

**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)**

**MOTION FOR ORDER
DETERMINING CLAIMS AND
CLAIM AMOUNTS, ESTABLISHING
CLAIM FRACTIONS AND
DIRECTING DISTRIBUTION OF
PROCEEDS**

TC05-047

The staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") hereby moves that the Commission bring this matter on for hearing to render a decision resolving the claims that are the subject of this proceeding. A Staff's Recommended Disposition of Claim for each Claim was filed together with this Motion and was served on the Claimant for such Claim. All of the Staff's Recommended Disposition of Claims attached hereto as Exhibit D are intended to be treated as included in this Motion and are hereby incorporated by reference herein.

A. RELIEF REQUESTED

Specifically, the Staff requests that the Commission issue an order, pursuant to SDCL 49-31-117 ("Order"), that:

1. In conformity with its Order Regarding Notice to Potential Claimants issued March 17, 2005 in this Docket, treats complaints filed with the Commission against S&S Communications ("S&S") and consolidated in Docket CT05-005 as claims against proceeds received by the Commission, and the earnings thereon, from bonds and other security issued for the benefit of S&S's customers ("Proceeds"), subject to the condition that such treatment will not constitute an adjudication of the complaints themselves in Docket CT05-005;
2. Either allows, denies or consolidates with a duplicate Claim, each claim filed by a customer of S&S against Proceeds ("Claim" and "Claimant");
3. Establishes the total dollar amount that each allowed Claim would entitle the Claimant to recover from Proceeds, assuming sufficient Proceeds were received to satisfy all Claims in full ("Approved Claim Amount");
4. Bases the Approved Claim Amounts for all Claims on the same substantive and computational factors, consisting of (i) the total original amount of the Claimant's prepaid contract amount (ii) multiplied by the quotient of the number of days remaining unfulfilled on Claimant's contract divided by the total number of days on Claimant's contract (iii) less

the amount that Claimant financed through a loan, credit agreement, lease agreement or the like that Claimant has not repaid, and will not be required to repay, and less any insurance proceeds received by Claimant on the loss;

5. Excludes from the Approved Claim Amount any claimed loss or damage arising from delay in service initiation, other ordinary service deficiencies, loss of business, procurement of alternative services or other contractual, consequential or incidental loss, damage or expense;

6. Approves a Claim Fraction Method that will be applied to Approved Claim Amounts to establish the fractional share, expressed as a decimal, that each approved Claim is entitled to receive of Proceeds ("Claim Fraction") (Staff has provided two potential claim fraction calculation methods for consideration by the Commission in Section C of this Motion);

7. Employing the selected Claim Fraction Method approves the Claim Fraction for each Claim.

8. Directs the Deputy Executive Director to disburse the cash Proceeds currently in the possession of the Commission to each Claimant having an approved Claim in an amount equal to the then current cash Proceeds multiplied by the Claim Fraction;

9. Leaves this Docket open for the purpose of attempting to effect a conversion into cash of the 35 shares of stock in Aberdeen Finance Corporation ("AFC") that the Commission received as Proceeds from AFC in satisfaction of the Commission's claim against AFC's estate in the AFC Bankruptcy Proceeding (*In re Aberdeen Finance Corporation*, Case No. 04-10175, U.S. Bkrt. Ct., Dist. of S.D.) and making a subsequent distribution of any cash Proceeds received as a result of such conversion in accordance with the Claim Fractions established in the order requested in this Motion or, if necessary, the AFC stock itself.

B. BASIS FOR MOTION AND ORDER

In support of this Motion and the relief requested by Staff herein, the Staff states as follows:

1. On December 21, 2000 in Docket No. TC00-114, the Commission issued an order granting a certificate of authority to S&S Communications Inc (COA Order). The COA Order required S&S to maintain continuous bond coverage for all pre-paid amounts not covered by a non-recourse "collateral" agreement provided by Aberdeen Finance Corporation (AFC) covering loans AFC made to customers to pay for their pre-paid service. S&S ceased providing wireline telecommunications service on or about June 3, 2003, leaving more than 630 S&S customers in South Dakota with approximately \$2.3 Million in pre-payments on account. On August 28, 2003, the Commission issued its Order revoking S&S's certificate of authority and levying a \$13,400 fine on S&S.

