

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

**IN THE MATTER OF THE
COMPLAINTS FILED BY CUSTOMERS
OF S&S COMMUNICATIONS**

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**MOTION FOR SUMMARY
DISPOSITION**

CT05-005

The staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") moves the Commission for an order granting summary disposition pursuant to SDCL 1-26-18 in favor of each complainant in each of the complaints against S&S Communications ("S&S") consolidated in this Docket, except those complaints which have been dismissed or consolidated prior to the entry of such order, ("Complaints") and ordering S&S to pay damages to each such complainant or group of complainants ("Complainant" and "Complainants," respectively) in the amount set forth for such Complainant or Complainants on the spreadsheet attached hereto as Exhibit C entitled Recommended Damages Award. Attached to this Motion for Summary Disposition ("Motion") are:

- Exhibit A, Statement of Established Material Facts;
- Exhibit B, Affidavit of Keith Senger;
- Exhibit C, Staff Complaint Disposition Analysis (Confidential and Non-Confidential Versions);
- Exhibit D, Staff Complaint Disposition Analysis – Staff Recommendations Not Approved (Confidential and Non-Confidential Versions);
- Exhibit E, Affidavit of James Mehlhaff;
- Exhibit F, Order Discharging Debtor in Case No. 05-10284, United States Bankruptcy Court, District of South Dakota; and
- Exhibit G, Order Dismissing Partnership Debtor in Case No. 05-10284, United States Bankruptcy Court, District of South Dakota.

In addition to these Exhibits attached to the Motion, this Motion also makes reference to and is supported by the following Exhibits, which are the official records of prior proceedings involving the subject matter to which the Complaints at issue in this proceeding pertain, that are too voluminous to attach but are available on the Commission's website at the addresses set forth for each such Exhibit:

- Exhibit H, Entire Docket Record in Commission Docket TC02-166;
- Exhibit I, Entire Docket Record in Commission Docket TC05-047; and
- Exhibit J, Entire Case File in *South Dakota Public Utilities Commission v. Les Sumption and Matt Swearingen d/b/a S&S Communications and S&S Communications, a South Dakota general partnership*, CIV 05-236, Sixth Judicial Circuit Court, Hughes County, South Dakota.

The above listed Exhibits are incorporated by reference in and made a part of this Motion and are offered by Staff in support of the Motion.

A. RELIEF REQUESTED

Specifically, the Staff requests that the Commission issue an order, pursuant to SDCL 49-13-1, 49-13-1.1, 49-13-14, 1-26-18 and 15-6-56 ("Order"), that:

1. Finds that there is no genuine issue of fact as to the material facts set forth on Staff's Statement of Established Material Facts attached hereto as Exhibit A.
2. Concludes that the facts as so found demonstrate that Complainants are entitled to judgment as a matter of law as recommended by Staff.
3. Establishes the damages award that each Complainant or group of Complainants is entitled to recover under each Complaint ("Approved Damages Award");
4. Bases the Approved Damages Awards for all Complaints on the same substantive and computational factors, consisting of (i) the total original amount of the Complainant's pre-paid contract amount for telecommunications services to be provided in South Dakota (ii) multiplied by the quotient of the number of days remaining unfulfilled on Complainant's contract divided by the total number of days on Complainant's contract (iii) less (a) the amount that Complainant financed through a loan, credit agreement, lease agreement or the like that Complainant has not repaid, and will not be required to repay, (b) any insurance proceeds received by Complainant on the loss and (c) the amount of bond proceeds received by Complainant as a result of Docket TC05-047;
5. Excludes from the Approved Damages Award any claimed loss or damage arising from delay in service initiation, other ordinary service deficiencies, loss of business, procurement of alternative services, losses from funds provided to S&S on an investment basis, or other contractual, consequential or incidental loss, damage or expense;
6. Establishes the aggregate total amount of damages to be paid by S&S to all Complainants for all Complaints ("Total Damages") and the date by which such damages are to be paid;
7. Requires the payment of prejudgment interest on all Approved Damages Awards and approves the method for computation of such prejudgment interest proposed by Staff;
8. Approves the straight-line apportionment method approved in Docket TC05-047 as the Damages Apportionment Method to be applied to Approved Damages Awards to establish the fractional share, expressed as a decimal, ("Approved Judgment Fraction") that each approved Complainant(s) shall be entitled to receive from any money paid to the Commission by S&S or its remaining partner to satisfy the Total Damages or received in satisfaction of any subsequent judgment entered in this matter by the Court;
9. Excludes from coverage under the Order any Complaint or portion thereof which has not been dismissed and concerning which Complainant has filed a Notice of Dispute and Request for Hearing and has demonstrated a genuine issue of material fact with respect to his Complaint (such as provable damages in addition to those calculated in accordance with paragraph A.4., including those of the types excluded by paragraph A.5.) that is particular to such Complaint and not covered by the Commission's determinations on issues common to all similar Complaints;
10. Provides for re-computation of the Total Damages and Approved Judgment Fraction in the event an excluded Complaint receives a non-conforming damages award following hearing;

