SOUTH DAKOTA

OFFICE OF HEARING EXAMINERS

In the Matter of the Petition of Venture Communications Cooperative for suspension or modification of local dialing parity and reciprocal compensation obligations.	)))	PUC 7-01 Docket No. TC06-181

RURAL CELLULAR CORPORATION'S RESISTANCE TO VENTURE COMMUNICATIONS' MOTION TO COMPEL

Rural Cellular Corporation (hereinafter "RCC"), by and through its undersigned attorneys, hereby files this Response to Venture Communications Cooperative's ("Venture") Motion to Compel. Denial of Venture's Motion is appropriate under S. D.C.L. § 15-6-26(b), because Venture seeks irrelevant information that is not likely to lead to admissible evidence. Denial is also proper because Venture's requests are onerous and unduly burdensome, and as a result, impermissible under S.D.C.L. § 15-6-26(b). Moreover, the discovery sought by Venture is imposed for purposes of harassment and oppression, thereby entitling RCC to a protective order precluding Venture from demanding the information sought pursuant to S.D.C.L. § 15-6-26(c). In support, an Affidavit of Jennifer Arnold has been filed simultaneously with this Resistance and is incorporated herein through this reference.

INTRODUCTION

On October 24, 2006, Venture filed the current Petition, pursuant 47 U.S.C. § 251(f)(2) and SDCL § 49-31-80, seeking suspension or modification of its long-standing dialing parity and reciprocal compensation obligations. RCC intervened as an interested party on November 13, 2006. The matter was ultimately transferred to the Office of Hearing Examiners on February 6, 2007.

In conjunction with this Petition, Venture served discovery requests upon RCC on March 20, 2007. RCC timely provided responses to the same on April 23, 2007. Contained therein, RCC objected to many of Venture's requests as follows:

> RCC objects to the request as unduly burdensome, onerous, wholly irrelevant and not likely to lead to the discovery of admissible evidence within the instant suspension proceeding.
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> The requested information is unnecessary for the proceeding as any reciprocal compensation calculations would have to be determined in an arbitration under 47 U.S.C. §§ 251 and 252. Thus, Venture's request for specific RCC cost information is premature. The interrogatory is also overly broad and unduly burdensome in that it requests information that is not tracked by RCC or that the accumulation of information due to the fact that RCC has acquired various towers and tower locations from other companies making it impossible or cost prohibitive to produce.

See RCC's Response to Interrogatory No. 10; *See Generally* Responses to Interrogatories 9, 11-18, 19-37, and 38. RCC's objections were appropriate because Venture's discovery requests seek highly detailed cost information and call traffic data not regularly kept by RCC in the course of business. The objections were also appropriately interposed because Venture's requests seek information that is not relevant or likely to lead to the discovery of admissible evidence.

To illustrate, Venture generally has asserted it needs all this detail to establish that wireless costs for delivering calls to Venture are less than the cost of Venture to deliver calls to the wireless carriers. However, Venture's position has absolutely nothing to do with the economic burden analysis that it must satisfy to be entitled to a suspension or modification of the requirements set forth under 47 U.S.C. § 251(b)(3) and (5). Thereunder, Venture must demonstrate that satisfying the requirements of 251(b)(3) and (5), place and undue economic burden upon Venture or places an adverse economic impact upon end users. The costs to RCC to provide a similar service have no bearing upon the economic burden Venture alleges occurs.

As a result, Venture's requests are premised on a faulty legal position. Furthermore, Venture is well aware of the fact that RCC does not maintain this information in the regular course of business and that compilation of the same would require extensive time and expense. Plainly, Venture's discovery requests are overly broad, unduly burdensome and imposed purely for purposes of harassment and oppression. As such, Venture's motion to compel responses to the same is properly denied.

DISCUSSION

I. Discovery Standards.

Public Utilities Commission Administrative Rule 20:10:01:22.01, provides that, "The taking and use of discovery shall be in the same manner as in the circuit courts of this state." "South Dakota Codified Law § 15-6-26(b)(1) establishes the general scope *and limits* of discovery." Public Entity Pool for Liability v. Score, 2003 SD 17, ¶ 20, 658 N.W.2d 64 (*emphasis added*). The rule states,

> (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

S.D.C.L. § 15-6-26(b)(1). "When discovery efforts go beyond those subjects not 'reasonably calculated to lead to the discovery of admissible evidence,' a court has authority to issue protective orders...." Score, 2003 SD 17, ¶ 20 (*citing* S.D.C.L. § 15-6-26(c)).

