

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

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IN THE MATTER OF THE COMPLAINT  
FILED BY JOHN REINTS, RAPID CITY,  
SOUTH DAKOTA, AGAINST BLACK HILLS  
FIBERCOM, LLC REGARDING ITS  
LATE PAYMENT CHARGE

CT03-155

=====

Transcript of Proceedings  
December 16, 2003

**ORIGINAL**

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
BOB SAHR, CHAIRMAN  
GARY HANSON, VICE CHAIRMAN (by telephone)  
JIM BURG, COMMISSIONER

COMMISSION STAFF  
Rolayne Ailts Wiest  
John Smith  
Karen Cremer  
Kelly Frazier  
Greg Rislov  
Harlan Best  
Keith Senger  
Dave Jacobson  
Michele Farris  
Jim Mehlhaff  
Tina Douglas  
Heather Forney  
Pam Bonrud

APPEARANCES  
Darla Pollman Rogers  
Brett Koenecke

Reported By Cheri McComsey Wittler, RPR

**PRECISION REPORTING**  
**L I M I T E D**

APPEARANCES BY TELEPHONE

- Mary Sisak
- Linn Evans
- Marvin Truhe
- Pat Mastel
- Todd Boyd
- Mary Lohnes
- Colleen Sevold
- Tim Goodwin
- Jim Tarpey
- Meredith Moore
- Tom Welk
- Steve Chernoff

=====

TRANSCRIPT OF PROCEEDINGS, held in the  
 above-entitled matter, at the South Dakota State  
 Capitol, Room 412, 500 East Capitol Avenue, Pierre,  
 South Dakota, on the 16th day of December 2003,  
 commencing at 9:30 a.m.

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1 CHAIRMAN SAHR: CT030-155, In the  
2 Matter of the Complaint Filed by John Reints,  
3 Rapid City, South Dakota, Against Black Hills  
4 Fibercom, LLC Regarding its Late Payment Charge.

5 And the questions that we are addressing today  
6 are shall the Commission grant Black Hills  
7 FiberCom's Motion to Dismiss, and shall the  
8 Commission grant Complainant's Motions to Amend to  
9 seek sanctions of counsel for abusive conduct, add  
10 allegations of violations of Commission rules and  
11 seek additional damages, two, Motion for  
12 postponement of hearing to permit discovery and  
13 claim for additional damages and/or, three, a  
14 Motion to Amend to correct typographical errors.

15 The first question before us is Black Hills  
16 FiberCom's Motion to Dismiss. So I think I'll go  
17 to Black Hills on that issue.

18 MR. TRUHE: This is Marv Truhe, and  
19 I have submitted on behalf of the company an Answer  
20 and Motion to Dismiss, which I believe should be  
21 self-explanatory so I won't go through it in any  
22 sort of detail.

23 To summarize the Motion to Dismiss, there are  
24 three matters that were raised in Mr. Reints'  
25 Complaint. The first was the \$3 monthly late

1 payment fee. The second was the rate of interest  
2 charged on those payments. Finally, the disconnect  
3 consequences of failure to make payment.

4 In our Motion to Dismiss we attached a copy of  
5 the agreement that Mr. Reints signed at the time  
6 that he received the services from Fibercom, and  
7 all three of those issues are specifically  
8 addressed in that written agreement contract for  
9 Mr. Reints to sign.

10 And, again, I won't go through in detail other  
11 than to state that the company has followed right  
12 down the line step by step every aspect of that  
13 written contract in terms of their actions with  
14 regard to late payment.

15 The Motion to Dismiss also mentions the fact  
16 that an attempt to resolve this and make some  
17 concessions to Mr. Reints -- that they actually  
18 remove three months of late payment fees, but  
19 Mr. Reints responded by indicating the removal of  
20 their late payment charges was their attempt to  
21 keep him from getting before the Commission with  
22 his Complaint.

23 The legal basis for the Motion in this  
24 particular case, we cited a couple of them, but I  
25 think the one that's probably most appropriate is

1 ARSD 20:10:1:11.01 which states that on a Motion he  
2 can seek a dismissal if the Complainant does not  
3 have a good or sufficient reason for making a  
4 Complaint.

5 On that basis, we would move the dismissal of  
6 the Complaint.

7 CHAIRMAN SAHR: Thank you very much.  
8 Is Mr. Reints on the line or -- he doesn't appear  
9 to be here in the room, or is anyone representing  
10 Mr. Reints this morning?

