

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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RECEIVED

AUG 11 2003

IN THE MATTER OF THE ESTABLISHMENT  
OF SWITCHED ACCESS REVENUE REQUIREMENTS  
IN TC02-052, TC02-053, TC02-054, TC02-058,  
TC02-064, TC02-065, TC02-066, TC02-067,  
TC02-068, TC02-071, TC02-072, TC02-073,  
TC02-074, TC02-076, TC02-077, TC02-078,  
TC02-079, TC02-080, TC02-087, TC02-088,  
TC02-089, TC02-090, AND TC02-091

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

**ORIGINAL**

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Transcript of Tape-recorded Proceedings  
August 4, 2003

= = = = =

BEFORE THE PUBLIC UTILITIES COMMISSION,  
ROBERT SAHR, CHAIRMAN  
GARY HANSON, VICE CHAIRMAN (by telephone)

COMMISSION STAFF

Rolayne Ailts Wiest  
John J. Smith  
Karen Cremer  
Kelly Frazier  
Greg Rislov  
Harlan Best  
Keith Senger  
Dave Jacobson  
Michele Farris  
Tina Douglas  
Bonnie Bjork  
Pam Bonrud

APPEARANCES

Darla Rogers

Reported By Cheri McComsey Wittler, RPR

**PRECISION REPORTING**

**L I M I T E D**

1 THE PUBLIC UTILITIES COMMISSION  
2 OF THE STATE OF SOUTH DAKOTA  
3 =====  
4  
5 IN THE MATTER OF THE ESTABLISHMENT  
6 OF SWITCHED ACCESS REVENUE REQUIREMENTS  
7 IN TC02-052, TC02-053, TC02-054, TC02-058,  
8 TC02-064, TC02-065, TC02-066, TC02-067,  
9 TC02-068, TC02-071, TC02-072, TC02-073,  
10 TC02-074, TC02-076, TC02-077, TC02-078,  
11 TC02-079, TC02-080, TC02-087, TC02-088,  
12 TC02-089, TC02-090, AND TC02-091  
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15 Transcript of Tape-recorded Proceedings  
16 August 4, 2003  
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20 ROBERT SAHR, CHAIRMAN  
21 GARY HANSON, VICE CHAIRMAN (by telephone)  
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Pam Bonrud  
APPEARANCES  
Darla Rogers  
Reported By Cheri McComsey Wittler, RPR

1 APPEARANCES BY TELEPHONE  
2 David Saville  
3 Susan Travis  
4 Tom Welk  
5 Larry Toll  
6 Ben Dickens  
7 Matthew McCaulley  
8 Cindy Grosvenor  
9 Wendell Aanerud  
10 Mary Lohnes  
11 Tom Simmons  
12 John Coleman  
13 Kyle White  
14 Doug Eidahl  
15 Christi Dewitt  
16 John Burke  
17 Tim Goodwin  
18 =====  
19  
20 The following is a TRANSCRIPT OF  
21  
22 TAPE-RECORDED PROCEEDINGS, held in the above-entitled  
23  
24 matter, at the South Dakota State Capitol, Room 412,  
25  
26 500 East Capitol Avenue, Pierre, South Dakota, on the  
27  
28 4th day of August 2003, commencing at 1:30 p.m.

1 CHAIRMAN SAHR: All right. The next  
2 item is under telecommunications. And the first  
3 agenda item is In the Matter of the Establishment  
4 of Switched Access Revenue Requirements in  
5 TC02-052, 053, 054, 058, 064, 65, 66, 67, 68, 71,  
6 72, 73, 74, 76, 77, 78, 79, 80, 87, 88, 89, 90, and  
7 91.  
8 And the question before the Commission today  
9 is shall the Commission grant the Motions to  
10 Dismiss, and shall the Commission grant extensions  
11 of time to respond to second discovery requests.  
12 Ms. Rogers.  
13 MS. ROGERS: Thank you, Chairman,  
14 Commissioners, members of the Commission. I would  
15 like to take the opportunity today to respond to  
16 S&S's brief and resistance to our Motion to Dismiss  
17 them as interveners in this Docket.  
18 And I represent, as you are aware, the local  
19 exchange carriers that you just listed in all of  
20 these Docket numbers, and I won't repeat them. In  
21 addition, Mr. Ben Dickens is on line, and he  
22 represents the local exchange carrier as well.  
23 I would like to respond to the brief, and then  
24 if Mr. Dickens has some additional comments, I  
25 would hope that you would afford him the

1 opportunity to make the same when I am finished  
2 with my comments.  
3 First of all, I would note that S&S's brief  
4 for resistance for a Motion to Dismiss appears to  
5 me to be divided into two parts. Part 1-A of the  
6 brief, in my opinion, does not really go into the  
7 merits of the Motion, but seems to be in response  
8 to one particular argument or point made in our  
9 argument in support of the Motion.  
10 In particular, S&S points to a phrase in our  
11 Motion that states "S&S's intervention in this  
12 Docket has not promoted a timely hearing and  
13 disposition of this case by the Commission," and  
14 S&S designates as an "unwarranted personal attack."  
15 I would just like to clarify that that was not  
16 at all intended as a personal attack against S&S.  
17 The point was generic. Any time there's  
18 intervention in a Docket, in my experience, whether  
19 it's S&S or whether it's Qwest or whether we're the  
20 interveners, that tends to make the Docket take  
21 longer. And especially since discovery is  
22 involved.  
23 And that was my whole point. It was a generic  
24 point made just in general in support of the  
25 argument. And I obviously couldn't control whether

