

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT
FILED BY JOHN REINTS, RAPID CITY,
SOUTH DAKOTA, AGAINST BLACK HILLS
POWER REGARDING ITS FLAT MONTHLY
CHARGE

CE03-003

= = = = = Transcript of Proceedings **COPY**
December 2, 2003
= = = = =

BEFORE THE PUBLIC UTILITIES COMMISSION,
ROBERT SAHR, CHAIRMAN
GARY HANSON, VICE CHAIRMAN
JIM BURG, COMMISSIONER

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

APPEARANCES
Steve Wegman
Darla Pollman Rogers
Rita Mulkern
Tamie Aberle
Donald Ball
David Gerdes
Senator Frank Kloucek

Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING
L I M I T E D

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2 OF THE STATE OF SOUTH DAKOTA
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1 APPEARANCES BY TELEPHONE
2 David Bloomquist
3 Talbot Wiecezorek
4 Bob Pomeroy
5 Jeff Partridge
6 Meredith Moore
7 Mary Lohnes
8 Colleen Sevold
9 Tim Goodwin
10 Mary Sisak
11 Benjamin Dickens
12 Todd Boyd
13 Bill Heaston
14 Linn Evans
15 Stewart Wevik
16 Marv Truhe
17 Joe Schuele
18 Barbara Brohl
19 Aaron Eisenbraun
20 Fred Anderson
21 John Reints
22
23 =====
24
25 TRANSCRIPT OF PROCEEDINGS, held in the
26 above-entitled matter, at the Governor's Inn,
27 700 West Sioux Avenue, Pierre, South Dakota, on the
28 2nd day of December 2003, commencing at 9:30 a.m.
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1 CHAIRMAN SAHR: CE03-003, In the
2 Matter of the Complaint Filed by John Reints,
3 Rapid City, South Dakota Against Black Hills Power
4 Regarding its Flat Monthly Charge.
5 And the question today is shall the Commission
6 reconsider its decision to deny the Complainant's
7 motion to add punitive damages and shall the
8 Commission grant Black Hills Power's
9 October 29, 2003 Motion to Dismiss?
10 MR. REINTS: Mr. Chairman,
11 John Reints.
12 CHAIRMAN SAHR: Yes. Go ahead,
13 Mr. Reints.
14 MR. REINTS: I have filed several
15 pleadings in this matter, and the critical person
16 might claim that there were elements of static
17 among them. I would ask permission to make a brief
18 statement to remove any such elements and to
19 summarize very concisely what I mean.
20 CHAIRMAN SAHR: Thank you. Go
21 ahead, Mr. Reints.
22 MR. REINTS: My complaint brings
23 three main allegations against Black Hills Power.
24 First, unfair and unreasonable billing practice
25 which violates equal protection requirements and

1 South Dakota Public Utilities statutes.
2 Second, misleading accounting to gain
3 Commission approval for this practice of billing a
4 fixed charge to residences.
5 And, third, repeated verbal and written
6 threats of disconnection of service mixed with
7 issuing disinformation about consumer rights, all
8 of this juxtaposed so as to violate Commission
9 rules and notice requirements and constitutes
10 malicious actions.
11 These threats, as they've been employed by
12 Black Hills Power in relation to me, and as I claim
13 are normally practiced towards consumers who have
14 disputes with Black Hills Power, have been employed
15 out of all proportion to any material interests of
16 Black Hills Power. Malicious conduct in relation
17 to service is certainly failure to deliver
18 reasonable service.
19 I'd like to mention a small detail which sheds
20 much light. Black Hills Power's management is
21 acutely aware that it wields the practical power to
22 shut down households and bring to a stop activities
23 necessary to livelihood. And my experience shows
24 that it's willing to use this power corruptly.
25 Black Hills Power folks and events leading up

<p>5</p> <p>1 to this complaint has made to me several verbal 2 threats of disconnection, which I have stated were 3 improper in themselves and in relation to which I 4 am here to seek remedy. The terms of some of these 5 verbal threats appear to conflict with written 6 notices of disconnection and forms a pattern which 7 was generally confusing so that I was left in doubt 8 over a period of several weeks about which was 9 the -- (Inaudible) -- threat and as to whether my 10 power would go off the next minute. 11 In a letter which was hand-delivered to me in 12 direct response to my filing with the Commission, I 13 was told in effect we're going to shut you down, 14 baby, and there's no regulation or appeal that can 15 stop that happening and the fact is they just don't 16 matter. 17 But the small detail I want to point out is 18 that in no case, not one, in which disconnection 19 was confusingly threatened or improperly threatened 20 did this utility act afterward to clarify the 21 situation. 22 Mr. Eisenbraun, who wrote the letter and is 23 present on the line this morning, as I understand 24 it, did not call me to say we were mistaken to 25 state this to you, we're not going to turn off your</p>	<p>7</p> <p>1 For example, any practice that Black Hills 2 Power, which I partly please is discrimination in 3 violation of the 14th Amendment, would, if proven, 4 also constitute establishment of an unreasonable 5 preference by a public utility within the meaning 6 of South Dakota 49-34A-3, the Commission need not 7 hold hearings, according to the statute, to find 8 that a utility has established an unreasonable 9 preference. 10 Accordingly, if the Commission rules that it 11 lacks jurisdiction to find tort damages, it does as 12 follows, that the complaint and its supplements and 13 amendments should be dismissed. Unlike the courts, 14 the Commission has the authority to proactively 15 investigate. You may determine, I respectfully 16 submit, both appropriate damages under 49-13-14 and 17 actively investigate whether violation of notice 18 requirements or giving false notice in order to 19 frighten and coerce has been knowing and to a 20 malicious purpose. 21 I ask that you investigate the facts that I 22 assert and my damage claims. To dismiss my 23 complaint for doing so would be at a minimum 24 premature. Specifically, I ask that you do not 25 dismiss my complaint before you have concluded your</p>
<p>6</p> <p>1 power at this time. No one said to me we 2 acknowledge that what we've communicated to you is 3 confusing, here now is our position. 4 The reason no one acted to clarify was because 5 this utility acted maliciously, caused as much 6 uncertainty, threat, and anxiety as possible and to 7 try to induce the belief elsewhere stated openly in 8 a letter by the general counsel of Black Hills 9 Corporation that any appeal to the Commission would 10 be fruitless. 11 This caused me several kinds of harm. The 12 Commission has punitive authority and should 13 exercise it in this case where Black Hills Power 14 knowingly violated notice requirements to a 15 malicious purpose and more than once. 16 BHP has challenged the Commission's 17 jurisdiction upon facts damages in tort-based 18 claims and these claims form a portion of the 19 complaint in this amendment and supplement. But 20 even if the Commission rules that it lacks 21 jurisdiction to find tort damages, it certainly can 22 determine the fact whether they approve violation 23 of the Commission Rules in South Dakota Public 24 Utilities statutes and, where harm's been done, 25 award damages.</p>	<p>8</p> <p>1 49-34A-26 investigation. 2 To respond and to protest that the Commission 3 approved the complaint of the billing practice, I 4 respond that no authority is immune to operation of 5 the law's unintended consequence, and its 6 discriminatory impact substantially the same thing 7 as establishment of unreasonable preference has 8 greatly increased since the tariff was improved. 9 The Commission's authority to investigate and 10 remedy unreasonable discrimination under 11 South Dakota 49-34A-26 is not limited to matters in 12 which no tariff has been approved. 13 Issues of jurisdiction aside, I concede that 14 each of my three main allegations has 15 characteristics which make it attractive to the 16 Commission Respondent's invitation to dismiss the 17 complaint and be rid of the entire can of worms. 18 My burden is to show that though the worms are 19 wiggly, will crawl in several directions if they 20 get loose. They won't devastate the countryside, 21 and they won't waste anyone's time. Foremost among 22 the unattractive features of my allegations is that 23 each one relates to my personal experience to what 24 I believe are general practices of Black Hills 25 Power deserving of Commission investigation.</p>

1 This might seem like puffing myself up to try
2 to act as a spokesman for everyone, but I have pled
3 in this way because the Commission simultaneously
4 exercises oversight and adjudicated the claims of
5 this individual.