2. Pursuant to the COA Order, the Commission received the following bonds and other security for the benefit of the customers of S&S and has to-date received the Proceeds set forth in the last column:

<u>Issued</u>	<u>Company</u>	<u>Amount</u>	<u>Term</u>	<u>Proceeds</u>
9/8/00	Allied Insurance	\$50,000	9/6/00 - 6/25/01	Released
6/21/01	Allied Insurance	\$75,000	6/20/01 -10/30/01	\$30,000
11/13/01	Star Insurance	\$75,000	10/30/01 - present	\$75,000
10/30/02	Underwriters	\$75,000	10/30/02 - present	\$75,000
9/12/02	Aberdeen Finance	\$125,000	9/12/02 - 9/12/04	35 Shares

3. On December 12, 2006, the Commission approved a settlement with Allied Insurance under which the Commission received \$30,000 in satisfaction and release of both Allied bonds. In connection with AFC's plan of reorganization in bankruptcy and AFC's emergence from bankruptcy, the Commission received 35 shares of AFC's common stock in satisfaction of its claim against AFC's estate in bankruptcy. Staff has engaged in discussions with AFC's management in an effort to obtain a cash-out of these shares, but this effort is on hold until after June 1, 2007 at the request of AFC to enable it to stabilize its business and attempt to obtain bank financing.

4. On March 17, 2005 the Commission issued its Order Regarding Notice to Potential Claimants in this Docket directing the Staff to attempt to provide notice to all customers of S&S whom the Staff could identify who had not yet filed a claim with the Commission against S&S. Following a process of attempting to identify and locate all customers of S&S, Staff sent out a first mailing of notice to all customers who could be identified on or about August 23, 2005 and sent out a press release to all major news organizations in the state. Due to a significant number of undeliverable returns, Staff performed second and third notice mailings, and Staff believes that all reasonable measures have been taken to notify S&S customers of this proceeding.

5. Including the Claims received in response to the notices sent out by Staff in 2003 and 2005 and the formal complaints consolidated in Docket CT05-005, the Commission has received a total of 384 Claims against Proceeds.

6. SDCL 49-31-117, passed by the Legislature in 2005 and effective July 1, 2005, authorizes and requires the Commission to disburse the proceeds it receives from bonds, letters of credit and other proceeds, and all interest and other revenue earned on such proceeds, in accordance with SDCL Chapter 1-26.

C. STAFF'S RECOMMENDATIONS

1. Staff has performed an analysis of each Claim, employing the same analytical and decisional factors and assumptions for all Claims. These factors were:

a. Claims should be approved only with respect to services S&S was authorized to provide by the COA Order. The COA Order authorized S&S to provide interexchange

wireline telephone service. The bonds and AFC letter of credit, the Proceeds of which are the subject of this proceeding, were procured by S&S and issued to comply with the COA Order and were never intended to cover services not covered by the COA Order such as service based out-of-state, wireless service or loans to or other investments people made in S&S.

b. Claims should be approved only for loss of prepaid telephone service. The COA Order contained the following condition:

S&S reporting to the Commission the current level of prepaid customers and updating its bond every six months to provide 100% coverage of the prepaid amounts not covered under the collateral agreement.

