

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE COMPLAINT FILED
BY ELDON LINDQUIST ON BEHALF OF
PIERRE RADIO PAGING & TELEPHONE,
PIERRE, SOUTH DAKOTA, AGAINST VENTURE
COMMUNICATIONS COOPERATIVE, INC.
F/K/A SULLY BUTTES TELEPHONE
COOPERATIVE, INC. REGARDING A
BILLING DISPUTE

CT05-004

Transcript of Recorded Proceedings
July 28, 2005

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION,
GARY HANSON, CHAIRMAN
BOB SAHR, VICE CHAIRMAN
DUSTY JOHNSON, COMMISSIONER

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

APPEARANCES

Thomas M. Maher
Robert C. Riter

Reported By Cheri McComsey Wittler, RPR, CRR

PRECISION REPORTING
L I M I T E D

1 THE PUBLIC UTILITIES COMMISSION
 2 OF THE STATE OF SOUTH DAKOTA
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 5 BY ELDON LINDQUIST ON BEHALF OF
 6 PIERRE RADIO PAGING & TELEPHONE, CT05-004
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 27 APPEARANCES
 28 Thomas M. Maher
 29 Robert C. Riter
 30
 31 Reported By Cheri McComsey Wittler, RPR, CRR
 32

1 CHAIRMAN HANSON: CT05-004, In the
 2 Matter of the Complaint Filed by Eldon Lindquist on
 3 Behalf of Pierre Radio Paging & Telephone of
 4 Pierre, South Dakota, Against Venture
 5 Communications Cooperative, Incorporated of
 6 Sully Buttes Telephone Cooperative, Inc. Regarding
 7 a Billing Dispute.

8 And the question before the Commission today
 9 is shall the Commission grant the Motion.

10 We will first hear arguments from -- we should
 11 hear them first from Mr. -- from the Pierre Radio
 12 Paging & Telephone. No? Oh, you made the Motion.
 13 That's right. The Complainant is -- thank you.

14 MR. HOUDEK: Excuse me,
 15 Mr. Chairman. This is Randy Houdek from Venture.
 16 I have also called in.

17 CHAIRMAN HANSON: Thank you, Randy,
 18 for letting us know. You're represented here this
 19 morning by Bob Ritter. Riter, Ritter. I always --

20 MR. RITER: You do tend to mix it
 21 up. It's Riter.

22 CHAIRMAN HANSON: Bob. That's why I
 23 call you Bob.

24 MR. RITER: I don't blame you.
 25 Hanson is easier to pronounce than Riter,

1 APPEARANCES BY TELEPHONE
 2 Colleen Sevoid
 3 Tammy Christman
 4 Melanie Acord
 5 Marlene Bennett
 6 Melissa Thompson
 7 Ron Spangler
 8 Rick Johnson
 9 Jeff Decker
 10 Jim Wilcox
 11 Kevin Kouba
 12 Linda Walsh
 13 Randy Houdek
 14 -----
 15
 16 TRANSCRIPT OF RECORDED PROCEEDINGS, held in
 17 the above-entitled matter, at the South Dakota State
 18 Capitol, Room 412, 500 East Capitol Avenue, Pierre,
 19 South Dakota, on the 28th day of July 2005, commencing
 20 at 9:30 a.m.
 21
 22
 23
 24
 25

1 obviously.

2 CHAIRMAN HANSON: Unless it's a
 3 particular Hanson or Hansen. Thank you, Bob.

4 MR. RITER: You bet. Mr. Chair,
 5 members of the Commission, I'm appearing today as a
 6 member of Riter, Rogers, Wattier & Brown.
 7 Darla Rogers is otherwise involved in other
 8 matters, and so she has asked me to appear today on
 9 behalf of Venture Communications. And as
 10 Randy Houdek indicated, he is by phone appearing on
 11 behalf of Venture Communications as well.

12 The Motion that's been submitted is very
 13 straight forward. We have asked that this matter
 14 be dismissed, principally asked that it be
 15 dismissed because the claim that's being asserted
 16 by Mr. Lindquist and his company involves
 17 interpretation of federal law, more particularly a
 18 federal decision.

19 And the statute in South Dakota which gives
 20 authority to this Commission over carriers
 21 indicates that the jurisdiction applies to issues
 22 not otherwise regulated by federal law or
 23 regulation and involves in effect the concerns and
 24 issues regarding the laws of this state.

25 But in this particular case what we've got

5

1 before the Commission or what Mr. Lindquist has
2 brought before the Commission is a question
3 involving not what he was charged, not what the
4 tariff rates are but rather -- and whether he was
5 charged pursuant to our tariffed but rather whether
6 a decision from the FCC makes a change required in
7 the rates.

8 And we argue that this is a decision that
9 ought to more properly be brought -- if he wants to
10 pursue it, before the FCC. It is not a decision
11 that involves issues specific to the State of South
12 Dakota and it does not involve an interpretation of
13 our state law or your regulation or statutes
14 governing utilities that operate in South Dakota.

