

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

IN THE MATTER OF THE APPLICATION OF QWEST CORPORATION TO RECLASSIFY LOCAL EXCHANGE SERVICES AS FULLY COMPETITIVE)))))))	ORDER DENYING MOTION TO DISMISS, SECOND ORDER RESTRICTING DISCOVERY AND ORDER EXTENDING TIME TC03-057
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On March 14, 2003, the South Dakota Public Utilities Commission (Commission) received the complaint of Qwest Corporation (Qwest) to reclassify local exchange and other related services as fully competitive in all Qwest exchanges in South Dakota (Complaint). On March 20, 2003, the Commission electronically transmitted notice of the filing and the intervention deadline of April 4, 2003, to interested individuals and entities. On April 24, 2003, the Commission issued an Order Granting Intervention to Black Hills, NVC, Midcontinent, PrairieWave, Midstate, SDTA and WorldCom.

In response to various motions of the parties related to discovery, the Commission issued an oral order to compel discovery and protective order at its ad hoc meeting on July 9, 2003, an Order Granting Qwest's Motion to Reduce Time to Respond to Discovery on July 14, 2003, and an Order to Compel Discovery and Protective Order on July 15, 2003. The complete procedural history of this proceeding is found in the Order to Compel Discovery and Protective Order.

On July 3, 2003, PrairieWave filed a Motion to Dismiss. On July 8, 2003, Midcontinent filed a Second Motion for a Protective Order. On July 11, 2003, Midstate and NVC each filed a Second Motion for Protective Order. On July 14, Qwest filed a Response to PrairieWave's Motion to Dismiss and PrairieWave filed a Motion for a Protective Order in Response to Qwest Interrogatories and Request for Production of Documents (Second Set). On July 15, 2003, Black Hills filed a Second Motion for Protective Order.

On July 15, 2003, at its regular meeting, the Commission considered PrairieWave's Motion to Dismiss and the Second Motions for Protective Order filed by Midcontinent, NVC, Midstate, PrairieWave and Black Hills. The Commission voted unanimously to deny PrairieWave's Motion to Dismiss, to grant the Second Motions for Protective Orders of Midcontinent, PrairieWave, NVC and Black Hills, and to grant in part and defer in part Midstate's Second Motion for Protective Order.

Based upon the representations made by the parties and their attorneys in their respective motions and before the Commission at the July 15, 2003 meeting, the Commission finds, concludes and orders as follows:

DENIAL OF PRAIRIEWAVE'S MOTION TO DISMISS

1. The basis asserted by PrairieWave for its motion to dismiss was the ripeness of Qwest's complaint to reclassify its local exchange and related services in South Dakota. PrairieWave asserted that the matter was not ripe for consideration because of the effect of SDCL 49-31-86 which restricts any telecommunications company with more than two hundred thousand retail access lines in South Dakota from raising its prices for either recurring or nonrecurring residential and business local exchange services, permits a telecommunications company having more than two hundred thousand retail access lines to lower its prices but then prohibits the

company from later raising its prices and exempts promotional price reductions of a duration of ninety days or less from the price increase prohibition. PrairieWave asserted that because Qwest was a company with more than two hundred thousand retail access lines in South Dakota based upon the testimony pre-filed by Qwest, there would be no material consequence flowing from a Commission decision to reclassify Qwest's local exchange services as fully competitive and that therefore the complaint did not assert an actual present case or controversy.

2. With its Response to PrairieWave's Motion to Dismiss, Qwest filed a supporting Affidavit of Katherine Felton, a Lead Network Planning Engineer for Qwest. In her Affidavit, Ms. Felton stated that as of June 30, 2003, Qwest was serving 194,866 retail access lines in South Dakota.

3. Without in any way addressing the legal merits of PrairieWave's Motion to Dismiss in the event that its assertion that Qwest does in fact serve more than two hundred thousand retail access lines in South Dakota were ultimately found by the Commission to be true, the Commission finds and concludes that:

a. In deciding a motion to dismiss, the Commission's inquiry is into the legal sufficiency of the allegations of the Complaint assuming the allegations of the Complaint to be true.

b. Summary judgment is the appropriate remedy in a situation where the allegations of the Complaint as pled state a valid basis for proceeding to hearing but where, based upon the facts asserted in the motion, supporting affidavits and other evidence presented to the Commission, there is no genuine issue of fact presented for hearing and that the moving party is therefore entitled to judgment as a matter of law or where a fact with respect to which there is no genuine issue is dispositive of the proceeding as a matter of law.

