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STATE OF SOUTH DAKOTA

PUBLIC UTILITIES COMMISSION

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

In the Matter of S&S Communications/Alterna-Cell's
Compliance with Commission Order;TC02-166,
and

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; TC 02-071; TC 02-072; TC02-073; TC02-074;
TC02-076; TC02-077; TC02-078; TC02-079; TC02-080;
TC02-087; TC02-088; TC02-089; TC02-090; TC02-091.

TRANSCRIPT OF PROCEEDINGS

DATE: August 19, 2003

TIME: 1:30 p.m.

BEFORE THE PUBLIC UTILITIES COMMISSION

Mr. Bob Sahr, Chairman

Mr. Gary Hanson Vice Chairman

Mr. Jim Burg Commissioner

STAFF: Mr. Kelly Frazier
Mr. John Smith
Ms. Rolayne Wiest

APPEARANCES: Ms. Darla Rogers
Mr. John Burke

APPEARANCES BY PHONE:

Mr. Tom Sannes Mr. Bill Heaston
Mr. Stuart Wevik Mr. Marlen Bennett
Mr. Brett Koenecke Ms. Colleen Sevoid
Mr. Bob Mercer Ms. Cindy Grosvenor
Ms. Mary Lohnes Ms. Karen Cremer

1 BOB SAHR: This is the Tuesday August 19th
2 meeting of the South Dakota Public Utilities Commission.
3 We have a regular agenda and also an addendum to the
4 agenda. What I would propose is starting off with the
5 addendum to the agenda of the Commission meeting and that
6 is one item which is TC02-166; In the matter of S&S
7 Communications/Alterna-Cell's Compliance with Commission
8 Order.

9 And in this matter we had hearings held on June
10 30th and July 2nd of 2003, and at that point in time the
11 Commission recessed and took some time to consider the
12 evidence and to formulate a decision. And here today we
13 are here to announce our decision and with that in mind I
14 just want to make a couple remarks.

15 And I think the first thing I would like to say
16 is I know that this is something that's really of interest
17 to people all across the State of South Dakota and when
18 you look down the customer list of people who are affected
19 by this company and who signed up for prepaid services for
20 whatever reason they are not going to be able to receive,
21 it really strikes me that it's impacting people all around
22 the state.

23 It's people who are our friends, our neighbors,
24 people who are running small businesses, people running
25 large businesses, from all different walks of life. And I

1 think it's very unfortunate the breadth that this
2 company's failure to provide these prepaid services has
3 really affected.

4 And I know that their attorney Mr. Sannes had
5 portrayed them as two guys driving around in mini vans
6 living modestly and I think that really is irrelevant to
7 this. There are a lot of people who drive around in mini
8 vans and live in modest homes who follow the laws, follow
9 the rules, and go about making a living or sometimes not
10 being able to make a living in a fair manner.

11 And that's what really struck me here is that we
12 have a situation where we had a company who started off
13 business by not following state laws. They didn't get the
14 proper certificate of authority from our Commission and
15 they have in essence shown that they continue to flaunt
16 the Commission, they failed to file information in a
17 timely manner, they failed to file accurate information.
18 And all of that has contributed to what unfortunately will
19 be damages to the State of South Dakota, our consumers,
20 our companies that certainly are in the hundreds of
21 thousands of dollars range if not into the millions.

22 And I just really am struck by the fact that a
23 relatively small company was able to create so much damage
24 across the State of South Dakota. And to this day we have
25 not seen either Mr. Sumption or Mr. Swearingen appear

1 before this Commission to defend themselves or explain why
2 it happened, how it happened, and we have seen no plan for
3 restitution to the consumers who have lost their money who
4 have paid in advance and expected to receive telephone
5 service. And that is something that I find extremely
6 disappointing and, frankly, when we talk about the
7 appropriate penalties, I personally wish the penalties
8 could be stronger. And I think that's something that may
9 need to be considered in this day and age of deregulated
10 services. We need to look and see what we can do to
11 protect the consumers going forward and we need to do
12 everything we can to try to make the consumers and the
13 companies whole and also to make sure that this sort of
14 thing doesn't happen again or if it does happen that we
15 minimize the amount of damage to our consumers, to our
16 telephone companies across the state and to the entire
17 State of South Dakota.

18 So with that in mind I'm going to make the
19 following motion. On June 16th, 2003, the Commission
20 found that sufficient cause existed to issue an Order for
21 Show Cause and Notice of Hearing and ordered S&S and its
22 owners, Les Sumption and Matt Swearingen, to appear before
23 the Commission on June 30th, 2003, to show cause why one
24 or more of the following remedies or penalties should not
25 be imposed upon S&S and its owners.

