

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

IN THE MATTER OF THE COMPLAINT            )  
OF VENTURE COMMUNICATIONS            )     SD PUC DOCKET CT20-001  
COOPERATIVE AGAINST AT&T            )  
MOBILITY                                    )  
  )

**AT&T MOBILTY’S OBJECTION TO THE MOTION TO AMEND COMPLAINT  
AND AT&T MOBILITY’S MOTION TO DISMISS**

COMES NOW, AT&T Mobility (“AT&T”), by and through its counsel of record and submits this Objection to the Motion to Amend Complaint filed by Venture Communications Cooperative (“Venture”) in this docket. AT&T further moves the Commission for a dismissal of the complaint filed by Venture for failure to prosecute its claim pursuant to SDCL 15-6-41(b). An Affidavit of counsel is attached and incorporated in support of this Motion.

**FACTS**

In late 2017, AT&T added three DS1 interconnection trunks between its mobile telephone switching office in Sioux Falls and Venture’s end offices in Sisseton, Highmore and Britton. Pre-filed testimony of Karen Brown (“KB”), October 22, 2020, at 1-2. Venture began billing these trunks in February of 2018. KB at 2. A billing agent for AT&T disputed these charges by May of 2018, three months after they were first billed. KB at 2. The parties over the next year and a half exchanged correspondence and disputed the nature of services provided and whether or not amounts were owed by AT&T and Venture. KB at 2-4. Counsel became involved and after additional correspondence the Complaint before the Commission was filed on May 12, 2020.

The parties exchanged discovery and AT&T moved for Partial Summary Judgment on May 19, 2021. Commission denied the Partial Summary Judgment sought by AT&T on July 14, 2021. An evidentiary hearing was last set in this matter for September 7, 2021, but postponed by agreement of the parties. Subsequently, on November 5, 2021, Venture filed the motion to set a hearing date but that motion was denied by the Commission on November 24, 2021.

The parties had a history of settlement offers being exchanged in this matter and commensurate with the rules of evidence, those discussions are not relevant or subject to disclosure here, but the timelines are illustrative of why the pending Motion to Dismiss should be granted by the Commission.

On October 8, 2020 in house counsel for AT&T reached out to counsel for Venture and proposed a settlement in this matter. Affidavit of William Van Camp (“WV Aff.”) at 3. Response to this proposal was received on July 10, 2021. WV Aff. at 4. Nine months later. In that July 2021 response was a settlement proposal by Venture which was responded to on August 4, 2021, by the undersigned counsel for AT&T. WV Aff. at 5. Venture quickly responded to that counter offer on August 27, 2021 with another counter. WV Aff. at 6. This was answered by counsel for AT&T on September 16, 2021 with another counter. WV Aff. at 7. This flurry of proposals and counters occurred around the time of the last scheduled hearing. That is not unusual. However, since September 16, 2021, no response has been received by AT&T on its proposal of that date other than as described below. WV Aff. at 8. No discovery has occurred and no pleadings had been filed until the current motion before the Commission.

In early 2022, AT&T began the effort of turning down the trunks in dispute. This was done at Venture’s suggestion and not as an effort, in their own words, of resolving the dispute but “to stop the bleeding.” WVC Aff. at 10. There were, in the spring and early summer of this year, communications between the parties through counsel relating to the trunks being turned down. Venture suggested calls would be dropped by AT&T’s efforts. AT&T asked for assistance from Venture in testing calls routed without the disputed trunks. No assistance was given. AT&T found individuals in the local exchanges to help test the call routing changes. The tests showed calls would continue to be completed. It is AT&T’s believe that calls have not been dropped as a result of the change.

After the September 7, 2021 hearing was postponed, staff sought updates from AT&T and Venture and suggested new hearing dates be set at several instances. First on December 16, 2022, then on February 7, 2002 and lastly on July 27, 2022. WV Aff. at 9.

Counsel for Venture in email correspondence stated on July 22, 2022 that in light of the routing dispute Venture would be requesting a new hearing date as soon as possible. WV Aff. at 11. Since July 27, 2002 no communications have been sent or received in this docket from Venture prior to the pending Motion to Amend its Complaint which was filed on November 8, 2022. WV Aff. at 12.

