2005. Aff. ¶ 4. This is the last filing made in the docket until the Motion to Dismiss

¹ Should the Commission grant this Motion, WWC agrees the Commission may at the same time dismiss the complaint in this matter. The primary underpinnings of the complaint, Venture's failure to refund overpayments to WWC has been nullified by Venture applying credits to bills to WWC. While some of the ancillary claims, such as interest during the time of credit, were not paid by Venture, WWC has no intent on pursuing these claims unless Venture should prevail in this Motion and continue its counterclaims.

filed contemporaneously with this brief.

In 2005, the parties agreed between them to allow the Commission to hear a similarly situated case first before pursuing the Complaint and Counterclaims asserted in the WWC v. Venture matter. *See* Aff. ¶ 6. The similarly situated case was another complaint case, *In the Matter of the Complaint filed by WWC License LLC against Golden West Telecommunications Cooperative, Inc., Vivian Telephone Company, Sioux Valley Telephone Company, Armour Independent Telephone Company, Bridgewater-Canistota Independent Telephone Company and Kadoka Telephone Company Regarding Intercarrier Billings, CT 05-001 (Golden West Complaint)*.

The *Golden West* case presented identical issues as far as the Complaint and Counterclaim pending in this docket with the exception of one additional issue in the *Golden West* case. The *Golden West* case also featured a unique issue on a transiting question. After the *Golden West* case had gone through hearing and during briefing, all issues that it shared in common with this docket were settled. *See* Staff's Reply Brief of October 23, 2006 in the *Golden West* case. Prior to the settlement of those issues, the Commission also had made various interim determinations on some of the obligations and rights of the parties as it concerned the presented issues. As of October 2006, the *Golden West* case had provided all the guidance on the facts and issues pending in this docket that it could. Also by that time, the credit being applied to WWC by Venture had all but exhausted the excess payment amounts. Neither party did anything else on this case.

On March 24, 2010, Commission Counsel Wiest inquired as to the status of this matter. Counsel for WWC provided a response stating it was believed the case and issues in the case had been resolved by a true-up calculation performed in a different docket. *See* Aff. ¶ 11, Affidavit Exhibit A. On February 15, 2011, counsel for WWC provided a Stipulation to Dismiss this

matter with prejudice to Venture's counsel. *See* Aff. Exhibit B. No reply was received.

On March 10, 2011, Commission counsel John Smith provided an email to counsel for Venture and WWC inquiring on the status of this matter. *See* Aff. ¶ 12, Exhibit B. The following day, counsel for WWC responded saying that Alltel saw no reason why this matter could not be immediately dismissed with prejudice. *Id.* No response has been received from Venture's counsel.

LEGAL ANALYSIS

South Dakota law provides that a party may move for dismissal of a claim if the claimant fails to diligently pursue the case. *See* SDCL § 15-6-41(b). A.R.S.D. 20:10:01:01.02 provides that the Commission follows the same Rules of Civil Procedure used by the Circuit Court of this state where not in conflict with the Administrative Rules applicable to the South Dakota Public Utilities Commission or SDCL Chapter 1-26. This Commission's rules provide for dismissal of a pleading prior to a final order upon the motion of an interested party. A.R.S.D.

20:10:01:02.04. Therefore, the requirements of SDCL § 15-6-41(b) apply in this case.

In examining the applicability of SDCL § 15-6-41(b), the South Dakota Supreme Court performed an in-depth review on the statute's application to facts less egregious than those facing this Commission. In *Eischen v. Wayne Township*, 744 N.W.2d 788, 2008 SD 2, the Supreme Court reviewed a trial court's decision dismissing a claim under SDCL § 15-6-41(b) for failure to prosecute. The Court recognized that "dismissal for failure to prosecute should be granted when, in light of the circumstances, the plaintiff is shown to lack due diligence by failing to proceed with 'reasonable promptitude'". *Id.* at ¶ 13. Therefore, the question becomes whether the claimant has shown a lack of due diligence and an unexplained and unreasonable failure to promptly proceed. *Id.* at ¶ 27.

Eischen presented a situation where the plaintiffs had not brought forth the case and at

one point, had allowed an 18 month period to pass with no activity. *Id.* at ¶ 15. The Supreme Court noted that it had been the opposing party that had moved the case along when the case had moved at all. *Id.* On appeal, *Eischen* argued that the dismissal was not appropriate because previous cases granting dismissal under SDCL § 15-6-41(b) all had been inactive for at least three years. *Id.*

The Supreme Court recognized that a mere passage of time alone is not a measure to judge dismissals made under SDCL § 15-6-41(b) even though the Supreme Court acknowledged that the case history reflected “three years constitutes the figurative yardstick” to measure dismissals under SDCL § 15-6-41(b). *Id.* at ¶ 16. The Court went on to make a determination that even though the longest delay had been 18 months, the claim could still be subject to dismissal.

