BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

DOCKET NO. CT20-001

IN THE MATTER OF THE COMPLAINT OF VENTURE COMMUNICATIONS COOPERATIVE AGAINST AT&T MOBILITY	) REPLY TO OBJECTION) TO AMEND COMPLAINT) AND OPPOSITION TO) MOTION TO DISMISS)

Introduction

Venture Communications Cooperative, Inc. ("Venture"), by and through its attorney of record, submits this Reply to AT&T Mobility's (AT&T's) Objection to the Motion to Amend Complaint and Objection to AT&T's Motion to Dismiss. AT&T's Objection and Motion to Dismiss paints an incomplete picture, both of the facts and of the law, and invites the Commission to entertain the extreme remedy of dismissal to distract from Venture's motion to amend its complaint. In doing so, AT&T misstates the legal precedent the Commission must follow in considering either a Motion to Dismiss or a Motion to Amend.

First, Venture addresses the inaccurate statement of facts upon which AT&T relies to suggest that Venture has not diligently prosecuted its case. In reality, there has been substantial communication between the parties and internal effort on Venture's part, all directly related to this proceeding. Next, Venture provides the correct standard by which the Commission must weigh the Motion to Dismiss, and demonstrates how AT&T has failed to meet the high threshold required by South Dakota law such to warrant dismissal. Finally, Venture discusses the correct standard for the Motion to Amend, which requires the Commission to err on the side of permitting amendments unless a showing of prejudice is made by the non-moving party. As AT&T has failed to demonstrate prejudice, the Motion to Amend should be granted.

AT&T's Statement of Facts is Inaccurate

AT&T's pleading is littered with inaccurate and misleading statements of fact upon which it relies for support. References to "the matter" having grown "stale" and "11th hour" activity by Venture are examples of its flawed narrative that Venture has failed to prosecute its case. *AT&T Objection to Amend Complaint and Motion to Dismiss* at pg. 3, 4. AT&T puffs up the timeline to "four and one-half years" in a proceeding that was initiated only two and one-half years ago. *Id.* at 3. With the benefit of hindsight to craft its narrative, AT&T points to delays in 2021—yet no such concerns were raised before the Commission in 2021.[1] The reality, as discussed in greater detail below, is that the parties engaged in extensive email, telephone, and in-person contacts during the timeframe pertinent to the motions currently before this Commission: from the end of November 2021, when counsel for Venture participated in a hearing on its motion to set a hearing until the end of July, 2022, when Venture articulated its plan to move forward and AT&T and Commission Staff acknowledged such plan. As will be seen, this activity consisted of repeated counsel-to-counsel contact, at times including Commission Staff, as well as internal activity by Venture that progressed the case. The subject matter of these interactions concerned the trunks which were the subject of the collection action in this docket and AT&T's breach of the parties' Interconnection Agreement ("ICA"), which agreement has been the subject of extensive attention in the parties' pre-filed testimony and pleadings.

The correct narrative is as follows: In the first part of January, 2022, after the Commission denied Venture's Motion to Schedule Hearing due to Commission scheduling issues, Mr. Fay Jandreau (Venture's then Assistant General Manager) sent a letter to Ms. Cindi Dissett (AT&T's

[1] Recording of November 23, 2021 Commission meeting available at: https://puc.sd.gov/commission/media/2021/puc11232021.mp3.

billing agent). *See* Pollman Rogers Affidavit, Attachment A. The letter responded to another "overbilling" claim by AT&T, and proposed that AT&T conduct a traffic study to determine how to reduce the number of trunks—the invoices for which the parties are currently disputing in this proceeding—to be more in line with AT&T's actual usage.[2] Mr. Jandreau noted that his correspondence was not an effort to "settle their claim or series of claims," but was instead an effort to limit the growth in Venture's damages by AT&T's non-payment for these trunks during the pendency of the dispute, which trunks AT&T was still ordering and using. *See* Pollman Rogers Affidavit, Attachment A. A few days later, Venture Counsel transmitted a courtesy copy of the same letter to AT&T counsel, Mr. William Van Camp. *See* Affidavit of William M. Van Camp, p. 1, ¶ 10. In this way, Venture acted responsibly to narrow the financial scope of the dispute, conduct which the Commission would expect from litigants before it.