6 I am not alone in my complaint about
7 discriminatory and preferential billing practices,
8 proven by the petition which forms an exhibit to
9 this complaint. The Commission's duty is to
10 isolate issues in the complaint and progressively
11 narrow down the facts of this case so as to rule on
12 them one by one.

13 Respondent makes in its pleadings what is
14 really an emotional appeal to the Commission that
15 you believe I would in my complaint be heard --
16 (Inaudible) -- and try and to pull the Commission
17 into one swamp or another. The truth is that I
18 don't much like swamps, and Respondent's appeal for
19 the Commission's help to quickly get rid of the
20 smelly can that is open is not disinterested.

21 Respondent -- (Inaudible) -- that barbarians
22 are at the wall of a breakthrough that cannot
23 easily obtain the \$150 -- (Inaudible) -- despite my
24 legitimate dispute of some \$300 previously
25 collected from me and despite my very well founded

1 claims for real and other damages.

2 But Respondent's haste, pure rapid dismissal
3 has much more to do with two factors it would admit
4 rather not have names or even whispers before the
5 Commission, which I have the bad taste to plead and
6 it does with my \$150.

7 The first of these unthinkables is that
8 Respondent wishes to maintain what amounts to a
9 subsidy by the least able to pay of someone who
10 earns \$200,000 annually for its day-to-day
11 operation. The Commission has more than adequate
12 authority to declare that this practice reflects
13 establishment of an unreasonable preference.

14 The second is that Respondent strongly wishes
15 to keep me and all of its customers in the grip of
16 a nasty Catch-22, namely that the Commission's
17 tariff and rate rulings have the full force of law
18 and directly affect persons' well being and
19 property of each customer, but at the same time the
20 Commission is barred by the courts or otherwise
21 hesitant to enforce all of the remedies the law
22 provides.

23 The Commission can substantially remove this
24 Catch-22. I respectfully ask that you do so in
25 this case by appropriately applying statutes which

1 require reasonable performance, fair practice, and
2 responsibility for damages from all public
3 utilities.

4 Respondent appeals to the Commission's
5 reasonable aversion to -- (Inaudible) -- crawling
6 when it is certain without factual support of any
7 kind whatsoever and without -- (Inaudible) -- even
8 to argue that some factual basis exists, that my
9 principal purpose in filing this complaint is to
10 avoid the delay.

11 Respondent is, in fact, itching to change the
12 subject. The truth is BHP is comfortable with
13 lucrative practices, which it would rather not be
14 subjected to scrutiny nor have to defend. Scrutiny
15 is overdue.

16 That concludes my statement here, and I'd ask
17 that I might be heard very briefly in relation to
18 the question of punitive damages. If the
19 Commission prefers and permits, I will say my peace
20 on punitive damages right now in about 45 seconds.

21 CHAIRMAN SAHR: Why don't you go
22 ahead, Mr. Reints.

23 MR. REINTS: Okay. I filed for
24 punitive damages in this complaint because BHP's
25 conduct as implemented by Mr. Eisenbraun was

1 malicious and intended to build on previous similar
2 malicious conduct so that I'd be unable to enjoy my
3 home and gain my life.

4 The Commission may under South Dakota 49-13-1
5 find damages which are not specifically pled. I
6 submit that questions before the Commission today
7 on my petition for rehearing include this one, what
8 remedy is correct if the Commission finds malicious
9 action caused fear, uncertainty, stress,
10 interference with people's enjoyment, and
11 interference with life.

12 If the Commission in the first instance
13 dismissed my punitive damage claim on grounds that
14 it lacked jurisdiction and if today again you
15 dismiss this claim on the same ground, I ask that
16 the record clearly show that the dismissal is
17 without prejudice so I may pursue my remedies
18 elsewhere.

19 But I don't concede that the Commission lacks
20 authority on the facts I state to make a punitive
21 award, that the Commission's intended by the
22 Legislature to have authority to impose punishment
23 in the case of knowing violation of its rules
24 clearly established by South Dakota 49-34A-66.

25 I submit that the Commission may determine

1 appropriate damages to its broad 49-13-14
2 authority. I also submit that the Commission's
3 49-13-14 discretion extends to issuing an order
4 that penalties imposed under South Dakota 49-34A-66
5 be paid to parties who have been harmed by the
6 violation in question, and I respectfully pray that
7 I be thus compensated.
8 That concludes my brief statement on that.
9 CHAIRMAN SAHR: Thank you very much.
10 Black Hills Power.
11 MR. TRUHE: Mr. Chairman, this is
12 Attorney Marv Truhe responding. We have stated our
13 position in three sets of pleadings on the issues
14 that Mr. Reints has just reiterated.
15 I'd like to point out first that the
16 underlying complaint issue which gave rise to all
17 the other issues which Mr. Reints has raised in
18 subsequent pleadings has to do to a challenge to a
19 rate schedule that was approved by the Commission
20 back in 1995.
21 And we have responded with a Motion to Dismiss
22 based upon the fact that that was a Commission
23 approved rate schedule and also that the statutes
24 of this state as well as the regulations provides
25 for procedures to timely take issue with any

1 proposed rate schedule or tariff. And that
2 statutory time has expired for either intervention,
3 challenge, or appeal with Mr. Reints doing none of
4 those and that he is, therefore, in a position
5 right now that he is asking to reopen hearings that
6 were held almost 10 years ago with regard to the
7 rate schedule, and that we are entitled as a matter
8 of law to a Motion to Dismiss under the
9 circumstances of this case.
10 In addition, I will address the issue of
11 punitive damages. As the Commission knows, we had
12 a hearing on this on November 4. Mr. Reints asked
13 for a rehearing because of inadequate notice. And
14 our pleadings indicated that we had no objection to
15 having this reheard here today in the interest of
16 making sure that Mr. Reints could have his position
17 stated.
18 Again, our pleadings are directly on point
19 with regard to that issue, that a punitive damages
20 claim is not a remedy within which the Commission
21 can grant and, therefore, the remedy is not
22 available and as we stated in this pleading,
23 therefore, the motion to amend to include punitive
24 damages should also be dismissed.
25 CHAIRMAN SAHR: Thank you. Staff.