1 One, whether the certificate of authority of S&S
2 should be revoked or suspended if S&S is found to have
3 acted in violation of any of the commission's orders,
4 rules, or State law pursuant to SDCL 49-31-3,
5 20:10:24:04.02, 20:10:24:04.03 and 20:10:24:04.04.

6 Two, whether fines or penalties should be
7 imposed if S&S is found to have acted in violation of any
8 of the commission's orders, rules or State law pursuant to
9 SDCL 49-31-7.4, 49-31-38 and 49-31-38.1.

10 Three, whether an Order to Compel should be
11 issued requiring S&S to produce records and books as
12 provided in SDCL 49-31-7.1.

13 Four, whether S&S should be ordered to release
14 800 numbers if requested by the customer that has been
15 assigned the 800 number.

16 Five, whether the Commission should take action
17 against the bonds and letter of credits issued by Aberdeen
18 Finance Corporation.

19 Six, whether Les Sumption and/or Matt Swearingen
20 should be barred from providing telecommunication services
21 in South Dakota in the future if the Commission determines
22 that if they have violated any Commission orders rules or
23 state law pursuant to ARSD 20:10:24:04.02 and
24 20:10:24:04.04 and any other appropriate relief that may
25 be granted by the Commission.

1 The hearing was held as scheduled on June 30th,
2 2003, and was continued until July 2nd, 2003. At the end
3 of the hearing the Commission unanimously voted to revoke
4 S&S's certificate of authority, ordered S&S to release any
5 800 numbers, if requested, and decided to take action
6 against any bonds and the letter of credit issued by
7 Aberdeen Finance Corporation. The Commission took the rest
8 of the issues under advisement.

9 With respect to the remaining issues, I moved
10 that the Commission take the following action. One, that
11 the Commission assess a civil fine of \$13,400 against S&S
12 and its owners Les Sumption and Matt Swearingen.

13 And I should note that under our state law there
14 is the possibility of being fined up to \$1000 or \$5000 for
15 these type of penalties, and in this case, unfortunately I
16 think due to the way that the law was drafted, I think the
17 commissioners felt in some instances the \$5000 penalty
18 would have been appropriate, but because of the actual
19 wording in the law, we felt that the most the Commission
20 could levy would be a \$1000 fine.

21 Two -- and I should also note that that was for
22 15 violations, is that correct, of the law?

23 MS. WIEST: Yeah.

24 BOB SAHR: Two, that at this time the Commission
25 not issue any orders to compel.

1 And three, that the owners of the S&S, Les
2 Sumption and Matt Swearingen, may not reapply for
3 certificate of authority during their lifetimes unless
4 otherwise ordered by the Commission.

5 GARY HANSON: I'll second the motion, and I know
6 Jim may wish to say something as well.

7 TOM SANNES: Excuse me, this is Tom Sannes and
8 I'm unable to hear anything.

9 GARY HANSON: Were you able to hear Chairman
10 Sahr's motion?

11 TOM SANNES: Yes, sir.

12 GARY HANSON: This is Commissioner Gary Hanson,
13 I seconded the motion. Let me know if you can't hear from
14 this standpoint on. The S&S Communications as far as I
15 can ascertain from all of the hearings, the testimony, the
16 discussions that were held during those hearings was a bad
17 idea that went wrong. And that as a result of that, the
18 citizens of South Dakota and of other states, North
19 Dakota, were harmed; that financially businesses as well
20 as individuals will as a result of S&S's non due diligence
21 to their business practice will end up financially unable
22 to regain what they have lost to them.

23 It's hard to imagine that the design of this was
24 from a standpoint to make a successful business. It's
25 hard to believe that the practice was to actually try to

1 make it succeed. The fact is it's extremely disappointing
2 when there are thousands of honorable people employed in
3 the telecommunications business in South Dakota in dozens
4 of businesses, and I think that this besmirches their and
5 tarnishes tele -- did I say telemarketing, I hope I didn't
6 say that -- telephone businesses in South Dakota, and
7 that's unfortunate because one bad apple can cause harm to
8 all of those other good reputable companies.

9 Certainly from a stand point as a commissioner
10 it is our responsibility to protect not only the welfare
11 of the citizens but the welfare of other businesses and I
12 think that the action that we are taking here today is
13 responsible, and in fact I would echo Commissioner Sahr's
14 feelings that it is unfortunate that we cannot take even
15 stronger actions. And for that reason I second the
16 motion.