Specifically, S.D.C.L. § 15-6-26(c), provides the Court discretion to protect a party from "...annoyance, embarrassment, oppression, or undue burden or expense...." It states,

> Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, and for good cause shown, the court in which the action is pending, on matters relating to a deposition, interrogatories, or other discovery, or alternatively, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) That the discovery not be had;
> ...
> (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; ....

S.D.C.L. § 15-6-26(c). In effect, the statute provides the Court discretion to enter "any order which justice requires" to protect a party from annoyance, oppression, undue burden or expense. Score, 2003 SD 17, at ¶ 21.

Instructively, the United States Supreme Court has also noted, "...discovery rules should 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action'...judges should not hesitate to exercise appropriate control over the discovery process." Id. (*emphasis added*)(*quoting* Herbert, 441 U.S. at 177 (*quoting* Fed.R.Civ.P. 1)). Furthermore, "pretrial discovery is time consuming and expensive . . . and judges are to be commended . . . for keeping tight reins on it." Id. at 927 (*citing* Oliviere v. Rodriguez, 122 F.3d 406, 409 (7th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998)).

II. Venture's Motion To Compel Is Properly Denied Because The Information Sought Is Not Relevant To The Issues Before The OHE, Nor Is It Likely To Lead To The Discovery Of Admissible Evidence.

Venture seeks suspensions of its obligations for providing dialing parity and reciprocal compensation under 47 U.S.C. § 251(b)(3) and (5). Venture's petition for suspension is properly denied if Venture is unable to satisfy the two-part test set forth in 47 U.S.C. § 251(f)(2). The first part requires that Venture, as the local exchange carrier (LEC), show a (1) "significant adverse economic impact on the users of telecommunication services generally"; or, (2)"that the

suspension is necessary to avoid imposing a requirement that is unduly economically burdensome"; or, (3) to avoid a requirement that is "technically infeasible." 47 U.S.C. § 251(f)(2). The second part of the test requires a finding that a suspension is "...consistent with the public interest, convenience, necessity." Id. There is no dispute that the services required under 47 U.S.C. § 251(b) are technically feasible. Thus, Venture must make a showing of either significant adverse economic impact or an unduly economically burdensome result to prevail on its petition for suspension.

The Eighth Circuit Court of Appeals has had an opportunity to address what is properly considered in evaluating whether or not an unduly economically burdensome result is incurred by an ILEC. Iowa Utilities Board v. Federal Communications Commission, 219 F.3d 744, 761 (8th Cir. 2000), *reversed on other grounds in*, Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002), *judgment vacated on other grounds in*, Iowa Utilitied Bd. v. FCC, 301 F.3d 957 (8th Cir. 2002).[1] It has stated, "It is the full *economic burden on the ILEC of meeting the request* that must be assessed by the State Commission." Id. (*emphasis added*). As such, the focus of the economic aspects of a suspension test found under 47 U.S.C. § 251(f)(2), is on the ILEC seeking suspension of its affirmative pro competition obligations under the Federal Telecommunications Act. Plainly, the focus is on what happens to the incumbent local exchange carrier, in this case, Venture.

Furthermore, the South Dakota Public Utilities Commission has dealt with a previous suspension request made by Venture. Therein, Venture requested the Commission suspend its obligation to provide number portability, an obligation under 47 U.S.C. § 251(b)(2). In that filing, the Commission concluded, that the undue economic burden focus is on, "Venture and

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[1] For discussion of the FCC's ability to require LECs to perform a forward-looking cost analysis, *see* Verizon Communications, Inc. et al, 122 S.Ct. 1646, 553 U.S. 467(2002).

its/their customers." *See* Statement of Fact 47 to Amended Final Decision and Order, January 5, 2005, filing docket TC04-060, copy of the Amended Final Decision and Order attached; *See Also* Conclusion of Law 6 (finding "The Commission concludes that this standard should be applied to assess the burdensomeness of the requirement on both the consumer and the company.") A review of that docket demonstrates only Venture's costs of providing the service were admitted into evidence.

Venture's position that it must now ascertain costs or margins that might exist for any other telecommunications company carrier to prove it suffers an undue economic burden in this proceeding is wholly without merit. Venture has failed to cite any authority, statutory or otherwise, to support its position. Nor has it provided the OHE any rationale upon which it could even arguably conclude that information sought is relevant. Therefore, Venture is not entitled to the same pursuant to S. D.C.L. § 15-6-26(b).

