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**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT FILED BY
SOUTH DAKOTA NETWORK, LLC AGAINST SPRINT
COMMUNICATIONS COMPANY L.P. REGARDING
FAILURE TO PAY INTRASTATE CENTRALIZED
EQUAL ACCESS CHARGES AND TO IMMEDIATELY
PAY UNDISPUTED PORTIONS OF SDN'S INVOICES

TC09-098

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Transcript of Proceedings
February 23, 2010

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
DUSTIN JOHNSON, CHAIRMAN
STEVE KOLBECK, VICE CHAIRMAN
GARY HANSON, COMMISSIONER (by telephone)

~~COMMISSION STAFF~~

- Rolayne Ailts Wiest
- John Smith
- Karen Cremer
- Kara Semmler
- Greg Rislov
- Dave Jacobson
- Bob Knadle
- Tim Binder
- Terri LaBrie Baker
- Jon Thurber
- Brian Rounds
- Deb Gregg
- Demaris Axthelm

APPEARANCES

- Talbot Wieczorek (telephonically)
- Margo Northrup

Reported By Cheri McComsey Wittler, RPR, CRR

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State Capitol
Building, 500 East Capitol Avenue, Pierre, South Dakota,
on the 23rd day of February, 2010 commencing at 3:45 p.m.

1 CHAIRMAN JOHNSON: Item number 2 deals with SDN
2 and their filing against Sprint regarding failure to pay
3 intrastate centralized equal access charges and to
4 immediately pay undisputed portions of SDN's invoices.

5 The question before the Commission today really
6 deals with Sprint's Motion to Dismiss Count III.

7 At this time we will hear from Sprint.

8 MR. WIECZOREK: Thank you, Commissioner.
9 Talbot Wieczorek from Sprint.

10 We are dealing with a Motion to Dismiss only
11 Count III of the Complaint of SDN. Count III revolves
12 around a claim for double damages and attorneys fees
13 pursuant to SDCL 49-13-14.1.

14 This is a little deja vu all over again for me.
15 This exact same Motion was heard by this Commission
16 approximately four and a half years ago. I happened to
17 be on the opposite side, and I happened to have lost last
18 time. And when I first thought about filing this Motion
19 it kind of brought up bad memories because I hate
20 thinking about the times I've lost.

21 But I thought, well, since Margo won it last
22 time, and now she has to argue why you were wrong when
23 she won it, that maybe it's going to be harder for her to
24 argue today.

25 The statute's pretty straightforward. The

1 statute specifically provides that for double recovery --
2 but in the case of double recovery it has to be recovered
3 with suit. And the reasonable attorney's fees and costs
4 has to be fixed by the court in which the suit is heard
5 upon or appeared.

6 If you look back to this Commission's Order --
7 and last time I talked about this case, it's CT05-001, I
8 only mentioned that Commissioner Hanson heard this, and
9 then Commissioner Johnson clarified that he also had to
10 sit through the entire case too. And that is correct
11 because you go and look at the Order, and it is signed by
12 both Hanson and Johnson and also at that time
13 Commissioner Sahr.

14 And at that time the Commission concluded as
15 follows: That the double damages and attorneys fees
16 provision in SDCL 49-13-14.1 apply only in the case of a
17 suit brought in court and only with respect to claims of
18 the types specified in SDCL 49-13-14.1.

19 This Commission is not a court. It was the
20 determination by the Commission back then it was not a
21 court and we would have had to bring this action in
22 litigation to Circuit Court or Federal Court to make the
23 claim for the damages.

24 You might recall that Western Wireless in that
25 case had asserted that relief in a situation where the

1 RLECs acknowledged that Western Wireless had overpaid or
2 refused to refund saying they would just credit.

3 There is a citation -- we filed our brief last
4 November. The SDN filed their brief Friday night. I did
5 take a look at their brief. They do cite to a case and
6 take the position that this Commission is not bound by
7 its prior decisions.

8 The case they do cite, though, say that that's
9 true if it's a public policy decision, but when looking
10 and reading a statute you cannot -- that you don't revise
11 the statute as a Commission. If the statute is what it
12 was when you decided it the first time, that's the
13 question for the legislature to change the statute.

14 So this is not -- I'm not asking you to make a
15 public policy change here. I'm saying this is the
16 statute. This is how you said the statute applies four
17 years ago, and I'm simply making a Motion and asking this
18 court to make the same -- or this Commission, you're not
19 a court, to make -- in the last week I've been in front
20 of a lot of councils and commissions, and I have a bad
21 tendency to call them courts.

22 And I'm just asking that this Commission make
23 the same determination it did four and a half years ago
24 and strike the relief requested in Count III in SDN's
25 Complaint.