17 JIM BURG: This is Jim Burg, can you hear me?

18 TOM SANNES: I can hear you fine, sir.

19 JIM BURG: The only comment I want to make is
20 that to me it was unfortunate that a certificate of
21 authority was granted in this matter in the first place,
22 but we did it, and this was prior to Commissioner Sahr and
23 Commissioner Hanson being on the Commission. We did it to
24 try to protect the public again. We actually had to bend
25 our own policy in issuing the certificate of authority

1 because I was very adamant when we started getting
2 certificates of authority every single meeting for
3 multiple companies that we do not allow prepaid services
4 of any kind because if you prepay you put your money out
5 before you get services and we were finding that a lot of
6 companies were not living up to those standards.

7 However, in this case they had already sold
8 prepaid services before they received the certificate of
9 authority and we were well aware that the only way that
10 those people would get anything out of their investment
11 was if they were able to go into business to offer the
12 service. So we put a bond requirement and also agreed to
13 the -- what do you want to call it -- letter of credit
14 with the Aberdeen Finance Corporation. And so that we
15 thought we could protect from the people that made prepaid
16 cards, prepaid services, and that they would also still be
17 able to offer service to those people who they went into
18 business illegally before they came to us.

19 Unfortunately from that time on they did not
20 adhere to the letter of the law and keep us informed and
21 keep an adequate bond, did not even respond to the number
22 of contracts that they had issued so that we knew that the
23 bonding level, and in my estimation and at that time they
24 actually not only broke the rules and regulations of the
25 Commission but also probably law. For that reason I

1 second the motion as presented by Chairman Sahr -- or I
2 concur in the motion.

3 MR. SAHR: And that will conclude the addendum
4 to the agenda.

5 MR. SAHR: Next item number nine; In the Matter
6 of the Establishment of Switched Access Revenue
7 Requirements in TC02-052, 02-053, 02-054, 02-058, 02-064,
8 02-065, 02-066, 02-067, 02-068, 02-071, 02-072, 02-073,
9 02-074, 02-076, 02-077, 02-078, 02-079, 02-080, 02-087,
10 02-088, 02-089, 02-090, and 02-091, and those are
11 affecting the companies of West River Cooperative
12 Telephone Company; Interstate Telecommunications
13 Cooperative; Vivian Telephone Company; Sioux Valley
14 Telephone Company; Sully Buttes Telephone Cooperative;
15 Splitrock Properties, Inc; Splitrock Telecom Cooperative,
16 Inc; Midstate Communications, Inc; McCook Cooperative
17 Telephone Company; Baltic Telecom Cooperative; East Plains
18 Telecom, Inc; Sanborn Telephone Cooperative and SANCOM,
19 Inc; Valley Telecommunications Cooperative Associations;
20 Brookings Municipal Telephone Company; Union Telephone
21 Company; Bridgewater-Canistota Independent Telephone
22 Company; Kennebec Telephone Company; Beresford Municipal
23 Telephone Company; DTG Community Telephone; Roberts County
24 Telephone Cooperative Associations and RC Communications,
25 Inc; Tri-County Telcom, Inc; the docket entitled in the

1 Matter of the Establishment of Switched Access Rates for
2 Local Exchange Carriers Associations; and the docket
3 entitled In the Matter of the Establishment of Switched
4 Access Rates for South Dakota Network LLC.

5 And I'm going to read the procedural history
6 just because I think it is something that the people in
7 the audience may want to hear as well. On July 11th,
8 2003, each of companies filed a Motion to Dismiss and
9 Motion for Extension of time to respond to second
10 discovery request with the Commission.

11 On July 24th, 2003, S&S filed its brief in
12 resistance to Motion to Dismiss and Motion for Extension
13 of time with the Commission.

14 On August 8th, 2003, the Commission issued a
15 notice of intent to consider motion as One for Summary
16 Judgment Order for and Notice of Hearing, Order Extending
17 Time for Response. Under this notice and order, S&S is
18 the demonstrate that a genuine issue of material facts
19 exist as to its present interest in the proceeding or the
20 companies' Motion to Dismiss what we decided as a motion
21 for summary disposition under SDCl 1-26-18.

22 Alternatively, if a genuine issue of material
23 fact exists concerning S&S's interest, an evidentiary
24 hearing will be held on the issue.

25 The question today is shall the Commission

1 determine that S&S has raised a genuine issue of material
2 fact as to its interest in the proceeding, and if the
3 Commission determines that S&S has not raised a genuine
4 issue of material fact as to its interest, how shall the
5 Commission rule on the motion to dismiss considered as a
6 motion for summary disposition under SDCL 1-26-18. Or
7 shall the Commission proceed to hearing on the issue of
8 S&S's present interest in the proceedings.

9 With all that being said, who do we hear from
10 first, S&S or from the telephone cooperatives.

11 Ms. Rogers?

12 MS. ROGERS: Thank you, Commission. I have
13 filed a response to S&S's Affidavit that was submitted
14 earlier and I would just add a few comments in addition to
15 the response made that I filed with the Commission.

