PrairieWave Communications

June 28, 2006

Ms. Patricia Van Gerpen, Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
State Capitol Building
Pierre, SD 57501

RE: PrairieWave's Reply to AT&T's Response to PrairieWave's Motion to Dismiss AT&T's Counterclaim and Motion for Summary Judgment on its Complaint
Docket No. CT05-007

Dear Ms. Van Gerpen:

On behalf of PrairieWave Telecommunications, Inc., enclosed please find an original and four (4) copies of PrairieWave's Reply to AT&T's Response to PrairieWave's Motion to Dismiss AT&T's Counterclaim and Motion for Summary Judgment on its Complaint.

Should you have any questions, please contact William P. Heaston at 605-965-9894 or bheaston@prairiewave.com.

Sincerely,

Dawn Haase

Dawn Haase
Legal Assistant
PrairieWave Communications, Inc.
605-965-9368

Enclosures
cc: Service List

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Complaint filed by PrairieWave Telecommunications, Inc. against AT&T Communications of the Midwest, Inc. Regarding Access Charges	))))	**Docket No. CT05-007**

PrairieWave's Reply to AT&T's Response to PrairieWave's Motion to Dismiss AT&T's Counterclaim and Motion for Summary Judgment on Its Complaint

AT&T filed its response on May 15, 2006. To put it simply and to the point, if the Commission adopts the AT&T and unfortunately the Commission Staff logic and argument, AT&T could avoid intervening in any Commission docket and then on the day after the Commission's final order in a proceeding, AT&T could file a complaint challenging a company's rates and the Commission is required to reopen and reconsider the matter it has just concluded. Better yet, AT&T can just refuse to pay the approved, tariffed rates, wait until the local exchange carrier ("LEC") complains to the Commission, still refuse to pay the approved, tariffed rates, and then assert a counterclaim of unreasonable, unfair and discriminatory rates without a scintilla of factual support, continue to refuse to pay the approved, tariffed rates, and believe the Commission, its staff, and the LEC should jump through all the hoops one more time to please AT&T, and still not pay the LEC for its services.

PrairieWave wishes to address the AT&T and Commission Staff analyses in the following particulars.

1. The Motion to Dismiss should be granted. AT&T correctly states the law with regard to the standard for reviewing a SDCL § 15-6-12(b)(5) motion to dismiss. The

motion tests the legal sufficiency of the pleading, not the facts that support it.[1] AT&T's claim is construed in a manner most favorable to it, that is, facts "well pled" and not mere conclusions may be accepted as true and doubts are resolved in favor of AT&T.[2] The Commission needs to know what facts are "well pled" and presumed to be true. Those facts are:

a. PrairieWave and Qwest provide switched access services to AT&T to allow AT&T to reach end user customers who chose AT&T as their preferred intrastate toll carrier.

b. AT&T has to use this PrairieWave and Qwest access service to get access to those customers.

c. PrairieWave charges approximately $.07 per minute of use for the access service. Qwest provides the same service to AT&T and charges less than $.06 per minute of use.

d. The PrairieWave rate is higher than the Qwest rate. [3]

These facts are not disputed, are true, and are the only facts before this Commission to determine whether the AT&T "pleadings" state a claim. All other statements in AT&T's counterclaim regarding "excessively high," "unjust," "unreasonable" and "unilateral" PrairieWave rates, or that the rate creates a "disincentive," are the "mere conclusions" that the *Schlosser* court, cited by AT&T, says cannot be accepted as facts or as true.

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[1] *Vitek v. Bon Homme County Board of Commissioners*, 650 N.W.2d 513, 516 (S.D. 2002); *Schlosser v. Norwest Bank South Dakota*, 506 N.W. 2d 416, 418 (S.D. 1993).
[2] *Schlosser*, 506 N.W. 2d at 418.

[3] One fact conveniently not "well pled" by AT&T is that the PrairieWave and Qwest rates were approved by this Commission in Commission proceedings conducted pursuant to South Dakota statute and Commission rules.

As AT&T stated in its brief, summary judgment is appropriate when no genuine issue as to any material fact exists, and PrairieWave is entitled to judgment as a matter of law.[4] AT&T Response Brief, page 3 (citations omitted). The facts are not disputed and require no further proof. The pled facts do not support a claim of any unreasonableness, unfairness, unjust discrimination, the undermining of competition, or any violation of law and regulation. AT&T quotes the applicable statutes and Commission implementing rules correctly,[5] but to no purpose.