1 And I'd be more than happy to take questions or
2 if you want to leave that until the end.

3 CHAIRMAN JOHNSON: Thank you, Mr. Wieczorek.
4 Ms. Northrup.

5 MS. NORTHROP: Thank you. Good afternoon.
6 Margo Northrup on behalf of South Dakota Network, LLC. I
7 think I understand that Bill Heaston is also on the phone
8 from SDN.

9 As Mr. Wieczorek has identified, SDN has filed a
10 Complaint against Sprint, and it identified three causes
11 of action. The first is for nonpayment of centralized
12 equalized access fees. The second is for not applying
13 SDN's tariff and using a self-help or an accounting
14 mechanism that we believe is illegal. And the third
15 count, of course, is the count that we're here to discuss
16 today, which would be whether or not 49-13-14.1 would
17 apply in this situation.

18 I first want to acknowledge that I am aware of
19 that Order that was in the WWC v. Golden West case back
20 in 2005. I believe that this Commission has to determine
21 that it is not able to give double damages in this
22 context. But we believe that there are two avenues that
23 we can end up in court from this position.

24 The first, of course, would be in the event of
25 an appeal, and the second would be whether or not we had

1 to bring a separate action pursuant to 49-13-24, which
2 is, in essence, an enforcement action. So really we
3 brought this Complaint and Count III in an abundance of
4 caution that we wouldn't waive this issue in the event
5 that we did find ourselves in Circuit Court after this
6 proceeding.

7 We are not asking and based on the prior ruling
8 that this Commission has that we necessarily get double
9 damages in this forum. I just wanted to make that clear.
10 I just wanted to identify one of the issues that
11 Mr. Wieczorek had identified in his Brief is that we
12 haven't alleged in the context of this Complaint in
13 Count III that we even apply to 49-13-14.1.

14 And I just want to submit to you that I believe
15 that the Commission does have general power and authority
16 pursuant to 49-31-7 and 7.1, which allows them to
17 investigate unwarranted business practices. And in our
18 Complaint SDN has identified that they believe that this
19 is an illegal self-help mechanism and believe that a
20 finding could be made in our favor if that is the case.

21 And if we're looking at this as an appeal, that
22 would be a finding that we would be able to rely on and
23 would be jurisdiction in Circuit Court if that's where we
24 ultimately end up.

25 So we are asking that you resist the Motion to

1 Dismiss and that we be allowed to keep this Count III
2 available if we need it in the next level.

3 Thank you.

4 CHAIRMAN JOHNSON: Ms. Cremer.

5 MS. CREMER: Thank you. This is Karen Cremer
6 from staff.

7 I am not clear, you know, as to why SDN included
8 Count III. And I'm not sure that they really need that
9 as a place holder, as Ms. Northrup was talking about. I
10 couldn't find anything when I researched that would show
11 SDN would be harmed later if this count were dismissed
12 from the Complaint.

13 And Sprint is certainly correct on what the
14 Commission's prior decision was here on basically the
15 very same legal arguments that were made. In the big
16 picture, of course, administrative agencies are not bound
17 by stare decisis, and if the Commission's view of what's
18 in the public interest today, you know, is different than
19 what it was then, even without a change of circumstances
20 you could deny the Motion to Dismiss.

21 However, I do believe that Sprint ultimately is
22 correct here and the Commission should continue to follow
23 that what they have done before and deny -- or, I'm
24 sorry, and grant Sprint's Motion to Dismiss Count III.

25 CHAIRMAN JOHNSON: Thank you, Ms. Cremer.

1 Any questions for any party?

2 MS. AILTS WIEST: I have a question for
3 Mr. Wieczorek. In the event that the Commission would
4 dismiss this count, then would it be Sprint's position
5 that you would not be able to bring that up in the event
6 that -- on appeal or in a later action for double damages
7 or attorney's fees? You would not bring up the fact that
8 this was dismissed at the PUC level?

9 MR. WIECZOREK: Well, I think, first of all, if
10 this Commission would dismiss it and there would be a
11 direct appeal to Circuit Court, they could raise the
12 issue as it was improper for the Commission to dismiss it
13 and the Commission should have allowed and made a
14 determination on that issue. So it certainly is a
15 question for the Circuit Court.

16 To the extent that I think there's a real issue
17 to say that this Commission -- if the Circuit Court would
18 agree that this Commission -- with this Commission's
19 prior decision that the double damages statute isn't
20 available in front of this Commission, I don't think the
21 Circuit Court could then award double damages even if
22 they prevailed because I think an appeal from this
23 Commission is limited to only review what this Commission
24 could or could not do.

25 Now if this Commission dismisses the claim --

1 the Count III, they could certainly dismiss without
2 prejudice. And then if there is -- if they bring it
3 someplace else, then it's been dismissed without
4 prejudice.