In Staff's opinion, this condition indicates that the bond coverage to be maintained by S&S was intended to cover prepaid amounts and was never intended to cover other potential losses such as front-end service initiation delays, service quality and other routine contract issues, losses of loans to or other investments made in S&S, economic losses due to loss of phone service, the cover cost of procuring alternative phone service and other incidental and consequential expenses and damages. This conclusion is bolstered by the use of the words in the conditions of the bonds themselves, "unable or unwilling to return [prepayments] to said customer as a result of insolvency or [sic] other [sic] business failure. . . ."

c. Except in two cases, Staff recommends that the appropriate beginning point for determining the total period for which prepayments were made should be the contract commencement date and not the date phone service was initiated. As far as we can determine, the period to be covered by the S&S prepayment was defined by the contract term in all cases (except for the two exceptions described below in d.). Furthermore, to be consistent with our recommendation concerning the non-coverage of ordinary contract issues not arising from S&S's cessation of service, Staff feels it is necessary to treat front-end service initiation delays on the same footing.

Lastly, besides these interpretation issues, using another date such as the actual service initiation date presents significant practical complications. First, a number of the contracts contained a provision stating "subject to 30 day grace period." Second, Claimants offered various estimates of the duration between contract date and service initiation date and all but a handful of these were within the range of a few days to a month. Third, even as to contracts with the 30 day grace period language, many Claimants had service much more promptly than that and some later. Because (i) Staff has no way of verifying when service was actually commenced for the Claims, (ii) the variation in service initiation lag time among Claims amounts to only a small percentage of contract duration and (iii) this variation produces a minimal effect on any Claim Amount or Claim Fraction, Staff elected to treat all Claims consistently and to use the contract date as the beginning date for the prepayment coverage period (except in the cases noted below in d.). Our objective has been equity among all Claims.

d. The two exceptions to Staff's recommendation regarding the commencement date of the prepayment coverage period are 1st Financial Bank, USA, Dakota Dunes facility,

Exhibit C, Claim No. 1 (“Dakota Dunes”) and First National Bank of Yankton, Claim No. 59. In the Dakota Dunes case, Claimant received no service at all in minutes of use on its contract. In First National’s case, service was fully initiated four and a half months after contract execution and terminated soon after service initiation. There are several reasons Staff recommends treating these Claims slightly differently. First, these contracts were different from all of the other ordinary phone service contracts. Unlike the other contracts, which had a contract term defined with reference to specific dates, the Dakota Dunes and First National contracts specified that the contract term “starts at the time of T1 turn-up.” One problem with this in Dakota Dunes’s case in terms of our recommended treatment of term start date is that the evidence in TC02-166 indicates that “T1 turn-up” may never have occurred at all. This would mean the contract term never commenced (TR 207-210).

Second, the contracts in these Claims were for specialized, high volume T1 circuits that had to be specially provisioned for use by these facilities, and the contracts expressly contemplated an installation and provisioning period of up to 90 days in the case of Dakota Dunes and 45 days in the case of First National.

Third, in the case of Dakota Dunes, the contract itself and the evidence adduced in Docket TC02-166 (TR 207-210) demonstrate that the delay in obtaining the provisioning of the T1 circuits, at least for some portion of the period from October 1, 2002 until June 1, 2003, appears to be attributable not to S&S’s business failure but rather to a contract specifications and provisioning issue. 1st Financial’s witness in Docket TC02-166 testified that S&S did pull in T1 circuits within the agreed period, but that they were the wrong circuits. The witness stated that 1st Financial had specifically ordered AT&T circuits and that S&S was pulling in circuits from another carrier. The Dakota Dunes contract, however, contains no such specification. 1st Financial agreed to test the installed circuits against their standards. These tests demonstrated the installed circuits did not meet the call center specifications, and so 1st Financial agreed to a 90 to 120 day period for S&S to install AT&T T1 circuits. This installation was never completed. In First National’s case, a number of number switch-over and other glitches occurred, and full service was not finally completed until April 14, 2003, three months after the 45 day contract “grace period” expired.