1 MR. FRAZIER: Thank you,
2 Commissioner. Kelly Frazier, staff attorney. I
3 would just merely without muddying the waters, as
4 to the first issue, recommend that the Commission
5 do consider -- or reconsider its decision on
6 punitive damages so -- for the purposes which we
7 already had, which is allowing Mr. Reints to be
8 heard, but I would join in on a recommendation that
9 they reaffirm their last decision on that matter.
10 CHAIRMAN SAHR: Do you have an
11 opinion as to the Motion to Dismiss?
12 MR. FRAZIER: I would also join in
13 with the company on the Motion to Dismiss.
14 CHAIRMAN SAHR: Thank you. Any
15 questions for Mr. Reints or Black Hills Power from
16 the Commissioners?
17 And, Mr. Reints, if I'm correct, all of the
18 allegations that you are making do derive from the
19 flat monthly fee that we're discussing today; is
20 that correct?
21 MR. REINTS: It is correct that
22 chronologically that's the origin of the complaint.
23 However, I claim that I also have standing to raise
24 issues of improper conduct, which aren't dependant
25 upon the other complaints.

1 In other words, if I were not disputing the
2 monthly charge and I encountered the kind of
3 practices of which I complained in pleadings of
4 Black Hills Power, I claim I would have independent
5 standing to bring a complaint to the Commission.
6 And, in particular, with regard to the issue
7 of the \$8 flat fee, the Commission has before it
8 the exhibits attached to my complaint a request
9 that the Commission investigate to seek whether the
10 practice is discriminatory.
11 There is no authority of which I'm aware, and
12 I have searched diligently, which would prevent the
13 Commission from exercising its investigative powers
14 to determine whether this is a serious
15 discrimination against those least able to pay.
16 And I don't believe that either my standing to
17 complain or the Commission's power to investigate
18 depends upon my complaint of -- my assertion of any
19 of the other facts in my complaint.
20 CHAIRMAN SAHR: Thank you. Have you
21 actually been disconnected?
22 MR. REINTS: No, I have not.
23 Repeated threats have been made and a situation
24 above certainty has been created, but I have not,
25 in fact, been disconnected.

17

1 CHAIRMAN SAHR: One of the things I
2 would encourage you and Black Hills Power to do,
3 and maybe you've already done so, is to discuss
4 that and try to come up with a -- some set of
5 circumstances where you can avoid being
6 disconnected.
7 MR. REINTS: I have been
8 consistently willing to speak civilly with
9 Black Hills Power, but my experiences in trying to
10 do so have been somewhat discouraging.
11 CHAIRMAN SAHR: Black Hills Power,
12 do you have anything to add?
13 MR. TRUHE: We certainly will
14 concede the Commission has authority to do an
15 investigation with regard to issues that come
16 before it. But I don't think that's the issue
17 that's before you at this point.
18 It has to do with the complaint and the
19 allegations of that complaint and, again, what
20 arose from that complaint including the alleged
21 threat of disconnection.
22 MR. REINTS: If I may respond,
23 Mr. Chairman.
24 CHAIRMAN SAHR: Yes, you may.
25 MR. REINTS: The petition attached

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1 to the complaint has exhibited -- does bring the
2 issue before you. The exhibit is part of the
3 complaint so that I claim that the Commission's
4 authority to investigate is in question here and
5 that any dismissal of my complaint prior to
6 completion of that investigation would be
7 premature.
8 CHAIRMAN SAHR: Thank you.
9 Mr. Smith, do you have anything to add?
10 MR. TRUHE: If I may respond,
11 Mr. Chairman. My understanding of the pleadings
12 were that Mr. Reints did, in fact, fax his 25 plus
13 signatures petitioning for an investigation and
14 then he then attached that as part of his total
15 pleadings, which are numerous.
16 But I do believe that those are two separate
17 issues and that the dismissal of the complaint is
18 certainly in order today and that even for another
19 day the decision whether or not the Commission
20 seeks as they would in any case when presented with
21 a petition of with necessary signatures to
22 investigate other issues.
23 MR. REINTS: If I may respond
24 briefly?
25 CHAIRMAN SAHR: Yes. Go ahead.

19

1 MR. REINTS: May I respond briefly,
2 Mr. Chairman?
3 CHAIRMAN SAHR: Yes, you may.
4 MR. REINTS: The outcome of the
5 investigation is material to the issues in my
6 complaint. If the Commission finds that the flat
7 fee is, in fact, a discriminatory practice within
8 the meaning of the statute cited, then it has
9 authority to -- and a mandate to set policies to
10 put a stop to that.
11 I claim that I have been harmed by the same
12 practice. So I claim that there is a material
13 relation between the investigation sought and the
14 issues raised in my complaint. There is an issue
15 of fact, and I claim the right to have benefits of
16 the Commission's investigation in resolution of --
17 Well, they're actually questions of both
18 jurisdiction and fact, and I claim the right to
19 have benefits of the Commission's investigation
20 prior to action on the petition to dismiss my
21 complaint.
22 CHAIRMAN SAHR: Thank you.
23 Mr. Smith.
24 MR. SMITH: Mr. Truhe, would you
25 please or are you prepared today to address at all

20

1 the issue of whether Section 49-34A-26 is a statute
2 that affords the Commission discretion as to
3 whether or not to initiate an investigation and
4 then please address, if you would, if you believe
5 that it is a section that gives us discretion as to
6 whether to do so, would you address whether and how
7 the Commission ought to exercise that discretion
8 with respect to the issues that the Complainant has
9 raised.
10 MR. TRUHE: Well, again, I think
11 that one of the difficult things, frankly, with
12 regard to this matter is that there is a tremendous
13 number of pleadings that have been filed, and it's
14 very hard to sort out through them exactly at some
15 point what Mr. Reints is seeking and under what
16 particular authority that he's asking to have that
17 done.
18 In answer specifically to your question about
19 notice of investigation, I can't respond to that
20 today. I believe the Commission has the authority
21 to investigate matters that come properly before
22 it.
23 In this particular case, however, the
24 requested investigation relates directly to the
25 issue of the complaint, that is the flat monthly

21

1 fee is \$7.50 a month. And if the Commission
 2 decides that the rate was properly approved and
 3 was -- went into effect and that there was not a
 4 timely objection or appeal or intervention made
 5 with regard to that, and that, therefore, that
 6 tariff stands, then the basis for the investigation
 7 also fails.
 8 I made my earlier statement about the
 9 authority. It was merely a statement that you do
 10 have the general authority to investigate any
 11 complaints.
 12 But I believe in this case if the Commission
 13 agrees with us that the flat statutory -- if the
 14 Commission approves the 7.50 a month is appropriate
 15 and stands, then there is no longer a basis for an
 16 investigation.
 17 MR. REINTS: If I may respond,
 18 Mr. Chairman.
 19 CHAIRMAN SAHR: Yes.
 20 MR. REINTS: The language of
 21 49-34A-26 does not condition the power of the
 22 Commission to investigate on its own initiative or
 23 its duty to investigate on receipt of a petition
 24 such as is attached to my complaint on whether or
 25 not a matter to be investigated involves an