15 So we believe that the jurisdiction of the PUC
16 in this matter does not exist. It's not a billing
17 dispute too. And he alleges in his Complaint that
18 it is a billing dispute. We think that it is not a
19 billing dispute, but rather it is an allegation
20 that the rate charged was in excess of the tariffed
21 rate.

22 And the only reason it would become in excess
23 of the tariffed rate according to his argument is
24 the decision of the FCC requires an interpretation
25 that it is in excess of the tariffed rate. Because

6

1 we did not charge in excess of the tariffed rate
2 and so it all boils around or it all revolves
3 around, more particularly, the decision from the
4 FCC in the case that we cited in our Motion to
5 Dismiss.

6 Lastly, as far as the jurisdictional issue,
7 49-31-5.1 confirms that the PUC would not have
8 jurisdiction over Venture's local rates. They are
9 filed, as I understand it, for informational
10 purposes, and they are kept at the offices in
11 Highmore where Mr. Houdek is located and reflect
12 the rates as they exist over there.

13 The second part of our Motion is a Motion to
14 Strike. And the reason we brought the Motion to
15 Strike is Mr. Lindquist's Complaint includes as
16 attachments many different communications by and
17 between the parties. And some of the
18 communications involve efforts by the parties to
19 resolve this matter and, more particularly, efforts
20 by Venture to resolve this matter so it would not
21 have to come before the FCC or perhaps before this
22 PUC as he has attempted to now pursue.

23 The law in South Dakota and in particular the
24 statute says that evidence of efforts to compromise
25 or attempt to compromise a claim are not

7

1 admissible. That's SDCL 19-12-10. Mr. Lindquist
2 has not only sought to make them admissible, but he
3 has submitted them before you as part of his
4 attachments on his Complaint, and they are not
5 admissible. The case law in South Dakota is very
6 clear that those should not be admissible because
7 they then interfere with efforts of the parties to
8 try to resolve the matters in an amicable way so
9 they do not have to come before you or the tribunal
10 or if it's a case before the court.

11 So clearly much of the items -- or many of the
12 items attached to his Complaint are in effect not
13 admissible and should not be on the Complaint.
14 They should be stricken from the Complaint.

15 Interestingly enough, however, one of the
16 attachments on -- attached to his Complaint is a
17 letter from a lawyer in Washington, D.C. on his
18 behalf to my partner, Ms. Rogers, dated
19 March 12, 2001. And the last paragraph of that
20 letter says that we are -- Pierre Radio is -- and
21 I'm paraphrasing, but Pierre Radio is prepared to
22 press our request for resolution of this matter at
23 the Federal Communications Commission. This letter
24 serves as our Notice of Intent to bring a formal
25 Complaint before the agency if the instant matter

8

1 is not resolved in a timely manner.

2 I mention that only because I think their own
3 correspondence from counsel in Washington, D.C. on
4 their own behalf reflect the fact that Complainant
5 understands or at least his counsel in D.C.
6 understood that if this matter were to be brought
7 forward for resolution, that appropriate
8 jurisdiction for it is before the FCC and not
9 before this Commission. Accordingly, we would ask
10 that this matter be dismissed.

11 CHAIRMAN HANSON: Thank you,
12 Mr. Riter. Are there any questions at this
13 juncture?

14 John.

15 MR. SMITH: And maybe it's better if
16 I wait until the end here. I can have a couple of
17 questions, I think. I think would you -- is it
18 your position that this dispute is an intercarrier
19 dispute?

20 Was Mr. Lindquist's company working as a
21 telecommunications carrier at the time as opposed
22 to a consumer of your services at retail?

23 MR. RITER: If I might respond.

24 MR. SMITH: Please.

25 MR. RITER: I will attempt to answer

1 that question. I am -- either a radio paging -- he
2 had a radio paging company. I understand that he
3 has attempted to submit his claim as a radio paging
4 company.

5 Now certainly I don't -- I don't know that he
6 would be a regulated utility, if that's the
7 question. I don't know the answer to that, and
8 maybe you're better served to ask him.
9 Unfortunately, I just don't know that I can answer
10 that directly.

11 MR. SMITH: Oh, I thought -- the
12 reason I'm asking it is just with respect to the
13 issue of Section 5.1 of Chapter 31, and the issue
14 regarding your tariffed retail rates and whether or
15 not -- you know, if this is an intercarrier claim,
16 then that particular defense may not be applicable
17 here. And that was my reason for asking that.

18 MR. RITER: Well, I think I've
19 effectively not answered your question so I --

20 MR. SMITH: Well, and ultimately I
21 think, you know, it's for -- part of that is going
22 to rest on him and what he was doing. And it's not
23 completely clear from the Complaint what this is
24 all about, you know.

25 You know, I think one of the troublesome

1 things or I think for us looking at this from a
2 jurisdiction standpoint is at least I've done some
3 research on this, and I can't find the case
4 anywhere that seems to be -- to hold that a State
5 Commission is preempted in a situation like this
6 from hearing a intercarrier case involving a CMRS
7 provider. And at least I can't find one.