11. Sets a date certain for payment by S&S of the Total Damages and authorizes the Staff to file a civil action on behalf of Complainants pursuant to SDCL 49-13-24 and 49-13-27 in the event S&S fails to satisfy the Total Damages awarded by the date set by the Commission for payment and to pursue execution of any judgment entered as a consequence of such action; and

12. Authorizes the Executive Director or the Deputy Director, from time to time in their reasonable discretion, to disburse any proceeds received by the Commission in satisfaction of the Total Damages or the damages awarded by the Court pursuant to paragraph A.8. to each Complainant having an Approved Damages Award in an amount equal to the then current cash proceeds in the possession of the Commission multiplied by the Complainant's Approved Judgment Fraction.

B. BASIS FOR MOTION AND ORDER

In support of this Motion and the relief requested by Staff herein, the Staff states as follows:

1. SDCL 1-26-18 provides as follows:

Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. However, each agency, upon the motion of any party, may dispose of any defense or claim:

(1) If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law; .

This statute sets forth for administrative agencies essentially the same standard for summary disposition of claims as applies to the courts under SDCL 15-6-56. Accordingly, the case law pertaining to summary judgment in the courts of this state is appropriate authority to guide the Commission's exercise of discretion on motions for summary disposition in cases before the Commission.

2. The South Dakota Supreme Court recently stated the standard for summary judgment as follows:

[W]e must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. *First American Bank & Trust, N.A. v. Farmers State Bank of Canton*, S.D.2008, 2008 WL 3523783, ¶ 13, p. 3.

3. Staff's position in bringing this Motion is that there is no genuine issue of material fact with respect to the facts set forth on Exhibit A, Statement of Established Material Facts, and that such facts demonstrate that the disposition of the Complaints in accordance with Exhibit C, Staff Complaint Disposition Analysis and Recommendations, is appropriate and justified as a matter of law.

4. The general rule governing damages for breach of a contractual obligation is set forth in SDCL 21-2-1:

21-2-1. General measure of damages for breach of contract--Uncertain damages not recovered. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin.

5. In *Lamar Advertising of South Dakota, Inc. v. Heavy Constructors, Inc.*, 2008 S.D. 10, 745 N.W.2d 371, the Supreme Court stated with respect to damages for breach of contract at ¶ 14, p. 376:

To recover damages for breach of contract, the loss must, however, “be clearly ascertainable in both its nature and origin.” *McKie v. Huntley*, 2000 SD 160, ¶ 18, 620 N.W.2d 599, 603. “In proving damages, the party must also establish ‘a reasonable relationship between the method used to calculate damages and the amount claimed.’ ” *FB & I Bldg. Prod., Inc. v. Superior Truss & Components, A Div. of Banks Lumber, Inc.*, 2007 SD 13, ¶ 20, 727 N.W.2d 474, 480 (citing *McKie*, ¶ 18, 620 N.W.2d at 603). The damages must also be reasonably certain and not speculative. *Olson v. Aldren*, 84 S.D. 292, 299, 170 N.W.2d 891, 895 (1969).

6. Staff contends in this Motion that there is no genuine issue of material fact with respect to the lack of reasonable certainty, the clear ascertainability of the nature and origin of loss and the establishment of the reasonableness of the relationship between method of calculation and amount claimed regarding the claims of damage in many of the Complaints for the incidental or consequential effects of S&S’s cessation of services such as (i) the loss of productivity, including potential losses of sales, due to a period of service interruption, in all cases limited to a day or two, following S&S’s cessation of service, (ii) the inconvenience and expenditure of time in procuring alternative service, (iii) the incrementally higher cost of the alternative service procured following S&S’s cessation of service, and (iv) in a few cases, hassles with other service providers over switch over and related billing issues. Because of the uncertain nature of these claims, their apparent immateriality in amount and Complainants’ right to produce evidence to show with reasonable certainty that material and ascertainable damages were in fact sustained by them, Staff contends that summary disposition is appropriate with respect to Staff’s recommendation to exclude all such incidental and consequential damages from the Approved Damage Awards in this case.