11 Have we had any contact from him regarding  
12 this case recently?

13 MR. MEHLHAFF: I sent Mr. Reints a  
14 notification of the meeting by e-mail, letter, and  
15 also left a message on his phone, and we have not  
16 heard back from him.

17 CHAIRMAN SAHR: Mr. Smith, do you  
18 have any suggestions how to proceed?

19 MR. SMITH: Why don't we hear from  
20 staff.

21 CHAIRMAN SAHR: Staff, do you have a  
22 position?

23 MR. FRAZIER: Thank you,  
24 Commissioner. I believe Mr. Reints had fair and  
25 adequate notice of today's hearing, and I would

1 consider his absence from the meeting today as  
2 voluntary.

3 20:10:10 would be the provisions which staff  
4 would originally use when looking at a  
5 disconnection. However, I believe that Black Hills  
6 FiberCom would fall within the exemption of those  
7 rules under 20:10:5.

8 On that basis then, I think we would revert to  
9 the contract which Mr. Reints signed and look to  
10 see whether there was any subsequent agreement from  
11 that contract which permitted him to make partial  
12 payments of the \$10 payment here.

13 Since Mr. Reints isn't here and there's no  
14 evidence of a subsequent agreement since that  
15 contract, I believe I would support the Motion to  
16 Dismiss on the basis that I believe that sufficient  
17 cause has been shown from the Complaint.

18 VICE CHAIR HANSON: Mr. Chairman,  
19 this is Gary Hanson.

20 CHAIRMAN SAHR: Go ahead, Gary.

21 VICE CHAIR HANSON: At our very last  
22 PUC hearing wasn't Mr. Reints informed that this  
23 particular item was going to be at this meeting?

24 CHAIRMAN SAHR: I would have to  
25 check with the transcript on that. I don't know if

1 anyone recalls. My recollection was I know we  
2 talked to him about the pending MDU rate case, but  
3 I don't know if this particular -- I think it's a  
4 third complaint that he has filed, and I don't know  
5 if we discussed that one in particular.

6 Staff has indicated, though, that he had  
7 adequate notice.

8 VICE CHAIR HANSON: Thank you.

9 CHAIRMAN SAHR: Mr. Truhe, looking  
10 through Mr. Reints's Complaint, one thing that did  
11 draw my attention was there's questions about some  
12 oral -- an oral conversation that has been  
13 purported to be written down verbatim from  
14 Mr. Reints that involved some alleged promises from  
15 Black Hills as far as what sort of procedure would  
16 be followed.

17 And one could construe that as perhaps being  
18 something where he could raise either an estoppel  
19 argument or oral modification or maybe come in with  
20 some other reliance or equity type arguments.

21 Do you have any thoughts on that particular  
22 set of facts that Mr. Reints has raised?

23 MR. TRUHE: Mr. Chairman, while it's  
24 certainly true in South Dakota that if both parties  
25 mutually agree by oral contract, they can modify a

1 prior written contract, but in this particular case  
2 and is in the case of the court, there is  
3 discretion on the part of the Commission to make a  
4 first level determination on their own discretion  
5 as to whether or not there is any merit, that I  
6 think that's one of the reasons why you have the  
7 regulation that I just cited to you that the  
8 Complainant does not have a good or sufficient  
9 reason for making a Complaint.

10 If the rule were otherwise, that is every time  
11 you had a written contract a party later came back  
12 and alleged no matter how frivolously that it had  
13 been modified by oral contract, you would be  
14 compelled to have a hearing in every instance which  
15 a subsequent oral agreement was alleged.

16 I think this falls within the category of what  
17 we discussed two weeks ago in which the Commission  
18 has the discretion, for example, on whether or not  
19 to conduct an investigation. Just because a  
20 Complainant filed, as Mr. Reints did in the  
21 Black Hills Power situation, a request for  
22 investigation, it does not mean that we do not have  
23 the discretion to decide whether or not to  
24 actually conduct one.

25 So in summary you do have discretion, I



1 believe, under your rules to make a preliminary  
2 determination and thus avoid a hearing every time  
3 somebody makes an allegation, even if it's --  
4 (Inaudible).

5 CHAIRMAN SAHR: Thank you,  
6 Mr. Truhe. I'm going to ask the court reporter,  
7 could you hear him at the very end there?

8 (Discussion off the record)

9 MR. TRUHE: I'm sorry. The very end  
10 is what you missed?

11 The Commission does have the discretion to  
12 dismiss the Complaint, even faced with an  
13 allegation that a subsequent oral modification of a  
14 written contract took place.