8 So that puts us -- if there isn't one out
9 there, then that puts us in the tough position of
10 having to go out on our own and make a preemption
11 finding, you know, without any kind of federal
12 court case or FCC decision or express statutory
13 preemption language.

14 MR. RITER: If I might reply, I
15 think the statute under which this PUC does
16 operate -- its operations or handles its matters
17 reflects that in a situation like this where it
18 involves something that is regulated by federal law
19 and regulation -- and clearly it is in this case
20 because you've got a decision from the FCC that is
21 the basis for Mr. Lindquist's claim before the
22 Commission.

23 And it doesn't involve the billing. It
24 doesn't involve him having been billed in excess of
25 tariff rates or something that would be more

1 specific to the State of South Dakota. But rather
2 it involves his beliefs that the interpretation
3 that the FCC has given any case impacts his -- the
4 charges that he has received or that his company
5 has received.

6 And it seems to me that everything clearly
7 revolves around federal law and that under 49-31-3
8 that this is a matter that is regulated by federal
9 law. And, as I have indicated, I think his own
10 statement of his counsel in the letter that I
11 cited -- or referenced reflects the knowledge and
12 intent that this is a matter that is -- if
13 appropriate to be brought, appropriate to be
14 brought before the FCC as opposed to this
15 Commission.

16 MR. SMITH: Just with respect to his
17 settlement letters, and I don't think there's any
18 dispute that settlement negotiations are not going
19 to be evidence in this case unless they're relevant
20 for some purpose that isn't apparent yet. Might
21 those letters -- I mean, if we're just looking at
22 this from Eldon having filed this at the time
23 without legal counsel on his own behalf, might we
24 not view those letters as merely his way of without
25 having had to try to ferret out everything that's

1 in the letters, the exchanges and put them into a
2 Complaint and in his words have just attached those
3 so that -- to give the Commission an idea of what
4 this is all about?

5 MR. RITER: Well, and I appreciate
6 that, that that might well have been his intent. I
7 would say, however, that Exhibit 1 that is his --
8 as opposed to an attachment of correspondence is
9 his actual statement and the basis for his
10 Complaint references the same things. I mean,
11 these are drawn out from those letters and
12 communications that we've had between our company
13 and Mr. Lindquist's company relative to these
14 issues.

15 So I think it invades more than just a couple
16 of attachments.

17 MR. SMITH: Thank you.

18 CHAIRMAN HANSON: Thank you. Are
19 there any further questions at this time?

20 If not, we will hear from Eldon Lindquist's
21 representative or Eldon.

22 Good morning.

23 MR. MAHER: Good morning. Tom Maher
24 Senior appearing with Eldon. I haven't been
25 involved in this until today, but Eldon asked me to

13

1 come along and I'll do it.

2 It seems to me we may have hit basically the

3 crux of this. Eldon should be able to go to a

4 South Dakota company from which he's buying

5 services and get his billing records and try and

6 settle a billing dispute.

7 And what he's saying to you is that he has

8 tried to do that. He's asked for these billing

9 records many times. He's asked for them from the

10 company. He's asked from their attorneys. He's

11 had me ask their attorneys for these billing

12 records. And they haven't been provided.

13 So to me you're being told that there's

14 nothing you can do about it, that you have no

15 jurisdiction to hear his Complaint of a

16 South Dakota citizen who does business here in

17 Pierre against a company that's up here in Onida.

18 This should be the kind of thing that you sat down

19 across the desk and resolved. It shouldn't be

20 something that we have to involve the Commission

21 and attorneys to get how much he was overbilled.

22 It's clear he was overbilled a lot of money,

23 okay. And it's clear they have never given him

24 records on it.

25 Now you're being told that because there's a

14

1 FCC regulation, a ruling, that affects the -- these

2 charges, that that is the only remedy that anybody

3 in the whole United States can seek to deal with

4 this. And I don't believe that is the case at all.

5 It doesn't -- it doesn't meet the common sense

6 guideline that everyone in the whole United States

7 who's been overbilled by one of these people would

8 have to go to Washington to have it resolved.

9 And what they've simply done is they've said

10 you are using an unfair procedure here in billing

11 across the board, that this was going on across the

12 board. Just like you would say, hey, you've been

13 making these radial tires and the bands in them are

14 bad and you're going to have to recall some and

15 you're going to have to replace some.

16 That doesn't mean that every consumer of that

17 tire has to go into Washington, D.C. and sue to get

18 their tire fixed. They can sue Goodyear or if they

19 bought it from a reputable dealer that's still in

20 business, right here in Pierre.

21 And so when they're saying there is a remedy

22 in Washington that doesn't mean it's the only

23 remedy. And what we really have is a billing

24 dispute that has been ongoing, that has -- frankly,

25 that other providers were doing also. Qwest was

15

1 doing it. They stepped up to the plate. They gave

2 Eldon the total of what they had overbilled. And

3 he's reached a settlement with them. He's resolved

4 it with them. They did it in a businesslike way.