16 First of all, I would state that in absence of
17 any other evidence the unsubstantiated factual allegations
18 in Mr. Sumption's Affidavit fall far short of establishing
19 a genuine issue of material fact. I believe that there
20 are portions of the Affidavit that are inconsistent and
21 unbelievable on the very face of the Affidavit.

22 One of the examples is that Mr. Sumption states
23 that over the past several weeks, several individuals
24 and/or entities have expressed an interest in purchasing
25 S&S Communications and/or its assets. I think it would be

1 interesting to explore the possibilities here.

2 If we are talking about the sale of S&S as a
3 business, the question comes to mind what is there to
4 sell. This is not an ongoing business. Now I've been
5 involved personally in business transactions before and
6 generally when you have a sale of an ongoing business, you
7 purchase such things as customer lists, you purchase any
8 equipment that is there, you purchase good will.

9 In this case there are no current customers
10 because the company is no longer in business. I sincerely
11 doubt that there is any good will left to sell. With
12 regard to the sale of assets, it also stretches one's
13 imagination to imagine the sale of assets in this case as
14 well because even if a sale of assets could by some remote
15 possibility establish an interest in this docket, which I
16 don't believe it can, the assets that we are talking about
17 in this case are heavily encumbered.

18 I did a UCC search on S&S Communications' assets
19 and also on Matt Swearingen and Les Sumption and of course
20 as you are aware, these are a public record. Aberdeen
21 Finance Corporation has four UCC filings against all of
22 the telecommunications assets of S&S including, but not
23 limited to, personal property, equipment, radio stations,
24 FCC licenses, assignments of FCC licenses, general
25 intangibles, accounts, goods, towers and transmitters.

1 These UCC filings date anywhere from July 29 of
2 2003, and they go back as far as July of 2000. There are
3 other FCC filings include a lien against or a filing
4 against radio license and also the brick frame office and
5 warehouse building of S&S. These UCC filings, like I
6 mentioned, are against both the partners of the company
7 and also against S&S Communications.

8 There are other UCC filings against S&S
9 Communications, they include filings on lease payments,
10 apparently S&S had leased certain software and equipment
11 from a company and then had in turn assigned the lease
12 payments to another company and these are also encumbered.
13 In light of that it would appear to me extremely
14 improbable that there are any assets that could be sold.

15 But even aside from that, I think that we need
16 to really get to the crux of the matter here, Mr. Sumption
17 states that S&S is, quote, presently in negotiations, end
18 quote, to sell its business or its assets. On its face
19 this calls for speculation.

20 If S&S is presently negotiating, who is the
21 buyer? What is S&S selling? Is it assets or is it
22 business, and to say either or is not sufficient factual
23 basis to establish that there is a genuine issue of
24 material fact.

25 So the bottom line is it doesn't really matter

1 that these factual statements were placed before the
2 Commission because the real crux is how does any potential
3 sale, however speculative, establish a direct and
4 immediate affect on S&S's pecuniary interests and the
5 answer is that it does not. S&S will not be purchasing
6 switched access services, they do not have a certificate
7 of authority. S&S cannot raise an interest of someone
8 else. Even if a purchasing entity exists, which is highly
9 unlikely, and the sale fails, failure is because of the
10 position into which S&S's business has fallen. All of the
11 assets are encumbered, there is no customers and there is
12 no good will.

13 I think it's also helpful to note that there is
14 nothing in Mr. -- or while there is nothing in
15 Mr. Sumption's Affidavit that establishes a genuine issue
16 of material fact, we also have the aid and guidance of
17 established case law in South Dakota. Under the case law
18 guiding us with regard to summary judgment motions our
19 Supreme Court has said we cannot ask the Commission to
20 anticipate possible proof. Unsupported conclusions and
21 speculative statements do not raise a genuine issue of
22 fact. And that's the case that I cited in my response.

23 So for purposes of this hearing today, we would
24 urge the Commission, first of all, to find that the
25 factual allegations submitted to this Commission do not

1 establish a genuine issue of fact. Therefore, that leaves
2 the Commission with the alternative of considering the
3 motion for summary judgment as a matter of law.

4 I believe the Commission can take judicial
5 notice of it's revocation of S&S's certificate of
6 authority. The record shows that S&S has no interest in
7 these dockets; that S&S has not paid, will not pay, and
8 never has paid the switched access rates that are the
9 subject of this docket.

10 The administrative rules of this Commission
11 require a showing that the Petitioner will be bound and
12 affected either favorably or adversely with respect to an
13 interest peculiar to the Petitioner as distinguished from
14 an interest common to the public or taxpayers in general.
15 In fact, S&S has failed to show that it is affected at
16 all. Nonspecific statements concerning a potential sale
17 are not only patently unrealistic but they also fail to
18 establish the interest required under the rules.