15 If that were not the case, then the Commission  
16 would be required to conduct a hearing every time  
17 somebody alleged a subsequent oral modification  
18 regardless of whether the Commission felt that on  
19 the face of it it was a frivolous allegation.

20 CHAIRMAN SAHR: Thank you.  
21 Mr. Reints, I'll check one last time to see if  
22 you've joined us. And he obviously didn't come  
23 into the room here.

24 I think in light of the fact that Mr. Reints  
25 has not appeared today, I feel comfortable making

1 the Motion to Dismiss. He can always request  
2 reconsideration. I think there may be some  
3 question as to how to handle this allegation of  
4 some type of oral modification. At the same time,  
5 if Mr. Reints isn't here representing himself and  
6 in the past he has shown up and that he had notice  
7 of this particular hearing, I'm comfortable moving  
8 to grant Black Hills FiberCom's Motion to Dismiss.

9 COMMISSIONER BURG: I'll second it.

10 VICE CHAIR HANSON: Concur.

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THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE IMPLEMENTATION  
OF THE FEDERAL COMMUNICATIONS  
COMMISSION'S TRIENNIAL REVIEW ORDER  
REGARDING UNBUNDLING OBLIGATIONS

TC03-181

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Transcript of Proceedings  
December 16, 2003

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
BOB SAHR, CHAIRMAN  
GARY HANSON, VICE CHAIRMAN (by telephone)  
JIM BURG, COMMISSIONER

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APPEARANCES  
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Brett Koenecke

Reported By Cheri McComsey Wittler, RPR

1 CHAIRMAN SAHR: Under  
2 Telecommunications is TC03-181, In the Matter of  
3 the Implementation of the Federal Communications  
4 Commission's Triennial Review Order Regarding  
5 Unbundling Obligations.

6 And the question today is shall the Commission  
7 grant Qwest's Motion to postpone mass market  
8 switching case and close docket?

9 And on the line with us from Qwest -- well, I  
10 should ask who's appearing on behalf of Qwest.

11 MR. GOODWIN: Tim Goodwin. I don't  
12 think I was listed in the roll call.

13 CHAIRMAN SAHR: Thank you, Tim. Why  
14 don't you go ahead then. Mr. Goodwin, if you want  
15 to go ahead and proceed.

16 MR. GOODWIN: Sure. There's not a  
17 whole lot I have to add beyond what we had stated  
18 in the Motion. I think it became clear after we  
19 had gotten into the process and received in most of  
20 the 14 states several hundred discovery requests  
21 from staff, MCI, AT&T, and others and looking at  
22 the state of the appeal and the state of our  
23 resources that at this point it was not really  
24 viable to continue cases in the states where we did  
25 not meet what Qwest believes is the arbitrary level

1 of the three triggers existing in any relevant  
2 market.

3 So this is what we have decided to do is to  
4 ask the Commission --

5 CHAIRMAN SAHR: Tim, could you  
6 either move closer to the speaker or try to talk a  
7 little bit more loudly or if you're on the speaker  
8 phone, go ahead and pick up because you're breaking  
9 up at the tail ends of your sentences.

10 MR. GOODWIN: I'm on a headset here.  
11 Let me change off of it. I hope that's better. Is  
12 that better?

13 CHAIRMAN SAHR: Tim, I'm going to  
14 check with the court reporter here in Pierre and I  
15 think she was able to catch up something from a  
16 couple of sentences ago but make sure she got the  
17 last sentence.

18 (Discussion off the record)

19 MR. GOODWIN: So this is what we  
20 have asked the Commission in four states,  
21 South Dakota, Wyoming, Montana, and Idaho, to  
22 discontinue their proceedings in regards to the  
23 nine-month proceeding for a mass market switching.

24 And all the motions actually filed in the four  
25 states are virtually identical, and we'd ask that

1 South Dakota approve our Motion and that the -- be  
2 closed and postponed as we set forth in our  
3 conclusionary paragraph vacating the schedule for  
4 hearing and the filing of the prefiled testimony,  
5 all discovery, including outstanding subpoenas  
6 issued to third parties, pending motions, and all  
7 other procedural requirements, all without  
8 prejudice to the ability of Qwest to reopen the  
9 case for a determination on the merits.