5 Now I think that all he's asking is for a

6 little help to get their attention and make them at

7 least give him the billing records and admit how

8 much they overbilled and when they stopped.

9 They're saying statute of limitations. What date

10 did they stop billing him improperly? We don't --

11 they haven't provided it. It's kind of like

12 asking, you know, when did you stop beating your

13 dog? I mean, we don't know.

14 Okay. And typically this would happen that

15 Eldon should be able to go in and talk to

16 Mr. Houdek in Onida and they should calculate up

17 what he was overbilled and they should say, well,

18 since you've been a little bit late, we're going to

19 adjust your rates in the future or we're going to

20 give you this much credit or we're going to resolve

21 this in this manner.

22 That hasn't happened here. I don't think

23 there's been any businesslike approach to settling

24 this. There's been what I would call delay, no

25 answer, no information, and then after some time

16

1 has run, hey, you're too late, statute of

2 limitations. That's basically what I think -- or

3 you've got to go to Washington.

4 So on -- and I don't practice in front of the

5 PUC all the time but I did read their brief and

6 they say that you have no jurisdiction because of

7 49-31-5.1. And they say that that exempts you from

8 having any authority under 49-31-3. But first

9 49-31-5.1 does not exempt them from 49-31-3. It

10 exempts from 49-31-3.1 through 4.1. It's very

11 specific.

12 It does not tear out the section that says

13 that you have the right to inquire into any

14 Complaints, any neglect, and you have the right to

15 exercise powers necessary to properly supervise and

16 control such companies.

17 So that statute that I say gives you the right

18 to hear a Complaint such as we say this is a

19 billing Complaint, is in -- is not exempted under

20 the statute that they cited.

21 Secondly, the party making a Motion has the

22 burden of proof. And I don't believe they've

23 presented to you any dates, any records, that show

24 when they stopped this billing because they haven't

25 even given us how they were misbilling. So,

17

1 therefore, that's the earliest date that the
 2 statute of limitations would arguably start to run,
 3 and they haven't offered it to you nor us.
 4 If they would do that, this could be resolved,
 5 I think, just the way it was resolved with Qwest.
 6 MR. LINDQUIST: I have just a
 7 brief -- I didn't bring enough copies here to share
 8 with everyone. Kind of my talking points.
 9 CHAIRMAN HANSON: Thank you.
 10 MR. LINDQUIST: First of all, I'll
 11 go through this first. You know, for 40 years I
 12 believe I've done business with Venture and
 13 Sully Buttes both as a customer and as -- both as a
 14 customer and both as the provider of services to
 15 them for their -- for their equipment. And this is
 16 the only matter that I have not been able to come
 17 before them and discuss this in a reasonable
 18 manner.
 19 I have gone to Randy Houdek several times and
 20 I'm always referred to the legal counsel and it
 21 just gets bogged down from there.
 22 This matter is really about the Telecom Act
 23 of '96 where the FCC rearranged the -- everything
 24 as far as some of these regulations is concerned.
 25 And this was a matter of changing their billing

18

1 practices effective with the 1996 Telecom Act. And
 2 this was not brought out and mandated by the FCC
 3 until 19 -- until the year 2000. So here we have
 4 four years that nobody knew what was going to
 5 happen.
 6 Of course, it was appealed and -- and so we
 7 attempted to, you know, get this resolved and
 8 they -- it was just virtually stonewalled in
 9 every -- at every angle.
 10 The only time that I got any type of response
 11 was to come to the PUC staff and ask for some help
 12 in trying to bring them to the table to at least
 13 discuss this. And even at the latest -- at that
 14 time, you know, they did respond that there was
 15 some responsibility and did make an offer to settle
 16 this. However, it was done at -- with no idea of
 17 what the past billing records were, and any attempt
 18 for us to -- you know, and I just calculated the
 19 best I could what I thought it should be and, of
 20 course, Tom said he tried to resolve this, they
 21 insisted on not talking and coming to the
 22 Commission, bringing this Motion to the Commission.
 23 So I think this is just a matter of principle
 24 and what is right. We did everything we could in
 25 our -- on our behalf to try and bring this to some

19

1 reasonable conclusion. And, you know, it just did
 2 not happen.
 3 I've answered your question about the
 4 possibility of it being an intercarrier exchange
 5 problem. I believe that there is. However,
 6 there's been some deregulation in that manner, and
 7 I don't know what the timing has been on some of it
 8 either. I just don't know.
 9 MR. SMITH: With respect to that,
 10 Eldon, I mean, during -- these bills we're talking
 11 about are billings between your paging company --
 12 MR. LINDQUIST: Yes. Definitely.
 13 This is not --
 14 MR. SMITH: That is not you as
 15 Eldon Lindquist as a person.
 16 MR. LINDQUIST: No. Not as --
 17 MR. SMITH: Okay. These aren't
 18 personal phone calls.
 19 MR. LINDQUIST: No.
 20 MR. SMITH: And are these bills
 21 right now -- do you still own and operate the
 22 paging company?
 23 MR. LINDQUIST: I'm still involved
 24 in the business, yes. I'm still majority
 25 stockholder.