22

1 approved tariff or not.
 2 And, in fact, it would create an absurd
 3 situation if the Commission were only permitted
 4 under 49-34A-26 to investigate matters in which no
 5 tariff had been approved or where there was no
 6 conflict with an approved tariff.
 7 The Commission exercises multiple authority to
 8 pursue multiple duties, and one of them is public
 9 oversight. If the argument of Black Hills Power is
 10 accepted in this instance, the Commission would
 11 very readily be trapped by any unforeseen
 12 consequence of approval of a particular tariff.
 13 49-34A-26 leaves the door open to protect the
 14 rights of the consumer, and in this case the
 15 Commission has a mandate by reason of petition next
 16 to my complaint to conduct such an investigation.
 17 Since it is a factual matter that such
 18 investigation will be conducted and since there is
 19 really no grounds for the assertion that 49-34A-26
 20 investigations may not trespass on matters in which
 21 a tariff has been approved, then I claim the right
 22 to have the benefit of the outcome of that
 23 investigation in relation to the material
 24 assertions of my complaint.
 25 If the investigation confirms what I assert

23

1 and if 49-34A-26 authority is not limited by the
 2 approval in 1995 of the tariff in this matter, then
 3 there is an integral relation between the two, and
 4 I do claim the right to have benefit of the outcome
 5 of the investigation.
 6 CHAIRMAN SAHR: Thank you. The
 7 issue of the flat monthly charge, I think we would
 8 have discretion whether or not to investigate or
 9 what we may have termed that we already have
 10 investigated.
 11 I think the flat monthly charge has a useful
 12 purpose. It's something that is not unique to
 13 South Dakota, and in certain circumstances I think
 14 there can be a great benefit to consumers. And so
 15 I'll acknowledge, you know, Mr. Reints's ability to
 16 file what he has filed and to make the sort of
 17 request.
 18 And certainly if he has subsequent issues to
 19 file again, based on what he perceives to be a
 20 wrongdoing, I think in this case that the
 21 appropriate disposition is to grant Black Hills
 22 Power's Motion to Dismiss and allow the flat
 23 monthly charge to stand, and I will make that
 24 motion.
 25 COMMISSIONER BURG: I will second

24

1 it.
 2 VICE CHAIR HANSON: Hanson concurs.
 3 CHAIRMAN SAHR: With that, I don't
 4 think we need to reach the second question about
 5 motion to add punitive damages because that becomes
 6 mute.
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7	MONTANA-DAKOTA UTILITIES CO.	
8	REGARDING IT FLAT MONTHLY CHARGE	
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1 cited. It creates the situation where the
2 Commission might feel obliged to accept a harmful
3 practice because the utility could argue, as
4 Black Hills Power has, that in the sense that the
5 Commission tied its hands when it approved the
6 tariff.

7 I respectfully submit that the Commission's
8 hands are not tied.

9 CHAIRMAN SAHR: Thank you,
10 Mr. Reints. And I do want to clarify something
11 with the last Motion to Dismiss. I certainly did
12 not and I doubt my fellow Commissioners hold that
13 the approval of the tariff precluded a subsequent
14 challenge on its face.

15 I think what we're saying is that we felt that
16 the flat monthly charge was an appropriate charge
17 and not something that we were willing to review at
18 this point in time. And I think there is an
19 important difference. I think you do have the
20 right to file for review and investigation, but I
21 don't think that necessarily means that we have to
22 conduct the sort of investigation that you want us
23 to.

24 MR. REINTS: I agree, Mr. Chairman,
25 that the Commission has extremely broad discretion

1 as to what type of investigation it may conduct.
2 And I would just respectfully submit that although
3 the investigation which your staff has kindly
4 helped me with is not complete in terms of the
5 pleadings and discovery and documentary material
6 considered when the tariff and its antecedent
7 tariff in 1975 were approved, the material --
8 nevertheless, the material which has come from your
9 staff and all of the material that I have been able
10 to investigate does not show any study or any
11 consideration of the issue of the consequence which
12 I submit is an unanticipated consequence of the
13 Commission's approval of this tariff that the
14 poorest and least able to pay of these utilities
15 customers are, in fact, charged at a significant
16 premium, sometimes as much as double the per unit
17 rate for gas, in the case of MDU, as our customers
18 who buy more of the product that MDU sells.

19 I think that the Commission has -- I should
20 say the utilities case is stronger, would be
21 stronger, if the Commission had explicitly
22 considered in its approval of the tariff issues of
23 the discriminatory effects, which I allege in
24 pleadings.

25 Since the Commission -- there is no evidence

1 that I have been able to find that the Commission
2 exercised such consideration when it approved the
3 tariff, I believe that my petition for an
4 investigation is timely and that it would be wise
5 as a matter of public policy, especially at the end
6 of an economic downturn, to take a good close look.

7 My petition in this case has not been to
8 forbid MDU, or in the previous case Black Hills
9 Power, from imposing the \$8 monthly charge in every
10 case. I have pled that because of the
11 discriminatory impact the charge should be
12 eliminated on bills on which it constitutes more
13 than 20 percent of the total monthly charge.

14 And I would respectfully ask that in this case
15 that the Commission within its broad discretion
16 conduct an investigation which includes
17 consideration, explicit consideration, of the
18 impact on those least able to pay, the impact on
19 those who must exercise the power that they have,
20 which is mainly using less energy to control their
21 costs, and that action on Motion to Dismiss my
22 complaint against MDU be held premature until the
23 Commission completes a investigation.

24 CHAIRMAN SAHR: Thank you. I should
25 say I think the equal protection clause claims are

1 squarely before the Commission, and that's what
2 we're considering today. Whether or not you
3 foresee a different form of investigation or way of
4 being resolved, I think we clearly are considering
5 that today.

6 And I was not on the Commission at the time
7 that these rates were approved, but they may very
8 likely have considered those type of arguments in
9 the past as well.

10 With that in mind, it is MDU's opportunity to
11 respond. Mr. Gerdes.

12 MR. GERDES: Mr. Chairman, members
13 of the Commission, my name is Dave Gerdes. I'm a
14 lawyer from Pierre, and I represent MDU in this
15 matter.

16 Many of the arguments -- as Mr. Reints
17 indicated, many of the arguments that were made in
18 the prior docket that the Commission has just
19 considered also relate to this docket.

20 Simply put, the base rate was approved during
21 MDU's last rate case. The analysis that Mr. Reints
22 alleges should be made of the rate structure of the
23 company was, in fact, considered at that time.
24 That's the very nature of a rate case, as, of
25 course, the Commission knows.

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1 And this base rate is part of the approved
2 tariffs that result from the computations made, the
3 investigations made, and the decisions made by the
4 decision at the time of the rate case. As we've
5 mentioned in our Motion to Dismiss, our Supreme
6 Court has held that a tariff carries with it the
7 force of law and is to be viewed in legal effect
8 the same as that of a statute.

9 As such, while I would agree with Commissioner
10 Sahr that the Commission certainly has the
11 jurisdiction to investigate on its own notion if it
12 wishes, there has to be some evidence that there
13 was, in fact, a mistake made, I would submit,
14 during a prior rate case, and we would submit at
15 this point that no such evidence exists, number
16 one.

17 And, number two, the time for contesting the
18 factual basis of that decision passed long ago, as
19 was argued by Mr. Truhe in the prior matter.

20 Having said all of that, members of the
21 Commission, it's our position that the Motion to
22 Dismiss should be granted for the reason that,
23 number one, the matter has already been adjudicated
24 by the Commission and the time for appeal has
25 passed. And, secondly, the Commission is without

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1 jurisdiction to entertain much of what Mr. Reints
2 complains about.