Although the 2022 Legislative Session prevented formal correspondence, counsel engaged in informal settlement discussions during that period. *See* Pollman Rogers Affidavit, ¶¶ 11-12. Then, in March, 2022, counsel for AT&T contacted Venture Counsel for assistance with facilitating testing. *See* Pollman Rogers Affidavit, ¶ 13. Venture was later informed that the purpose of the testing was to "confirm the routing scheme for ported versus non-ported numbers." *Id.* Venture had never seen routing used in the manner AT&T appeared to suggest—as interconnection—and suspected it would be an unauthorized, and possibly illegal, use of a number porting trunk. During April, Venture studied AT&T's testing request and confirmed these suspicions, and determined that it should not participate in AT&T's apparent "routing scheme". *See* Pollman Rogers Affidavit, ¶ 14. In May, AT&T advised Venture that it had concluded its

[2] AT&T witness Le had earlier pre-filed testimony in the Complaint docket which strongly suggested that AT&T had overordered its trunking capacity.

testing—without Venture's participation—and Venture communicated its concern that diversion of the traffic as AT&T intended "will eliminate toll-free calling for Venture's customers to AT&T Mobility customers," contrary to AT&T's stated goals. *See* Pollman Rogers Affidavit, ¶ 15.

In June, 2022, Venture received disconnect orders for *all* of Venture's local trunk groups forming the direct connection between AT&T and Venture, which are at issue in this proceeding. As alleged in Venture's proposed First Amended Complaint, complete disconnection of these trunks violates the ICA, which requires direct connections between the companies. This was not "done at Venture's suggestion," as stated in AT&T's Motion and Affidavit; rather, Venture had proposed AT&T consider *reducing* the number of trunks it purchased as is evident from Mr. Jandreau's letter. *See* Pollman Rogers Affidavit, Attachment A. Venture noted several issues with the disconnect order, in particular the absence of "translation" information in the disconnect orders necessary to enable the local calling pattern from Venture's customers to AT&T's customers. *See e.g.*, Proposed First Amended Complaint, pg. 2-3. The disconnect order instead contained language suggesting that Venture itself haul this traffic—across South Dakota—at its own expense, contrary to the ICA. *Id.* at 3.

Given this significant change of events, July saw a flurry of activity to progress the case. On July 20, 2022, Venture again contacted AT&T's counsel and cautioned AT&T that the disconnection AT&T had ordered would result in toll calls when Venture's customers placed otherwise local calls to AT&T's customers. *See* Pollman Rogers Affidavit, ¶ 19. The same correspondence expressed an intention to follow up as to how to maintain the direct connections, and hence local calling. *Id.*

In follow-up, Mr. Van Camp responded acknowledging Venture's prior recommendation regarding a reduction in trunks, as well as a prior Venture settlement offer. *See* Pollman Rogers

Affidavit, ¶ 19. Within the same timeframe, Mr. Van Camp advised Venture Counsel and Commission Staff that all of AT&T's customers had been moved to "LRN routing" (i.e., were being treated as ported numbers) and there were no problems. Van Camp indicated: "The 3 Venture trunk groups have no traffic on them now, at this point you are only disconnecting unused trunks." *See* Pollman Rogers Affidavit, ¶ 19. Thus, although Venture had not yet disconnected the trunks per AT&T's order, the direct connections had already been bypassed.

On July 22, 2022, Venture Counsel notified Mr. Van Camp and Commission Staff that the two parties had again come to an impasse and that Venture intended to move forward with scheduling a hearing in this docket, and noted that pleadings could be amended accordingly. *See* Pollman Rogers Affidavit, ¶ 20. On July 27, 2022, Commission Staff informed Venture Counsel that if Venture still intended to proceed in that manner, it should file a Motion for an Amended Complaint along with a procedural scheduling request. *See* Pollman Rogers Affidavit, ¶ 20.