20

1 MR. SMITH: And just with reference
 2 to the -- and this is one that I don't know the
 3 answer to, but with reference to one of the statute
 4 of limitations statutes that we have, and that's
 5 15-2-4 is my recollection, and I know I'm putting
 6 you on the spot and you won't be able to answer it
 7 maybe, but that deals with the statute of
 8 limitations that governs open accounts.
 9 And what I'm getting at, I guess, is whether
 10 this might be a case that falls under that open
 11 accounts statute. And I don't know the answer to
 12 that. And maybe counsel could get back to us with
 13 some -- with some perspective as to whether that
 14 might be -- might be involved here.
 15 And it hits me that the -- I haven't at least
 16 been able to find a case right on point as to
 17 exactly how you figure out what the statute of
 18 limitations -- when it's told in a case like this,
 19 and it might be useful for us to have your attorney
 20 and Mr. Riter to give us some guidance as to what
 21 we would look to.
 22 And, again, I'm assuming that the FCC's
 23 statute of limitations does not apply to us with
 24 that question. I'm not deciding it. I'm just
 25 assuming it for the purposes of that question.

21

1 MR. LINDQUIST: I have one other
 2 comment on this as far as that FCC. And when this
 3 ruling came down the billing of these services
 4 dropped very dramatically, probably as much as
 5 50 percent. So we're looking at over four years of
 6 billing of what -- you know, the possible
 7 overbilling was from the November of '96 until
 8 whatever it was in -- well, we don't know when they
 9 changed their billing.
 10 MR. SMITH: Were these billings --
 11 excuse me.
 12 MR. LINDQUIST: It was, you know, at
 13 least -- we can't determine when that was because I
 14 don't have access to the (Inaudible).
 15 MR. SMITH: Is this particular claim
 16 right now still, for lack of a better term, owned
 17 by the paging company?
 18 Is the paging company a corporation?
 19 MR. LINDQUIST: I'm sorry?
 20 MR. SMITH: The paging company, is
 21 your paging company a corporation?
 22 MR. LINDQUIST: Yes. Yes.
 23 MR. SMITH: Are these -- is this a
 24 claim that is still owned by the paging company
 25 against Venture, or has this claim been assigned to

22

1 you as a person?
 2 MR. LINDQUIST: It is set aside
 3 because of a purchase agreement that I have with
 4 a -- with the -- the party that is purchasing did
 5 not want to be involved in this so I took it on as
 6 a separate item. However, I'm still a majority
 7 stockholder. Therefore, I own, you know -- I own
 8 them both, so to speak.
 9 MR. SMITH: But these are -- right
 10 now, and, again, without a document -- but I guess
 11 what I'm trying to get at, I mean, some of this
 12 relates to our statutes involving the necessity for
 13 you to have legal counsel. And, again, I'm not
 14 trying to oust Mr. Maher here, and it's useful to
 15 have a lawyer involved. I'll tell you that.
 16 But my reason for asking is -- the only reason
 17 I bring it up is if you can demonstrate that these
 18 are now claims of you as a human being as opposed
 19 to -- if you are the plaintiff as a person as
 20 opposed to a corporation, it may be possible for
 21 you to appear here without legal counsel. That's
 22 the only reason I'm bringing it up.
 23 MR. LINDQUIST: Any of these matters
 24 would still be handled, you know, within the
 25 corporation and any charges or any reimbursements

23

1 or anything would still be handled under the
 2 corporate name.
 3 MR. SMITH: Thank you. Then you do
 4 need legal counsel.
 5 MR. MAHER: Well, Eldon does a
 6 pretty good job. He knows far more about this.
 7 But I think he did hit on one thing and Eldon
 8 discussed it when -- I still call it Sully Buttes.
 9 When Sully Buttes makes a little settlement offer
 10 and Eldon is sitting in my law office, he comes in
 11 and he wants to know what to do, and I say what
 12 relationship does it bear to how much they
 13 overbilled you. And he doesn't know. They haven't
 14 given the records.
 15 So I say to Darla Rogers, we'll consider your
 16 proposal, but I need the billing records. I need
 17 to know how much he was overbilled. That's back in
 18 April or May. Okay. I'll get that. We'll get
 19 that to you.
 20 As I sit here today, I've got nothing. Okay.
 21 We can't judge if the proposal -- and that's why as
 22 they're making efforts to resolve it -- no, that's
 23 not making effort to resolve it. That's take it or
 24 leave it.
 25 MR. SMITH: So would then one of the

24

1 objectives of continuing the proceeding be to avail
 2 yourself of the Commission's discovery procedures?
 3 MR. LINDQUIST: Yes.
 4 MR. SMITH: Thank you.
 5 CHAIRMAN HANSON: Are there any
 6 further questions of Tom or Eldon?
 7 COMMISSIONER JOHNSON: Yeah,
 8 Mr. Chairman. Good morning, Mr. Maher and
 9 Mr. Lindquist. You've both addressed the Motion to
 10 Dismiss but not really the Motion to Strike.
 11 Do you have any comment or opposition to that
 12 Motion?
 13 MR. MAHER: I -- this is on the
 14 settlement papers and argument. Some of those --
 15 there are parts that relate to settlement and
 16 they're not admissible, but there are other parts
 17 that relate to notices to Sully Buttes that, hey,
 18 we've been overbilled, we'd like the records.
 19 There are parts of it I think that are admissible
 20 and parts that aren't.
 21 And the Commission would kind of sit in the
 22 position of the court and I think disregard the
 23 parts that would be related to let's settle this
 24 from the parts of, we need the records.
 25 COMMISSIONER JOHNSON: Thank you.

