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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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March 7, 2012

Patricia Van Gerpen
PUC Executive Director
500 E. Capitol Ave
Pierre, SD 57501

Re: TC12-023

Dear Ms. Van Gerpen,

On February 13, 2012 Mr. Allen Beyers filed a request with the SD Public Utilities Commission (herein Commission). He requested the Commission determine the applicability of SDCL 49-32-6 to MidContinent Communication (herein MidContinent) lines in Ipswich, SD. Commission Staff (herein Staff) believes the type of line and services it provides justify dismissal of this request. Staff makes no finding or recommendation regarding the liability or negligence of either party.

Specifically, while traveling through town with equipment approximately fifteen feet tall, a MidContinent line was hit. The accident caused significant damage. Mr. Beyer's insurance carrier denied the claim based on the following statute:

SDCL 49-32-6. Damages not collectible for destruction of facilities or wires under minimum height. No person owning or operating any telecommunications facilities or electric lines, or any part of such facilities or lines in this state, may collect damages from any person who cuts, breaks, removes, or otherwise destroys any such telecommunications facilities, or electric wires over or across a public highway if any part of the same is at any time less than eighteen feet from the ground.

We understand the company believed MidContinent was prevented from seeking damages because the line at issue did not provide for eighteen feet of clearance. After receipt of a large bill from MidContinent, Mr. Beyers sought assistance from the PUC.

On February 27, 2012 MidContinent replied to Mr. Beyer's filing. In its reply, MidContinent explained the line at issue does not provide telecommunication services. Rather the line is a cable line that also provides broadband internet services. As a result, MidContinent argues, the statute at issue does not apply.

The precise issue is whether "telecommunication facilities" includes broadband internet facilities. The statutes do not provide a definition for "telecommunication facilities." As a result, Staff relied on the related definition of "telecommunication services" in SDCL 49-31-1(29). The definition of "telecommunication services"

includes the "transmission of signs, signals, writings, images, sounds, messages, data..." At first blush it appears internet services are included in the definition.

When studying the issue with a broader view, however, Staff considered the FCC's determination that internet services are information services and not within the jurisdiction of this Commission. Despite the federal finding, it is possible to argue a determination of line height does not constitute regulation of the service itself. An examination of other PUC statutes and the effect of interpreting "telecommunication service" to include internet was more helpful for Staff. The following examples are illustrative:

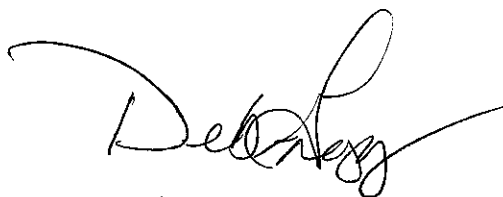
- 1) If a telecommunication service includes internet, all internet providers would be required to pay the 911 emergency surcharge (SDCL 34-45-5. The Chapter 49 definition of "telecommunication services" is used in Chapter 34)
- 2) If a telecommunication service includes internet, the PUC has jurisdiction to regulate the business of providing internet services and may promulgate rules accordingly. (SDCL 49-31-5). This regulation includes the ability to handle billing disputes, service interruptions, payment plans and refunds as well as record keeping requirements and deposits.
- 3) If telecommunication service includes internet, the PUC may order changes or improvements to facilities....as necessary for the improvement of internet service. (SDCL 49-31-7)
- 4) If telecommunication service includes internet the PUC may compel access to any internet facility in the state. (SDCL 49-31-15)

Staff is not making any judgment regarding the liability or negligence of either Midcontinent or Mr. Beyers. Should MidContinent choose to sue for the collection of its damages, no doubt, Mr. Beyer's or his insurance company can make arguments regarding the appropriateness of the line height despite a lack of exact statutory guidance regarding the same. The Commission is, however, not the appropriate venue to debate the issue.

Sincerely,



Kara Semmler



Deb Gregg