7. As the Commission stated in its brief in the Big Stone II appeal before the Supreme Court, S. Ct. No. 24485, 2007, and concluded in Docket CT02-021, the jurisdiction of an administrative agency is limited to the powers granted to it by statute. *Thies v. Renner*, 78 S.D. 617, 106 N.W.2d 253 (1960). In *O’Toole v. Board of Trustees of the South Dakota Retirement System*, 2002 S.D. 77, 648 N.W.2d 342, the Supreme Court further explained the general limits of administrative authority in South Dakota:

The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute. . . . An agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction. [citations omitted] 2002 S.D. at 15, 648 N.W.2d at 346.

8. SDCL 49-13-1 states:

Any person complaining of anything done or omitted by any telecommunications company or motor carrier subject to the provisions of this title in contravention of the provisions thereof, may apply to the commission for relief. No complaint may at any time be dismissed because of the absence of direct damage to the complainant or petitioner. The commission may make rules of practice prescribing the form and procedure for complaints in accordance with chapter 1-26.

SDCL 49-31-1(28) states:

Terms used in this chapter mean:

* * *

(28) "Telecommunications company," any person or municipal corporation owning, operating, reselling, managing, or controlling in whole or in part, any telecommunications line, system, or exchange in this state, directly or indirectly, for public use. . . .

SDCL 49-31-3 states:

The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies.

9. In *Northwestern Bell Tel. Co. v. Chicago & North Western Transp. Co.*, 245 N.W.2d 639 (S.D. 1976), one of the only cases addressing the Commission's complaint jurisdiction, the Supreme Court made a clear connection between the Commission's regulatory jurisdiction and its complaint jurisdiction. As these and other statutes and cases indicate, and as common sense informs us, the regulatory authority over telecommunications companies conferred upon the Commission by statute pertains to the provision of telecommunications services within this state. As the above-cited cases indicate, the Commission as an administrative agency has no common-law jurisdiction or inherent power such as might reside in a court of general jurisdiction and has only that authority expressly conferred upon it by statute or by necessary implication.

10. Based upon these principles, it is Staff's position that damages claims for pre-payments made for out-of-state telecommunications services do not fall within the Commission's complaint and damages jurisdiction under SDCL 49-13 because they neither arise out of the contravention of a provision of SDCL Title 49, as SDCL 49-13-1 contemplates, nor are based upon the matters over which the Commission has regulatory authority, namely the provision of telecommunications services and products in this state and the customer, associated service provider and intercarrier relationships attendant thereto. Although Staff can find no precedent directly on point with respect to this issue, Staff would assert that under the established principles of administrative law in South Dakota, it is highly questionable whether the Commission has jurisdiction to hear complaints involving services to be provided in another state. Staff believes that asserting jurisdiction over services to be provided in another state is an overly broad and imprudent interpretation of the Commission's complaint jurisdiction and accordingly recommends that claims in the Complaints based upon service to be provided in another state be dismissed without prejudice in accordance with the Motions to Dismiss filed contemporaneously with this Motion.

11. Based on these principles, it is also Staff's position that damages claims for non-payment of loans made to S&S are investment or general commercial transactions that do not fall within the Commission's complaint and damages jurisdiction under SDCL 49-13 because they neither arise out of the contravention of a provision of SDCL Title 49, as SDCL 49-13-1 contemplates, nor are based upon the matters over which the Commission has regulatory authority, namely the provision of telecommunications services and the customer, associated service provider and intercarrier relationships attendant thereto. These claims are rather grounded purely in securities law, commercial law, general contract law or some combination of these. Although Staff can find no precedent directly on point with respect to this issue, Staff would assert that under the established principles of administrative law in South Dakota, it is highly questionable whether the Commission has jurisdiction to hear such general business or securities claims not related to S&S's status as a telecommunications company. To assert the contrary is to argue that the Commission could hear and decide any manner of claim – everything from general collection disputes to lease disputes to real property disputes to, for that matter, personal injury claims involving a telecommunications company. Staff believes this is an overly broad and imprudent interpretation of the Commission's complaint jurisdiction and accordingly recommends that complaints arising out of a loan made to or investment in S&S be dismissed without prejudice.