10 CHAIRMAN SAHR: Mr. Goodwin, you  
11 mention the four states, South Dakota, Montana,  
12 Wyoming, and Idaho.

13 Have you filed in all the other states?

14 MR. GOODWIN: Yes. All the other  
15 states were filed at the same time with virtually  
16 identical motions.

17 CHAIRMAN SAHR: And you're  
18 proceeding in North Dakota, Nebraska, Minnesota,  
19 some of the other neighboring states; is that  
20 correct?

21 MR. GOODWIN: Yes. That's correct  
22 at this time.

23 CHAIRMAN SAHR: And what's the  
24 distinguishing feature between those states and  
25 South Dakota?

1 MR. GOODWIN: In those states there  
2 are markets where there are three switches that we  
3 have been able to determine at this point, markets  
4 served by three switches, which is the trigger case  
5 for mass market switching under the TRO.

6 CHAIRMAN SAHR: Thank you. I just  
7 wanted a little bit of background information.

8 Do any of the interveners have any comments?

9 CHAIRMAN SAHR: Mr. Koenecke.

10 MR. KOENECKE: Thank you,  
11 Mr. Chairman. I am authorized to state MCI and  
12 Midcontinent, neither one are opposing the Motion  
13 at all. Thank you.

14 CHAIRMAN SAHR: Thank you.  
15 Ms. Rogers.

16 MS. ROGERS: Yes. I represent  
17 Midstate Telecommunications and Northern Valley,  
18 and we do not oppose the Motion either.

19 CHAIRMAN SAHR: Any comments from  
20 staff?

21 MS. AILTS WIEST: I just had a  
22 couple of questions for Mr. Goodwin.

23 CHAIRMAN SAHR: Go ahead.

24 MS. AILTS WIEST: You talk about  
25 postponing the inquiry. Would you agree that the

1 Commission would just close this docket, we would  
2 not have any nine-month proceeding and then what  
3 would happen in the future is that Qwest could  
4 initiate something under the six-month rule?

5 MR. GOODWIN: Yes. That's -- yes.  
6 Provided that any closing of the docket would be  
7 without prejudice to our right to initiate a  
8 subsequent six-month proceeding.

9 MS. AILTS WIEST: Okay. And then  
10 would it be your understanding that the Commission  
11 would proceed with the batch hot cut review during  
12 that six-month review then?

13 MR. GOODWIN: The Commission need  
14 not continue with that because that is a portion of  
15 our mass market switching case is the operational  
16 phase, primarily consisting of the hot batch cut  
17 process.

18 In the other states, however, that we are  
19 continuing in there is still the multi-state batch  
20 hot cut process. And we will be continuing our  
21 commitment to that process and to that multi --  
22 since we have requested that there be no proceeding  
23 on a mass market switching, there's no need for the  
24 Commission to be involved in that.

25 However, the Commission or staff or whoever



1 wants to continue to monitor those proceedings, we  
2 certainly welcome that activity.

3 MS. AILTS WIEST: And then to the  
4 extent that Qwest files a petition later on, then  
5 the Commission would look at the batch hot cut  
6 process during that review; is that correct?

7 MR. GOODWIN: Yeah. I think given  
8 the legal landscape as it exists today, you know,  
9 depending what happens with the D.C. circuit in the  
10 appeal process, the landscape may be slightly  
11 changed, but given the landscape as it exists  
12 today, I think you're correct.

13 MS. AILTS WIEST: So at this time  
14 Qwest is going to continue to offer UNE-P for mass  
15 market?

16 MR. GOODWIN: That is correct.

17 MS. AILTS WIEST: Okay. With that,  
18 I would recommend that the Commission close this  
19 docket without prejudice.

20 CHAIRMAN SAHR: Thank you. Any  
21 questions or comments from Commissioners?

22 COMMISSIONER BURG: I'll move that  
23 Motion, close the docket without prejudice.

24 CHAIRMAN SAHR: And I will second.

25 VICE CHAIR HANSON: I concur.

1 STATE OF SOUTH DAKOTA )

2 :SS

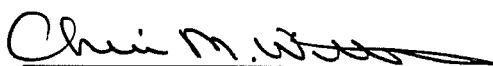
CERTIFICATE

3 COUNTY OF HUGHES )

4  
5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter and Notary Public in and for the  
7 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 16th day of  
11 December 2003, and that the attached is a true and  
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 29th day  
14 of December 2003.

15  
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18 Cheri McComsey Wittler,  
19 Notary Public and  
20 Registered Professional Reporter

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