BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED BY GARY LOUDNER, BLACK HAWK, SOUTH DAKOTA, AGAINST BLACK HILLS CORPORATION REGARDING ELECTRICAL OUTAGES	)))))	**FINAL DECISION AND ORDER GRANTING SUMMARY DISPOSITION AND NOTICE OF DECISION CE08-001**

On June 9, 2008, Gary Loudner (Complainant) filed a Complaint with the South Dakota Public Utilities Commission (Commission) against Black Hills Corporation (Black Hills) alleging that one or more electrical outages had occurred (Complaint). On June 30, 2008, Black Hills filed an Answer to the Complaint and Motion to Dismiss. On July 14, 2008, Complainant filed a Motion to Not Consider the Telco's Motion to Dismiss and Amend Complaint to Include Golden West and SDN. On October 2, 2008, the Commission received a Request by Commission Staff to Schedule Motions to Dismiss, which motion included Black Hills's Motion. On October 21, 2008, at a regularly scheduled meeting, the Commission voted unanimously to grant the Request by Commission Staff to Schedule Motions to Dismiss and to serve notice that the Commission would consider Black Hills' Motion in whole or in part as a motion for summary disposition under SDCL 1-26-18 and 15-6-56. On October 29, 2008, the Notice of Intent to Treat Motion to Dismiss as Motion for Summary Disposition; Order for and Notice of Hearing (Notice) was served on Complainant and Black Hills. The Notice provided that the parties could participate in the hearing telephonically. On November 7, 2008, Black Hills filed a Motion for Summary Judgment of Black Hills Corporation (together with Motion to Dismiss, the Motion).

The Commission held the hearing on the Motion as noticed on November 12, 2008. Complainant did not appear at the hearing either in person or telephonically. Black Hills appeared telephonically. After hearing from Black Hills and Staff, the Commission voted unanimously to grant summary disposition in favor of Black Hills on the Complaint.

Having considered the Motion, the pleadings of the parties, including documentary attachments thereto and/or references therein and the oral arguments of the parties present at the hearing, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

The Commission finds that there is no genuine issue of fact regarding the following facts and accordingly makes the following findings of fact:

1. On June 9, 2008, Complainant filed a Complaint with the Commission against Black Hills, Midcontinent Communications (Midcontinent) and Qwest Communications (Qwest) alleging that Complainant and his wife experienced three different telephone service outages. The Complaint alleges that one of these outages, occurring on May 20, 2008, was caused by a Black Hills power outage that caused the "lack of A/C wattage to Midcontinent's head in and residential telephone module" from 10:04 A.M. until 2:02 P.M. As a result of this Complaint, the Commission opened this docket and complaint Dockets CT08-003 and CT08-004 to address the allegations involving Black Hills, Midcontinent and Qwest, respectively.

2. On June 30, 2008, Black Hills filed an Answer to the Complaint and Motion to Dismiss. In its answer, Black Hills admitted that "an electrical outage occurred on or about May 20, 2008."

3. On July 14, 2008, Complainant filed a Motion to Not Consider the Telco's Motion to Dismiss and Amend Complaint to Include Golden West and SDN. As a result of this filing, the Commission opened complaint Dockets CT08-005 and CT08-006 to address allegations involving South Dakota Network, LLC (SDN) and Golden West Telecommunications Cooperative, Inc. (Golden West).

4. On October 2, 2008, the Commission received a Request by Commission Staff to Schedule Motions to Dismiss, which motion included Black Hills's Motion. After notice to Complainant evidenced by a certified mail receipt, the Commission considered this motion at a regularly scheduled meeting on October 21, 2008. Complainant did not appear either in person or telephonically. The Commission finds that Complainant had notice of the meeting and elected not to appear either in person or telephonically. The Commission voted unanimously to grant the Request by Commission Staff to Schedule Motions to Dismiss and to serve notice upon the parties of the Commission's intent to treat the Motion in whole or in part as a motion for summary disposition.

5. On November 7, 2008, Black Hills filed a Motion for Summary Judgment.

6. On October 29, 2008, the Commission served on Complainant its Notice of Intent to Treat Motion to Dismiss as Motion for Summary Disposition; Order for and Notice of Hearing, which set November 12, 2008 as the date for hearing on the Motion. The Notice provided that the parties could participate in the hearing telephonically. Black Hills appeared telephonically. In response to a question from the Commission at the hearing held on the Motion on November 12, 2008, counsel for Staff stated that on November 11, 2008, the state's Veterans Day holiday, Complainant recorded a voice mail on the Commission's central voice mail advising the Commission that he did not intend to appear either in person or telephonically at the hearing. Complainant did not appear at the hearing either in person or telephonically. The Commission finds that Complainant had notice of the hearing and elected not to appear either in person or telephonically.

7. Complainant's failure to appear at the November 12, 2008 hearing on the Motion constitutes a default.

8. A power outage does not *per se* constitute inadequate or unreasonable service. It is not reasonable to hold electric utilities to a standard of zero outages as a measure of the provision of adequate service. Absent evidence of a violation of the Commission's rules, the utility's tariff or a NERC or National Electric Safety Code standard, other neglect or an intentionally wrongful or unreasonable act or pattern of conduct, an occasional power outage does not constitute a violation of an electric utility's duty to provide adequate service.