Several possible treatments of the Dakota Dunes Claim could be justified. These range from (i) a complete denial of the Claim on the grounds that the T1 service was not a covered service under S&S’s COA and hence the Proceeds or that the non-commencement of the contract term means there is no service period to cover, to (ii) including coverage for the entirety of the 18 month contemplated contract term on the grounds that no service was ever received. Staff believes the former approach is inequitable to Dakota Dunes for obvious reasons and the latter approach is inequitable to other Claimants because we are recommending that losses attributable to contract issues not arising from S&S’s business failure not be covered.

Staff accordingly recommends that the Dakota Dunes contract term be deemed to have commenced on December 29, 2002, the date 90 days following contract execution and that “service” be imputed on Exhibit C from that date until June 3, 2003. The Dakota Dunes contract provided that service was to commence within 90 days. Although Dakota Dunes did

not actually receive minutes of use between December 29 and June 3, Staff believes this delay was caused in part by the contract specification confusion and the parties' efforts to resolve this situation, not to S&S's business failure. Staff believes this approach is justified by the facts and is equitable to both other Claimants and to Dakota Dunes. Staff similarly recommends that First National's contract be deemed to have commenced on January 13, 2003, the date 45 days after contract execution. Although the statements in First Financials submittal to the Commission do not contain the specifications issue, it appeared that a number of PIC and other switch over glitches occurred. Again, to remain consistent with the other claims, these kinds of contract performance problems should be excluded as they have been for the other Claims.

e. The date of service termination was assumed to be June 3, 2003 for all Claims. There is a possibility that a few Claimants may have had service terminated a day or two either side of June 3, but the difference on outcome is insignificant.

f. Where no contract was provided by Claimant, the information provided on the Proof of Claim form with respect to contract date, contract amount, contract term, etc. should be taken at face value except where other documentation in the possession of the Commission indicates such information is erroneous. Staff has reviewed all Claims against data obtained from S&S, AFC, Midland Leasing and Carroll Credit, Inc. and has attempted to verify all Claims on Exhibits A, B and C.

g. The amount of prepayment a Claimant financed and has neither paid nor will be required to pay should be deducted from the gross unrealized contract amount ("Contract Remaining Value") rather than from the original contract amount. This treatment results in the equal treatment, on an out-of-pocket basis, of Claimants who paid cash for their whole contract amount and those who paid cash for only a portion of their contract amount.

This analysis resulted in Staff arriving at a Staff's Recommended Disposition of Claim for each Claim. These Staff's Recommended Disposition of Claims are incorporated by reference and included in this Motion. The Staff's Recommended Disposition of Claim for each Claim is being served on the Claimant along with this Motion.

2. Staff strongly recommends that the Commission adopt and employ a philosophy of consistency with respect to the treatment of substantive issues raised by the Claims. Staff has attempted to do so in its Recommended Disposition of Claim decisions and believes that it has done so.

3. Although Staff has attempted to obtain the best information possible in order to analyze and verify Claims and arrive at a correct Recommended Disposition, the large number of Claims and difficulty in obtaining detailed documentation from all Claimants has made it impractical to verify everything with perfect documentation. Staff of necessity relied to an extent on the integrity of the information provided by Claimants. In its cover letter to Claimants with the service of this Motion, the Recommended Disposition of Claims and Notice of Hearing, Staff encourages Claimants to contact Staff with any errors or omissions they find in Staff's analysis and treatment of Claims. To the extent Claimants find errors or omissions in individual Recommended Disposition of

Claims and Staff verifies such errors or omissions, Staff will modify and file such amended Recommended Dispositions of Claims and correspondingly amended Exhibits A, B and C prior to hearing.

4. Staff recommends denial of the Claims set forth on Exhibit A. The reasons for denial are set forth in the column labeled "Reason for Denial" on Exhibit A and also on the associated Staff's Recommended Disposition of Claim for the corresponding Claim number in Exhibit D. The reasons for the denial recommendations are: (i) the service was not a service covered by the COA Order and the associated bonds and other security, such as wireless service; (ii) the service was not located in South Dakota; (iii) the Claimant received the full amount of the contracted service; and/or (iv) the claim is based on an "investment" Claimant made in S&S, not on the loss of telecommunications service for which Claimant contracted and pre-paid.