3 And the Commission knows our Supreme Court has
4 also held that the Commission is not a court and
5 cannot take up matters such as violations of civil
6 rights, things like that for damages independent of
7 the cost of service issues which are involved and
8 within the jurisdiction of the Commission.

9 And so the allegations of unreasonable
10 preferences and alleged discrimination to the
11 extent that Mr. Reints would be seeking other
12 judicial or damage type relief, it would be our
13 position that that's outside the jurisdiction of
14 the Commission. And so it's our position,
15 Mr. Chairman, and members of the Commission that
16 the Motion to Dismiss should be granted.

17 Just factually so that you know where we are
18 with this, there has been no payment by Mr. Reints
19 since March, and disconnect notices have been
20 given, but given the weather and present weather
21 and MDU's adherence to its own policy with regard
22 to disconnections during bad weather, it has not
23 been executed at this point.

24 So Mr. Reints still does have service,
25 although records would indicate that he has only

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1 been minimally using that service for the past
2 several months.

3 CHAIRMAN SAHR: Thank you. Staff.
4 MR. REINTS: If I may respond,
5 Mr. Chairman.
6 CHAIRMAN SAHR: Mr. Reints, I'm
7 going to go to our staff.
8 MR. REINTS: I do beg your pardon.
9 CHAIRMAN SAHR: It's all right. I
10 appreciate that. We'll come back to you.
11 MR. FRAZIER: This is Kelly Frazier,
12 staff attorney. Just briefly I would support -- I
13 would recommend that the Commission grant MDU's
14 Motion to Dismiss.
15 CHAIRMAN SAHR: Thank you.
16 Mr. Reints.
17 MR. REINTS: I would make three
18 points. First of all, counsel for MDU asserts that
19 issues of discrimination and issues of the tariff
20 having to be a preferential practice to the
21 detriment of those least able to pay, those
22 consumers that use less fuel, asserts that it was
23 considered. A reasonably diligent search on my
24 part and on the part of Commission staff has found
25 no evidence that it was considered.

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1 And efforts by counsel for MDU and the counsel
2 for BHP to render mute any challenge under
3 South Dakota statute or Commission rules the
4 practice that's carried on under an approved tariff
5 creates a number of certain situations. I will
6 name one of them.

7 I was not resident of South Dakota in 1995. I
8 had no opportunity, by reason of lacking standing,
9 to -- even if I had been aware of the tariff
10 proceedings, to raise the issues which I here raise
11 at the -- at what counsel for MDU claims is the
12 only time they could reasonably have been raised.

13 The other -- (Inaudible) -- which would result
14 from the interpretation advanced by counsel is that
15 the Commission might -- may be trapped by a
16 previous tariff ruling, and the language of the
17 statutes do not support the version advanced by
18 counsel that the Commission is trapped.

19 The language of 49-34A-26 gives the Commission
20 the power to investigate, although it does not
21 impose on the Commission any guidelines as to how
22 it should investigate, any practice which is
23 seriously or extremely discriminatory.

24 If the statute -- if the plain meaning of the
25 statute is that the Commission may investigate and

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1 there's no constraints, doesn't say investigate
2 except in certain matters, then that authority is
3 renewed day by day.
4 And it is not reasonable to assume that the
5 Commission might be charged to investigate -- might
6 find a seriously discriminatory practice and might
7 be prevented from acting set policy to eliminate
8 that practice simply because it had approved a
9 tariff nine or 15 or 20 years before.
10 The last point that I would make is that I
11 agree with counsel for MDU that the South Dakota
12 Supreme Court has set some fairly clear limits on
13 what amounts to tort jurisdiction of the Public
14 Utilities Commission, and I concede that the
15 findings of the Supreme Court in other cases
16 suggest the possibility that the Commission may not
17 properly award some of the damages that I seek in
18 my complaint.
19 But I respectfully point out to the Commission
20 that my claims are not exclusively tort claims.
21 They're not exclusively constitutional claims. In
22 each case specific Public Utilities statutes are
23 cited.
24 I do not agree with counsel that where the
25 Commission has current authority to investigate

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1 determines whether an extreme discriminatory
2 practice exists, that it has no authority to remedy
3 any such practices it finds.
4 That is the issue before the Commission in my
5 complaint to which a petition mandating an
6 investigation is attached, and I would --
7 (Inaudible) -- that it is not reasonable that the
8 Commission should dismiss my complaint before
9 conducting that investigation.
10 CHAIRMAN SAHR: Thank you.
11 Mr. Smith.
12 MR. SMITH: I have a question for
13 Mr. Gerdes. Mr. Gerdes, is it not true that a rate
14 proceeding is currently open and underway involving
15 MDU that is presently considering the precise
16 issues of what MDU's rates should be at this point
17 in time?
18 MR. GERDES: That's true.
19 MR. SMITH: And would it not be
20 possible or have been possible for Mr. Reints to
21 have intervened in that proceeding and perhaps even
22 now still comment in that proceeding concerning the
23 rate structure that MDU should be following?
24 MR. GERDES: All of the notices
25 required by law of the pendency of that rate case

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1 were given, and the matter is up for approval, as
2 you know, and I would submit that the time for
3 submitting comment has passed, unless -- I mean,
4 obviously that matter is not before us here now,
5 but I would take the position that the time for
6 comment has now passed.
7 Obviously, if Mr. Reints or anyone else wanted
8 to petition the Commission and ask them to
9 reconsider, there is a mechanism there for that
10 too, correct.
11 MR. SMITH: In terms of opening an
12 investigative docket regarding MDU's rates, though,
13 it's true that that matter is open right now. I
14 mean, that investigation in MDU's rates is
15 occurring as we speak.
16 MR. GERDES: That is true. And, in
17 my opinion, the Commission has the jurisdiction at
18 any time to open a docket to look into the rates
19 charged by public utilities, whether or not there
20 is an open rate case pending.
21 So, I mean, yes, I agree the Commission has
22 the jurisdiction to look into the rates of MDU
23 under either circumstance.
24 MR. SMITH: Mr. Reints, would it be
25 your position that there are people out there that

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1 would be unable to pay a \$7 a month fee for -- flat
2 charge for the right to --
3 MR. REINTS: Of course. And the
4 evidence for that is that in Rapid City at the
5 present time by the best statistics available there
6 are approximately 800 homeless people. The
7 dynamics by which the discriminatory effects of --
8 MR. SMITH: Do those homeless
9 people have gas supplied to their nonhomes?
10 MR. REINTS: The theory implicit in
11 my remark is that homeless people have not always
12 been homeless. And as a matter of basic -- the
13 question is it's the starting point of the
14 analysis.
15 If someone is marginal in their own home or in
16 a rented apartment, it is theoretically challenging
17 to say which factor is the straw that breaks the
18 camel's back and causes the particular sequence of
19 events which it leads to homelessness or leads to
20 lack of electricity or heat.
21 The way it works in reality, as we all know,
22 is that people make choices and do the best they
23 can. The discriminatory -- the impact of the
24 discriminatory or preferential practice which I
25 complain of here is that it results in a higher per

