BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PROCEEDS FROM BONDS AND OTHER SECURITY FOR THE BENEFIT OF CUSTOMERS OF S&S COMMUNICATIONS	)))))	**FINDINGS OF FACT AND CONCLUSIONS OF LAW; NOTICE OF ENTRY OF ORDER TC05-047**

On March 2, 2005, the Public Utilities Commission (Commission) received a Petition from Commission Staff to open a docket for the administration and distribution of proceeds from bonds and other security (Proceeds) received by the Commission for the benefit of customers of S&S Communications (S&S). On or about June 3, 2003, S&S ceased providing wireline telecommunications service for which several hundred South Dakota customers had prepaid. On August 28, 2003, the Commission issued its final decision in Docket TC02-166 revoking S&S's certificate of authority.

In the Petition, Staff requested that the Commission issue one or more preliminary orders to establish and administer the claims procedure relative to the Proceeds. Specifically, Staff requested that the Commission issue preliminary orders to:

a. Establish a procedure for providing notice to claimants and potential claimants of the opening of this docket and their rights and responsibilities in regard to filing claims against Proceeds.

b. Establish a cut-off date by which all potential claimants to the Proceeds shall have filed their claims or be foreclosed from so filing.

c. Determine that formal docketed complaints filed with the Commission by customers against S&S also constitute claims against the Proceeds.

d. Ordering such other preliminary relief that Staff shall request in the proceeding by appropriate motion.

With respect to a final decision and order, Staff requested that the Commission issue a final order on the following issues:

a. Determining the dollar amount of each claimant's potential entitlement to Proceeds and the fractional share of Proceeds to which each claimant is entitled.

b. Applying the claimants' fractional shares to the amount of Proceeds then in the custody of the Commission.

c. Providing that any Proceeds received by a claimant shall constitute a satisfaction, to the extent of such amount, of any damages order or judgment issued by the Commission or a Court against S&S arising out of the subject matter for which the Proceeds were received.

d. Authorizing and directing the Executive Director to take necessary action to distribute Proceeds then in the custody of the Commission.

e. Directing Staff to file motions to authorize additional distribution of Proceeds as they are received.

Finally Staff requested that the Commission order such other and further relief as the Commission deems just and proper.

At its March 8, 2005 meeting, the Commission voted to: 1) provide notice to all potential claimants by instructing Staff to mail a notice of this proceeding and the opportunity to file a claim to all of the estimated 633 S&S customers in South Dakota, and all other potential South Dakota claimants who can be located who had prepaid for services that S&S had not yet provided under prepaid service contracts; 2) establish a cut-off date of 45 days after the mailing of the notice by which all potential claimants to the Proceeds must file their claims or be foreclosed from filing a claim; and 3) find that the formal docketed complaints filed with the Commission by customers against S&S also constitute claims against the Proceeds. The Commission further directed Staff to follow-up on all notices that were unable to be delivered and to issue press releases regarding this docket.

Notices and claim forms were sent to potential claimants. Claims were filed by claimants. On March 20, 2007, a Motion for Order Determining Claims and Claim Amounts, Establishing Claim Fractions and Directing Distribution of Proceeds was filed by Staff. The Motion contained Staff's recommendations for disposition of all claims. The Motion and an Order for and Notice of Hearing was sent to the claimants. Claimants were also sent a Notice of Dispute and Request for Hearing form. On April 27, 2007, a Supplemental Order for and Notice of Hearing was sent to the claimants. The Supplemental Order included the additional issue of what action the Commission should take, if any, regarding the 35 shares of stock of Aberdeen Finance Corporation (AFC) and AFC's obligation to pay the Commission a total of $2500 in four equal annual installments beginning in September of 2007. The hearing was held as scheduled on May 8, 2007. No claimants appeared at the hearing. Commission Staff presented its evidence regarding the claims. At the conclusion of the hearing, the Commission unanimously voted to accept Staff's recommendations regarding the disposition of the claims. The Commission further voted to accept AFC's offer to pay $100 per share on the condition that AFC would pay the $2500 in a lump sum and each claimant entitled to a disbursement of the Proceeds would be given the opportunity to purchase shares on a first come, first served basis.

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On March 2, 2005, the Commission received a Petition from Commission Staff to open a docket for the administration and distribution of proceeds from bonds and other security (Proceeds) received by the Commission for the benefit of customers of S&S Communications (S&S).