5. Staff's information indicates that all Claims set forth on Exhibit B are duplicates of other Claims included on Exhibit C. Staff recommends the consolidation and merger of all Claims listed on Exhibit B into the corresponding duplicate Claim or Claims set forth on Exhibit C and the consideration of these consolidated and merged Claims and the information provided in support thereof as one Claim.

6. Staff recommends the Commission allow all Claims tabulated on Exhibit C, including those into which the duplicate Claims on Exhibit B were consolidated and merged.

7. Staff recommends that the Commission approve the Claim Amount for each Claim as calculated by Staff and set forth in the column labeled "Claim Amount" on Exhibit C (and on Exhibits A and B to the extent the Commission does not follow Staff's recommendation on any of these regarding denial or consolidation). These Claim Amounts were calculated by Staff employing the substantive and computational factors and formula set forth in paragraph A.4. of this Motion. The individual factors are set forth in separate columns labeled Total Contract Amount, Percent of Contract Remaining and Amount Financed and Forgiven or Insured. In the event that the Commission rejects Staff's recommendations and allows any of these Claims as stand-alone Claims, Staff will have to re-perform the calculations for all Claims prior to entry of the final decision.

8. Staff recommends that the Commission approve the Straight Line Claim Fraction Method. This method is simply the Approved Claim Amount divided by the total of all Approved Claim Amounts. The reason Staff recommends approval of this method is that it is straight-forward, easy to understand and is probably less susceptible to second guessing.

9. Staff believes, however, that it should provide an alternative method that takes into account, and at least partially adjusts for, the skewing of harm caused by S&S's provision of service below cost, with the loss having to be financed by an ever larger pool of last-in customers. As evidence in TC02-166 (Ex 10, p. 5; TR pp. 182, 193, 209-210) and statements made to Staff in interviews with other customers not called as witnesses indicated, business customers either found or predicted that they would "break even" well before the expiration of their contract terms, some at less than forty percent of their contract terms. The portions of contracts following this "break even" point were in reality paid for by the last-in customers to contract and pre-pay. To that extent, customers who received a larger percentage of their contracted service could be argued to have been

“unjustly enriched” at the expense of later-in customers on a relative basis. The Weighted Claim Fraction Method attempts to moderate this inequity by weighting the losses in inverse proportion to the percentage of contract term completed. The calculation is as follows. Each Claim Amount is multiplied by the Percent Remaining on Contract Term to yield a Weighted Claim Amount. All Weighted Claim Amounts are added, and the Weighted Claim Fraction is calculated as the quotient of the Weighted Claim Amount divided by Total Weighted Claim Amounts.

10. In the event that the Commission decides to allow or deny Claims or Claim Amounts other than as recommended by Staff herein, Staff recommends that the Commission recess or continue the hearing to enable Staff to re-run its calculations, in order to correctly calculate the Claim Fractions using the new Claim Amount numbers.

11. Staff lastly recommends that the Commission determine and establish the Claim Fraction for each allowed Claim but not approve a particular dollar amount of Proceeds. Until the Deputy Executive Director is able to withdraw the Proceeds from the bank, they will keep earning interest. Calculation of the exact disbursement amounts must therefore be calculated at the time checks are cut. Staff therefore recommends that the Commission approve the method set forth in paragraph A.8. as the method the Deputy Executive Director is to use to calculate the payment amounts but not the amounts themselves. In addition, the Claim Fraction will also later be applied to disburse any additional Proceeds the Commission may receive, such as from conversion of the AFC stock or the AFC stock itself.

WHEREFORE, Staff requests that the Commission issue a Final Decision and Order affording the relief set forth in Section A of this Motion and such other and further relief as the Commission may deem just and proper.

Dated this 20th day of March, 2007.

COMMISSION STAFF

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