19 We have also established any further authority
20 before this Commission that you do have the authority to
21 dismiss an intervener when the rules are no longer
22 complied with.

23 We request that you grant the relief requested;
24 that would be to dismiss S&S's interveners. We further
25 request that you would rule that the companies do not need

1 to respond to the second discovery requests as the same
2 are moot. Thank you.

3 BOB SAHR: Thank you. Mr. Burke?

4 MR. BURKE: Ms. Rogers gave me quite a bit to
5 respond to but I think it's important to note at the
6 outset that her comments by themselves establish that the
7 Affidavit of Les Sumption does create a genuine issue of
8 material fact. I'm going to use quotes now from her
9 comments and I'm hoping that, of course, that she does not
10 intend to make herself a witness in this matter, but she
11 commented for your benefit that Les Sumption's Affidavit
12 was, quote, unbelievable, end quote.

13 It seems to me the credibility in whether a
14 witness's testimony is to be believed is not something
15 that is for summary judgment to be decided. That by
16 itself is credibility, character, a person's testimony as
17 to whether or not it's believable is something that a
18 Commission or another fact finder would determine, not
19 Ms. Rogers.

20 She also used the quote, stretches one's
21 imagination. Again, this is not her decision to make, it
22 is the Commissions. And in order for the Commission to
23 dismiss this matter on summary judgment, or under the
24 Motion to Dismiss that was originally brought, they would
25 have to make that decision and find that there was no

1 genuine issue of material fact.

2 Another word she used was improbable. Again, it
3 seems to me that if there is a dispute as to the veracity
4 of Mr. Sumption's Affidavit, that it's hardly anything
5 that would be summary judgment appropriate.

6 Ms. Rogers takes issue with the fact that some
7 of this is from her comments and some of it is from her
8 brief, in her brief she says the sale of S&S as a business
9 is very unlikely, that's a quote. And there is a, quote,
10 slim chance of a sale, end quote. I have failed to see
11 how Ms. Rogers is in any position to make that decision.
12 I see there is some gentlemen here with James Valley
13 shirts. If James Valley couldn't provide phone service
14 tomorrow, would you tell your shareholders that your
15 assets are worth nothing? Is that what you would tell
16 them, that their shares of stock are worth nothing if that
17 company is not doing business?

18 S&S has a switch and I know that several of you
19 if these are the ones affiliated with James Valley would
20 probably say that that's in excess of \$200,000 or more in
21 value. And I realize that S&S has assets that are
22 encumbered as Ms. Rogers noted, the problem is any money
23 S&S gets, any of it to lessen it's debt to creditors
24 increases the chances that some day they can get down to
25 paying back some of the people that were shorted on these

1 prepaid contracts.

2 But again, I don't think Ms. Rogers who
3 represents our competitors and doesn't have any of our
4 financial information is in any position to decide that
5 S&S cannot be sold or that its assets cannot be sold.

6 Ms. Rogers takes issue with the fact that we do
7 not identify the proposed buyer, and that the word
8 individual and/or entity is used. That's not a
9 misstatement. That's because they are dealing with one
10 individual in one instance and there is entities looking
11 at it in another. And frankly, I would not agree with any
12 premise that for this Affidavit to be valid Mr. Sumption
13 would have to identify who he's trying to sell his assets
14 or the phone company to. It's not relevant.

15 She takes issue with the fact that there is no
16 supporting documents. Mr. Sumption's Affidavit is
17 evidence. It's evidence. And the fact that the proposed
18 buyer is not named doesn't lessen it in any way shape or
19 form. I realize that the assets are encumbered. While
20 she says a sale, there is a slim chance of a sale and that
21 it's unlikely, again, I don't know that Ms. Rogers also
22 knows the value of S&S Communications' digital radio
23 licenses, I don't know that she knows that. If she does,
24 she knows quite a bit more about S&S Communications than
25 we've ever been able to ascertain about the LECs despite

1 being an intervener in a proceeding and entitled to
2 discovery, so I'm not sure whether this information is
3 easy to get, but if it's that easy to get maybe I'm going
4 to try to do it with all the LECs in these proceedings and
5 the antitrust case rather than trying to do it through
6 discovery.