### ARGUMENT

AT&T requests that the Motion to Amend be denied and that the Plaintiff's Complaint be dismissed for lack of prosecution pursuant to SDCL 15-6-41(b). Looking at the history of the dispute in this matter, what is undisputed is that AT&T within 3 months of being billed these disputed charges by Venture began, through its agents, objecting to the nature of the charges and their applicability to AT&T under the relevant agreements between the parties. That was four and one-half years ago.

So, with the clock ticking, AT&T paid the disputed charges from February 2018 until August 2019. It then stopped making the disputed payments after discussion between the parties reached an impasse. Mindful, the interconnection agreement between the parties requires good faith efforts to dissolve their disputes<sup>1</sup>, outreach continued.

After the first formal offer between counsel to resolve the matter there is a nine-month delay in response. Discovery and prehearing motions were exhausted and a hearing was set but that hearing was postponed in an effort to allow the parties to negotiate further. Those negotiations simply stopped after the aforementioned flurry of offers and counter offers. The network changes were done at Ventures suggestion, to stop its perceived yet disputed harm, and not as a settlement effort.

Now Venture apparently wants to add to its four and one-half year old complaint additional allegations regarding changes to call routing. Changes that occurred when the matter grew stale, Venture continued to accrue disputed amounts and it was suggested by Venture that if AT&T did not need all of the trunks it was being charged

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<sup>1</sup> Section 7.2.6 of the parties Interconnection Agreement states in part...“The Parties shall diligently work toward resolution of all billing disputes.”

for it could turn some of them down. This Motion to Amend should be denied as an effort to expand after all these years the issues being adjudicated in this docket. And frankly, since the accruing on Venture's part has stopped with the trunks no longer being used, their concerns on call routing are a separate matter.

Pursuant to SDCL 15-6-41(b), "(f) or failure of the plaintiff to prosecute or to comply with this chapter or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." In reviewing such a motion it is the responsibility and burden of Venture to move its cause of action forward and AT&T only needs to meet Venture step by step. See, Eischen v. Wayne Tp., 744 N.W.2d 788, 795 (SD 2008), *Internal citations omitted*. "[P]laintiffs bear the duty to advance their cases...." LaPlante v. GGNCS Madison, South Dakota, LLC, 941 N.W.2d 223, 228 (SD 2020), *quoting, Moore v. Michelin Tire Co., Inc., 603 N.W.2d. 513, 526 (SD 1999)*. A "dismissal for failure to prosecute should be granted when, in light of all the circumstances the plaintiff is shown to lack due diligence by failing to proceed with "reasonable promptitude." *Eischen @ 795, internal citations omitted*. Dismissal for failure to prosecute is an extreme measure which should only be granted when there is an "unreasonable and unexpected delay." *Id., internal citations omitted*. AT&T thinks it meets this standard and requests the Commission to dismiss accordingly the action with prejudice.

There is no passage of time test to a motion to dismiss pursuant to SDCL 15-6-41(b), rather this Commission must consider all the facts and circumstances. *Id.*, at 796, *internal citations omitted*. Four and one-half years later after paying disputed charges on very little traffic for nearly eighteen months rests the delay legally at the feet of Venture with it having the obligation to move the docket forward.

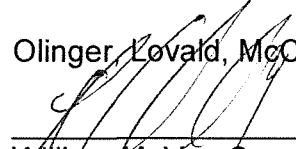
Alternatively, AT&T would offer that this Commission can dismiss this complaint on its own motion pursuant to SDCL 15-11-11 for failure to prosecute as there has been no activity on the record for one year other than this filing to amend pleadings coming now at the 11<sup>th</sup> hour. SDCL 15-11-11 places an affirmation duty on a party to move a case forward. See, LaPlante at 229. Venture has not done this.

## CONCLUSION

For the reason stated herein, the delay in responding or moving forward in settlement discussions or with a schedule demand, this Complaint should be dismissed with prejudice.

Dated this 18<sup>th</sup> day of November, 2022.

Olinger, Lovald, McCahren & Van Camp, P.C.



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## CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true and correct copy of the foregoing in the above-entitled action was delivered by electronic mail this 18th day of November, 2022, to the following:

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