As part of the analysis, the Supreme Court also looked at whether there could be a prejudice to the opposing party through the inactivity. *Id.* at ¶ 17. “[D]efendant need not demonstrate prejudice to obtain a dismissal under SDCL § 15-6-41(b).” *Id.* at ¶ 26, citing *Jenco, Inc. v. United Fire Group*, 2003 SD 79, ¶ 22, 666 N.W.2d 763. However, prejudice may be considered as a factor. *Id.* In the *Eischen* case, the Supreme Court found that because the defendant was a volunteer fire department and there is a high turnover of volunteers, prejudice resulted due to the loss of witnesses involved on the defendant’s behalf.

In this situation, even though the Supreme Court has noted the three year time period is a “figurative yardstick” and it is not required, it has been four years and nine months since resolution of the issues in the *Golden West* case. While there was an agreement to resolve the issues in the WWC case first, once those issues had been resolved Venture had an obligation to move its counterclaim forward.² Furthermore, prejudice exists. Since the initial complaint

² Venture cannot claim it was not aware of the resolution in the *Golden West* case as Venture’s counsel was also

action was commenced, WWC has been acquired by Alltel. Subsequent to that, Alltel was acquired by Cellco Partnership d/b/a Verizon Wireless (“Verizon”) and, while Verizon kept WWC License LLC as an operating entity, parts of WWC’s network were sold pursuant to a divestment order. *See United States v. Verizon Communications, Inc.* 607 F.Supp.2d 1 (D.D.C. 2009).

These acquisitions and the combining of networks have resulted in WWC having turnover of employees and network personnel. As noted by the Supreme Court in *Eischen*, such turnover of personnel results in prejudice as it impairs a party’s ability to defend the claim. *Id.* at ¶ 27.

The primary witnesses that appeared on WWC’s behalf at the *Golden West* hearings, Ron Williams and Mike Wilson, are no longer with WWC or any of the successor companies. *Aff.* ¶ 11. The fact that WWC no longer has company witnesses impairs and prejudices WWC in its defense of the counterclaims.

Further, this Commission also has the power to dismiss the counterclaims based on there being no activity for more than one year. SDCL 15-11-11 allows a court to dismiss an action for failure to prosecute when: (a) there has been no activity for one year, and (b) there is no showing of good cause which excuses the inactivity. *Swenson v. Sanborn County Farmers Union Oil Co.*, 1999 SD 61, 594 N.W. 2d 339. “[G]ood cause for delay requires contact with the opposing party and some form of excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines.” *Id.* at ¶15, 594 N.W. 2d at 344. The Supreme Court has found the following to not be good cause for delay, thereby allowing for dismissal:

Communication among a plaintiff and plaintiff’s counsel, but not with opposing counsel. *Holmoe v. Reuss*, 403 N.W. 2d 30 (SD 1987).

counsel for the Golden West companies and the resolution and settlement of the terms appear in the public record as noted by Staff’s brief.

Letters and settlement activity between the parties two years prior to dismissal. *Id.*

A massive amount of documentation and investigation. *Dakota Cheese*, 1995 S.D. 2, 525 N.W. 2d at 713, 716.

Plaintiff's failure to file a summons and complaint in circuit court fourteen months after being instructed to do so by the transferring small claims court. *Devitt v. Hayes*, 1996 SD 71, 551 N.W. 2d 298.

The serious nature of injuries to plaintiff. *Annett v. American Honda Motor Co., Inc.*, 1996 SD 58, 548 N.W. 2d at 804.

Plaintiff's difficulty in finding an expert witness and settlement activity which expired a year prior to dismissal. *Id.*

Illness and death of defendant's original counsel and further inaction by defendant's counsel's law firm. *Reed v. Heath*, 383 N.W. 2d 873 (1986).

In this situation, there has been no activity for several years and there is no good cause showing why there has been no activity. As such, this matter may also to be dismissed under SDCL § 15-11-11.

CONCLUSION

Given Venture's failure to bring forth its counterclaims, the elapsed time and the prejudice to WWC, WWC respectfully requests this Commission dismiss Venture's counterclaims with prejudice.

Dated this 12th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2011, a true and correct copy of WWC LICENSE, LLC's BRIEF IN SUPPORT OF MOTION FOR DISMISS OF COUNTERCLAIMS PURSUANT TO SDCL § 15-6-41(b) OR, IN THE ALTERNATIVE, SDCL § 15-11-11 was sent by electronically to:

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