<p>1 or not this was taken as a personal attack, but it 2 was certainly not intended in that manner. And I 3 would like to make that clarification. 4 I acknowledge that there have been plenty of 5 delays in this Docket, and if we're trying to 6 assess blame somewhere, there's plenty of it to go 7 around, including at the door of the Petitioners. 8 But that, however, in my opinion, does not go to 9 the actual merits of the Motion to Dismiss. 10 And that's where I'd like to focus my 11 attention today. S&amp;S's brief spends four pages and 12 four attachments and one footnote on that quote, 13 "personal attack," and I don't want to spend that 14 much time on it. I would like to go directly to 15 what I consider to be the merits of the resistance 16 for the Motion to Dismiss, and that begins, in my 17 opinion, on page 5 of S&amp;S's brief. 18 On the actual merits it appears to me that S&amp;S 19 makes four basic arguments. The first one I will 20 paraphrase as follows: Once an intervener, always 21 an intervener. S&amp;S appears to rely on party status 22 and then on a procedural argument to make that 23 point. 24 I would submit that the case law does not 25 support S&amp;S's position of once an intervener,</p>	5	<p>1 court reversed their request to intervene. And the 2 reason that they wanted to intervene is they wanted 3 some protection of what they considered proprietary 4 documents that were subject to discovery. 5 The Connecticut Supreme Court actually did 6 reverse their denial of the intervention and 7 allowed the seven priests to intervene. But the 8 court went through a history basically of 9 intervention, and concluded by stating that a court 10 has broad authority over intervention, including 11 limiting interveners, they can deny them, and the 12 court also has the authority to dismiss interveners 13 once their interest in the matter has expired. 14 Federal cases illustrate the intervention does 15 not grant absolute entitlement to continue as a 16 party until termination of the suit. That appears 17 to me to be what S&amp;S is arguing in the first part 18 of its brief. 19 The <u>Rosado</u> case goes on to cite several other 20 federal cases. I'm not going to take the time to 21 go into those, but for the purposes of what I 22 believe might be helpful to this Commission in 23 considering the merits of the Motion is to maybe 24 bring this closer to home. 25 S&amp;S appears to rely on "party status" in</p>	7
<p>1 always an intervener. And it appears to me that 2 the real question at issue here is whether the 3 court or an agency that has granted a party 4 intervention has the authority later to dismiss 5 that intervener from a Docket. And the clear 6 answer to that question is yes. 7 Probably the most clearly stated authority of 8 the courts to dismiss interveners is found in a 9 Connecticut case. It's called <u>Rosado versus</u> 10 <u>Bridgeport Roman Catholic Diocese</u>, 11 708 A.2d 916 (sic). And I realize that Connecticut 12 is a long ways from South Dakota. Never the less, 13 their civil procedure laws on intervention and the 14 right to intervene versus permissive intervention 15 are very similar to South Dakota's laws and also to 16 the federal rules on intervention. 17 Their facts are not on point either. But the 18 reason that I point you to this case is because the 19 court goes into a pretty exhaustive discussion of 20 intervention rights and the rights -- (Inaudible) 21 -- over intervention. 22 In this case which involved -- it was a 23 personal injury action against the dioses for 24 sexual abuse. There were seven priests that 25 attempted to intervene in the case. And the lower</p>	6	<p>1 support of its argument that it should be allowed 2 to remain in the case. And I believe S&amp;S's 3 reliance on party status may be overstated. 4 I would direct the court's attention to the 5 case of <u>Citibank vs. State of South Dakota vs.</u> 6 <u>Richard Butler</u>, which is a 1999 South Dakota case. 7 And it involves unclaimed property. Citibank 8 refused certain unmatched payments, and I think 9 there were about six payments in the case. And 10 they requested a declaratory ruling from our 11 circuit court -- one of the circuit courts in the 12 state as to whether they had to turn those 13 unmatched payments over to the State of South 14 Dakota under the Uniform Unclaimed Property Fund. 15 The circuit court said, no, they didn't. The 16 State then appealed that ruling to the Supreme 17 Court. At that point State Treasurer 18 Richard Butler moved to intervene in the case on 19 the appeal, and that Motion was granted. 20 Citibank and the State then settled their 21 issues, and the State dismissed the appeal. 22 Mr. Butler as intervener tried to prevent the 23 dismissal by arguing that "as a full party to the 24 action" he had the right to stop the dismissal. 25 Our Supreme Court disagreed. They said</p>	8

9

1 allowing him, that would be allowing Mr. Butler, to  
2 intervene in the action did not necessarily grant  
3 him the right as he claims to prevent dismissal of  
4 the action. An intervenor's presence in the action  
5 does not necessarily clothe it with a status of an  
6 original party. So I think that S&S's reliance on  
7 party status is misplaced.

8 I think it would also be helpful to view  
9 whether or not agencies have the same authority  
10 over intervention as courts do. And I would submit  
11 that they do.

12 I found a Nevada Public Service Commission  
13 case from November of 2002 that I think is  
14 particularly on point. In that case the Nevada  
15 power company filed a tariff revising its LEC  
16 tariff rates. There were numerous interveners in  
17 that action, and the power company and staff  
18 entered into a stipulation and the stipulation set  
19 forth the new rates and also which customers the  
20 new rates would apply to.

21 Well, there were two of the interveners that  
22 then no longer had an interest in the case because  
23 those rates did not apply to their customers. One  
24 of those interveners voluntarily withdrew from the  
25 Docket. The other one did not. So the staff

10

1 brought a Motion to Dismiss the other intervenor  
2 stating that that intervenor no longer had a  
3 director substantial interest in the case.

4 The intervenor objected to the staff's Motion.  
5 They said that they had an interest in the case  
6 because at some point their customers could perhaps  
7 have to pay that rate and they were generally  
8 interested in LEC rates that consumers in Nevada  
9 had to pay.

10 The Commission granted the Motion to Dismiss  
11 and said that there was no longer a direct and  
12 substantial interest in the matter and that the  
13 public interest that the intervenor claimed to have  
14 was not sufficient to maintain party status.

15 So I think that these cases and also the case  
16 in front of the Nevada Commission indicate -- they  
17 indicate two things. Number one, there is ample  
18 authority for court and for governing bodies and  
19 agencies to grant or dismiss an intervention. And,  
20 in fact, courts can dismiss an intervention subject  
21 to a Motion to Dismiss even after an intervenor has  
22 been allowed into the case. Once the interest in  
23 the matter has expired, a Motion to Dismiss is  
24 proper.