<p>41</p> <p>1 unit cost. It takes out of the hands of someone 2 who is in a marginal position the ability to 3 control cost by use. 4 To a significant degree on some of my electric 5 bills I see the flat fee has constituted half of 6 the total charge with the result that I have in 7 those instances paid twice the per kilowatt hour 8 rate, or in this case gas, twice the cubic unit 9 rate of customers who use significantly more gas. 10 The social dynamics are complex. The -- 11 MR. SMITH: Mr. Reints, are you 12 aware that there is a program in South Dakota to 13 provide assistance for persons who are in that 14 situation? 15 MR. REINTS: Yes. I am aware of 16 that and of the details of the program. And the 17 irony of the relationing of that program to the 18 practice of which I complained is the following: 19 The program provides, in the case of those with 20 least income, to cover approximately 70 percent of 21 what is calculated as heating costs. 22 But if someone progressively reduces use as a 23 means to control cost, the effect of the flat 24 monthly charge remains. In other words, it takes 25 out of the hands of the individual the ability to</p>	<p>43</p> <p>1 I do suggest that in those cases where there is 2 establishment of an unreasonable preference or 3 discriminatory impact within the meaning of the 4 utilities statute we've been discussing, that there 5 is an objection. 6 The United States Supreme Court has 7 consistently held that a public utility does not 8 have any vested right to recover any particular 9 fixed costs or any particular category of costs. 10 This is the Cane decision. I'm looking for the 11 citation. And I apologize that I don't have it 12 before me, but I don't believe the counsel can 13 challenge my representation of the clear holding of 14 the Supreme Court in that matter. 15 In other words, the public policy issue of 16 whether there is various discriminatory impact in a 17 case where the result of the \$8 fixed charge is to 18 double the per unit cost paid by a person troubling 19 to survive economically, in that case, yes, I 20 challenge somebody's legal right to recover a 21 portion of its fixed cost. 22 The explicit proposition that a utility has a 23 right to recover a portion or all of fixed costs 24 associated with a particular service has been 25 explicitly rejected by the Supreme Court of the</p>
<p>42</p> <p>1 control costs by use by progressively imposing a 2 higher per unit cost among people who use very 3 little in an effort to control costs. And that 4 dynamic obtains, whether or not the person is 5 receiving energy. 6 MR. SMITH: Just maybe one last 7 question then. So it's your contention that you 8 dispute what is a component of, I think, every 9 single rate in the State of South Dakota that 10 some -- 11 MR. REINTS: I -- 12 MR. SMITH: Just hear me out. That 13 some appropriate level of payment is properly to be 14 allocated to the basic cost of installing 15 facilities to provide service to a person's home. 16 MR. REINTS: Yes. 17 MR. SMITH: As with any other asset 18 that is involved for the benefit of a person, such 19 as an automobile, that those fixed costs must be 20 paid by someone and some portion of that fixed cost 21 that the company has is properly treated as a fixed 22 payment. 23 MR. REINTS: May I respond? 24 MR. SMITH: Please do. 25 MR. REINTS: Yes. Mr. Commissioner,</p>	<p>44</p> <p>1 United States. 2 CHAIRMAN SAHR: Thank you. 3 Commissioner Burg. 4 COMMISSIONER BURG: A little bit 5 along the same lines you partially answered. This 6 is Commissioner Burg. Are you indicating that if 7 no gas was used, there should be no payment? 8 MR. REINTS: I apologize. I'm 9 unable to hear. 10 COMMISSIONER BURG: Are you 11 advocating that if zero gas was used, there should 12 be no charge to that customer? 13 MR. REINTS: In cases where the 14 charge would constitute more than 20 percent of the 15 total monthly billing, yes. And the reason that I 16 propose 20 percent is because the discriminatory 17 impact disappears as a customer is able to and does 18 use more energy. 19 COMMISSIONER BURG: What I guess I'm 20 saying is that if the customer uses zero energy, 21 should there be no charge to that customer? 22 MR. REINTS: Yes. 23 COMMISSIONER BURG: Is there no cost 24 to the company if the facilities are there? 25 MR. REINTS: There is cost to the</p>

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1 company, absolutely. In other words, although the
 2 company in my opinion has somewhat exaggerated the
 3 fixed cost of residential service, that, however,
 4 is a complex issue and I don't think that it serves
 5 any appropriate purpose to enter that today.
 6 But, if I may, the question that you raised,
 7 as I understand it, is is there any point at which
 8 the utility gains the right or has the right in
 9 principle to recover a minimum of fixed costs from
 10 a particular customer.
 11 The Supreme Court of the United States has
 12 answered that question no. I agree. No. It is,
 13 in other words, in my opinion, and as I interpret
 14 the holding of the Supreme Court.
 15 COMMISSIONER BURG: It was just
 16 brought to my attention by one of my staff, and I'm
 17 aware because I have been on the Commission that
 18 long that at least three times we have generically
 19 looked at this issue.
 20 As a matter of fact, I presided once when we
 21 removed the gas connection to the fixed cost and we
 22 got a bad backlash from the people saying they had
 23 zero gas when they had the fixed cost because it
 24 still costs to have the meter, the pipes and that.
 25 I'm not going to pursue that any further.

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1 The other question I had for you just for
 2 clarification, have you either with Black Hills
 3 Power or MDU, have you been late or not paid your
 4 bill to those companies?
 5 MR. REINTS: Yes. I have frequently
 6 been late.
 7 COMMISSIONER BURG: And you think
 8 that you should not receive disconnection notices
 9 even if you're late?
 10 MR. REINTS: You raised a new issue
 11 which so far as I know is not before the Commission
 12 in this complaint.
 13 COMMISSIONER BURG: Okay. I'll drop
 14 it. It's not before us. That's all I have.
 15 CHAIRMAN SAHR: Thank you.
 16 COMMISSIONER HANSON: Mr. Chairman,
 17 may I?
 18 CHAIRMAN SAHR: Yes, Commissioner
 19 Hanson.
 20 VICE CHAIR HANSON: Mr. Reints, can
 21 you hear me all right?
 22 MR. REINTS: Yes, I can. Thank you.
 23 VICE CHAIR HANSON: This is
 24 Commissioner Hanson. I'm curious. We've discussed
 25 the flat monthly charge to a significant degree

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1 here today, and you have on a number of times
 2 stated that it's extremely discriminatory
 3 preferential treatment.
 4 And does that solely rest upon the theory that
 5 it can be charged above 20 percent of what a
 6 person's monthly billing would be?
 7 MR. REINTS: I'm not sure that I
 8 understand the question, but I'll take a stab at
 9 it. My argument is that where the discriminatory
 10 impact is disproportioned where it functions to
 11 take out of the hands of the customer the ability
 12 to control costs by reducing use, that at that
 13 point discriminatory impact prohibited under the
 14 South Dakota statute that we have been discussing
 15 occurs.
 16 In other words, it does no harm that the
 17 utility should recover a portion of its costs from
 18 a fixed charge so long as that charge doesn't
 19 result in discriminatory impact. That is my view.
 20 And I think that what -- my understanding of
 21 what has happened in the past is that there's been
 22 kind of a de facto acceptance of the idea because
 23 it's a logical idea that the utilities should be
 24 able to recover a portion of their fixed cost by a
 25 fixed charge.