7 The underlying premise when we get here today
8 seems to be what switch access rates should be in South
9 Dakota. I think what's overlooked here is the fact that
10 the ultimate goal is a fair switch access rate and that's
11 best for South Dakota consumers. And that seems to be
12 overlooked time and time again as the LECs try hard to get
13 S&S dismissed from this proceeding. And I have to ask
14 what harm is there if S&S is an intervener to this
15 proceeding. What do the LECs have to fear if their books
16 justify the switched access rates that they have now and
17 the rates they want to make them, I ask what the fear is.
18 Why are we spending the Commission's time, my time,
19 Ms. Rogers' time, arguing about whether we can be an
20 intervener. It's speculative on my part, but I would like
21 to think that if the information just would have been
22 provided perhaps our expert would have said, you know
23 what, the justification is there, close the docket, it's
24 all done. But instead, we are still fighting and we'll be
25 doing it on appeal about whether we can even be a party

1 when the docket probably could have already been taken
2 care of. But I fail to see what prejudice there could be
3 to the LECs if S&S was allowed to partake in the process.

4 S&S's goal from the outset was pretty straight
5 forward. There's been a lot of criticism of S&S
6 Communications on how they did business and a lot of those
7 comments are fair. S&S had a big problem though with the
8 fact that the tariff rates for intrastate long distance in
9 South Dakota exceeds 20 cents a minute. That's double
10 what the LECs sell it to their subscribers for the entire
11 call. So their intentions are valid because as our rates
12 go up, others are going down, and it seems troubling to me
13 and I believe the Commission should be troubled and South
14 Dakota citizenship should be troubled that the tariff
15 rates to transport this call exceed 20 cents a minute but
16 you can go buy it for a dime or less if you are a retail
17 customer. But if you are trying to do it yourself you
18 can't do it for 20 cents.

19 In any event, I think that S&S Communications
20 has created an issue of fact, if credibility comes down to
21 an issue which Ms. Rogers clearly has conceded and has
22 because that's her only -- that was the focus of her
23 comments was that it was not believable or that he's maybe
24 misrepresenting whether there is an actual sale. Well
25 credibility, if that's the case, it's not something that's

1 decided on summary judgment. That's for a fact finder and
2 that's why summary judgment as well as the Motion to
3 Dismiss is inappropriate.

4 I would like to reiterate that I think that even
5 delving into this process goes beyond what the law would
6 be. We are an intervener, we were granted that status.
7 I believe that we should be treated like a party. As far
8 as the Citibank case that Ms. Rogers references, that was
9 the case where the parties have reached an agreement on
10 appeal. The case was over. There's been no agreement
11 reached here. The case isn't trying to be dismissed.
12 It's still pending, and unfortunately it's not going
13 forward because we are fighting about whether S&S can even
14 be involved. Thank you.

15 BOB SAHR: Thank you, Mr. Burke. Staff?

16 MS. CREMER: We are unable to hear bits and
17 parts of Ms. Rogers and Mr. Burke so I would just state
18 that staff would agree with the legal assessment of the
19 companies regarding the Affidavit and the insufficiency of
20 S&S to establish the existence of a genuine issue of
21 material fact and I'm basing that on what they both
22 submitted not what they just argued. Part of what I heard
23 was Mr. Burke said at the end, he sounded to me like they
24 more are looking for a rule change and this isn't the
25 proper forum to be doing that.

1 And the other thing that I would note is that
2 the prejudice to the companies is that staff and the
3 companies are ready to go and could have this matter taken
4 care of by next month. The prejudice that remains here is
5 that if they are left in the case, we are probably talking
6 sometime next year before this will be ready to go and so
7 I do believe there is prejudice here because I do believe
8 they have lost their standing. Thank you.

9 BOB SAHR: Thank you very much. Ms. Rogers, did
10 you want to respond?

11 MS. ROGERS: Thank you. First of all, I concur
12 with Ms. Cremer's comments with regard to prejudice. I
13 would also point out that under the intervention rule, the
14 issue is not whether or not the party is prejudice but
15 whether the intervening party can actually establish a
16 genuine interest or peculiar interest in the outcome of
17 the proceeding.

18 With regard to some of Mr. Burke's arguments, I
19 would merely state that the burden is here and now. And
20 under SDCL 15-6-56E it specifically requires an adverse
21 party to set forth specific facts showing that there is a
22 genuine issue for trial.

23 One other case I would point the Commission to
24 that is cited in my response is the Heinrich versus
25 Carpenter case, and this is also a South Dakota case,

1 wherein the Court stated when challenging a summary
2 judgment the nonmoving party, quote, must substantiate his
3 allegations with sufficient probative evidence that would
4 permit a finding in his favor on more than mere
5 speculation, conjecture or fantasy. I submit that there
6 has been no probative evidence submitted in this case,
7 just Mr. Sumption's speculation and that I would urge the
8 Commission to grant our Motion to Dismiss. Thank you.