25 The second thing I think these cases show us

11

1 is that proper procedure has been followed here.  
2 Twice in S&S's brief they refer to the fact that  
3 parties cannot be summarily dismissed and S&S  
4 cannot be summarily dismissed from this proceeding.

5 I don't think there's any question of summary  
6 dismissal here. We've had a Docket opened, we've  
7 had an intervention granted, we've had discovery,  
8 we've had a change in circumstances pursuant to  
9 this court's order revoking a Certificate of  
10 Authority, we brought a Motion to Dismiss the  
11 intervention. S&S has had an opportunity to  
12 respond in opposition to this and, in fact, S&S has  
13 responded in opposition to this and we have the  
14 opportunity to come here today to argue this in a  
15 forum in front of the Commission and then the  
16 Commission can decide the case.

17 I think that is not even close to a summary  
18 procedure. It's the exact procedure followed in  
19 the cases that I have cited and I think that the  
20 issue is right and I think it can properly be  
21 granted in this case. S&S no longer has an  
22 interest in the matter at hand here, and they  
23 should be dismissed.

24 That takes me to --

25 MR. BURKE: I'd like to inform you

12

1 that I have now got on line. This is John Burke.  
2 Can you hear me?

3 MS. ROGERS: Yes.

4 CHAIRMAN SAHR: Thank you,  
5 Mr. Burke.

6 MS. ROGERS: I will continue. Is  
7 that satisfactory?

8 I will proceed to what I construe to be S&S's  
9 second argument in opposition to our Motion to  
10 Dismiss, and that is that the petitioner will not  
11 in any way be prejudiced by S&S's participation. I  
12 think that that totally overlooks the second issue  
13 in front of the Commission today and that is the  
14 second discovery request that has been already  
15 served on the Petitioners.

16 Intervenor's second discovery request is, I  
17 think, particularly onerous. For example, S&S  
18 requests a certification or equivalent document  
19 from an independent auditor and/or accountant  
20 attesting to various FCC procedures that need to be  
21 followed in dockets.

22 In addition to that, there's a whole other  
23 page of discovery requests, and then S&S requests  
24 federal income tax returns for 2000, 2001, and  
25 2002.

13

1 I would remind the Commission that these are  
2 cost study dockets. Aside from the issue of  
3 relevance, which I'm not waiving but I'm not here  
4 to address today, we're talking about independent  
5 certified audit statements to be provided to an  
6 intervenor that no longer holds a Certificate of  
7 Authority to do telecommunications business in the  
8 state.

9 So contrary to S&S's contention, this is  
10 prejudicial to Petitioners on its face. I would  
11 also remind the Commission that you have the full  
12 authority to protect all the parties in a Docket,  
13 including the original parties.

14 In a Texas case that addressed intervention in  
15 a case where a corporation lost its authority to  
16 transact business in the state, the court  
17 admonished the lower court to look at the original  
18 parties to the pending case and they must be  
19 protected from the disadvantages of intervention  
20 and a court should consider that in considering a  
21 Motion to Dismiss the intervenor.

22 So I would say that on its face it is  
23 prejudicial for S&S to continue on in this Docket  
24 and to force Petitioners to respond to yet further  
25 discovery requests.

14

1 The third argument that I see raised on the  
2 merits in S&S's Motion -- or brief in opposition to  
3 our Motion is that S&S will aid the Commission in  
4 achieving fair switched access rates.

5 With all due respect to S&S, I believe this  
6 Commission is fully capable to determine fair  
7 access rates regardless of the presence or absence  
8 of intervenors. In fact, you've been doing so as a  
9 Commission for years, and that's part of your  
10 statutory duties.

11 The Commission is aided by very capable staff.  
12 They have analyzed and re-analyzed and will  
13 continue to analyze our cost studies. In addition,  
14 we have rules that you have promulgated that tell  
15 us what needs to be filed and staff is very  
16 diligent in making sure that our cost studies  
17 follow these rules.

18 Under South Dakota Law I would again remind  
19 the Commission that to grant intervention a party  
20 must demonstrate a peculiar interest that is  
21 distinguishable from an interest common to the  
22 public or to taxpayers in general. S&S states that  
23 its objective in remaining in the Docket is the  
24 ultimate objective that the switched access rates  
25 are fair to petitioner, to interexchange carriers,

15

1 and the citizens of South Dakota.

2 That is not the peculiar interest required  
3 under our rule of governing intervention. And, in  
4 fact, S&S Communications is no longer an  
5 interexchange carrier, and the citizens of  
6 South Dakota are protected by this Commission.

7 So I would submit that that argument must fail  
8 because it does not follow the laws governing  
9 intervention. S&S has no continued interest in  
10 this case.

11 I believe by way of footnote S&S raises  
12 another argument, and, like I said, it's in a  
13 footnote so I assume it's an argument, although it  
14 wasn't given status in the main part of the brief.

15 S&S argues that it has a pecuniary interest in  
16 the dockets because "petitioner will no doubt seek  
17 retroactive recovery of the switched access rates  
18 from interexchange carriers, including S&S." I  
19 would submit that that is not correct. Petitioners  
20 are not seeking retroactive recovery of access  
21 rates in this case.

22 In the past Petitioners have placed new rates  
23 in effect only as ordered by the Commission. S&S  
24 was granted its Certificate of Authority in  
25 December of 2001. I went back and looked at some

16

1 of the filings that we have made since that time.  
2 The one that's closest in time was in June of 1999.  
3 The Docket was TC99-067, and we requested this  
4 Commission to approve tariff revisions.

5 The Commission granted that Motion and entered  
6 an order, and the order was dated January 14 of  
7 2000. And in that order it specifies that LEC  
8 tariff revisions are hereby approved as filed and  
9 shall be effective for telecommunications services  
10 rendered on or after January 15, 2000. We  
11 implemented those rates on January 15, and they  
12 were in effect until the end of January of 2001.

13 The next order, same way, the order  
14 specifically says the effective date of the new  
15 rates and that's when we implement them. So I do  
16 not believe that S&S has any standing to challenge  
17 our rates on this basis.