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1 My objection to that is, A, that reasoning has
 2 been explicitly rejected by the Supreme Court of
 3 the United States.
 4 VICE CHAIR HANSON: Mr. Reints,
 5 before we go over everything all over again.
 6 MR. REINTS: I won't.
 7 VICE CHAIR HANSON: I guess in your
 8 arguments I'm having a difficult time understanding
 9 whether you are absolutely opposed to a flat
 10 monthly charge or whether you favor it under some
 11 circumstances.
 12 MR. REINTS: I am opposed to it in
 13 any case where it constitutes more than 20 percent
 14 of a given monthly bill on a residential service.
 15 VICE CHAIR HANSON: So in that case
 16 it would be a fluctuating charge so it wouldn't be
 17 a fixed charge.
 18 MR. REINTS: I think it is well
 19 within the discretion of the Commission to
 20 determine any such charge and how it be applied
 21 according to its investigative findings of whether
 22 there is discriminatory impact and what that impact
 23 is.
 24 In other words, I am not acting in this
 25 complaint or speaking now from the objection in

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1 principle to a fixed charge.
 2 VICE CHAIR HANSON: So you're in
 3 favor of a fixed charge?
 4 MR. REINTS: Well --
 5 VICE CHAIR HANSON: It sounds as if
 6 you're arguing on both directions, and
 7 theoretically I don't see how you can arrive at the
 8 two conclusions that you do.
 9 The other arena that I was curious about was
 10 when you argued that you should have the right to
 11 open up the hearing and discussion pertaining to
 12 your rights based upon the fact that you were not
 13 here at the time that the rates were decided,
 14 wouldn't it be extremely burdensome on a business
 15 if every time a new resident arrived in
 16 South Dakota who was not part of a hearing process
 17 that they objected to whatever the rate was that we
 18 should open up a hearing so they could be able to
 19 comment?
 20 MR. REINTS: Yes. It would be
 21 extremely burdensome and absurd, and that, I
 22 presume, is why the Legislature has given the
 23 Commission current authority to conduct
 24 investigations and so on.
 25 In other words, I agree that that is so, and I

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1 just -- I make the same point that I did before,
 2 that the Commission's authority to investigate and
 3 determine where there is a discriminatory impact is
 4 open all the time, it's renewed every day.
 5 VICE CHAIR HANSON: Certainly. We
 6 don't disagree with that.
 7 MR. REINTS: And I only claim there
 8 is material relation between my personal requests
 9 for such an investigation, the investigation
 10 petitions for and the petition filed by, I believe,
 11 30 some people and attached to my complaint, and
 12 material allegations of my complaint.
 13 My position there is quite simple. I agree
 14 with you completely, but I do believe that the --
 15 (Inaudible) -- out of the company.
 16 VICE CHAIR HANSON: Thank you,
 17 Mr. Chairman.
 18 COMMISSIONER BURG: I'm ready to
 19 make a motion. I would move that the Commission
 20 grant MDU's Motion to Dismiss. I think that we do
 21 have the right to open a hearing. I have seen no
 22 evidence that shows that there's any reason to open
 23 an investigation in this case because I don't think
 24 that any evidence has been proven that was not
 25 considered at the rate cases that I've been

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1 involved with over my 17 years on the Commission.
 2 So, with that, I move that we grant MDU's
 3 Motion to Dismiss.
 4 CHAIRMAN SAHR: And I will second.
 5 VICE CHAIR HANSON: Hanson concurs.
 6 CHAIRMAN SAHR: Mr. Reints, thank
 7 you very much for appearing today, and, as
 8 Mr. Smith mentioned, there is a pending proceeding
 9 with MDU on their rates, and you may want to take a
 10 look at the filings in that record.
 11 MR. REINTS: If I may comment, my
 12 understanding is there is basically settlement in
 13 that matter and it is too late to do anything but
 14 file, which I would attempt to do.
 15 My only other request of the Commission would
 16 be --
 17 (Discussion off the record)
 18 MR. REINTS: My only other request
 19 to the Commission would be that the record show
 20 that if the dismissals today are on the grounds of
 21 lack of jurisdiction, that be explicitly indicated
 22 in the record.
 23 CHAIRMAN SAHR: Thank you. We'll
 24 take that under consideration. Considering that
 25 your complaints have a number of different

52

1 features, I think we'd have to take a look at that.
 2 At the same time, though, if you're exercising
 3 a statutory right to file and have the Commission
 4 consider something, I think that statutory right
 5 can continue on prospectively. So I think again
 6 you'd have to -- we'd have to look at the
 7 individual basis for the particular claim. So we
 8 will definitely take that under consideration.
 9 MR. REINTS: Thank you.
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<p>1 THE PUBLIC UTILITIES COMMISSION</p> <p>2 OF THE STATE OF SOUTH DAKOTA</p> <p>3 =====</p> <p>4 IN THE MATTER OF THE APPLICATION OF MIDCONTINENT COMMUNICATIONS, INC. FOR 5 APPROVAL TO EXPAND ITS CERTIFICATE OF AUTHORITY TO PROVIDE LOCAL EXCHANGE TC03-068 6 SERVICE IN THE SERVICE TERRITORY OF INTERSTATE TELECOMMUNICATIONS COOPERATIVE, 7 INC.</p> <p>8 =====</p> <p>9 Transcript of Proceedings December 2, 2003</p> <p>10 =====</p> <p>11 BEFORE THE PUBLIC UTILITIES COMMISSION, ROBERT SAHR, CHAIRMAN 12 GARY HANSON, VICE CHAIRMAN JIM BURG, COMMISSIONER</p> <p>13 COMMISSION STAFF 14 Rolayne Ailts Wiest John Smith 15 Karen Cremer Kelly Frazier Greg Rislov 16 Jim Mehlhaff Harlan Best 17 Keith Senger Dave Jacobson 18 Michele Farris Tina Douglas 19 Heather Forney Pam Bonrud</p> <p>20 APPEARANCES 21 Steve Wegman Darla Pollman Rogers 22 Rita Mulkern Tamie Aberle 23 Donald Ball David Gerdes 24 Senator Frank Kloucek</p> <p>25 Reported By Cheri McComsey Wittler, RPR</p>	<p>55</p> <p>1 CHAIRMAN SAHR: TC03-068, In the</p> <p>2 Matter of the Application of Midcontinent</p> <p>3 Communications, Inc. For approval to Expand its</p> <p>4 Certificate of Authority to Provide Local Exchange</p> <p>5 Service in the Service Territory of Interstate</p> <p>6 Telecommunications Cooperative, Inc.</p> <p>7 And the question today is shall the Commission</p> <p>8 grant Midcontinent Communication's petition to</p> <p>9 amend its Certificate of Authority to provide local</p> <p>10 exchange service in the rural exchange area of</p> <p>11 Webster, South Dakota, and shall the Commission</p> <p>12 grant Midcontinent Communications a waiver of</p> <p>13 ARSD 20:10:32:15.</p> <p>14 Mr. Gerdes.</p> <p>15 MR. GERDES: Mr. Chairman, members</p> <p>16 of the Commission, I'm Dave Gerdes. I'm a lawyer</p> <p>17 from Pierre, and I represent Midcontinent</p> <p>18 Communications in this docket.</p> <p>19 MR. DICKENS: Chairman Sahr.</p> <p>20 MR. GERDES: I believe Ben Dickens</p> <p>21 just spoke.</p> <p>22 MR. DICKENS: Chairman Sahr, this is</p> <p>23 Ben Dickens. We're appearing this morning simply</p> <p>24 to indicate that we have reached an interconnection</p> <p>25 agreement with Midcontinent, and we filed the</p>
<p>54</p> <p>1 APPEARANCES BY TELEPHONE</p> <p>2 David Bloomquist</p> <p>3 Talbot Wieczorek</p> <p>4 Bob Pomeroy</p> <p>5 Jeff Partridge</p> <p>6 Meredith Moore</p> <p>7 Mary Lohnes</p> <p>8 Colleen Sevold</p> <p>9 Tim Goodwin</p> <p>10 Mary Sisak</p> <p>11 Benjamin Dickens</p> <p>12 Todd Boyd</p> <p>13 Bill Heaston</p> <p>14 Linn Evans</p> <p>15 Stewart Wevik</p> <p>16 Marv Truhe</p> <p>17 Joe Schuele</p> <p>18 Barbara Brohl</p> <p>19 Aaron Eisenbraun</p> <p>20 Fred Anderson</p> <p>21 John Reints</p> <p>22 =====</p> <p>23 TRANSCRIPT OF PROCEEDINGS, held in the</p> <p>24 above-entitled matter, at the Governor's Inn,</p> <p>25 700 West Sioux Avenue, Pierre, South Dakota, on the</p> <p>2nd day of December 2003, commencing at 9:30 a.m.</p>	<p>56</p> <p>1 agreement with the Commission for approval.</p> <p>2 We have also entered a stipulation indicating</p> <p>3 that we have no objection to Midcontinent providing</p> <p>4 local exchange service in ITC's Webster exchange,</p> <p>5 and we have further reserved all of our remaining</p> <p>6 rights should it appear necessary to assert any of</p> <p>7 those rights in the future.</p> <p>8 So, just by way of example, should</p> <p>9 Midcontinent come in in the future and ask to be</p> <p>10 designated as a competitive ETC, we would rely on</p> <p>11 our resurrection of rights as not having given our</p> <p>12 right to object up.</p> <p>13 And along those lines, to the extent that</p> <p>14 Midco requires a waiver of the complete study area</p> <p>15 service rule to serve the Webster exchange, we</p> <p>16 would have no objection to it. But if they sought</p> <p>17 to use that same waiver to provide ETC services and</p> <p>18 ETC later, of course we'd rely on our resurrection</p> <p>19 of rights.</p> <p>20 So that's kind of a long-winded and</p> <p>21 complicated proviso to say we've reached an</p> <p>22 agreement with Midcontinent and would have no</p> <p>23 objection other than the resurrection of rights</p> <p>24 that I outlined.</p> <p>25 CHAIRMAN SAHR: Thank you very much.</p>

