

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED) CT 07-006
BY JACK AND CINDY BRUNSON, EDGMONT,)
SOUTH DAKOTA, AGAINST GOLDEN WEST)
TELECOMMUNICATIONS COOPERATIVE)
REGARDING TELCOMMUNICATIONS)
SERVICES.)

BRIEF IN SUPPORT OF MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

COMES NOW, Golden West Telecommunications Cooperative (“Golden West”), by and through its undersigned attorneys, and for its Brief in Support of its Motion to Dismiss or For Summary Judgment the Complaint of Jack and Cindy Brunson, states and alleges as follows:

I. Background

Jack and Cindy Brunson have complained to the South Dakota Public Utilities Commission (“Commission”) that Golden West has wrongfully refused to serve the property in Edgemont, South Dakota referred to as the “school house” or the “hunting lodge”, which Golden West expressly denies. A formal Complaint was filed on December 13, 2007 by the Brunsons. Golden West filed an Answer to the Complaint and Motion to Dismiss on January 2, 2008 stating, among other things, that it is ready, willing and able to serve the Brunson’s hunting lodge as soon as a valid easement is executed and filed with the Register of Deeds.

Since December of 2007, Golden West has engaged in settlement negotiations with Pat Ginsbach, an attorney in Hot Springs, South Dakota, who held himself out to be the attorney for Jack and Cindy Brunson. In the fall of 2008, Golden West actually believed said docket was settled. Pat Ginsbach notified this Commission in early 2009

that he no longer represented Jack and Cindy Brunson. Since that time, Golden West has made attempts to engage in settlement negotiations with the Brunsons directly, but has not been able to reach a satisfactory resolution. This docket has been before the Commission for more than two years and there has been no activity but for the settlement negotiations and these negotiations have been very limited throughout the last year.

II. Standard of Review

The Complaint of the Brunsons should be dismissed pursuant to SDCL 15-6-12(b) for failure to state a claim upon which relief can be granted. A complaint should only be dismissed for failure to state a claim if it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Thompson v. Summers, 1997 SD 103 7, ¶ 5, 567 NW2d 387, 390. The Brunsons can not prove any set of facts that would entitle them to relief from Golden West.

Alternatively, Golden West should be granted summary judgment and the Complaint should be dismissed pursuant to SDCL 15-6-56. The Complaint does not state any genuine issue of material fact upon which relief can be granted and Golden West is entitled to dismissal as a matter of law. The Commission must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Jacobson v. Leisinger, 2008 SD 19, ¶ 24, 746 NW 2d 739, 745.

The attached Affidavit of Denny Law, General Manager and Chief Executive Officer of Golden West, as well as the pleadings on file herein, confirm there is no genuine issue of fact and that the Complaint filed by the Brunsons fails to state a claim upon which relief can be granted. Summary judgment is appropriate when a party is entitled to a judgment as a matter of law. Witte v. Goldey, 1999 SD 34, 590 NW2d 568.

Finally, the Complaint of the Brunsons should be dismissed for want of prosecution pursuant to SDCL 15-11-11. A Court can dismiss any civil case for want of prosecution upon written notice to counsel of record where the record reflects that there has been no activity for one year, unless good cause has been shown. SDCL 15-11-11.

III. Arguments and Authorities

The Brunsons are requesting that the Commission determine they are entitled to telephone service. See Complaint Page 2. Although the Complaint filed by the Brunsons and the Answer of Golden West is laden with facts due to the long history between the two parties, the salient issue raised in this Complaint is clearly a legal question. The Commission must decide if it has the authority to require Golden West to serve a customer that will not execute a valid easement which allows Golden West to legally enter the property. Golden West submits that if the Commission orders the requested remedy, it will in effect be ordering Golden West to commit an illegal taking without just compensation in violation of the South Dakota Constitution and state law, thereby circumventing the eminent domain procedures set in place by the legislature and compelling a trespass which could subject Golden West to further liability.

