

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

<b>IN THE MATTER OF THE COMPLAINT</b>	)	<b>FINAL DECISION AND ORDER</b>
<b>FILED BY GARY LOUDNER, BLACK</b>	)	<b>GRANTING SUMMARY</b>
<b>HAWK, SOUTH DAKOTA, AGAINST</b>	)	<b>DISPOSITION AND NOTICE OF</b>
<b>MIDCONTINENT COMMUNICATIONS</b>	)	<b>DECISION</b>
<b>REGARDING TELEPHONE OUTAGES</b>	)	<b>CT08-003</b>

On June 9, 2008, Complainant Gary Loudner filed a Complaint with the South Dakota Public Utilities Commission (Commission) against Midcontinent Communications (Midcontinent) alleging that one or more telephone outages had occurred. On June 20, 2008, Midcontinent filed a Response to the Complaint. On June 27, 2008, Midcontinent filed a Motion to Dismiss (Motion). On October 2, 2008, the Commission received a Request by Commission Staff to Schedule Motions to Dismiss, which motion included Midcontinent'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 Midcontinent's 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 Midcontinent. The Notice provided that the parties could participate in the hearing telephonically.

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. Midcontinent appeared. In response to a question from the Commission, counsel for the Commission's Staff (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. After hearing from Midcontinent and Staff, the Commission voted unanimously to grant summary disposition in favor of Midcontinent on the Complaint.

Having considered the Motion, the pleadings of the parties including documentary attachments thereto and/or references therein, the affidavits filed by the parties 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 Midcontinent, Black Hills Corporation (Black Hills) and Qwest Communications (Qwest) alleging that Complainant and his wife experienced three different telephone service outages. As a result of this Complaint, the Commission opened this docket and complaint Dockets CE08-001 and CT08-004 to address the allegations involving Midcontinent, Black Hills and Qwest, respectively.

2. On June 20, 2008, Midcontinent filed a Response to the Complaint. On June 27, 2008, Midcontinent filed a Motion to Dismiss (Motion).

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 Midcontinent'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 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. Midcontinent appeared. 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.

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

7. The Complaint alleges that Complainant and his wife are Midcontinent customers and that they experienced three telephone service outages. The Complaint further alleges that they are both chronically ill and require uninterrupted telephone service. The Complaint requests that Midcontinent's authority to provide telecommunications services in this state be suspended. In his subsequent filing on July 14, 2008, Complainant requests that he be awarded \$20,000,000 in damages and that Midcontinent's certificate of authority be revoked.

8. The alleged outages include: (i) an outage on May 27, 2008 that lasted from 2:40 P.M. until 10:00 P.M. due to a switch failure on Midcontinent's system; (ii) an outage on May 20, 2008, from 10:04 A.M. until 2:02 P.M. due to a Black Hills power outage that caused the "lack of A/C wattage to Midcontinent's head in and residential telephone module"; and (iii) an "outage" that occurred either in February 2008 or in November 2007 that affected access to the E-911 PSAP.

9. The general standard governing the provision of telecommunications services in South Dakota is set forth in SDCL 49-31-10 as follows: "Any telecommunications provider in this state shall use great care and diligence in the transmission and delivery of telecommunications services. . . ." A telephone service outage does not *per se* constitute a violation of this duty of care. Absent evidence of a violation of an applicable statute or rule, neglect or an intentionally wrongful or unreasonable act or pattern of conduct, an occasional telephone service outage does not constitute a violation of a telecommunications company's duty to provide service.

10. In ARSD 20:10:33:02, the Commission sets forth the general standard for the level of service to be provided by local exchange carriers in this state: "A local exchange company shall furnish and maintain adequate and reliable plant, equipment, and facilities to provide satisfactory transmission and reception of telecommunications services among users in its service area."

11. In its response to the Complaint, Midcontinent provides detailed explanations of each of the three alleged outage incidents. With respect to the May 27, 2008 incident, Midcontinent acknowledges that it did incur a failure in its master switch on that date. Midcontinent promptly reported the failure to the Commission, emergency authorities and the media. Midcontinent further stated that its technical team responded immediately as calls from customers experiencing intermittent inability to place long distance calls began to come in. Midcontinent escalated the analysis and response to its switch vendor's technical experts and design engineers as soon as its technical team had isolated the problem to the switch. The switch vendor was able to diagnose and correct the problem and will perform periodic audits of the system to ensure similar outages do not occur again. Midcontinent stated that this failure is the first associated with its switch in nearly 11 years.

12. ARSD provides as follows with respect to interruptions of access line service:

Each local exchange company shall make all reasonable efforts to prevent interruptions of access line service. When interruptions occur, the exchange carrier shall reestablish access line service with the shortest possible delay consistent with the physical conditions encountered, the available work force, and normal safety practices. Priority shall be given to a residential customer who verifies in writing to the company that telecommunications service is essential due to an existing medical condition of the customer, a member of the customer's family, or any permanent resident of the premises where service is rendered.

13. 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 Midcontinent was neglectful in its operations and maintenance practices, that it intentionally caused the May 27, 2008 outage or that it did not respond and correct the problem with the shortest possible delay. Midcontinent's response indicated that it had not had a switch failure in almost 11 years of using its switch. There is no evidence to indicate that Midcontinent had any advance knowledge of the existence of the problem that caused the outage. Midcontinent's evidence indicates that it responded promptly and resolved a difficult problem with reasonable actions and diligence and has taken additional steps to minimize the likelihood of a similar occurrence in the future. No other party offered any evidence to rebut Midcontinent's version of the facts.