Additionally, Venture's motion fails to explain how its various requests will lead to admissible evidence. Rather, Venture generally asserts that it wants to prove, "that the cost of transport termination for a wireless carrier such as RCC are different and lower than Venture's costs to terminate calls. A complete picture of RCC's network, including its affiliates, will support Venture's claim." *See* Venture's Motion to Compel, page 3, ¶ 2. However, a differentiation in costs in no way relates to the economic impacts which Venture alleges result if it is required to perform its obligations. The actual question is whether the costs created by requirements to deliver traffic create an undue economic burden on the ILEC. Thus, one looks to what costs are imposed on the ILEC, not whether the ILECs margins are not as good as other telecommunication company's margins for just one part of the business.

This is an important distinction because Venture petitioned for suspension of its obligations related to all carriers. However, all the potentially effected carriers are not parties to this action. For example, Verizon is not currently a party and as a result is not subject to Venture's discovery requests. In addition, future potential carriers are likewise not taken into account.[2] Taking Venture's position to its logical end, if indeed margins are considered in an economic burden analysis, then the only suspension that could result in this proceeding is Venture's obligations with relation to RCC and Alltel. Surely, it is not Venture's position that it wants suspension of its obligations with respect to certain entities, but not others.

Moreover, if Venture's position is that it is appropriate to look at the economic impact on all parties, rather than just on itself, then Venture is failing to consider the entire economic impact on RCC. Specifically, it must be noted that Venture's charges for various phone calls are significantly more than RCC's in various circumstances. For example, if one were to call from a land line in Watertown to a Venture number in Sisseton, Venture would charge the carrier that delivered that call 12.5 cents per minute to put that call through. This is the intrastate rate approved by the South Dakota Public Utilities Commission.

Conversely, if the same person in Watertown would call an RCC number in Sisseton, RCC does not collect intrastate rates. RCC would only receive money if there was a reciprocal compensation agreement with the originating carrier and that rate would likely be less than one cent per minute. Because of this, it is a ridiculous proposal that the difference in margins on what it takes RCC to deliver a call to Venture, versus what it takes Venture to deliver a call to RCC, can be used as a standard for an economic burden. Simply because one company might be

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[2] If for example, Midcontinent Cable seeks interconnection, is it Venture's position that there is no suspension as to Midcontinent Cable because the first one would have to prove up differentiations in margins for it to delivering and exchanging traffic?

more economically effective in one part of the business does not mean there is an economic burden placed on Venture.[3]

Notably, Venture claimed it could prove it was entitled to a suspension when it filed this proceeding, prior to anyone intervening. Now that RCC has intervened, Venture has essentially changed its position and asserted that it requires extensive information from RCC to prove it is entitled to a suspension. However, Venture failed to cite to any authority to suggest one has to essentially do a FLEC analysis of other companies to prove economic burden. Venture likewise failed to point to any statutory interpretation that could even arguably create this need.

Venture points to no other reason to support its need for any of the discovery except for this differential in margins issue. As delineated above, a difference betweens Venture's and RCC's margins has no relation to the economic impact which results if Venture is required to fulfill its obligations. Because there is no basis in law to establish that this analysis has any bearing to this proceeding, the Motion to Compel should be denied in whole pursuant to S.D.C.L. § 15-6-26(b).

III. Venture's Motion To Compel Is Appropriately Denied Because RCC Does Not Compile The Information Sought And Creation Of The Same Would Place An Onerous And Unduly Burdensome Requirement Upon RCC That Is Not Permitted Under S.D.C.L. § 15-6-26(b).

Pursuant to S.D.C.L. § 15-6-26(b), onerous and unduly burdensome discovery requests are not permissible. Venture's Motion to Compel is properly denied because the subject requests create and undue burden on RCC. Specifically, the information is not kept in the regular course of business and creation of the same would result in extensive time and expense to RCC.

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[3] If the analysis will be company-wide, it should be noted that RCC is a publicly traded company and last year lost in excess of $9 dollars a share.

To illustrate, as explained in Jennifer Arnold's Affidavit in Support of this Resistance to Venture Communications' Motion to Compel, the majority of the information Venture seeks is not readily maintained by RCC. It is not maintained because RCC does not create tariffs like an ILEC does. As a result, the necessity to highly track costs does not exist. *See* Arnold Affidavit, ¶¶1-9.

In addition, unlike a company such as Venture that relies greatly on what it is charging carriers delivering calls to it; RCC, like every wireless company, looks primarily to its own users to pay for its network. Because of this, RCC has not invested in the type of tracking software or infrastructure mechanisms necessary to track billing and costs creation created by receiving calls from other carriers. *See* Arnold Affidavit, ¶¶ 8-9. Thus, the type of information sought by Venture does not exist.