At the same time these discussions were occurring, Venture worked internally on implementing the AT&T disconnect orders. While this activity did not include AT&T, it nevertheless provides a reasonable explanation for any delays—the changed fact set required as such. As discussed, AT&T's disconnection of *all* trunks caused calls being made from Venture customers to AT&T customers to go from local calls to long distance calls. *See* Proposed First Amended Complaint, ¶¶ 6-7. As the dominos fell, Venture needed to develop a plan for these calls—either let them drop or send them over long distance trunks. It also required implementing a plan for customer outreach regarding the loss of local dialing and coordination with Commission Staff regarding complaints from customers of long distance charges. *See* Pollman Rogers Affidavit, ¶¶ 17, 20. Venture received contacts from Commission Staff in August 2022 regarding

customer complaints to the Public Utilities Commission related to these issues. *See* Pollman Rogers Affidavit, ¶ 21.

The Commission Should Deny AT&T's Motion to Dismiss

In light of the events described above, AT&T's Motion to Dismiss Venture's original Complaint under either SDCL 15-6-41(b) or SDCL 15-11-11—both of which concern allegations of lack of prosecution—should be denied. These rules have been considered by the South Dakota Supreme Court, and it has enunciated certain principles about their application by South Dakota courts and agencies. AT&T acknowledges two such cases,[3] but its analysis falls well short of the mark such to warrant dismissal. Venture has engaged in substantial activity toward progressing the case, and AT&T's motion to dismiss should be denied.

The first pertinent statute, SDCL SDCL 15-6-41(b), provides that "a defendant may move for dismissal" for failure of the plaintiff to prosecute the case. Importantly, dismissal is only appropriate pursuant to this statute "when the plaintiff's conduct is *egregious*." *Eischen v. Wayne Township,* 2008 S.D. 2, ¶ 12 (emphasis added). The second applicable statute, offered as an alternative argument by AT&T, is SDCL 15-11-11, provides that "[t]he court may dismiss any civil case for want of prosecution . . . where the record reflects there has been no activity for one year, unless good cause is shown to the contrary." Notably, SDCL 15-11-11 "was meant to operate as a clerical tool, not a substantive dismissal[]" and is "not meant to forever bar a case." *LaPlante v. GGNSC Madison, South Dakota, LLC*, 2020 S.D. 13, ¶ 17. Further, "[a] case should not be dismissed with prejudice merely because the statute allows a court to clear its docket after a quota of inactivity is met." *Id.*

[3] *LaPlante v. Madison,* 2020 S.D. 13 and *Eischen v. Wayne Tp.*, 2008 S.D. 2.

As a threshold matter, the time between the last docket activity by Venture and Venture's Motion to Amend Complaint was *less* than one year. Venture Counsel, on the record during the November 23, 2021, hearing, proactively withdrew the Motion to set a hearing date after it became apparent the Commission's schedule would not permit a hearing at that time. *See* Pollman Rogers Affidavit, ¶ 8. Given that Venture's Motion to Amend was filed on November 8, 2022, SDCL 15-11-11's requirement of a year of inactivity on the record is simply not met. Further, Venture was actively involved in this matter between the withdrawal of its Motion to Set a Hearing Date in November, 2021 and the filing of its Motion to Amend Complaint in November, 2022.

The case of *Swenson v. Sanborn County Farmers Union Oil Co., et al*, is particularly instructive in its analysis of these statutes. 1999 S.D. 61. That case concerned a lawsuit over allegedly ineffective applications of herbicide to agricultural fields. *Swenson* at ¶¶ 2-4. Almost two years elapsed between the plaintiff's last action on the record and the defendant's motion to dismiss for lack of prosecution under SDCL 15-11-11 and 15-6-41(b). The trial court granted the motion to dismiss but the South Dakota Supreme Court reversed, finding that the trial court had abused its discretion in granting the motion. In making its finding, the Supreme Court set out the relevant principles concerning dismissal under either SDCL 15-11-11 or SDCL 15-6-41(b):