2. By order dated December 21, 2000, the Commission issued a Certificate of Authority authorizing S&S to provide interexchange service in South Dakota. Staff Exh. 385. As a condition of granting the Certificate of Authority, the Commission required a minimum surety bond of $50,000 and required S&S to report to the Commission the current level of prepaid customers and to update its bond "every six months to provide 100% coverage of the prepaid amounts not covered under the collateral agreement." *Id.* The collateral agreement was an agreement between S&S and AFC providing that in the event of a default by S&S of its contractual obligations to provide long distance service to S&S's prepaid customers, AFC would look to certain collateral of S&S for payment instead of S&S customers who entered into finance agreements with AFC for the purchase of prepaid service. Staff Exh. 387, Finding of Fact 21; Tr. at 56-57.

3. Throughout the time period when S&S was in operation, various bonds were issued in an attempt to comply with the bonding requirement contained in the certificate of authority. *See* Staff Exhs. 390-392. In addition, AFC issued an Irrevocable Standby Letter of Credit in the amount of $125,000 in favor of the Commission. Staff Exh. 393. Collection on the Letter of Credit was subject to the following condition:

> 1) Beneficiary's affidavit executed by authorized member of the South Dakota Public Utilities Commission certifying that claims(s) have been presented by South Dakota Consumers against S&S Communications for not providing long distance services.

4. On or about June 3, 2003, S&S ceased providing wireline telecommunications service for which several hundred South Dakota customers had prepaid. On August 28, 2003, pursuant to an Order to Show Cause and Notice of Hearing issued against S&S by the Commission, the Commission issued a decision revoking S&S's certificate of authority. Staff Exh. 387, Docket TC02-166.

5. In order to distribute any proceeds collected on the bonds or other sureties, the Commission sent bond claim forms to potential claimants in the fall of 2005. Tr. at 46; Exhibit 399. Names of potential claimants were obtained from S&S and financial institutions that had financed S&S contracts. Tr. at 47. In addition to the direct mailings, notice was posted in numerous statewide newspapers. *Id.*

6. The Commission was eventually able to collect a total of $180,000 in bond proceeds. *See* Staff Exhs. 390-392; Tr. at 17-19. The Commission was unable to collect on the Letter of Credit due to the filing of Chapter 11 bankruptcy by AFC. Tr. at 21. An Order Confirming Plan was issued by the Bankruptcy Court on September 11, 2006. Staff Exh. 389. Under AFC's approved Plan of Reorganization, the Commission received 35 shares of stock and a future payment of $2500 to be paid in four equal annual installments beginning in September of 2007. Staff Exh. 389; Tr. at 21-22.

7. Commission Staff made a tentative offer to sell the AFC stock back to AFC, asking for $1,000 per share, for a total of $35,000. Tr. at 22; Staff Exh. 393, p. 6. AFC offered to pay $100 per share, for a total of $3500, subject to the approval of its bank. Staff Exh. 393, p. 7. AFC also stated there was the possibility that one of the shareholders would pay the $2500 cash payment owed under the bankruptcy plan. *Id.*

8. On March 20, 2007, Staff mailed its Motion for Order Determining Claims and Claim Amounts, Establishing Claim Fractions and Directing Distribution of Proceeds (Motion) to the claimants. Staff Exh. 394; Tr. at 25. Attached to the Motion were three exhibits. Exhibit A listed the claims that Staff was recommending that the Commission deny. Staff Exh. 394; Tr. at 25-26. Exhibit B consolidated claims made by claimants who had filed two or more claims for the same S&S contract. Staff Exh. 394; Tr. at 26. Exhibit C listed the claims that Staff was recommending the Commission approve. *Id.* Also attached was an individual sheet sent to each claimant that contained the personal information for each contract and Staff's recommendation regarding claims made by that claimant. *Id.* Each claimant was also provided a Notice of Dispute and Request for Hearing form. Staff Exh. 394; Tr. at 27. If a claimant wanted to dispute Staff's recommendation, the claimant could complete the Notice and send it to the Commission. *Id.* The claimants were also sent an explanatory letter and a notice of the hearing scheduled for May 8, 2007. *Id.*

9. On April 27, 2007, a Supplemental Order for and Notice of Hearing was sent to all of the claimants. Staff Exh. 403; Tr. at 47-48. The notice and accompanying letter explained the offer made by AFC regarding the 35 shares of stock and listed the possible actions that could be taken by the Commission with respect to the stock. *Id.* Claimants were informed that they could contact Staff with their recommendations or attend the hearing in person or by telephone. *Id.* Staff subsequently heard from two claimants, both of whom recommended accepting the offer from AFC. Tr. at 48.