By way of further example, Venture has requested information regarding 2006 minutes of use and an analysis on these minutes of use. This request covers RCC territories throughout the nation. RCC does not have 2006 minutes of use. *See* Affidavit of Jennifer Arnold, ¶ 21. It appears this information is being sought in a way to force RCC to do traffic studies for potentially hundreds of different telecommunications companies. *See* Arnold Affidavit, ¶¶ 19-20. RCC does not keep in-house expertise necessary to do this type of analysis even if RCC still had the information. Thus, outside experts would have to be retained and the cost would likely be well over $100,000. *See* Arnold Affidavit, ¶¶ 21-22.

The type of detailed cost being requested is not available, and RCC does not have a dedicated person who could spend hundreds of hours trying to find this material. RCC would also need to look at hiring outside people to comb its records to see if any of this information could be determined. The compilation of this information would not be easy or inexpensive. In

many cases, the information simply does not exist. *See* Arnold Affidavit, ¶¶ 11-21. Therefore, an order requiring RCC to produce the same in response to Venture's discovery requests would result in substantial undue economic burden on RCC. Such a burden is not permitted under the Rules of Civil Procedure. As a result, Venture's Motion to Compel is properly denied pursuant to S.D.C.L. § 15-6-26(b).

In the alternative, should the OHE order that RCC produce the information requested by Venture, RCC herein requests that in conjunction the OHE order that Venture pay RCC's costs to compile the information. As set forth in Jennifer Arnold's Affidavit, RCC does not maintain the information Venture has requested in its normal course of business. As a result, extensive resources and costs will be involved in responding to Venture's requests. *See* Arnold Affidavit. Such an order is appropriate because S.D.C.L. § 15-6-26(c), through A.R.S.D. 20:10:01:22.01, provides the OHE discretion to enter "any order which justice requires" to protect a party from annoyance, oppression, undue burden or expense. Score, 2003 SD 17, at ¶ 21.

IV. RCC Is Entitled To A Protective Order Pursuant To S.D.C.L. § 15-6-26(c) Because Venture Has Imposed Its Discovery Requests For Purposes Of Harassing, Oppressing, And Placing An Undue Burden Upon RCC.

When one reads Venture's discovery requests as a whole, it is clear that Venture is simply trying to intimidate and harass RCC to try to prevent RCC from intervening or force RCC to withdraw in this case. By way of example, Venture asks such things as detailing all contractor and subcontractor costs for dirt work at every RCC wireless site in the MTA. *See* Interrogatory 12. In Interrogatory 14, Venture seeks every cost associated with every radio frequency study done on any site. Radio frequency tests are performed numerous times over the course of the years and tests at some sites might be 10-15 years old.

Further, in template 2 in Venture interrogatory 39 a request is made for a breakout between intra and interMTA calls using 2006 information for all calls traveling RCC network nationwide. To come up with such information, one has to create a traffic analysis study as this information is not usually tracked or kept by wireless companies. Also, the raw data has to be captured when the call is made and not created after the fact. This fact is well known to Venture's expert as the expert was involved in trying to come up with a traffic study for wireless companies and negotiating interconnection agreements with other companies.

Venture's lack of analysis on why this information would be admissible or lead to admissible evidence and a review of the highly detailed type of requests clearly show the discovery to be an intimidation tactic. As recognized by South Dakota law, when discovery is just being used to put one to a great expense or to harass, a protection order is the appropriate responses by the Court. For those reasons, RCC requests a protection order pursuant to SDCL § 15-6-26(c).

CONCLUSION

Based upon the aforementioned arguments and authorities, Rural Cellular Corporation respectfully requests the Office of Hearing Examiners deny Venture Communications Cooperative's Motion to Compel. In conjunction therewith, Rural Cellular Corporation requests the Office of Hearing Examiners enter a protective order precluding discovery of the onerous and unduly burdensome information sought by Venture Communications Cooperative.

Dated this 17 day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of May, 2007, a true and correct copy of **Rural Cellular Corporation's Resistance to Venture Communications Cooperative's Motion to Compel** was sent electronically to:

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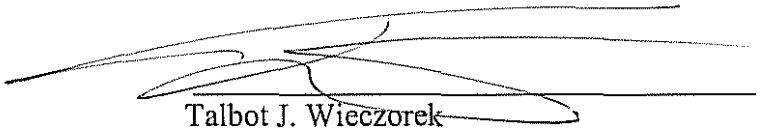

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