18 And in particular in this case our new access  
19 rates went into effect July 1, 2003, subject to  
20 refund by the Commission. And that was pursuant to  
21 statutory notice required to all the companies.  
22 S&S was no longer providing switched access  
23 services on that date. And, in fact, its  
24 Certificate of Authority was formally revoked by  
25 this Commission on July 2 of 2003.

1 Therefore, the new 2001 access rates have no  
2 effect on S&S whatsoever. They would potentially  
3 have a chance at a refund, except that they never  
4 paid these rates because they were no longer in  
5 business when they were implemented. So they don't  
6 have any interest in these rates at all.

7 So I think the bottom line is this. S&S has  
8 failed to establish in any of its closing arguments  
9 that it still has a peculiar interest in these  
10 dockets because, point of fact, it has not. Its  
11 interest has been extinguished. Therefore, there  
12 is no reason to maintain and continue them as  
13 interveners in this case.

14 Under declaratory and case law and the rules  
15 of this Commission our Motion to Dismiss should be  
16 granted. Thank you.

17 CHAIRMAN SAHR: Thank you.

18 Mr. Dickens.

19 MR. DICKENS: I cannot add anything  
20 beyond Ms. Rogers' comprehensive argument. Thank  
21 you.

22 CHAIRMAN SAHR: Thank you.

23 Mr. Burke.

24 MR. BURKE: Yes. Mr. Sahr, can you  
25 hear me okay?

1 CHAIRMAN SAHR: Yes. We can hear  
2 you.

3 MR. BURKE: I should note at the  
4 outset that the reason I -- I was unaware of this  
5 hearing apparently until someone told me. I have  
6 learned now it was in the e-mail agenda that I get.

7 Frankly, I had expected a Notice of Hearing in  
8 the mail like I typically get. But for some reason  
9 I guess I didn't get that. So I apologize for any  
10 inconvenience I've caused.

11 I did not hear the entirety of Ms. Rogers'  
12 argument. The first thing I heard was the  
13 discussion of, I believe, a Nevada case. That  
14 wasn't in any sort of a reply brief. I didn't get  
15 a reply brief so I don't know if you have the  
16 benefit of one or whether I was left out or  
17 something like that.

18 I don't know what Nevada case she's talking  
19 about. There wasn't a single case referenced in  
20 her brief. But if I could walk through, frankly,  
21 S&S's responses to a few of her comments and in my  
22 brief, I can at least give you our take on this  
23 matter.

24 The first thing I wanted to talk about was,  
25 frankly, I thought, an unfair personal attack

1 against, I think, me or S&S or both about us not  
2 contributing to the timely disposition of this  
3 matter.

4 I hope that the Commission, at least if  
5 anything to indulge me, would review my brief. I  
6 won't burden your time with restating it now, but I  
7 detailed the time line of events since the  
8 petitioner filed their dockets back in June of  
9 2002. I detailed the time line, and I, frankly,  
10 included letters that I had written to Ms. Rogers  
11 trying to push this along.

12 So I really don't think it's fair that there  
13 should be any sort of comment against S&S and me  
14 that we're not trying to work this forward. And,  
15 frankly, if you have any questions about that, I  
16 would encourage you to ask your own staff or  
17 counsel whether we've been dilatory.

18 With regard to on the merits as to S&S's  
19 status, I produced case law in my brief explaining  
20 that once you've been granted intervention status  
21 you are now a party to the proceeding. When a  
22 party intervenes they're a full participant in the  
23 lawsuit, and we're treated just as if we were a  
24 plaintiff or a defendant or someone else.

25 By Administrative Rule 20:10:01:15:05, "as a

1 party we became entitled to all rights granted to  
2 parties by statute."

3 For that reason I said that we could not be  
4 summarily dismissed and pointed out some comparable  
5 civil rules where dismissal could be sought on the  
6 merits.

7 Ms. Rogers apparently takes issue with my use  
8 of the term summarily dismissed. But, frankly,  
9 that's really what she's asking for here. The  
10 Motion has nothing to do with the merits or whether  
11 or not we should be involved. It's more in her  
12 words. She used the words our rights have now been  
13 "extinguished."

14 The fact that that happened shouldn't affect  
15 whether or not we have a contribution to make and  
16 whether or not she needs to treat us as a party to  
17 the proceeding rather than just wait out long  
18 enough in the release of information.

19 Frankly, perhaps I could have bothered the  
20 Commission with a Motion to Compel even sooner, but  
21 it's been my experience that commissions, courts,  
22 judges alike prefer to have people sort out  
23 discovery issues on their own.

24 We tried. I served discovery requests  
25 promptly after getting involved, and on the 30th

1 day we received nothing but objections, and I  
2 didn't think that was a contribution to the speedy  
3 process. Because if there was nothing more than  
4 objections and wanting to get the thing going, she  
5 could have given me a letter the next day and said  
6 you're going to need to file a request for access  
7 to confidential information.

8 So I did that. And then we proceeded to have  
9 discussions about a confidential agreement, and it  
10 wasn't until spring of this year that our expert  
11 finally got the opportunity to see some of this  
12 information. We've tried to make a contribution.

13 So the first point is we're a party to the  
14 proceeding. We have those rights. I don't believe  
15 under the law that we can simply lose that status  
16 because of what's going on with S&S financially.

17 Secondly, Ms. Rogers misconstrues the  
18 definition of prejudice. Prejudice has to do with  
19 how it will harm them in some way or negatively  
20 impact them. Responding to discovery requests  
21 isn't being prejudiced. That's not being  
22 prejudiced in a proceeding.

23 I would submit, as I did in my brief, that,  
24 frankly, as of the time that she served this and at  
25 the time that S&S lost its COA 20 days of the

1 30 that have passed, she should have already had a  
2 chunk of this material gathered and should have  
3 been able to provide us that.

4 While it's speculative on my part, I don't  
5 know, maybe she was just waiting for that to happen  
6 and bring her Motion. But, I mean, some of this  
7 material should have already been gathered, but  
8 it's not prejudicial to ask questions to try and  
9 get to the bottom of the cost studies and whether  
10 the information underlying them is actually there.