9 MR. SAHR: Thank you. Mr. Burke?

10 MR. BURKE: I still have never gotten the case
11 that she is relying on. The one cite she gave for the
12 record for the last one was incorrect. I've got the
13 Citibank case but none other. You gave an Atlantic 2nd
14 cite at the last hearing that was incorrect.

15 MS. ROGERS: I did not use that case today.

16 MR. BURKE: I know. I'm just still wanting to
17 know what it was from back there.

18 MS. ROGERS: Okay. I'll look it up. I have it.

19 BOB SAHR: Thank you. And I have a couple of
20 questions for Mr. Burke and I would like to ask him to
21 come forward to respond just so that we can make sure that
22 staff can hear this as well. It's the same sort of
23 question that I asked and I think all the commissioners
24 had concerns about at the last hearing, here we have a
25 company that's no longer offering telecommunication

1 services and I don't really understand where the interest
2 comes in as far as the actual interest to continue on in
3 this case. And I understand the theory that it may
4 somehow cause less value to be associated with assets
5 during potential sale, but can you flush anything out
6 beyond that?

7 And I guess a hypothetical question that I would
8 have is let's say for instance Commissioner Hanson,
9 Commissioner Burg and I say we are thinking about starting
10 a telecommunications company, would we have standing to
11 interject in that proceeding? Would we have standing to
12 come forward? I mean, at what point in time does a
13 persons or company's position become so hypothetical and
14 so remote as to make it appropriate to dismiss the case?

15 The question is, here we have a company that's
16 actually not doing business right now and really can't
17 show anything other than a potential sale of assets to
18 give it standing to interject in this case, and my
19 question is, is there anything else that he can show on
20 behalf of his client that would indicate that they have a
21 reason to be in this case when the rates that we are
22 talking about went into affect after the business closed
23 its doors.

24 MR. BURKE: Thank you, Chairman Sahr. With
25 regard to S&S Communications' interests, when compared to

1 you and Commissioner Burg perhaps starting or thinking
2 about starting a telephone company, I don't think it's the
3 same situation because here S&S Communications had and
4 presently has intervener status and so it's not a
5 situation where you have someone that's just out there in
6 the blue and going to jump in head first. We were
7 actually involved working through the discovery process,
8 trying to partake when S&S Communications lost it's
9 certificate of authority. So it would seem to me that
10 it's less, I guess, speculative than a couple of
11 individuals who are thinking about starting a phone
12 company. We actually were in the driver's seat as
13 intervener but lost our certificate of authority.

14 As far as an interest that they can presently
15 show, I conceded at the last hearing that we had on this
16 particular docket or these dockets, I should say, that S&S
17 Communications as Ms. Rogers pointed out is not paying for
18 tax services in South Dakota. That being said -- and
19 Ms. Rogers' comments to the likelihood of a sale not
20 withstanding, if S&S were to be -- if the purchase were to
21 follow through that's being discussed right now, though
22 they may not do business as S&S Communications, their
23 switched access and everything else, I guess that goes
24 with their phone company regardless of what name it's
25 under would be that that entity would be doing business

1 and would have to pay switched access services in South
2 Dakota.

3 And unfortunately what we are seeing is some
4 reluctance on the buyer's part for the obvious reason
5 that, you know, switched access rates in South Dakota
6 exceed 20 cents a minute. And I suppose the comment could
7 be that that party could simply buy the S&S Communications
8 and then perhaps start two or three years down the road,
9 the next time this proceeding takes place again. That
10 doesn't seem to me to be in the interest of judicial
11 economy given the fact that we've already obtained the
12 cost studies. Frankly, I don't know that there was a lot
13 more information that was going to be needed before we
14 could at least give our assessment of it and it would seem
15 to me that it would be kind of a one-time deal because I
16 think the process is pretty much the same year to year.

17 But in any event, while I guess I would like to
18 be able to add more as to the specifics about potential
19 buyers and who they are dealing with, I'm not at liberty
20 to do that so I think that's all I can give you right now.

21 MR. SAHR: Thank you. Are there other
22 questions from the commissioners?

23 GARY HANSON: Mr. Burke, can you tell us if the
24 potential buyer plans to do business in South Dakota?

25 MR. BURKE: Yes, they would.

1 GARY HANSON: And is there any asset that the
2 company has besides the equipment to sell to the proposed
3 potential purchaser?

4 MR. BURKE: Actually, I don't know that I could
5 answer that specifically. I know that they have assets,
6 radio licenses and that sort of thing, and I assume there
7 is a certain amount of technology with how those things
8 are operated. I don't know that I can give you a list of
9 what those would be.