10. Staff made corrections to some of its recommendations regarding the claims after being contacted by some of the claimants. Tr. at 30-31. A summary of all of the substantive changes that were made were listed in Staff Exhibit 397.

11. At the hearing, Keith Senger, Staff utility analyst, presented Staff's revised recommendations in Exhibits 395 and 396. Exhibits 395 and 396 are the same except that Exhibit 396 is the confidential version that includes each claimant's identity.

12. Senger recommended denial of certain claims. Tr. at 28-29. One category of denied claims consisted of claims that Staff did not believe were covered under the bonds or other sureties. Tr. at 28. These included claims involving money that was invested in S&S, claims regarding wireless services provided by S&S, and claims involving claimants who did not receive service in South Dakota. *Id.* Senger also recommended denial of claims where the amount paid was fully realized, such as if the claimant had financed the payment to S&S and the loan was forgiven and the principal amount of the loan forgiven exceeded the amount of service left on the contract. Tr. at 28-29. In addition, he recommended denial of claims where the contract term had expired prior to the time S&S discontinued service. Tr. at 29. He further recommended denial of claims where claimants were able to recover insurance for their losses. Tr. at 35.

13. Senger explained that consolidated claims occurred because some claimants submitted multiple claims for the same contract and because some claimants had submitted individual complaints against S&S and subsequently submitted a claim in this docket. Tr. at 34.

14. For the allowed claims, Senger calculated the percent of the contract that was remaining when S&S ceased providing service and took that percent times the total contract amount to come up with the remaining value of the contract. He then subtracted any amount that had been received or not paid by a claimant to come up with a recommended claim amount. Staff Exhs. 395, 396; Tr. at 39-40. Senger used a straight line allocation method to derive a claim fraction. Staff Exhs. 395, 396; Tr. at 40. The claim fraction multiplied by the amount of available proceeds would be the amount a claimant would receive. Tr. at 41. He used $180,000 as the amount of proceeds to calculate an estimated amount the claimant would receive. *Id.* He explained that the $180,000 would not be the exact amount of proceeds since the proceeds are currently earning interest. *Id.* He also estimated the number or fractional number of shares a claimant would receive if the 35 shares were distributed. Staff Exhs. 395, 396; Tr. at 41.

15. In addition, Senger proposed a weighted allocation method that could be used instead of the straight line allocation method. Staff Exhs. 395, 396; Tr. at 41-43. Under a weighted allocation, claimants who had more time left on their contract would receive a larger credit for their contract amount. *Id.* The rationale for using a weighted allocation method was that claimants who had received low cost service from S&S for a longer period of time had benefited more than those who entered into contracts at later times and therefore did not receive as much lower cost service. *Id.*

16. Senger recommended the use of the straight line allocation method rather than the weighted allocation method because it was the clearest method and treats all claimants the same. Tr. at 49.

17. Two written disputes were filed by claimants. Tr. at 44. Senger provided a summary of the written disputes. Staff Exh. 398. One of the disputes concerned Staff's recommended denial of claims regarding wireless services. Tr. at 45. He talked to the claimant who indicated that he would not call in or attend the hearing. *Id.* The second dispute was withdrawn by the claimant. Tr. at 45-46.

18. At the direction of the Commission, Staff obtained two analyses from financial consultants regarding the sale of AFC's stock. Tr. at 51-54; Staff Exhs. 401, 402. The consultants

arrived at opposite conclusions regarding whether the Commission should accept the AFC offer to buy the stock for $100 per share. *Id.*

19. With respect to the stock issue, Senger did not recommend distributing the shares of stock to the claimants. Tr. at 79. He noted that the claimant with the largest claim share would receive 3.5 shares with all of the other claimants receiving less than a share. *Id.* Senger recommended making a counteroffer to AFC in which the Commission would accept the offer of $100 per share, the $2500 would be paid upfront, and each claimant would have the option to purchase his or her portion of the shares back for $100 per share on a prorated basis. Tr. at 79-80.