11 The third point, I personally think -- I have  
12 high confidence in the Commission as well, but it  
13 kind of parallels my prejudice argument. I don't  
14 understand how S&S's expert's involvement, any  
15 contribution he can make, how that wouldn't be of  
16 some assistance or aid to the Commission. And it  
17 certainly doesn't prejudice anyone.

18 If the ultimate objective is the same for all  
19 of us here, I don't understand why the LECs are  
20 against it, that that's what probably bothers me  
21 the most is not only are they against S&S's expert  
22 having some participation, they'll go to the  
23 lengths to take shots at me to hope that you won't  
24 continue to allow S&S to participate. And that  
25 troubles me.

1 To respond to what Ms. Rogers views as the  
2 ultimate test or the bottom line, you know, is S&S  
3 paying switched access rates right now? Mr. Sahr  
4 you correctly asked that at an earlier hearing.  
5 No, they're not.

6 I do think, though, that it might affect our  
7 ability to sell S&S Communications or if someone  
8 were to take over that business.

9 Now I don't know that there's anything in the  
10 works in that regard, but we'd certainly have to  
11 agree that any business or entity that might buy  
12 S&S Communications as a going concern will be  
13 affected by this ruling if they have to pay those  
14 switched access rates.

15 As far as the retroactivity, whether --  
16 Ms. Rogers points out in some earlier orders  
17 retroactive payment wasn't awarded or wasn't  
18 brought out, I don't know about those awards, and I  
19 don't even know if the LECs sought it in that case.

20 My guess is they may not have, if anything,  
21 for the fact that the time line hadn't been so long  
22 between the time that they filed their dockets and  
23 when the rates were ultimately approved.

24 Other than that, I would leave it only to  
25 respond briefly if Ms. Rogers brings up anything

1 that I haven't discussed. And, again, I apologize,  
2 but I thought I would get a written Notice of  
3 Hearing from somebody or something.

4 CHAIRMAN SAHR: Thank you very much.  
5 Ms. Rogers, would you like to reply?

6 MS. ROGERS: Just a couple of things  
7 in response.

8 Mr. Burke, you were not on the call yet when I  
9 responded to what you construe as a personal  
10 attack. I believe I clarified that that was not in  
11 any sense intended as an unwarranted personal  
12 attack against you.

13 It was an argument raised just generically  
14 that intervention dockets tend to slow down the  
15 ultimate process, especially when discovery is  
16 involved, and that would not matter whether S&S was  
17 the intervener or someone else.

18 So I think that we have definitely responded  
19 to what you construed as a personal attack, and it  
20 was not in any way meant to be that type of an  
21 attack.

22 With regard to the other issues raised, I  
23 believe that we have already responded to  
24 Mr. Burke's assertions about rights of a party, and  
25 I think that the cases that I have cited clearly

1 indicate that both courts and agencies have full  
2 discretion to dismiss interveners once their rights  
3 no longer appear to rise to the level that is  
4 required for intervener status. And I believe that  
5 that's where we are in this case.

6 And so I believe that, again, the bottom line  
7 is S&S can no longer establish a peculiar interest  
8 in this case and their Motion of intervention -- or  
9 their intervention in this Docket should be  
10 dismissed.

11 CHAIRMAN SAHR: Thank you. And I  
12 didn't mean to skip staff. Staff.

13 MS. CREMER: Thank you. Staff  
14 doesn't have much to add. I guess we're not clear  
15 what relief it is the Commission could grant S&S  
16 since they no longer have a pecuniary interest in  
17 this matter.

18 I would agree that when they were granted  
19 intervener status that they certainly had standing.  
20 However, I believe they have since lost their  
21 standing, and they can no longer show any actual or  
22 threatened injury caused by the telecommunication  
23 company's actions if we were to prevail here on the  
24 switched access filing.

25 As to the prejudice argument, I believe

1 prejudice does exist because staff's actually been  
2 ready to proceed on this matter for quite some  
3 time, and we've just been waiting for these two  
4 parties to sort out their differences. That could  
5 go on for quite some time yet, I believe.

6 We are ready to move on, and I believe that  
7 should the Motion be granted, this would come to a  
8 rather quick conclusion.

9 And as a point of fact, there is no method for  
10 retroactive rate recovery. So that argument, I  
11 believe, does not exist. And so staff would  
12 recommend granting the Motion.

13 CHAIRMAN SAHR: Thank you. Any  
14 questions from the Commissioners?

15 Vice Chairman Hanson?

16 VICE CHAIR HANSON: I have none.

17 CHAIRMAN SAHR: I have a couple of  
18 questions, and, Mr. Burke, I think you answered the  
19 first one is since July 2, the date the COA was  
20 revoked for S&S, and since we have no indication  
21 that S&S was offering services after July 1 -- and  
22 I do also have the same question I had previously  
23 is, what exactly would we be hearing if S&S has  
24 virtually no interest in it because they're not  
25 actually offering telecommunications services?

1 I mean, do you have anything to add to that?  
2 I guess I'll state that in the form of a question.

3 MR. BURKE: Do we have anything to  
4 add to the process, you mean, or what interest --

5 CHAIRMAN SAHR: Well, what interest  
6 do you have if you're not offering service anymore?

7 MR. BURKE: Well, frankly, I think  
8 it may affect our ability to sell the business as  
9 an ongoing concern, and also they don't pay the  
10 rates right now. I think everybody agrees with  
11 that.

12 Frankly, I think the problem we have is they  
13 had an interest when they were granted status. I  
14 don't think it can be summarily removed under the  
15 law, but are they paying rates now? No.

16 CHAIRMAN SAHR: And then the  
17 question I think I'd have probably more  
18 appropriately for Ms. Rogers would be right now the  
19 Motion before the Commission is a Motion to  
20 Dismiss, and my question would be do you think this  
21 would be better treated as a Motion for Summary  
22 Judgment as opposed to a Motion to Dismiss?

23 And I'm asking you -- (Inaudible) -- why don't  
24 you go ahead, John.

25 MR. SMITH: I just have a follow-on

1 question, I guess. Can we decide this without  
2 making a factual finding? Maybe start with that.