5 I cannot make a global statement that you
6 wouldn't necessarily raise the issue at some time because
7 I don't know if two years from now a Circuit Court case
8 there might be other things that go forth. So I can't
9 say going forward under any circumstances there would not
10 be perhaps a waiver argument.

11 But if you dismiss it without prejudice, there's
12 no waiver argument based on that dismissal is the general
13 law.

14 MS. AILTS WIEST: Would Sprint be prejudiced at
15 all if the Commission weren't to actually dismiss this
16 count but instead state in its Order that it's standing
17 with respect to what it stated in CT05-001 is still the
18 position of the Commission; therefore, we would not
19 actually be in a position to award a double damages or
20 attorneys fees?

21 MR. WIECZOREK: Well, I guess the way they've
22 stated it is a count. I'm not sure that -- if what
23 you're saying is the count's not a viable count in front
24 of this Commission but we're not going to dismiss it, I
25 think that, in essence, is a dismissal.

1 Had they stated it like a claim of relief, this
2 is a straight claim of relief, you could probably say
3 that's not relief available here and treat it like a
4 Summary Judgment Motion.

5 I find it kind of an awkward evidentiary
6 position if you leave a claim technically open but say,
7 well, we've decided this but we're still leaving it open
8 for -- then do we have to put on evidence to it? And do
9 I have to turn then and amend counterclaims to make sure
10 I allege that? I find that -- I guess I find that an
11 awkward procedural approach.

12 And I think that's why courts have the right to
13 dismiss claims without prejudice is it is to avoid those
14 kinds of awkward, okay, now how do we deal with it
15 because technically it's still there but we've made the
16 decision we can't do anything about it.

17 I'm not saying you can't do it. I'm not
18 familiar with it being done, and I would think that it
19 would raise a lot of questions that I would specifically
20 be asking for some clarification on.

21 MS. AILTS WIEST: Thank you. Then I had a
22 question for Ms. Northrup.

23 I think there's a general rule that if you don't
24 bring up an issue before an administrative agency, then
25 you're precluded from bringing that up at the Circuit

1 level.

2 But in this case if the Commission -- you have
3 brought this up at the Commission level. The Commission
4 could just determine that it does not have the authority
5 to hear that count. So how would you be precluded from
6 bringing this issue up if the Commission would dismiss it
7 without prejudice?

8 MS. NORTHRUP: Well, I guess I'm -- first of
9 all, I'm unclear of what Mr. Wieczorek just indicated
10 whether or not they would argue that we were precluded or
11 that we were not precluded by bringing this.

12 I believe that if you dismiss it with prejudice,
13 we would be allowed to bring that issue forward in
14 Circuit Court -- or I'm sorry with -- without prejudice.
15 Yes.

16 But I guess I also heard Mr. Wieczorek say that
17 if we didn't bring it up at this level, that we may be
18 precluded in the event of appeal, which I think is
19 contrary to the language of the statute.

20 So, I mean, I think that you could either leave
21 it open -- I don't think we'd have to present evidence on
22 it. And we would be able to -- in the event that we
23 appealed or had to enforce the judgment, would be able to
24 rely on it or if you dismissed it, we wouldn't be
25 precluded from arguing it at the Circuit Court level.

1 MS. AILTS WIEST: Thank you.

2 CHAIRMAN JOHNSON: Further questions? Any
3 thoughts, Ms. Wiest?

4 MS. AILTS WIEST: I think the Commission should
5 dismiss Count III without prejudice. I think that will
6 preserve their rights to bring this in a different court
7 setting.

8 CHAIRMAN JOHNSON: Thank you. Any Commissioner
9 comments or action?

10 Commissioner Kolbeck.

11 COMMISSIONER KOLBECK: In TC09-098 I think the
12 Commission should dismiss the count without prejudice.

13 CHAIRMAN JOHNSON: Motion has been made. No
14 second is required.

15 Any discussion on the pending Motion?

16 Hearing none, we'll proceed to vote.

17 Hanson.

18 COMMISSIONER HANSON: Aye.

19 CHAIRMAN JOHNSON: Kolbeck.

20 COMMISSIONER KOLBECK: Aye.

21 CHAIRMAN JOHNSON: Johnson votes aye. Motion
22 carries 3-0.

23

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1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 23rd day of
11 February, 2010, and that the attached is a true and
12 correct transcription of the proceedings so taken.

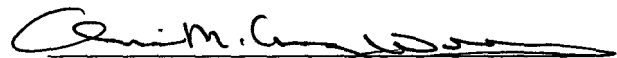
13 Dated at Onida, South Dakota this 17th day of
14 March, 2010.

15

16

17

18



Cheri McComsey Wittler,
19 Notary Public and
Registered Professional Reporter
20 Certified Realtime Reporter

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25

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