25

1 CHAIRMAN HANSON: Further questions?

2 VICE CHAIRMAN SAHR: So it would be

3 your position that if the proceeding went forward,

4 that we could handle it at or nearby the hearing

5 and basically since the evidentiary issues -- just

6 take what is evidence and then take out what is not

7 appropriate for evidence?

8 MR. MAHER: Yes.

9 VICE CHAIRMAN SAHR: Okay. Thank

10 you.

11 CHAIRMAN HANSON: Seeing no further

12 questions of Tom or Eldon, thank you very much.

13 Randy, at the beginning of the conversation

14 you stated you were on the line. You were

15 represented by capable legal staff here. Did you

16 want to make a statement or --

17 Mr. Houdek.

18 MR. HOUDEK: Yeah. I'm here. Yeah.

19 Mr. Riter was doing a fine job so I won't step in

20 front of him. However, I will say that some of the

21 statements made on behalf of Mr. Lindquist and his

22 counsel weren't -- were not accurate. And there

23 have been several attempts to try to resolve this,

24 not because we thought we did anything wrong but to

25 avoid this process and the involvement of legal

26

1 counsel and just to make it go away.

2 I can't speak for Qwest, but I suspect that's

3 probably why theirs has been resolved, not because

4 they felt they did something wrong but just to

5 avoid a legal and regulatory fight. Other than

6 that, we will -- I'll let Mr. Riter handle it for

7 us.

8 CHAIRMAN HANSON: Thank you,

9 Mr. Houdek. John has either a statement or a

10 question.

11 MR. SMITH: Well, it's just -- I

12 just want to observe here that we are not trying

13 the case today. This is just a Motion to Dismiss

14 and a Motion to Strike. So in terms of the factual

15 dispute over who said what and who did what when,

16 that's for the hearing. But today is we're just

17 dealing with the Motion.

18 So thank you, Randy and Eldon.

19 CHAIRMAN HANSON: Exactly. That's

20 why I didn't ask Randy for specifics now. It

21 sounds as if there's an opportunity for folks to

22 get together and have some discussion here, not

23 withstanding the Motion to Dismiss and Strike.

24 MR. RITER: Could I have just a

25 minute?

27

1 CHAIRMAN HANSON: Certainly.

2 Certainly, Mr. Riter.

3 MR. RITER: I appreciate Mr. Smith's

4 comment, but I can't let some of that go

5 unanswered. You know, there's correspondence in

6 the file from the year 2000 where Darla Rogers on

7 behalf of Venture was communicating with counsel

8 for Mr. Lindquist and his company. So I don't want

9 the Commission to be left with the innuendo that

10 somehow Venture and/or Darla Rogers were not

11 responsive to trying to tell Pierre Radio Paging

12 what we believe the law is and how it applies in

13 this particular case.

14 We have been consistent in our belief and

15 position that this is a matter for the FCC, if it

16 is a matter for anyone. And so we've let them know

17 that throughout. And I don't want that suggestion

18 to go unanswered.

19 A couple other things more to the merits of

20 this. As the Commission knows, what some other

21 carrier did or didn't do doesn't relate to the

22 issues before you as far as whether or not there's

23 jurisdiction. And so the statements made relative

24 to that, frankly, are of little significance to the

25 issues to you today.

28

1 And I appreciate Mr. Smith's comment that

2 he -- that in his question on the statute of

3 limitations that you are presupposing that the

4 federal statute of two years would not be

5 applicable and that we should look at the state

6 statute.

7 Our belief and argument still would be that

8 the federal statute is the appropriate one to look

9 at.

10 But back to the real merits of the Motion.

11 The issue presented relates to a decision made by

12 the Federal Communications Commission in June of

13 2000. And Mr. Lindquist is right. It relates to

14 the 1996 Telecommunications Act so it is an

15 interpretation by a federal body, of a federal act,

16 that he is seeking to say because of that I am

17 entitled to a different charge.

18 Not because of the tariffed rates. He's not

19 claiming he was overbilled. He's just claiming

20 that if you would look at this federal law and if

21 you would look at this federal decision, then you

22 would find that there is an inappropriate charge in

23 this case.

24 I mean, I think and I would argue that the

25 basis that he brings before you is clearly a

1 federal law. It's a federal decision, and it ought
2 to be resolved. And if he is dissatisfied with the
3 resolution of it, dissatisfied with our responses
4 and our argument to him, that it ought to be
5 resolved by the Federal Communications Commission.