In this instance the legal presumption[6] is that the Commission has faithfully abided by the law and its regulations in establishing the existing PrairieWave prices for its access services – there is no allegation of any Commission error, mistake or malfeasance in reviewing the filed cost study and its determination that the PrairieWave tariffed rates are fair and reasonable.[7]

There is nothing in the pleadings to inform the Commission of any issue that could in anyway overcome the statutory presumption that the PrairieWave prices are fair and reasonable.[8] A mere comparison of two companies' rates demonstrates nothing,

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[4] The Commission Staff's cite to the requirements in SDCL § 1-26-18 does not change this. Those requirements mirror the language in SDCL § 15-56-6(c). The only thing we have is the AT&T pleadings. We do not have depositions, answers to interrogatories, admissions on file or affidavits to consider here. PrairieWave does not have a burden creating any of those documents. In fact, AT&T has admitted it owes PrairieWave for its tariffed access services and at the tariffed rates, at least up to December 19, 2005. AT&T Response Brief, at 11-12. AT&T misapprehends the import of retroactive ratemaking discussed *infra* in claiming any reduction in rates after the filing of its counterclaim.

[5] AT&T Response Brief, pp. 4-5.

[6] SDCL 49-31-12.1.

[7] *In the Matter of the Establishment of Switched Access Rates for PrairieWave Telecommunications, Inc.*, Order Approving Switched Access Rates, Docket No. TC04-115 (December 29, 2004).

[8] In reviewing the access tariffs on file with the Commission, the Qwest per minute rate is $.059873, the PrairieWave ILEC per minute rate is $.116341, and the Local Exchange Carrier Association ("LECA") per minute rate is $.1511 (LECA is a rate charged by practically every other local exchange carrier in South Dakota. AT&T is apparently paying all of these rates for the same service it unlawfully refuses to pay

certainly nothing to indicate whether one rate is fair and the other is not. By statute, both companies rates are presumed fair and reasonable, unless AT&T can plead some facts that would demonstrate otherwise, which it clearly has not and cannot do. Indeed, the Commission rules have been in effect and administered by the same qualified and experienced Commission Staff for many years. The Commission Staff knows the rules, knows and understands the cost methodology, and has reviewed scores of studies over the years. No cost study and certainly no rates derived from a cost study gets a Commission Staff recommendation for approval as fair and reasonable without a careful review and analysis by these experts.[9] AT&T makes no claim that the staff did not follow the rules, misapplied the rules, or did anything other than what they have done in reviewing all of the other studies that are the basis for the rates of other companies that AT&T pays and has not complained about.

2. The filed rate doctrine applies and requires the claim be dismissed. PrairieWave agrees with the Commission Staff that AT&T has the right to file a complaint to challenge a rate in a filed tariff, and that the Commission has the right to change and revise rates as circumstances require.[10] But that statement of the law takes us nowhere. As discussed above, there must be some factual basis for the complaint, otherwise there is nothing for the Commission or its Staff to consider. The Commission Staff agrees with

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PrairieWave's per minute rate of $.068621 for. If one is looking for a "range of reasonableness" in South Dakota, from $.06 to $.15 is it. PrairieWave's rate is on the lower end of that range. There is certainly no inherent unreasonableness in a rate different than that charged by Qwest, but that is the premise of the AT&T pleading.

[9] AT&T could have appealed the Commission's 2004 decision claiming that the Commission's action was arbitrary, capricious and unreasonable, and that the Commission's findings were not supported by substantial evidence. *Northwestern Public Service Company v. Cities of Chamberlain, et al.*, 265 N.W.2d 867, 871-73 (S.D. 1978) ("*Northwestern Public Service*"). AT&T did not file such an appeal. This makes the Commission Staff brief even more confusing. Just what does Ms. Greff believe AT&T could reasonably allege to justify going any further with this matter?

[10] SDCL § 49-31-12.

PrairieWave that the filed rate doctrine is applicable in this case.[11] Citing the *Arkansas Louisiana Gas Co.* case,[12] the Commission Staff correctly notes that the filed rate doctrine is meant to insure that the customer pays only the rate the Commission has approved as reasonable.[13] AT&T is the customer. AT&T must pay the rate the Commission has determined to be reasonable and no other rate.

The Commission Brief also makes the point that a corollary to the doctrine is the understanding that the rate is paid until the Commission changes the rate on a *prospective* basis.[14] The rule against retroactive ratemaking is closely related to the filed rated doctrine and the purpose of both rules is to insure the fairness and predictability of rates.[15] The provisions of SDCL §§ 49-31-12, 49-31-12.4, 49-31-18 and 49-31-19 and the Commission's switched access rules in ARSD ¶¶ 20:10:27 through 20:10:29 are the South Dakota legal expression of the filed rate and prospective ratemaking principles.