3 MS. ROGERS: Well, looking at like,  
4 for example, the Nevada case, they did not treat  
5 that as a Motion for Summary Judgment. They  
6 considered whether -- the Motion was whether or not  
7 to dismiss this intervener in the case because they  
8 no longer had an interest in the approved tariff.

9 The order that Nevada entered would be, I  
10 guess, very similar to the orders that you enter in  
11 these dockets. And there were, you know --

12 MR. SMITH: Well, I think the order  
13 we might enter ultimately if we were to grant  
14 however the Motion is treated, would probably be  
15 dismissal. That would be the relief granted.

16 MS. ROGERS: Dismissal of the --

17 MR. SMITH: Of the party. The thing  
18 is I guess what I'm getting at is do we have to  
19 make a factual determination here as to whether or  
20 not S&S does have interest?

21 MS. CREMER: This is Karen Cremer.  
22 Can you not take judicial notice of your order of  
23 July 2?

24 MR. SMITH: I think we can. The  
25 only issue I -- the only reason I raised that issue



1 about the Summary Judgment -- and I think it goes  
2 to his summary disposition argument -- is that if  
3 the Motion requires Summary Judgment treatment, it  
4 does require 10-day notice and all of the rigmarole  
5 of going through that.

6 MS. CREMER: Right.

7 MR. SMITH: And giving the party an  
8 opportunity to demonstrate that there's a genuine  
9 issue of fact. And that's my only issue I guess I  
10 would have here is whether or not we can just do  
11 this without offering the party an opportunity to  
12 demonstrate through affidavit or whatever that  
13 there is a genuine issue of fact to continued  
14 interest.

15 MS. ROGERS: Did S&S not have the  
16 opportunity to do that in this brief and resistance  
17 to Motion?

18 I mean, they could have certainly demonstrated  
19 any continued interest they have in the case. They  
20 did not do that because, as a matter of fact, they  
21 really don't have an interest in the case anymore.

22 MR. SMITH: Well, Mr. Burke has now  
23 asserted at least a possible interest, and that is  
24 the fact that the value of the assets may be  
25 impaired somehow as an ongoing concern.

1 And, I mean, he's raised it orally today. I  
2 guess I'm unaware as to whether it is an ongoing  
3 concern. I don't know whether it is or not. I  
4 don't know whether it has any going concern value.  
5 I guess the only reason I ask is just whether or  
6 not -- I'm just asking for what you think in terms  
7 of whether we need to make a factual finding or  
8 whether we can just do that on the basis of -- I  
9 mean, we definitely can't dismiss it on the basis  
10 of the face of the intervention petition itself  
11 because the facts as stated therein we're  
12 determined by the Commission to entitle S&S  
13 intervention.

14 MS. ROGERS: It would appear to me  
15 that procedurally we follow the same procedure as  
16 has been followed in these cases that I've cited.

17 There's been a Motion to Dismiss the  
18 intervention and -- (Inaudible) -- filed and it's  
19 been responded to and we've had an opportunity to  
20 come here today and argue it.

21 I don't think -- I mean, I think the procedure  
22 is right for you to decide this Motion.

23 MR. SMITH: I don't know that I've  
24 read those cases that you cited. Do you have  
25 citations to those you can provide to us?

1 MS. ROGERS: Yes, I do.

2 MR. SMITH: Because I'd like to look  
3 at those. I guess in those cases --

4 MR. BURKE: Actually, I would like  
5 to see those as well if you want to give us the  
6 cites now maybe.

7 MR. SMITH: Do you want to read  
8 those off, Darla? The one was an 8th Atlantic  
9 case, and the other --

10 MS. ROGERS: Yeah. The Rosado case.

11 MR. SMITH: How do you spell Rosado?

12 MS. ROGERS: R-O-S-A-D-O.

13 MR. SMITH: Rosado. Okay.

14 MS. ROGERS: 708 A.2d 916.

15 MR. SMITH: Okay.

16 MS. ROGERS: That's a 2000  
17 Connecticut case. That case deals more on a  
18 court's authority and in particular a federal  
19 court's authority to dismiss interveners.

20 The South Dakota case that I cited is Citibank  
21 vs. State of South Dakota vs. Richard Butler is  
22 599 N.W.2d, 402.

23 The Nevada case, I'm not sure what the  
24 citation is necessarily, but I do have a copy of  
25 that so I can certainly provide it to the

1 Commission. It's November 2002.

2 MR. SMITH: Is that a Nevada  
3 Commission case?

4 MS. ROGERS: Yes. Nevada Public  
5 Utilities Commission case.

6 MR. SMITH: What was the date of  
7 that?

8 MS. ROGERS: November 5, 2002,  
9 Nevada Public Service Commission. It's Docket  
10 No. 02-1020 and 02-1021.

11 MR. SMITH: Are these accessible on  
12 the Internet?

13 MS. ROGERS: Yes. I got them  
14 through Lexus.

15 MR. SMITH: Okay.

16 MS. ROGERS: I would like to just  
17 respond briefly to the alleged interest in the sale  
18 of the business as an ongoing or viable business.  
19 I really find that to be a stretch of a peculiar  
20 interest in this case.

21 Number one, it appears to me that it would be  
22 hard to sell this as an ongoing business because  
23 they have no Certificate of Authority to provide  
24 telecommunications in the state.

25 Number two, to say that, well, we do not have

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1 an interest right now because we're not paying  
2 these rates but at some future point there may be  
3 interest if we're able to sell it, that seems like  
4 a stretch to me and does not at all meet the  
5 criteria of the rule as it's been construed in any  
6 of these cases or by Nevada or even our own rules.  
7 I do not think that that rises to the level of  
8 interest in this case.

9 CHAIRMAN SAHR: And, Mr. Burke,  
10 that's the question that I would have is that along  
11 those same lines that Ms. Rogers just raised, I  
12 mean, what about the issue of ripeness here?

13 I mean, we're talking about a speculative  
14 interest and also an interest that if, in fact, S&S  
15 was sold, that that particular party could allege  
16 on their own.

