

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

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**IN THE MATTER OF THE  
APPLICATION OF CLARITY  
TELECOM, LLC dba VAST  
BROADBAND FOR AN AMENDED  
CERTIFICATE OF AUTHORITY**

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**STAFF’S MEMORANDUM IN  
RESPONSE TO OPPOSITION TO  
PETITION OF SDTA TO INTERVENE  
  
TC16-009**

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Clarity Telecom, LLC dba Vast Broadband (Clarity) currently holds a certificate of authority<sup>1</sup> (COA) to provide competitive local exchange services throughout the non-rural areas in South Dakota. In this docket, Clarity seeks to amend its COA to include the Brookings service area. Brookings Municipal Telephone dba Swiftel Communications is the incumbent local exchange carrier for the Brookings service area. MCC Telephony of the Midwest, Inc. dba Mediacom (MCC) operates as a competitive local exchange carrier (CLEC) in the Brookings service area. In addition, Sprint Communications Co. LP (Sprint) obtained a COA to operate as a CLEC in certain portions of the Brookings service area in Docket No. TC06-178.

The South Dakota Telecommunications Association (SDTA) and Brookings Municipal Utilities dba Swiftel Communications (Swiftel) filed for intervention in this docket. Clarity filed an objection to the intervention of SDTA. The purpose of this memorandum is to discuss the applicable law and Staff’s interpretation thereof.

SDCL 49-31-70 provides that “each telecommunications company holding a certificate of authority to provide local exchange services within the service area...shall be...granted intervenor status.” At least three companies, Swiftel, Sprint, and MCC, hold COAs to provide

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<sup>1</sup> In Docket No. TC14-073, the Commission approved the transfer of the local exchange and interexchange COAs held by Knology of the Black Hills, Knology of the Plains, and Knowledge Community Telephone to Clarity.

local exchange services within the service area at issue. Swiftel has applied for intervention. Because of the provision in SDCL 49-31-70, that grant of intervention is not discretionary. However, Swiftel's intervention is not at issue, as it was not contested. As SDTA is not a LEC, this statute does not apply to SDTA's intervention.

In addition to SDCL 49-31-70, other pertinent statutes and rules include SDCL 1-26-17.1, SDCL 15-6-24(b), and ARSD 20:10:01:15.05. Each will be addressed below.

**A. SDCL §§ 1-26-17.1 and 15-6-24(b)**

SDCL 1-26-17.1 provides that “a person who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency's order made upon the hearing may become a party to the hearing by intervention, if timely application therefor is made.” However, the South Dakota Supreme Court has held that “the criteria for intervention that is applicable in judicial proceedings is likewise applicable in administrative proceedings.” *Application of Union Carbide Corp.* 308 N.W.2d 753, 759 (S.D. 1981).

Therefore, it is also necessary to examine the application for intervention under SDCL 15-6-24(b), which provides:

Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a question of law or fact in common. ... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

SDCL 15-6-24(b) is clearly the more broad of the two statutes. It says nothing of pecuniary interests or immediate effect. Instead, the statute focuses on common claims, timeliness, and prejudice to the original parties.

Furthermore, the Court has held that “[i]ntervention is strictly procedural and “intervention standards are flexible, allowing for some tailoring of decisions to the facts of each case.” *In re Estate of Olson*. 2008 S.D. 126, ¶ 5, 759 N.W.2d 315 (citations omitted). The Court went on to state that all doubts are resolved in favor of the proposed intervenors. *Id.* The Court then laid out a three-part test to be utilized in interpreting SDCL 15-6-24(b).

- 1) the party must have a recognized interest in the subject matter of the litigation;
- 2) that interest must be one that might be impaired by the disposition of the litigation; and
- 3) the interest must not be adequately protected by the existing parties.

*Id.*

Staff does not take a position as to the application with respect to the facts at hand.

## **B. Administrative Rules**

In addition to the statutes discussed above, administrative rules have been promulgated regarding intervention in matters before the Commission. ARSD 20:10:01:15.02 controls who may file for intervention. This rule allows any “person who is not an original party to a proceeding before the commission and who claims an interest in a pending proceeding may petition the commission for leave to intervene.” Clearly, this rule is not intended to be the test for intervention, as it would provide for *per se* intervention for any party that claimed an interest, no matter how tenuous that interest, without allowing the intervention to be given due consideration. Thus, it is apparent that this rule applies to the *filing* of an application to intervene and the contents thereof, rather than the *granting* of an application. It must, therefore, be read in conjunction with ARSD 20:10:01:15.05, which controls Commission action on a petition to intervene. This rule provides in relevant part:

A petition to intervene shall be granted by the commission if the petitioner shows that the petitioner is specifically deemed by statute to be interested in the matter involved, that the petitioner is specifically declared by statute to be an interested party to the proceeding, or that by the outcome of the proceeding the petitioner will be bound and affected either favorably or adversely with respect to an interest peculiar to the petitioner as distinguished from an interest common to the public or to the taxpayers in general.

While ARSD 20:10:01:15.01 is directed at the applicant, ARSD 20:10:01:15.05 is directed at the Commission. It is the opinion of Staff that the latter should, therefore, be given more weight when deciding whether to grant an application for intervention.

Again, Staff does not take a position on the application with respect to this specific set of facts.

### **C. Reconciling Differences**

ARSD 20:10:01:15.01 appears to be less narrow than SDCL 15-6-24(b). Based upon Court interpretation, the threshold criteria for the statute are, 1) a recognized interest; 2) stake in the outcome; and 3) an interest not already represented. The administrative rule, on the other hand appears to lack the third element.

Administrative rules adopted in contravention of statutes are invalid. *Paul Nelson Farm v. South Dakota Dept. of Revenue*, 2014 S.D. 31, ¶24, 847 N.W.2d 550 (citations omitted).

However, the administrative rule in question is not in contravention of the statute, as it is *less* strict than the statute. The Court has held that an agency cannot enlarge the scope of a statute.

*Id.* In this instance, that would mean placing greater burdens on intervention. The Commission, through its administrative rule, has done the opposite.

#### **D. Previous Contested Interventions**


While the Commission does not bind itself through precedent, it may be helpful to review prior decisions. As the Commission is aware, intervention has infrequently been an issue contested before the Commission. However, two examples of contested intervention are Docket No. EL16-013 and Docket No. EL12-046.

In EL16-013, the applicant sought to prevent the South Dakota Association of Rural Electric Cooperatives (SDREA) from intervening, arguing that the local cooperative had already been granted party status and, therefore, SDREA lacked a unique or pecuniary interest. Ultimately, the Commission voted 2-1 to allow the intervention.

In EL12-046, a wind developer sought to intervene in an Xcel rate case. The Commission voted 2-1 to deny intervention, finding that the party seeking intervention was not a ratepayer and, therefore, not directly and immediately affected; lacked a pecuniary interest; and had the ability to express concerns through comments.

Given the varied outcomes of contested interventions, it cannot be said that the Commission has taken a clear position on interventions.

Dated this 25<sup>th</sup> day of July, 2016.

  
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