A. The Relief Requested by the Brunsons Would Require Golden West to Commit a Trespass.

Generally, the right to construct a telephone line over private property may be acquired by one of two ways:

1. consent or contract with the owner; or
2. prescription. 74 Am.Jur 2d § 10

It is Golden West's policy to gain consent of the property owner before providing service to a property. Generally, a telephone company may refuse to serve customers who refuse to comply with the company's reasonable regulations. 64 Am Jur 2d § 21. Requesting an easement so as to protect itself from liability is certainly a reasonable regulation by Golden West.

At least one Court has confirmed that this policy is a sound policy. For example, a Florida Court opined that "prudence dictates that a utility must obtain necessary easement or other legal sanction from those whose property rights are to be affected before its lines and poles are installed." Florida Power Corp v. Scudder, 350 So.2d 106, (Fla. App 1977) This policy protects Golden West from any trespass or inverse condemnation action that may be brought by landowners, such as the Brunsons.

In South Dakota, it is clear that placement of a utility's equipment on property without an easement is a trespass. In the Johns v. Black Hills Power, Inc. case, the landowners sued Black Hills Power, Inc. ("BHP") for trespass or in the alternative, inverse condemnation. 2006 SD 85, ¶ 12, 722 NW2d 554, 558. BHP had placed anchor pole and guy wires on land without an easement. Although the case was dismissed because the landowners lacked standing to bring the Complaint, the Court recognized the

“inverse condemnation or taking because of the permanent nature of the trespass”. Id at ¶12 (citing City of Sioux Falls v. Miller, 492 NW 2d 116, 119 (SD 1992)) (The clearest case of a permanent nuisance or trespass is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility). By ordering Golden West to serve the Brunsons without a valid easement in place, the Commission would be forcing Golden West to subject itself to potential future liability under the trespass statutes. Golden West also needs a valid easement to perform routine maintenance on the fiber optic cable. Without a valid easement, Golden West would be subjecting itself to liability any time it needed to enter the property.

B. The Commission Does Not Have the Authority to Order Golden West to Commence a Condemnation Proceeding.

In order for Golden West to serve the Brunsons, a fiber optic cable will need to be buried on the Brunson’s property. This placement by utilities is considered a taking under South Dakota law and can subject Golden West to an inverse condemnation action. Johns v. Black Hills Power, Inc. 2006 SD 85, 722 NW2d 554. The South Dakota Constitution states that “Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article. Const. Art. 6 § 13. The legal procedure for taking private property is codified in SDCL 21-35.

Golden West, as a telecommunications provider, has the right of condemnation pursuant to SDCL 49-30-12. The question that ensues is “Does the Commission have the authority to order Golden West to commence a condemnation proceeding to obtain the

necessary easement to serve a customer?” Golden West submits that the Commission does not have such authority.

Condemnation under eminent domain is codified in SDCL 21-35. SDCL 21-35-1 states as follows:

In all cases where any person, group, or corporation, public or private, including the owners of water rights, ditches, flumes, reservoirs, and mining property under the provisions of the laws of Congress, invested with the privilege of taking or damaging private property for public use, in making, constructing, repairing, or using any work or improvement allowed by law, shall determine to exercise such privilege, it shall file a petition in the circuit court for the county in which the property to be taken or damaged is situated, praying that the just compensation to be made for such property may be ascertained by a jury.

The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Anderson v. City of Tea, 2006 SD 112, ¶ 5, 725 NW2d 595, 597.

First of all, reading the plain language of this statute makes it clear that the cooperative is given the authority to “determine to exercise” the privilege of eminent domain. This is supported by South Dakota case law. In State v. Sayer, 177 NW 807, 809 (SD 1920) the Court made it clear that the legislature “intended to and did confer upon the game and fish commission authority to exercise the power of eminent domain for purposes contemplated by the act”. The clear language of this statute does not allow an interpretation that would give the Commission authority to order Golden West to

commence an eminent domain proceeding. Rather, Golden West is in the position to decide if that privilege should be exercised.