> First, this Court ordinarily will not interfere with the trial court's rulings in these matters. Second, a *dismissal of an action for failure to prosecute is an extreme remedy* and should be used only when there is an unreasonable and unexplained delay. An unreasonable and unexplained delay has been defined as an omission to do something 'which the party might do and might reasonably be expected to do towards vindication or enforcement of his rights.' Third, *the mere passage of time is not the proper test to determine whether the delay in prosecution warrants dismissal.*

Swenson at ¶ 10 (emphasis added, internal citations omitted). Against this framework, the Supreme Court then considered the motion under the separate respective requirements of SDCL 15-11-11 and SDCL 15-6-41(b).

In *Swenson*, the Supreme Court found that despite the absence of activity on the court record in excess of one year, the interaction and communications between the parties in *Swenson* constituted good cause for the delay within the meaning of SDCL 15-11-11. *Id.* These communications consisted of three letters from the plaintiff's counsel during the absence of docket activity: a letter discussing settlement negotiations, a letter discussing a change in counsel and a scheduling order, and a letter transmitting a proposed scheduling order. *Id.* The Supreme Court also found that the Swensons' behavior had not been egregious, as required for dismissal under §15-6-41(b). Rather, the Court found that the Swensons acted as would be expected of a plaintiff trying to proceed with a case: they were trying to conduct discovery and scheduling for trial. The Court also found persuasive that they were simultaneously occupied with the proceedings of a declaratory judgment action that was an offshoot of the same matter. Ultimately, the Supreme Court held that, "[w]hile not demonstrating the epitome of promptness, the evidence shows Swensons were acting with due diligence in trying to proceed with this action under the circumstances. Dismissal is a serious remedy which these facts do not merit." *Swenson* at ¶ 20.

The resemblance of *Swenson* to the facts of Venture's case is striking. As demonstrated above, Venture was not inactive. The parties continued settlement discussions in January and February despite other obligations of both counsel; in March, April, and May Venture proposed a means of addressing the disputed traffic arrangement in the interim, and considered (to the extent possible given the vagueness of AT&T's approach) counter-proposals by AT&T. In June and July, Venture addressed the fallout of AT&T's disconnection order which provided grounds for its Motion to Amend. Against this background, it is clear that Venture had good cause, as required by SDCL 15-11-11, for any absence of docket activity, and that any delay in the prosecution of

Venture's case is not unreasonable, not unexplained, and certainly not egregious, as required by SDCL 15-6-41(b).

Also relevant here is *LaPlante v. GGNSC, Madison S.D., LLC*, which is relied upon by AT&T but not discussed in meaningful detail. 2020 S.D. 13. In *LaPlante*, the South Dakota Supreme Court reversed the decisions of both the South Dakota Department of Labor and the circuit court in granting a motion to dismiss the case due to lack of prosecution under an administrative rule that is almost identical to SDCL 15-11-11.[4] *LaPlante* at ¶ 20. Given this similarity, the Court's analysis primarily involved interpreting SDCL 15-11-11.

In discussing the lack of activity on the docket in *LaPlante*—one year and six months—the Court further explained that the term "activity" is not confined to court filings or a particular communication between the parties. *Id.* at ¶ 18. Instead, the activity must "move[] the case forward." *Id.* The activity must be shown on record before a dismissal is entered, but even if the events occurring in a case are not simultaneously documented in the official case file, a record of the activity can be made after the fact in response to a motion to dismiss. *Id.* Ultimately, the Court found that the Department and the circuit court read the term "activity" too narrowly, and that claimant's participation in a vocational rehabilitation program did constitute sufficient activity to keep the case moving forward. *Id.* ¶ 25.