c. The Commission has in other cases treated motions to dismiss as motions for summary judgment pursuant to SDCL 1-26-18 and 15-6-56 in accordance with the procedural guidelines set forth in *Richards v. Lenz*, 539 N.W.2d 80 (1995) and other cases, where the motion goes to the existence of a genuine issue as to a material fact which would entitle a party to judgment as a matter of law.

d. The Commission finds and concludes that PrairieWave's Motion to Dismiss is based, not upon the legal sufficiency of Qwest's Complaint, but upon its assertion of the absence of a genuine issue as to a material fact, namely Qwest's serving more than 200,000 retail customers, which PrairieWave asserts should entitle it to judgment as a matter of law on the grounds of ripeness.

e. Given the factual assertions contained in the Affidavit of Katherine Felton, the Commission cannot find and conclude that there is no genuine issue of material fact presented as to whether Qwest serves more than two hundred thousand retail lines and accordingly can not find and conclude that PrairieWave is entitled to judgment as a matter of law.

4. PrairieWave's Motion to Dismiss is therefore denied.

ORDER RESTRICTING DISCOVERY

5. Based upon the representations of the parties in their motions and before the Commission on July 15, 2003, and the general findings and conclusions stated in the Order to

Compel Discovery and Protective Order issued by the Commission on July 15, 2003, the Commission finds and concludes that the probative value of the following discovery requests made by Qwest to certain of the intervenors in this proceeding are outweighed by the burden on such intervenors of disclosure and risk of competitive harm from its disclosure, and the Commission therefore grants the motions of Midcontinent, PrairieWave, NVC, Midstate and Black Hills for a protective order with respect to this information. Respondents shall not be required to provide the following information to Qwest:

- a. Midcontinent, NVC, Midstate and Black Hills shall not be required to respond to Qwest's Interrogatories, Second Set Nos. 1(a), 1(b) and 1(c). The intervenor revenue information sought by these interrogatories is not sufficiently essential to proving any of the factors for decision set forth in SDCL 49-31-3.2 to justify either the burden on the intervenors of responding or the risk of competitive harm to them. To the extent that any of the foregoing intervenors do not provide such responses to Qwest, however, it shall be precluded from offering any such evidence in the proceeding.
- b. PrairieWave shall not be required to respond to Qwest's Interrogatories, Second Set Nos. 4(a), 4(b) and 4(c). The PrairieWave revenue information sought by these interrogatories is not sufficiently essential to proving any of the factors for decision set forth in SDCL 49-31-3.2 to justify either the burden on PrairieWave of responding or the risk of competitive harm to PrairieWave. To the extent that PrairieWave does not provide such responses to Qwest, however, it shall be precluded from offering any such evidence in the proceeding.
- c. Based upon the request of the attorneys for Qwest and Midstate for time to discuss a resolution of Midstate's request regarding Request for Production No. 1, the Commission deferred decision on this issue.

ORDER EXTENDING TIME

6. By Order for and Notice of Procedural Schedule and Hearing issued on May 16, 2003, Qwest's rebuttal testimony was due on July 28, 2003. At its regular meeting on July 1, 2003, the Commission voted unanimously to grant Qwest's Motion to Reduce Time to Respond to Discovery. In that motion, the Commission stated that intervenors had until July 14, 2003, to respond to Qwest's discovery requests. Motions for Protective Orders were subsequently filed by PrairieWave, Black Hills, NVC, Midstate and Midcontinent. At an ad hoc meeting on July 9, 2003, the Commission considered both Qwest's Motion to Compel Discovery and the intervenors' Motions for Protective Orders and voted unanimously to grant in part and deny in part Qwest's Motion to Compel Discovery and to grant in part and deny in part intervenors' Motions for Protective Orders. The Commission did not issue its written Order to Reduce Time to Respond to Discovery until July 14, 2003. At its regular meeting on July 15, 2003, the Commission considered Second Motions for Protective Orders filed by PrairieWave, Black Hills, NVC, Midstate and Midcontinent. At that time, counsel for Qwest stated that Qwest had not yet received much of the discovery information it had requested from intervenors. Given the delay in the completion of Qwest's discovery as a result of the discovery motion proceedings, the Commission deems it appropriate to extend the time for Qwest's rebuttal testimony, and the Commission accordingly extends the due date for Qwest's testimony to July 30, 2003.

It is therefore,

ORDERED, that the above stated Order Denying Motion to Dismiss, Second Order Restricting Discovery and Order Extending Time is hereby issued.

Dated at Pierre, South Dakota, this 17th day of July, 2003.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By:

Delaine Kaebo

Date:

7/17/03

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Robert K. Sahr

ROBERT K. SAHR, Chairman

Gary Hanson

GARY HANSON, Commissioner

James A. Burg

JAMES A. BURG, Commissioner