The plain language reading of SDCL 21-35-1 makes it clear that the petition must be filed in the circuit court, not the Commission. If the Commission orders that Golden West must provide service to the hunting lodge, lines will need to be placed under the Brunson's property. This taking would require "just compensation" under the eminent domain act. SDCL 21-35-1. The procedure in place for determining the amount of compensation was set by the legislature and requires a trial to a jury. SDCL 21-35-15. Thus, the Commission would not be able to determine the amount of just compensation owed pursuant to the taking. The law does not afford the Commission a viable remedy to order the relief requested by the Brunsons.

An eminent domain proceeding is not a viable option for Golden West. It is the longstanding practice of Golden West not to compensate landowners for easements that are required in order for Golden West to provide service to the customer requesting said service. This policy is also in accordance with the membership agreement of a cooperative. To compensate a landowner for an easement is contrary to the cooperative principles. When accepting telephone service from the cooperative, a member must also adhere to the policies and procedures of the cooperative. Golden West has sound policy reasons to request an easement prior to providing service to the Brunsons, and to not provide compensation for said easement.

As an example, in Tennessee, landowner sued an electric cooperative claiming a by-law provision was unconstitutional because it required members to grant easements to the Cooperative without monetary compensation. Lackey v. Meriwether Lewis Elec. Co-

op., 181 F.3d 101, 1999 WL 357792 (6th Cir. (Tenn.)) The Court found the provision was constitutional and recognized the contractual relationship of a member joining a cooperative for service. The Court stated the electric provider “was a Cooperative in the sense that a group of users of electricity entered into an agreement with it for the mutual benefit of all of its members. In doing this each member of the association agreed to be bound by the By-laws, rules and regulations of such association”. Likewise, Golden West’s requirement of obtaining an easement should be sustained.

IV. Want of Prosecution

This matter has been pending since December of 2007 with little or no activity. Golden West had actively negotiated early on with Patrick Ginsbach, an attorney in Hot Springs, who indicated he represented the Brunsons. Upon reaching a settlement, Brunsons indicated Ginsbach did not in fact represent them. Golden West then tried to negotiate with the Brunsons directly with no success.

The Court may “dismiss any civil case for want of prosecution upon written notice to counsel of record where the record reflects that there has been no activity for one year, unless good cause is shown to the contrary.” SDCL 15-11-11. The term “record,” for purposes of establishing good cause, shall include, but not by way of limitation, settlement negotiations between the parties or their counsel, formal or informal discovery proceedings, the exchange of any pleadings, and written evidence of agreements between the parties or counsel which justifiably result in delays in prosecution. *Id.*

In this case, there has been no formal or informal discovery proceedings or pleadings exchanged. There has, however, been settlement negotiations with Pat

Ginsbach, who Golden West later was informed, did not represent the Brunsons in this matter and the settlement negotiations were abandoned. Golden West has tried to resume settlement negotiations with Brunsons with no success. There is no good cause on behalf of the Brunsons for the delay in this matter. Golden West has actively been trying to resolve this matter to no avail. Good cause does not exist for this action not to be dismissed.

V. Conclusion

For the forgoing reasons, Golden West respectfully requests that the Commission dismiss the complaint of Jack and Cindy Brunson with prejudice. Golden West is ready, willing and able to serve the Brunsons as soon as a valid easement is in place. This Commission does not have the authority to order the remedy requested by the Brunsons.

DATED this 13 day of April, 2010.

RITER, ROGERS, WATTIER, &
NORTHRUP, LLP

By: Margo D Northrup
A member of said firm

Darla Pollman Rogers

Margo D. Northrup

319 S. Coteau – P. O. Box 280

Pierre, SD 57501-0280

Attorneys for Golden West Telecommunications
Cooperative