1 Mr. Gerdes.

2 MR. GERDES: Mr. Chairman, members
3 of the Commission, Mr. Dickens has eloquently
4 stated what I was going to state, and we would ask
5 that the Commission approve Midcontinent's
6 application and also its request to keep its
7 financial information confidential and grant the
8 waiver relating to providing service to less than
9 the entire ITC service area involving the Webster
10 exchange.

11 CHAIRMAN SAHR: Thank you. Staff?

12 MS. CREMER: Staff would recommend
13 that you grant Midcontinent's petition to amend as
14 they meet the requirements set forth in
15 ARSD 20:10:32.

16 As to the waiver, Midco only wants to serve
17 the Webster exchange. ITC agrees with that so I
18 believe the waiver should be granted as it does not
19 adversely impact universal service. Quality of
20 service will be maintained, and it is in the public
21 interest.

22 CHAIRMAN SAHR: Thank you. I do
23 have a couple of questions, and I'm somewhat
24 formulating them as I speak.

25 Is there another part of South Dakota where we

1 have a similar arrangement, or is this kind of new
2 ground where we have a telecommunications company,
3 Midcontinent, going into the I guess what I term
4 rural area?

5 MR. GERDES: Chairman Sahr, it's my
6 understanding that this is the first petition of
7 this type that has been requested in South Dakota.
8 There is the other -- the only other situation I'm
9 aware of is the Western Wireless situation where
10 they were granted a different kind of service in
11 the -- in rural areas. But this is the first
12 application of this type.

13 CHAIRMAN SAHR: And would either you
14 or Mr. Dickens address whether this is based on
15 reciprocity with ITC offering cable service, or is
16 this based on -- how does this interchange with the
17 rural safeguards, and how does this work from that
18 legal framework?

19 I guess, why is this occurring, and what about
20 those issues that no one's even discussed at this
21 point?

22 MR. DICKENS: Dave, did you want to
23 go ahead?

24 MR. GERDES: Well, I'll try, and you
25 can jump in. First of all, interconnection is a

1 responsibility for rural carriers under the Federal
2 Telecommunications Act, and Midcontinent is simply
3 pursuing that. And that was the basis, I think,
4 for that agreement.

5 Secondly, as the application states, this is a
6 competitive entry in the sense that ITC is offering
7 cable services in some of Midcontinent's areas.
8 But I don't know that that directly impacts on this
9 petition other than to say it was actuated by
10 competition.

11 But basically we're simply seeking
12 interconnection as required by the Federal Act.
13 Anything else?

14 MR. DICKENS: Chairman Sahr?

15 CHAIRMAN SAHR: Go ahead,
16 Mr. Dickens.

17 MR. DICKENS: I think I agree with
18 my brother, Mr. Gerdes. We have an obligation to
19 interconnect under Section 251(A) with other
20 carriers.

21 We have done so in a manner that we do not
22 believe affects the rural exemption that we have
23 under Section 251(F) of the '96 Act. And that, you
24 know, may be open for debate later, if we ever get
25 there, but we do not feel that issue was presented

1 by the particular form of interconnection that we
2 negotiated.

3 MR. GERDES: We are not seeking ETC
4 status, Midcontinent is not.

5 CHAIRMAN SAHR: Thank you. Any
6 questions or comments from Commissioners or
7 advisers?

8 MR. HEASTON: Chairman Sahr, this is
9 Bill Heaston. There is another situation that is
10 analogous, and that is Prairie Wave
11 Telecommunications providing service are competing
12 in the Centerville and Viborg changes with
13 Ft. Randall. That's been in existence since 1997.

14 And we have an Interconnection Agreement with
15 Ft. Randall, and we are the incumbent cable TV
16 company there. So there is one situation that the
17 Commission has already approved.

18 CHAIRMAN SAHR: Thank you very much.
19 I appreciate that, Mr. Heaston. Any other
20 questions or comments?

21 Seeing none, then I will make the motion that
22 we grant Midcontinent's petition and that we also
23 grant the waiver of ARSD 20:10:32:15.

24 VICE CHAIR HANSON: Second.

25 COMMISSIONER BURG: Concur.

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 took in shorthand the proceedings
10 had in the above-entitled matter on the 2nd day of
11 December 2003, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 15th day
14 of December 2003.

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17 
18 Cheri McComsey Wittler,
19 Notary Public and
 Registered Professional Reporter

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