6 And Mr. Maher argued that -- you know, this is
7 like why does he have to go to Washington? Well,
8 he didn't file any Complaint with -- Summons and
9 Complaint in Circuit Court. He didn't seek to do
10 that. The statute in South Dakota specifically
11 provides that the Public Utilities Commission
12 controls telecommunications companies, not within
13 the state to the extent such business is not
14 otherwise regulated by federal law or regulation.

15 Our argument is that this particular segment
16 of the business is clearly regulated by the
17 Telecommunications Act of 1996 that he submits his
18 basis upon, his claim upon, rather, and then also
19 by that decision in the year 2000.

20 And, you know, another -- just on the statute
21 of limitations issue. It seems terribly difficult
22 for any telecommunications company to be faced with
23 a decision at some time in the future of the year
24 2000 and say we're going to look back for 10 years
25 or 15 years and we're going to modify all of these

1 charges that have been made through all of these
2 years. Or even if you want to go an open account
3 if it's six years.

4 That's why the FCC's got the two-year statute
5 of limitations too. Because there has to be some
6 finality. There cannot be an open book forever and
7 ever and ever. So that's my argument.

8 CHAIRMAN HANSON: Mr. Riter, your
9 argument that it is not in the jurisdiction of the
10 PUC, does that also with Mr. Maher's statement that
11 it does not apply to your argument to 49-31-3, do
12 you believe your argument applies to both?

13 MR. RITER: If I might, Mr. Chair.

14 CHAIRMAN HANSON: Please.

15 MR. RITER: 49-31-3, and I forgot to
16 bring my book back up here with me, but that
17 statute is the one that really sets out the
18 jurisdiction of the Public Utilities Commission.

19 5.1 talks about the fact that carriers such as
20 Venture are not regulated under that statute, and
21 Mr. Maher is correct that it does not specifically
22 reference 49-31-3. But I think that that is the
23 statute that it appears grants the broad authority
24 that the Commission does have subject to these
25 certain limitations.

1 CHAIRMAN HANSON: Thank you. John.

2 MR. SMITH: What about the interplay
3 between 49-13 and 49 -- I think that's something
4 the Commission -- that we struggle with a lot here
5 is the way in which those particular things
6 interconnect. Not to use the telecom term in my
7 question.

8 I want to note too, Bob, I'm not presupposing
9 that the state statute of limitations applies. I
10 was just assuming it for the purposes of asking the
11 question.

12 MR. RITER: And I took it that way,
13 and if my comments were to the contrary, I took it
14 that way. That was just another issue that we
15 needed to present.

16 I haven't as part of my preparation for this
17 morning specifically looked at the interplay
18 between 49-31 and 49-13. Clearly 49-13 does grant
19 private citizens the ability to bring issues before
20 the Commission. Clearly there are claims that can
21 be asserted in this particular case, I think as you
22 pointed out in your questions and Mr. Lindquist
23 was -- I was pleased didn't answer that question a
24 lot better than I did being he's got more knowledge
25 of the business than I do as far as the paging

1 companies. But if they are a regulated utility,
2 certainly that would be -- we would argue we would
3 look at 49-31 relative to issues of that nature.

4 MR. SMITH: Thank you.

5 MR. RITER: Thank you.

6 CHAIRMAN HANSON: Any further
7 questions?

8 VICE CHAIRMAN SAHR: Mr. Chairman, I
9 have a couple. Mr. Riter, I'm just trying to make
10 sure in the course of the conversation I haven't
11 lost your arguments here.

12 Is yours -- on the jurisdiction or lack
13 thereof, is yours based more on the subject matter
14 involved or the determination of whether or not
15 they are a common carrier or provider or a consumer
16 type Complaint or something else?

17 MR. RITER: If I might, Commissioner
18 Sahr, my argument would be that this is a
19 federal -- these are federal issues regulated by
20 the Federal Communications Commission and involve
21 interpretations from the Commission. It does
22 not -- it is not a consumer billing dispute because
23 there's no claims that it's anything other than a
24 claim by Mr. Lindquist and his company that the
25 rate could not be charged to it pursuant to the

33

1 Federal Communications rules and regulations.
 2 VICE CHAIRMAN SAHR: And if we did
 3 deny the Motion to Dismiss, are you of the opinion
 4 that the evidentiary question of whether or not to
 5 strike and what to strike -- since it would be
 6 obviously not going to hearing until sometime in
 7 the future if that couldn't get resolved or
 8 certainly we could give the option to re-raise that
 9 Motion as opposed to going in and trying to figure
 10 out what to strike or not strike today.
 11 I mean, to me to a certain extent -- I know
 12 your big issue is the Motion to Dismiss. I don't
 13 want to lose the ball here or lose force for the
 14 trees but the question I would have is with the
 15 Motion to Strike, I mean, it almost seems like
 16 something where I think you have a valid point on
 17 certainly a lot of things in there.
 18 Would you be willing to sit down if we denied
 19 the Motion to Dismiss and work with Mr. Linguist
 20 and his counsel and just be able to clean that up
 21 and figure it out in that regard or else just wait
 22 until hearing on that issue?
 23 MR. RITER: Well, Commissioner, when
 24 Ms. Rogers and I discussed this when we were filing
 25 this pleading, we need to present to the Commission