14. Viewing the evidence most favorably to Complainant, the Commission finds that the problems with Midcontinent's switch on May 27, 2008, although unfortunate, do not indicate a violation of any statute or rule or a violation of Midcontinent's service obligations. The Commission further finds that Midcontinent was not dilatory or negligent in responding to the issues with its switch and that its actions to have its switch vendor periodically audit its systems to prevent future occurrences are reasonable.

15. With respect to the alleged May 20, 2008 outage, in its response to the Complaint 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. (emphasis supplied).

16. ARSD 20:10:33:19 sets forth the standard for back up power supply for facilities outside the central office: "The remote terminating electronics of a local exchange company shall be equipped with a local or remote battery plant designed for a minimum of 8 hours, plus or minus 15 percent, of battery reserve rated for peak traffic load requirements."

17. Neither Complainant nor any other party to the related Complaints offered any evidence to rebut Midcontinent's statement that its back up power supply for Complainant's phone service was working on May 20, 2008, and that basic phone service was not interrupted. Viewing the evidence most favorably to Complainant, 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.

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

19. With respect to the alleged February 2008 or November 2007 outage, Midcontinent's response states:

Again, while searching all records, the Midcontinent Network Operations Center found no 911 issues recorded in the month of February 2008.

An event occurred on November 13, 2007 that caused concern over E911 availability. One of two circuits carrying traffic from Sioux Falls to Rapid City failed, causing an overload on the other circuit. It was first believed that loss of one of the circuits would impact local phone traffic and 911 service for an unacceptably long period of time. However, Midcontinent technicians executed a backup plan and rerouted traffic for local calls to the PSAP, restoring service in all cases within 30 minutes of the initial outage report. The earliest internal reports suggested the problem was with a Qwest circuit. Through the cooperation of a number of vendors it was determined that the initial circuit overload was triggered by a Golden West circuit that impacted one of the two main circuits leased from SDN. Qwest had no part in this issue other than offering their cooperation to help Midcontinent's team eliminate Qwest circuits as part of the problem. Golden West, SDN and Qwest supported a large Midcontinent team to resolve the issue with limited impact on customers. A full report of this issue was filed with the Commission on November 14, 2007.

20. No party produced any offer of evidence to refute Midcontinent's version of events in February 2008 and November 2007. The Commission finds that Midcontinent did not have a failure of 911 service in February, 2008. The Commission further finds that although a problem did occur with respect to contracted transport circuits from Sioux Falls to Rapid City on November 13, 2007 on the SDN system that briefly affected Midcontinent's 911 access, Midcontinent took prompt and effective action to execute its backup plan and reroute local traffic to the PSAP so that local access to the PSAP was restored in less than thirty minutes. Viewing the evidence most favorably to Complainant, the Commission finds with respect to this incident that Midcontinent did not violate a statute, rule or standard of care and that Midcontinent responded to this problem aggressively and with diligence.

21. Complainant seeks damages against Midcontinent in the amount of \$20 Million. Complainant offered no evidence that he sustained any damages as a result of any of the alleged outages. Furthermore, the Commission has found in this decision that Midcontinent did not commit any violations of any statutes, rules or standards with respect to the three alleged outages. The Commission finds that Complainant is not entitled to any award of damages against Midcontinent.

22. Complainant additionally requests a permanent suspension or revocation of Midcontinent's certificate of authority. Based upon the findings set forth above, the Commission finds that sanctions against Midcontinent, including suspension or revocation of its certificate of authority, have not been demonstrated to be warranted.

23. The Commission finds for Midcontinent and against Complainant on the Motion to dismiss considered in whole or in part as a motion for summary judgment.

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

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-31 and 49-3.

2. The general standard governing the provision of telecommunications services in South Dakota is set forth in SDCL 49-31-10 as follows: "Any telecommunications provider in this state shall use great care and diligence in the transmission and delivery of telecommunications services. . . ."

3. ARSD 20:10:33:02 sets forth the general standard for the level of service to be provided by local exchange carriers in this state: "A local exchange company shall furnish and maintain adequate and reliable plant, equipment, and facilities to provide satisfactory transmission and reception of telecommunications services among users in its service area."

4. Based upon the Commission's Findings of Fact set forth in this decision, the Commission concludes that Midcontinent did not commit a violation of either of these standards in connection with the outage incidents alleged by Complainant.

5. 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 Midcontinent should be dismissed on the grounds of default pursuant to SDCL 1-26-20.

6. 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 . . . ."

7. 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. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. (emphasis supplied).

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

9. Viewing the evidence most favorably to Complainant, the material facts as to which no genuine issue exists demonstrate that Midcontinent did not fail to furnish adequate, efficient, and reasonable service and that Midcontinent is entitled to judgment as a matter of law on substantive grounds as well as default.

10. Midcontinent's Motion to Dismiss, considered in whole or in part as a motion for summary disposition, is granted.

It is therefore

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

ORDERED, that Midcontinent's Motion to Dismiss, considered in whole or in part as a motion for summary disposition, is 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 20<sup>th</sup> 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 20<sup>th</sup> day of January, 2009.

<b>CERTIFICATE OF SERVICE</b>	
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:	<u>Deanne Kolbo</u>
Date:	<u>1/20/09</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Dustin M. Johnson  
DUSTIN M. JOHNSON, Chairman

Steve Kolbeck  
STEVE KOLBECK, Commissioner

Gary Hanson  
GARY HANSON, Commissioner