17 Would you explain a little bit more about your  
18 theory of it somehow affecting potential sale  
19 really comes into play of whether or not it should  
20 be before the Commission now as opposed to at a  
21 later date if such a sale did occur.

22 MR. BURKE: Sure. The first thing  
23 is -- before I respond to that, I think we need to  
24 keep in mind that I think the law seems to be --  
25 under the Administrative Rules, the Rule I cited

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1 earlier, 20:10:01:15:05, that once we become an  
2 intervenor we are a full participant in the lawsuit  
3 and we have all the rights of any party.

4 So I want to -- I think that at least my  
5 comments need to be underlying then is the fact  
6 that we're really a party here and I don't think  
7 intervention status -- (Inaudible) -- depending on  
8 the day.

9 So with that, obviously, objection in mind is  
10 I disagree with Ms. Rogers, I guess, connotation  
11 of it that intervention status -- while we may not  
12 have it today, if S&S is sold tomorrow to a phone  
13 company with a COA and they run it as S&S did,  
14 that, well, now they're an intervenor again.

15 The problem is this Docket's going to go  
16 forward and once you take away our status, you  
17 know, I don't know when it might be sold or if.  
18 But if that were to happen, well, this opportunity  
19 is gone. And so that's why I really don't think  
20 intervention status is considered such a chameleon,  
21 if you will. I think once you're an intervenor  
22 you're a party.

23 And I didn't see any cases -- and I haven't  
24 seen one yet. I will go look at these. In fact, I  
25 pulled up Westlaw while we were on the phone. I'll

35

1 try and respond to these cases. I wouldn't have  
2 minded seeing that argument. But the law I had  
3 found -- because there wasn't any cases at all in  
4 her first brief.

5 The law I found seemed to say that when you're  
6 a party you're a party, and that's the way it  
7 works.

8 Now getting back to specifically your question  
9 about, you know, how S&S might be affected, I think  
10 that it's not fair to say that someone might not be  
11 interested in buying it if they didn't have a COA,  
12 I didn't think. It seems to me if anyone had a COA  
13 right now, they could buy -- S&S has its own  
14 switch, et cetera. I don't know why if they were  
15 going to run it like S&S did, if they did it under  
16 that name or however they did it, that they  
17 wouldn't be affected.

18 It seems to me that whatever happens today  
19 will hamper that person's ability, you know,  
20 whoever's going to be paying switched access rates  
21 or whoever might buy it.

22 The only other thing I guess I would add to  
23 that is I don't think -- I think Ms. Rogers maybe  
24 now would like you to regard this as a Summary  
25 Judgment Motion. I don't think that's what this

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1 was. I think it was a straight up Motion to  
2 Dismiss.

3 Normally when you move for Summary Judgment  
4 you do attach affidavits or point to certain  
5 evidence in the record with, you know, factual  
6 bases and then I respond with an affidavit showing  
7 why there's a genuine issue of fact or something  
8 for the Commission.

9 This was just a short Motion saying, hey,  
10 their COA has been, you know, taken away so they  
11 can't be, you know, an intervenor anymore. So  
12 that's what I responded to. I didn't personally  
13 perceive it as a Summary Judgment Motion, for  
14 whatever that's worth.

15 MR. SMITH: You know, I think on  
16 that, John -- this is John Smith. You know, I  
17 think we've in the past here a few times -- you  
18 know, the administrative Summary Judgment statute's  
19 pretty new but because of the statements in the  
20 Administrative Procedure Act that we are to follow  
21 the Rules of Civil Procedure, basically, except for  
22 those specific places where the Administrative  
23 Procedure Act specifically differs from that, we've  
24 taken it, I guess, here to mean, the law, that we  
25 can follow the same procedure that courts do and

1 when they're presented with a Motion to Dismiss in  
2 which factual determinations are required to be  
3 made, that the Commission on its own notion can  
4 treat that as a Motion for Summary Disposition,  
5 provided they follow the procedural steps that are  
6 required for a Motion for Summary Judgment, which  
7 admittedly haven't occurred yet. So we would have  
8 to do that.

9 I think that would -- if we decided we needed  
10 to do that, we would have to go through the steps  
11 of a Summary Judgment proceeding, okay, if that's  
12 what we decide, if that's what the Commission  
13 decides. And that would require the 10-day notice  
14 and all of that.

15 Can I ask you this? I want to ask you just  
16 sort of a practical question here, Mr. Burke. May  
17 I do that?

18 MR. BURKE: Certainly.

19 MR. SMITH: I mean, just given S&S's  
20 current situation with millions of dollars in  
21 unpaid customer obligations and vendors and the  
22 whole carnage along the highway out there, honestly  
23 why is S&S spending its money on this, rather than  
24 doing something about its customers and its  
25 vendors?

1 MR. BURKE: Probably because  
2 South Dakota, as I understand it, is in the top  
3 four in the country for switched access rates.  
4 While other states continue to go down, these  
5 people want to bring them farther up.

6 Everybody's going down with switched access  
7 rates. They want to push them higher. It seems  
8 odd that they're pushing them higher and saying  
9 that the cost is higher and higher but selling long  
10 distance on their web pages for a dime a minute.

11 I got a notice from Qwest in the mail the  
12 other day something about 7 cents a minute. I  
13 think termination and origination in the wireless  
14 is in the pennies. And these switched access rates  
15 continue to go higher. And I guess, if anything,  
16 it's because S&S believes they're right.

17 MR. SMITH: I guess that's nice  
18 philanthropy, but it just seems a little  
19 unseemingly in a situation where, you know,  
20 customers have paid these guys all of this money  
21 and they're getting nothing for it and that S&S is  
22 spending its money not on that but on a  
23 philosophical Qwest.

24 MR. BURKE: Well, that assumes, of  
25 course, that they're paying me right now.

1 MR. SMITH: I guess it does. And  
2 you have a consultant too. And, again, that's not  
3 the legal issue here. I'm just curious, though, as  
4 to why that is.