34

1 the fact that there are documents -- there are
 2 allegations that are not proper -- properly
 3 presented and that the Motion to Strike seemed to
 4 us to be the most appropriate approach to resolving
 5 that issue.
 6 Now I appreciate the fact that, you know, part
 7 of the difficulty is that you act as the judge that
 8 resolves the motions and also as the jury that
 9 decides the facts. And so once it's there or once
 10 it's presented, then it's more difficult, I
 11 suppose, to try to iron that out.
 12 But, I mean, I think obviously courts do it
 13 all the time where they will strike certain
 14 portions of the pleadings and, you know, there's
 15 nothing said that counsel could not sit down and
 16 determine that the parts that should be stricken
 17 and the parts that clearly are not necessarily
 18 handled in that area.
 19 VICE CHAIRMAN SAHR: Well, and I
 20 appreciate you raising the issue, and I think if I
 21 were in your shoes, I probably would have as well.
 22 But the -- one of the challenges -- well, first of
 23 all, I know I'm stating the obvious to you, but
 24 just because something is in a pleading or an
 25 allegation doesn't mean it's evidence.

35

1 The second thing is without some sort of
 2 supporting affidavit, direction, agreement amongst
 3 the party, I think maybe some of it on its face we
 4 could say absolutely settlement. Some of it might
 5 start getting a little ambiguous. I'm just saying
 6 strictly from my standpoint saying today what shall
 7 be stricken, what shall not be, I don't know if I
 8 have the proper set of information in front of me.
 9 And I think it's something that in 15 minutes in
 10 the hallway attorneys can hash out and bring to us.
 11 And I'm not criticizing what you've done. I
 12 think it's just been fine. But I'm just saying it
 13 may be something that is better resolved between
 14 the parties. And certainly if I were to deny that
 15 part of it, it certainly would be with the
 16 anticipation that it would be an issue going
 17 forward and certainly with the acknowledgment that
 18 I think it's a very appropriate issue to raise up
 19 that I think probably something that can be cleaned
 20 up a little bit later on.
 21 I'm just worried about striking something at
 22 this point in time that later on turned out to be
 23 pertinent. And I know we can correct that, but it
 24 seems like it's a little bit more difficult to go
 25 that route.

36

1 MR. RITER: And, Commissioner, I
 2 appreciate that. I know our Motion was very broad.
 3 Our Motion to Strike we didn't specifically
 4 reference sentences or paragraphs. So we
 5 referenced Exhibit 1 and all of the attachments.
 6 That's very broad, and clearly some of those
 7 communications there's an argument made that they
 8 don't specifically relate to settlement. And so I
 9 appreciate what you're saying. We can work on
 10 that.
 11 VICE CHAIRMAN SAHR: Thank you.
 12 CHAIRMAN HANSON: Are there any
 13 further questions?
 14 If not, it appears that all of the parties are
 15 in agreement that some of the items on the
 16 Complaint, some of the attachments, should not be
 17 included. I think we will -- unless someone is
 18 compelled to make a Motion -- excuse me? I think
 19 staff is in disagreement.
 20 Sara.
 21 MS. GREFF: No. Thank you, Chairman
 22 Hanson. Staff would just echo some of the comments
 23 already made, one by Mr. Smith. Yes, it is clear
 24 that the FCC has given itself jurisdiction in this
 25 matter. However, it has not given itself exclusive

1 jurisdiction and has not preempted State
2 Commissions from taking anything up.

3 We are dealing with intrastate traffic, and I
4 would see no reason why the Commission should be
5 precluded from hearing this matter.

6 On the issue of striking the settlement
7 negotiations, staff would recommend one of two
8 things, either having the parties work out some
9 sort of blacking out of the settlement discussions
10 within the agreements or simply taking the
11 documents out of the Complaint right now and then
12 in the future, if needed, they can be admitted for
13 limited purposes. Should they be needed for a
14 statute of limitations argument or something in the
15 future, they could be admitted for those limited
16 purposes in the future would be our suggestions.

17 CHAIRMAN HANSON: Thank you,
18 Ms. Greff. Well said.

19 Unless someone is compelled to make a Motion,
20 it would appear that we should defer this to a
21 future meeting and allow parties to work out some
22 of those challenges.
23
24
25

1 STATE OF SOUTH DAKOTA)

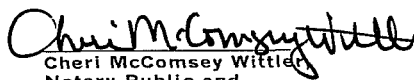
2 :SS CERTIFICATE

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 recorded portion of the foregoing
11 proceedings.

12 Dated at Pierre, South Dakota this 13th day
13 of September 2005.
14
15
16

17 
18 Cheri McComsey Wittler
19 Notary Public and
20 Registered Professional Reporter
21
22
23
24
25

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