20. Gail Sheppick, Director of Securities for the state of South Dakota, testified that the Commission could not auction the stock. Tr. at 102. He further stated that the Commission's greatest negotiating leverage for reselling the shares back to AFC is that if AFC did not purchase the 35 shares, AFC could then be faced with having over 300 additional shareholders. Tr. at 102-03. He stated that this is the "biggest leverage that you could have on a privately-held company." Tr. at 103. Sheppick found it significant that not one of the current shareholders were interested in buying the shares. *Id.* He believed that the Commission had done its due diligence and that there is no market for the shares. Tr. at 104.

21. The Commission finds that Staff's recommendation regarding distribution of the Proceeds is reasonable and fair. The Commission finds that Staff correctly excluded claims such as claims involving wireless services, services not provided in South Dakota, and investor claims. The Commission finds that Staff properly consolidated some of the claims to eliminate any double recovery for the same contract. The Commission finds that it will accept the straight line allocation method as proposed by Staff. The Commission finds this method is the fairest way to disburse the Proceeds and results in all claimants being treated the same way.

22. Regarding the 35 shares of AFC stock and the additional $2500 payment, the Commission finds that it will accept the AFC offer, subject to certain conditions. One of the conditions is verification that the $2500 will be paid in a lump sum, instead of in four annual installments. The other condition is that a stock option be made available to each claimant giving each claimant the option to purchase as many shares as the claimant is entitled to, rounded up to the nearest whole share, on a first come first served basis. Tr. at 118. The Commission imposes a 30 day time limit on its counteroffer. Tr. at 124. The Commission finds that allowing each claimant the opportunity to purchase stock would allow the claimant to decide whether he or she wanted to own any AFC stock rather than the Commission making that decision for the claimant.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL chapters 49-13 and 49-31, specifically 49-13-1, 49-13-1.1, 49-13-3, 49-13-4, 49-13-5, 49-13-13, 49-13-14, 49-31-3, 49-31-7, 49-31-7.1, and 49-31-117.

2. The Commission concludes that Staff's recommendations regarding disbursement of the Proceeds are fair and reasonable. The Commission finds, based on its statutory authority and the terms of S&S's certificate of authority and the terms of the bonds, that claimants who received wireless services are not entitled to collect any of the proceeds. The Commission points out that S&S's Certificate of Authority was only for interexchange wireline services. The Commission further finds that investors in S&S are not entitled to receive any of the proceeds because the bond and other securities were intended to protect the S&S customers who prepaid for telephone services. The Commission further finds that claimants who did not receive their service in South Dakota are not entitled to receive any of the proceeds because the Certificate of Authority and the bonds were clearly directed toward South Dakota customers. The Commission finds that the other denials as

recommend by Staff are justified in order to prevent a claimant from receiving more than his or her fair share of the proceeds.

3. Regarding the 35 shares of AFC stock and the additional $2500 payment, the Commission finds that it will accept the AFC offer, subject to certain conditions. One of the conditions is verification that the $2500 will be paid in a lump sum, instead of in four annual installments. The other condition is that a stock option be made available to each claimant giving each claimant the option to purchase as many shares as the claimant is entitled to, rounded up to the nearest whole share, on a first come first served basis. Tr. at 118. The Commission imposes a 30 day time limit on its counteroffer. Tr. at 124.

4. The Commission directs the Staff to work with AFC regarding the disposition of the shares of stock, the $2500 payment, and the option for claimants to purchase AFC stock. If an agreement is reached, the Commission authorizes the Executive Director to disburse all Proceeds in the possession of the Commission to each Claimant in accordance with this Order.

It is therefore

ORDERED, that all of the Proceeds shall be disbursed to the claimants in accordance with this Order; and it is

FURTHER ORDERED, that Staff shall work with AFC to come to an agreement consistent with this Order regarding the shares of stock, the $2500 payment, and claimants' option to purchase stock.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 24th day of May, 2007. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 24th day of May, 2007.

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: 5/25/07

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Dustin M. Johnson

DUSTIN M. JOHNSON, Chairman

Gary Hanson

GARY HANSON, Commissioner

Steve Kolbeck

STEVE KOLBECK, Commissioner