Again, the resemblance to the instant case is striking. Venture's efforts in decoding of AT&T's cryptic proposal to test non-ported call routing and addressing the fallout of AT&T's unauthorized disconnect order are similar to the claimant's participation in a vocational

[4] The motion to dismiss in *LaPlante* was made under ARSD 47:03:01:09, which allows the Department to dismiss a workers' compensation petition when there has been "no activity for at least one year, unless good cause is shown[.]" Due to a lack of precedent under ARSD 47:03:01:09, the parties and the Court relied on precedent for SDCL 15-11-11.

rehabilitation program. Both efforts moved the case forward, even though they were not necessarily communicated between the parties. Unlike the claimant in *LaPlante,* however, Venture also engaged in substantial communication between the parties, in addition to these efforts. There is simply no evidence that Venture failed to prosecute its case.

The Commission Should Grant Venture's Motion to Amend

Sufficient grounds exist to grant Venture's Motion to Amend its original Complaint. As Commission Staff notes, ARSD 20:10:01:16 provides that motions to amend may be granted at the discretion of the Commission. *Staff's Response to Venture Communications Cooperative's Motion to Amend Complaint and AT&T Mobility's Motion to Dismiss* at p. 2. However, SDCL 15-6-15 requires more. That section provides that leave to amend a pleading must be freely given when justice so requires. The South Dakota Supreme Court has held that, "the most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment." *Dakota Cheese, Inc. v. Ford*, 1999 S.D. 147, ¶ 24, 603 N.W.2d 73, 78, citing *Isakson v. Parris*, 526 N.W.2d 733, 736 (SD 1995). AT&T's correspondence is at odds with any such notion. *See* Pollman Rogers Affidavit, ¶ 20. (wherein AT&T's counsel indicates AT&T "looks forward to a hearing"). And, in any event, AT&T has described no prejudice, and any argument to the contrary now should be viewed as the "11th hour" attempt that it would be.

In determining whether prejudice might result from granting a Motion to Amend, the South Dakota Supreme Court has looked favorably upon the following test:

> In order to reach a decision on this point, the court will consider the position of both parties and the effect the request will have on them. This entails an inquiry into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.

Isakson v. Parris, 526 N.W.2d 733, 736-37 (S.D. 1995), quoting 6 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1487 (1990). Leaving aside for a moment the fact that AT&T has made no allegation of prejudice whatsoever, these factors all militate in favor of granting Venture's Motion to Amend. Denying Venture's Motion to Amend would create hardship by requiring it to pursue two separate proceedings before the Commission when one would suffice. Venture did not include the material proposed to be added to its original complaint because the events had not yet occurred. However, both the original complaint and the proposed amended complaint stem from the parties' obligations under the ICA. And, as discussed previously, AT&T has not indicated any injustice resulting from grant of the motion to amend.

Indeed, AT&T does not address any of these considerations, supporting denial of the motion simply because Venture's amendments would add additional issues to an existing proceeding. AT&T makes only the bare-bones statement that, "[t]his Motion to Amend should be denied as an effort to expand after all these years the issues being adjudicated in this docket." *AT&T's Objection to the Motion to Amend Complaint and Objection to AT&T's Motion to Dismiss* at p 4. Commission Staff seeks "further explanation or a valid reason" for granting its motion, *Staff's Response to Venture Communications Cooperative's Motion to Amend Complaint and AT&T Mobility's Motion to Dismiss* at p. 3, which Venture has provided above per Commission Staff's request. While both AT&T and Staff suggest the issues in Venture's proposed Amended Complaint are distinct and should be considered in a separate matter, Venture has also demonstrated the opposite—that these matters are a continuum of activity and claims that are inextricably intertwined by virtue of the ICA. Moreover, as just shown, whether a matter can be considered separately instead of included in an amendment is not a consideration under South

Dakota's law on amending pleadings. As such, Venture respectfully requests the Commission grant its Motion to Amend the Complaint.

Conclusion

The facts as outlined above, necessitate that AT&T's Motion to Dismiss fail and Venture's Motion to Amend be granted. Contrary to the scant legal analysis provided by AT&T, the South Dakota Supreme Court provides controlling precedent on both matters. The Commission should allow Venture to amend its complaint to align with the current status of the parties, and decline to issue the extreme remedy of dismissal as requested by AT&T.

DATED this 15th day of December, 2022.

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