12. Staff is recommending that prejudgment interest be awarded in accordance with SDCL 21-1-13.1, 21-1-13.1 and 54-3-16 which provide:

21-1-11. Interest awarded on damages certain. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

21-1-13.1. Interest on damages--Prejudgment interest--Retroactive application. Any person who is entitled to recover damages, whether in the principal action or by counterclaim, cross claim, or third-party claim, is entitled to recover interest thereon from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt. Prejudgment interest is not recoverable on future damages, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship. If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision and shall run to, and include, the date of the verdict or, if there is no verdict, the date the judgment is entered. If necessary, special interrogatories shall be submitted to the jury. Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be at the Category B rate of interest specified in § 54-3-16. Prejudgment interest on damages arising from inverse condemnation actions shall be at the Category A rate of interest as specified by § 54-3-16 on the day judgment is entered. This section shall apply retroactively to the day the loss or damage occurred in any pending action for inverse condemnation. The court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs.

54-3-16. Official state interest rates. The official state interest rates, as referenced throughout the South Dakota Codified Laws, are as follows: . . .

(2) Category B rate of interest is ten percent per year;

In accordance with *Tri-State Refining and Inv. Co., Inc. v. Apaloosa Co.*, S.D., 431 N.W.2d 311 (1988), Staff calculated pre-judgment interest using a simple interest formula. Staff also made two separate interest calculations. The first calculation covers the period from June 3, 2003 until July 13, 2007, the date on which the Commission mailed out the bond proceeds checks to Complainants receiving bond proceeds. The second calculation covers the period from July 14, 2007 until October 21, 2008, the date noticed for hearing this Motion. This second calculation reduces the principal amount on which interest is computed by the amount of bond proceeds received. These interest calculations are displayed on Exhibits C and D on the columns entitled "Prejudgment Interest from 6/3/03 to 7/13/07" and "Prejudgment Interest from 7/14/07 to 10/21/08." See Exhibit A, paragraph 26.

13. On December 6, 2005 in Bankr. Case No. 05-10284 ("Swearingen Bankruptcy"), the United States Bankruptcy Court for the District of South Dakota entered an Order Discharging Debtor(s) granting Matthew R. Swearingen and Monica G. Swearingen a discharge of Debts pursuant to 11 U.S.C. § 727 (see Exhibit A). Matthew R. Swearingen is the same person as the Matt Swearingen who was a principal and partner in S&S and thus a respondent in this case. The damages which Complainants seek in this case and which the Commission has the power to award are compensatory in nature and are therefore a dischargeable debt under 11 U.S.C. § 727.

14. Under 11 U.S.C. § 524(a), the discharge of Matt Swearingen:

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, . . .

15. On September 9, 2005, the Bankruptcy Court in the Swearingen Bankruptcy issued an Order Dismissing Partnership Debtor dismissing S&S Communications, a partnership, from the case (see Exhibit B). The order states, "that S&S Communications is dismissed from this case and that no relief under Title 11 of the United States Code shall be given to this entity." The Commission is therefore not precluded from proceeding with the Complaints against S&S.

C. STAFF'S RECOMMENDATION

Staff recommends that the Commission enter an order affording the relief requested by Staff in this Motion and in accordance with the Recommended Dispositions and Recommended Damages Awards set forth in Exhibit C and in the Motions to Dismiss, Motions to Dismiss in Part and Motions to Consolidate filed contemporaneously with this Motion. This matter has gone on for five years now due to various reasons, two hearings have already been held on the issues involving S&S, and the bond proceeds obtained by the Commission have been delivered to Claimants pursuant to the Commission's final decision in TC 05-047. It is time for this matter to be finally concluded, and if Staff's Motion is granted, this matter can be brought to conclusion expeditiously, reasonably and fairly.

WHEREFORE, Staff requests that the Commission issue a Final Decision and Order affording the relief requested in Section A of this Motion and such other and further relief as the Commission may deem just and proper.

Dated this 15th day of September, 2008.

COMMISSION STAFF

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