

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

IN THE MATTER OF THE COMPLAINT FILED)	FINAL ORDER GRANTING
BY JOHN REINTS, RAPID CITY, SOUTH)	MOTION TO DISMISS;
DAKOTA, AGAINST BLACK HILLS)	NOTICE OF ENTRY
FIBERCOM, L.L.C. REGARDING ITS LATE)	
PAYMENT CHARGE)	CT03-155

On November 3, 2003, the Public Utilities Commission (Commission) received a complaint filed by John Reints, Rapid City, South Dakota (Complainant), against Black Hills FiberCom, L.L.C. (FiberCom) regarding its late payment charge. On November 24, 2003, the Commission received an Answer and Motion to Dismiss from FiberCom. On November 25, the Commission received a Petition to Amend Complaint. On November 26, 2003, the Commission received a Petition to Amend to correct clerical errors in the Petition to Amend. On December 1, 2003, the Commission received Complaint's Request for Postponement of Hearing to Permit Discovery, Request for Additional Sanction of Counsel and Claim for Additional Damages. On December 2, 2003, the Commission received Complainant's Response to FiberCom's Answer and Motion to Dismiss. On December 11, 2003, Complaint filed a letter dated December 9, 2003, addressed to FiberCom. On December 16, 2003, at a regularly scheduled meeting, the Commission considered FiberCom's Motion to Dismiss. Complainant did not appear, and the Commission voted unanimously to grant the motion to dismiss, to dismiss the complaint and close the docket. On December 24, 2003, the Commission received a Petition for Rehearing from Complainant. On December 30, 2003, the Commission received an email filing by FiberCom stipulating that FiberCom had no objection to the Petition for Rehearing. At its regular meeting on January 6, 2004, the Commission voted unanimously to grant Complainant's Petition for Rehearing.

On January 29, 2004, at 1:00 PM, the Commission held a hearing on the parties' respective pending motions in the Commission's Cactus Conference Room in the Capitol Building in Pierre, South Dakota. FiberCom appeared through counsel by teleconference and Commission staff appeared in person. Complainant did not appear. At the hearing, FiberCom moved to dismiss the Complaint with prejudice by default on the grounds that the Complainant failed to appear. The Commission voted unanimously to grant FiberCom's motion to dismiss with prejudice by default for Complainant's failure to appear at the hearing.

The Commission having given notice of hearing to all parties as required by law and considered the motion of FiberCom and the arguments thereon of FiberCom and Commission staff, the Commission makes the following findings of fact, conclusions of law and final decision.

FINDINGS OF FACT

1. On November 3, 2003, Complainant filed his Complaint with the Commission. On November 24, 2003, the Commission received an Answer and Motion to Dismiss from FiberCom.
2. On December 16, 2003, at a regularly scheduled meeting, the Commission considered FiberCom's Motion to Dismiss. Complainant did not appear, and the Commission voted unanimously to grant the Motion to Dismiss, to dismiss the complaint and close the docket.
3. On December 24, 2003, the Commission received a Petition for Rehearing from Complainant. On December 30, 2003, the Commission received an email filing by FiberCom stipulating that

FiberCom had no objection to the Petition for Rehearing. At its regular meeting on January 6, 2004, the Commission voted unanimously to grant Complainant's Petition for Rehearing.

4. On January 15, 2004, the Commission issued an Order for and Notice of Hearing on Pending Motions and Notice of Intent to Treat Motion to Dismiss in Part as Motion for Summary Disposition (Notice). The Notice advised the parties that a hearing on all pending motions would be held at 1:00 P.M. on January 29, 2004, in the Commission's Cactus Conference Room in the Capitol Building in Pierre. The Notice further stated the parties had the right to be present, either in person or by conference call and to be represented by an attorney, that their rights and other due process rights may be forfeited if not exercised at the hearing, and that if a party failed to appear, the Commission may enter a default decision against the party. The Notice provided the conference call-in number and also advised Complainant that he could contact the Commission to arrange to have the Commission call him.

5. The Notice was served upon the parties, including Complainant, by first class mail on January 15, 2004. Delaine Kolbo of the Commission's staff executed a Certificate of Service indicating that the Notice had been served upon the parties on January 15, 2004.

6. The hearing was convened and held as scheduled on January 29, 2004. Complainant failed to appear either in person or by conference call and did not contact the Commission or any other party as to his inability to appear or to explain his reasons for not appearing.

7. At the hearing, FiberCom moved to dismiss the Complaint on the grounds that Complainant's failure to appear constituted a default as provided in the Notice. Commission staff joined in the motion to dismiss on the grounds of default.

8. Complainant failed to appear at the December 16, 2003 motion proceeding. After the Commission agreed to afford Complainant a rehearing, Complainant was given adequate notice of the January 29, 2004 hearing and was afforded the opportunity to participate by teleconference at the Commission's expense. Complainant did not request a continuance and offered no explanation as to his inability to appear.

9. The Commission finds that Complainant's failure to appear at the January 29, 2004 hearing constitutes a default and that FiberCom's motion to dismiss for default made at the hearing should be granted.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-13, including 49-13-1 through 49-13-14, inclusive, and SDCL Chapter 49-31, including 49-31-3, 49-31-7, 49-31-7.1, 49-31-7.2, 49-31-7.3, 49-31-7.4, 49-31-10, 49-31-11, 49-31-38, 49-31-38.1, 49-31-38.2, 49-31-38.3, and ARSD Chapters 20:10:01 and 20:10:34.

2. The Complainant was given adequate notice of the January 29, 2004 hearing and reasonable accommodation was made to allow Complainant to conveniently participate. Complainant did not appear and did not request a continuance or offer any explanation as to his inability to appear.

3. Complainant's failure to appear at the January 29, 2004 hearing constitutes a default and FiberCom's motion to dismiss on the grounds of default is accordingly granted pursuant to SDCL 1-26-20.

It is therefore

ORDERED, that FiberCom's motion to dismiss on the grounds of default is granted and Complainant's Complaint is dismissed.

PLEASE TAKE NOTICE that this Final Decision and Order was duly entered on this 30th day of January, 2004. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition therefor and ten copies with the Commission within 30 days from the date of issuance of this Final Decision and Order. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision within thirty (30) days after the date of service of this Notice of Decision and Order.

Dated at Pierre, South Dakota, this 30th day of January, 2004.

CERTIFICATE OF SERVICE
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.
By: <u>Alaine Kolbs</u>
Date: <u>1/30/04</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Robert K. Sahr
ROBERT K. SAHR, Chairman

Gary Hanson
GARY HANSON, Commissioner

James A. Burg
JAMES A. BURG, Commissioner