10 GARY HANSON: All right. Thank you.

11 MR. SAHR: Thank you. Well, seeing no other
12 questions I'm going to make the following motion; I move
13 that the Commission finally conclude that the assertions
14 contained in the Affidavit of Les Sumption are not
15 sufficient as a genuine issue of material fact as to
16 whether S&S has an interest peculiar to it as opposed to
17 the general interest of the public.

18 First, I don't believe that the facts asserted
19 by Mr. Sumption in his Affidavit are sufficient if it's
20 taken as true. I just don't think that the fact that
21 someone owns some telecommunications equipment is enough
22 to have standing to intervene in the switched access cost
23 proceeding.

24 Secondly, I don't think Mr. Sumption meets the
25 standard for raising a material issue of fact. The

1 interest asserted by S&S is based upon the beliefs of
2 third party, namely its asserted potential purchase of its
3 assets, this assertion is speculative if not based upon
4 actual communications from such party and merely states
5 what the potential purchaser might consider relative to
6 it's -- or if based on an actual communication is
7 inadmissible hearsay. We did not even know whether the
8 potential purchaser plans to do business in South Dakota
9 or use the access for purchases that was required to pay
10 switched access charges to the company. No evidence has
11 been presented either from an expert, from technical
12 literature or from an actual potential purchaser that
13 would demonstrate that the switched access rates of the
14 companies in these proceedings will in fact have a
15 material effect on the evaluation of S&S's assets.
16 Accordingly I move that the companies' motions to dismiss
17 be granted and that S&S be dismissed from the dockets
18 listed on the agenda.

19 JIM BURG: I'm going to second that motion and
20 add just a couple of comments on it. You know, what I'm
21 hearing was being asked for is the fact that anybody that
22 owned a switch could show a pecuniary interest to
23 intervene in this docket and I don't see that that would
24 be the case. Everybody in this room could fit that,
25 everybody in the State of South Dakota probably could

1 under certain circumstances. Especially if anybody
2 purchasing this were coming forward with some kind of a
3 business plan similar to what S&S had. The hypothetical
4 of the three of us forming a company, I at least think we
5 would have the opportunity to probably get a certificate
6 of authority. We've denied the certificate of authority
7 based on that business plan and the people involved with
8 it and I think that it would be very unlikely that that
9 could occur. I don't see that we should hold up this
10 process moving forward with the assumption that somebody
11 may at some point purchase that. I think if there is a
12 problem that they have first of all. Also then they would
13 have to have the showing that the rates that are being
14 determined here were not the right rates, were not the
15 fair rates, and I think that by the time any business is
16 in place they will get that opportunity through our
17 process. But I don't see that there is enough
18 justification here to hold up this process and allow these
19 companies to recover what they proved what they have had
20 to bring forward to us is the right rates to be charging.

21 GARY HANSON: I will concur. I certainly don't
22 want to provide any situation where the citizens of South
23 Dakota are not able to recoup some of the potential losses
24 that they have from S&S not being able to sell this
25 facility. However, you really have to have more than just

1 inventory to sell. There has to be an ongoing business of
2 some sort and I don't see that we are in any way creating
3 a challenge to S&S to selling that equipment. I don't see
4 that they are going to be losing equity or good will or
5 something of that nature as a result of our action.

6 BOB SAHR: And for those of you on the line
7 that was a Sahr motion, Burg second and Hanson
8 concurrence. And I want to thank everyone on the line and
9 everyone in the audience for their patience. We normally
10 don't have these technical problems and I really
11 appreciate everyone putting up with the speaker system and
12 the problems we have had to put up with with the phone
13 line.

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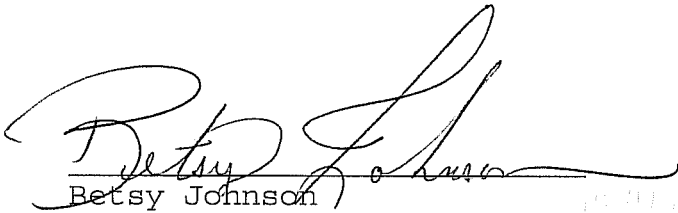
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1 STATE OF SOUTH DAKOTA)
) ss CERTIFICATE
 2 COUNTY OF BROWN)

3 I, Betsy Johnson, Court Reporter and Notary Public in
 4 and for the State of South Dakota, do hereby certify that
 5 the foregoing transcript, consisting of pages 1-32,
 6 inclusive, is a full, true and correct transcript of my
 7 original stenograph notes of the evidence offered and
 8 received and proceedings had in the aforementioned action.

9
 10 Dated this 20th day of September, 2003.

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 12
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 14 
 15 Betsy Johnson
 16 Court Reporter
 17 1015 S. Lloyd Street
 18 Aberdeen, SD 57401
 19 Commission expires: 9/26/04
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