5 MS. CREMER: This is Karen Cremer  
6 from staff. I would just note, you know, that in  
7 the sale of an ongoing business that you cannot buy  
8 a COA. So even if you were to sell S&S, the new  
9 company would be looked at as an individual  
10 and -- (Inaudible) -- intervene and the current  
11 switched access dockets for '03 if that were to  
12 happen.

13 The other thing you may want to consider  
14 rather than a Motion for Summary Judgment -- I know  
15 it's not entitled that way but maybe this is just a  
16 Motion to reconsider intervention. Although I  
17 guess probably time has passed on that, now that I  
18 think about that.

19 MR. SMITH: And  
20 that's -- (Inaudible) -- questionably had an  
21 interest.

22 MS. CREMER: Without a doubt. But  
23 now because, you know, circumstances have  
24 changed --

25 MR. SMITH: I think the issue,

1 Karen, is can we make that determination without a  
2 factual finding.

3 MS. CREMER: I guess, what is your  
4 factual finding on, whether or not they have a  
5 Certificate of Authority?

6 MR. SMITH: Whether or not they have  
7 an interest.

8 MS. CREMER: Just whether or not  
9 they have a pecuniary interest or a particular  
10 interest?

11 MR. SMITH: Particular interest.

12 MS. CREMER: Okay.

13 MR. SMITH: One of those might be  
14 the COA. I mean, even though we --

15 MS. CREMER: I'm just trying to  
16 figure out what you want people to submit.

17 MR. SMITH: I think we could -- I  
18 mean, we could probably take judicial notice that  
19 the Commission has voted to revoke the COA.

20 MS. CREMER: Right.

21 MR. SMITH: But even so, it's a  
22 factual finding, and can we do that without going  
23 through the rigmarole?

24 MS. CREMER: So you're just looking  
25 at notice that you need Mr. Burke to submit, or are

<p>41</p> <p>1 you looking for the, you know --</p> <p>2 MR. SMITH: If we --</p> <p>3 MS. CREMER: What's the next step</p> <p>4 here?</p> <p>5 MR. SMITH: The Commission would</p> <p>6 issue a notice.</p> <p>7 MS. CREMER: Stating what the issues</p> <p>8 are and what the parties are to -- okay.</p> <p>9 MS. ROGERS: I would suggest, if I</p> <p>10 might, that the procedure that we followed here is</p> <p>11 literally exactly the same as all of these cases</p> <p>12 that I viewed. The Motion is to dismiss the party</p> <p>13 as an intervener. And so that -- you know, that</p> <p>14 was the procedure that I followed here was the</p> <p>15 Motion to Dismiss. That's what the case is, of</p> <p>16 course, considered and they'd either grant it or</p> <p>17 deny the Motion. I -- (Inaudible) -- this is the</p> <p>18 proper procedure.</p> <p>19 CHAIRMAN SAHR: I think in light of</p> <p>20 what we've heard today, I think the appropriate</p> <p>21 thing to do is to treat this in the alternative as</p> <p>22 a Motion for Summary Judgment and still allow the</p> <p>23 question of the Motion to Dismiss to go forward.</p> <p>24 So I would move that the Commission on its own</p> <p>25 accord make -- that the Commission on its own</p>	<p>43</p> <p>1 VICE CHAIR HANSON: This is</p> <p>2 Commissioner Hanson. I second both motions.</p> <p>3 CHAIRMAN SAHR: Thank you.</p> <p>4 (The proceedings concluded at 2:25 p.m.)</p>
<p>42</p> <p>1 accord treat this in the alternative along with a</p> <p>2 Motion, being a Motion to Dismiss, as a Motion for</p> <p>3 Summary Judgment and request that counsel prepare</p> <p>4 the appropriate notice -- we have a 10-day notice</p> <p>5 requirement -- and in the notice set forth what is</p> <p>6 expected of anyone involved in the case.</p> <p>7 And I think with that we would be prepared to</p> <p>8 go forward either on the Motion to Dismiss or on</p> <p>9 whether or not to treat it as a Summary Judgment.</p> <p>10 We also have a second issue, which is whether</p> <p>11 or not to grant the extension of time. And I think</p> <p>12 considering that we are dealing with pending</p> <p>13 Motions to Dismiss or what will be a Motion for</p> <p>14 Summary Judgment as well, that at this point in</p> <p>15 time it is appropriate to extend the time for</p> <p>16 discovery until we have resolved the issue of</p> <p>17 whether or not to dismiss the case, whether it be</p> <p>18 for the Motion to Dismiss or else the Motion for</p> <p>19 Summary Judgment.</p> <p>20 So I would, along with moving that we grant</p> <p>21 the alternative issue of Motion for Summary</p> <p>22 Judgment, I would also move that we grant an</p> <p>23 extension of time until the Commission rules on</p> <p>24 either the Motion to Dismiss or the Motion for</p> <p>25 Summary Judgment.</p>	<p>44</p> <p>1 STATE OF SOUTH DAKOTA )</p> <p>2 :SS CERTIFICATE</p> <p>3 COUNTY OF HUGHES )</p> <p>4</p> <p>5 I, CHERI MCCOMSEY WITTLER, a Registered</p> <p>6 Professional Reporter and Notary Public in and for the</p> <p>7 State of South Dakota:</p> <p>8 DO HEREBY CERTIFY that as the duly-appointed</p> <p>9 shorthand reporter, I transcribed, to the best of my</p> <p>10 ability, the cassette tape of the foregoing</p> <p>11 proceedings.</p> <p>12 Dated at Pierre, South Dakota this 8th day</p> <p>13 of August 2003.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18 Cheri McComsey Wittler,</p> <p>19 Notary Public and</p> <p>20 Registered Professional Reporter</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

1 STATE OF SOUTH DAKOTA )

2 :SS

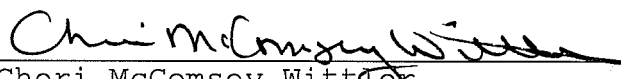
CERTIFICATE

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 transcribed, to the best of my  
10 ability, the cassette tape of the foregoing  
11 proceedings.

12 Dated at Pierre, South Dakota this 8th day  
13 of August 2003.

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