9. Section 302 of Black Hills's electric tariff on file with and approved by the Commission provides in relevant part:

> The Company will use reasonable diligence to provide continuous electric service but does not guarantee a constant supply of electric energy . . . , provided, however, that the Company or customer as the case may be, shall be prompt and diligent in removing or overcoming the cause or causes of such delay or interruption of delivery or receiving electric service . . . .

10. ARSD 20:10:18:03, the Commission's rule regarding interruptions of electric utility service, states in relevant part: "Each utility shall make all reasonable efforts to prevent interruptions of service. However, when such interruptions occur, the utility shall reestablish service with the shortest possible delay consistent with the safety of its customers, employees and the general public. If practical, every customer affected shall be notified in advance of any work which will result in an interruption of service"

11. No evidence, or even an allegation, was presented by any party to this docket or to the other dockets arising from the Complaint of any facts that would indicate that Black Hills violated its tariff, the Commission's rules or a NERC or National Electric Safety Code standard, that Black Hills was neglectful in its operations and maintenance practices or that it intentionally caused the outage.

12. In his July 14, 2008 filing, Complainant stated with respect to the May 20, 2008 outage, that Black Hills "had at least 3 (three) service personnel at the outage Event, from 1:02 pm to 8:05 pm, on said date." This statement supports a finding that Black Hills responded to the outage with diligence and the Commission so finds.

13. In its response to the Complaint dated June 18, 2008 and filed June 20, 2008, Midcontinent stated:

> In researching this complaint, the Midcontinent Communications Network Operations Center found no evidence of a power outage on May 20, 2008. According to our records, the node serving Mr. Loudner's residence had no interruptions. While there may have been an isolated power outage to his home, our backup power systems would have kept our service to his home available. Had our systems failed, our monitoring tools would have detected the outage or loss of service. At this time, therefore, Midcontinent is unable to ascertain the nature of Mr. Loudner's complaint regarding his service on this date.

14. Neither Complainant nor any other party offered any evidence to rebut Midcontinent's statement that it's back up power supply for Complainant's phone service was working on May 20, 2008, and that basic phone service was not interrupted. There is no evidence in the record on which the Commission could base a finding that Complainant suffered a phone service outage as a consequence of the Black Hills power outage on May 20, 2008, and the Commission accordingly does not so find.

15. Viewing the evidence most favorably to Complainant, the Commission finds that Black Hills did not commit a violation of law or the Commission's rules in connection with the power outage that occurred on its system on May 20, 2008, and that no basis has been shown for the Commission to sanction Black Hills or order Black Hills to take any remedial action.

Based on the foregoing Findings of Fact, the Commission makes the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-34A.

2. SDCL 49-34A-2 provides that "every public utility shall furnish adequate, efficient, and reasonable service."

3. ARSD 20:10:18:03, the Commission's rule regarding interruptions of electric utility service, states in relevant part: "Each utility shall make all reasonable efforts to prevent interruptions of service. However, when such interruptions occur, the utility shall reestablish service with the shortest possible delay consistent with the safety of its customers, employees and the general public."

4. SDCL 49-34A-10 provides that "schedules and tariffs approved by the commission have the force and effect of law."

5. There is no statute which gives the Commission authority to require the payment of damages by an electric utility to a complainant.

6. Complainant's failure to either appear at the hearing or otherwise offer any facts or other substantive response to the Motion or to the Commission's Notice of Intent to Treat Motion to Dismiss as Motion for Summary Disposition; Order for and Notice of Hearing constituted a default. The Commission accordingly concludes that this Complaint against Black Hills should be dismissed on the grounds of default pursuant to SDCL 1-26-20.

7. SDCL 1-26-18 provides in relevant part that "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 . . . ."

8. The standard for decision on summary judgment was recently reiterated in *Jacobson v. Leisinger*, 2008 SD 19, 24, 746 NW 2d 739, 745 as follows:

> The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. <u>The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists</u>. (emphasis supplied).

9. No genuine issue of material fact was raised by Complainant which would require this matter to go to evidentiary hearing.

10. Viewing the evidence most favorably to Complainant, the material facts as to which no genuine issue exists demonstrate that Black Hills did not violate the Commission's rules or fail to furnish adequate, efficient, and reasonable service and that Black Hills is entitled to judgment as a matter of law on substantive grounds as well as default.

11. Black Hills Corporation's Motion to Dismiss, considered in whole or in part as a motion for summary disposition, and Motion for Summary Judgment are granted.

It is therefore

ORDERED, that Complainant's Complaint is dismissed on grounds of default; and it is further

ORDERED, that Black Hills Corporation's Motion to Dismiss, considered in whole or in part as a motion for summary disposition, and Motion for Summary Judgment are granted.

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

PLEASE TAKE NOTICE that this Final Decision and Order was duly issued and entered on the 20th day of January, 2009. 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 with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. 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 to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 20th day of January, 2009.

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, electronically.

By: Delaine Kolbo

Date: 1/20/09

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

DUSTIN M. JOHNSON, Chairman

STEVE KOLBECK, Commissioner

GARY HANSON, Commissioner