The Commission cannot minimize the importance of ARSD ¶ 20:10:27:07. The rule requires PrairieWave to file a tariff and to file cost data in support of the rates in that tariff at least every three years. That rule promotes fairness and predictability, and is specifically an implementation of SDCL § 49-31-18, and the other switched access ratemaking statutes. The Commission should consider the language in SDCL § 49-31-12 to the effect that the Commission "may determine and approve *different rates or prices for different companies* (emphasis added)." AT&T's allegation of different rates for different companies as a basis for a complaint is not credible or rational.

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[11] Commission Staff Brief, at 3-4.

[12] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981).

[13] *Id.*, at 578

[14] Commission Staff Brief, at 3-4 (emphasis added).

[15] *Qwest Corporation v. Koppendrayer*, 436 F.3d 859, 864 (8th Cir. 2006) ("*Koppendrayer*").

3. Although the doctrine of *res judicata* would not be an appropriate basis for dismissing the AT&T counterclaim, it should still be dismissed for failure to state a claim. The South Dakota Supreme Court has "consistently recognized that rate making is a legislative process, whether performed directly by the legislature or by an agency of its creation."[16] The court went on to state:

> "The legislative discretion implied in the rate making power extends to the process by which a legislative determination is made and within the broad field where that discretion is operative legislative determinations are conclusive. (citations omitted). So long as a legislative agency pursues its authority and does not transgress constitutional limitations, the courts have no power to interfere with its determinations." *Application of Northwestern Bell Telephone, Co.*, 78 S.D. 15, 23, 98 N.W.2d 170, 174.

The Commission found the PrairieWave rate to be fair and reasonable acting in a legislative capacity with all of the conclusiveness described above. No fact, no law, no reason exist to challenge that determination. The Commission acting in its legislative capacity seeks to set rates that are fair, reasonable, predictable and stable.[17] The Commission has set in place a process by which it reviews PrairieWave's rates at least every three years using well-established cost rules and updated cost information. That process was most recently concluded on December 29, 2004. There are no facts to indicate that this process did not work as legislated, or that the cost and other factual information that formed the basis for the findings of fair and reasonable require another review at this time.

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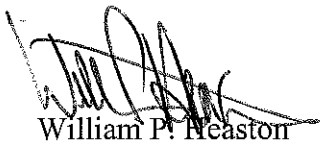
[16] *Northwestern Public Service*, 265 N.W.2d, at 871. When one has not argued rate making issues for a long time, one forgets some of the basic principles.

[17] *H.J. Inc v. Northwestern Bell Telephone Co.*, 954 F.2d 485, 488 (8th Cir. 1992) (The duty to file rates with the Commission and the obligation to charge only those rates have always been considered essential to preventing price discrimination and *stabilizing rates*.) (citing *Maislin Ind., U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 2766, 111 L.Ed. 2d 94 (1990) (emphasis added)).

4. There is no confusion: AT&T has not paid PrairieWave its tariffed rate. Despite assertions in its Brief,[18] as of the date of the filing of this brief, AT&T has not paid PrairieWave one penny of what is owed and claimed by PrairieWave in its complaint. There is no confusion as to the tariffed rate, and there is no confusion as to the number of minutes billed. The Commission Staff rationale that "confusion" should be the basis for going forward with the AT&T counterclaim is not validated by any fact. AT&T continues to flout the law and Commission authority. The Commission should not acquiesce in AT&T's unlawful behavior, encourage unfounded counterclaims, or put PrairieWave through the expense and effort of now defending its 2004 cost study without any reason.

Accordingly, the Commission should grant the motion for Summary Judgment on the claim for the access charges due and owing, which now amounts to $144,267.77 including late charges, and direct that AT&T continue to pay PrairieWave at its tariffed rates. The Commission should dismiss the AT&T counterclaim and appropriately sanction AT&T for its unlawful conduct.

Respectfully submitted this 28th day of June, 2006.



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[18] AT&T Response Brief, at 11.

CERTIFICATE OF SERVICE

I, Dawn Haase, on the 28th day of June, 2006, on behalf of PrairieWave Telecommunications, Inc. served the attached Reply to AT&Ts Response to PrairieWave's Motion to Dismiss AT&T's Counterclaim and Motion for Summary Judgment on its Complaint, Docket CT05-007, electronically and via UPS overnight mail to:

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And via USPS First Class Mail to:

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