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**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINTS FILED BY  
GARY LOUDNER IN DOCKETS CE08-001,  
CT08-003, CT08-004, CT08-005, AND CT08-006

=====

Transcript of Proceedings  
November 12, 2008

**ORIGINAL**

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
GARY HANSON, CHAIRMAN  
STEVE KOLBECK, VICE CHAIRMAN  
DUSTY JOHNSON, COMMISSIONER

COMMISSION STAFF

Rolayne Ailts Wiest  
John Smith  
Karen Cremer  
Kara Semmler  
Greg Rislov  
Dave Jacobson  
Nathan Solem  
Deb Gregg  
John Thurber  
Bob Knadle  
Demaris Axthelm  
Tim Binder

APPEARANCES

Kenna Hagan (by telephone), Black Hills Power  
George Thomson (by telephone), Qwest  
Brett Koenecke, Midcontinent  
Margo Northrup, SDN and Golden West

**PRECISION REPORTING**

**Cheri Wittler, RPR, CRR**



1                   TRANSCRIPT OF PROCEEDINGS, held in the above-entitled  
2 matter, at the State Capitol Building, 500 East Capitol Avenue,  
3 Pierre, South Dakota, on the 12th day of November, 2008,  
4 commencing at 10:30 a.m.

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1                   COMMISSIONER KOLBECK: This hearing -- it is  
2 November 12, 2008 at 10:30 or after here in Room 423 in the  
3 Capitol Building in Pierre, South Dakota. We're here to address  
4 consumer Complaints. The Complaints listed -- I should mention  
5 that I'm joined today by my fellow Commissioners, Commissioner  
6 Dusty Johnson and Commissioner Gary Hanson, and I am  
7 Commissioner Steve Kolbeck.

8                   And the consumer Complaints are, number one, In the  
9 Matter of the Complaints Filed by Mr. Gary Loudner in Docket  
10 CE08-001 -- I'm sorry -- 08-003, 08-004, 08-005, and 08-006. We  
11 will take these Complaints one at a time.

12                   First of all, let's check the line to make sure who's  
13 with us. Kenna Hagan for Black Hills Power.

14                   MS. HAGAN: Yes. Present with Cristy Schmidt.

15                   COMMISSIONER KOLBECK: Thank you. Mrs. Sevold, are  
16 you with us?

17                   MS. SEVOLD: Yes, I am, Mr. Commissioner.

18                   COMMISSIONER KOLBECK: And George Thomsom.

19                   MR. THOMSON: Yes, Mr. Commissioner, I'm here.

20                   COMMISSIONER KOLBECK: Tom Simmons.

21                   MR. SIMMONS: Tom Simmons, and I'm here with  
22 Mary Lohnes, Commissioner.

23                   COMMISSIONER KOLBECK: Thank you. And I knew that.  
24 I'm having a little trouble with tomato/tomato today. And we  
25 are joined in the crowd with some other folks, and we will take

1 them as they present.

2 First of all, we'll start with the Complaint filed by  
3 Mr. Gary Loudner, Black Hawk, South Dakota against Black Hills  
4 Corporation regarding electrical outages. Staff has filed a  
5 request that the Commission hear a Motion to Dismiss at its  
6 November 12, 2008 meeting. So today we will discuss that.

7 Today's questions for all of these dockets will be  
8 shall the Commission grant status Motion to Dismiss or Motion to  
9 Summary Judgment in the above-referenced Docket.

10 So, first of all, we'll start with Mr. Loudner --  
11 staff? Mr. Loudner, are you with us today?

12 (Pause)

13 COMMISSIONER KOLBECK: Mr. Loudner, we'll give you one  
14 more chance. If you're on the line, please respond.

15 Okay. If not, we'll turn to staff.

16 MS. SEMMLER: You know, I would look to the parties  
17 who filed the Motions to Dismiss or the Motions for Summary  
18 Judgment. So I think Ms. Kenna Hagan is on the line. I would  
19 look to her.

20 MR. SMITH: Mr. Chairman, might I butt in one for  
21 moment, if I might.

22 I would note that the Commission followed a procedure  
23 we have done in some other cases in the past and following up in  
24 the way the Circuit Court sometimes handles Motions to Dismiss.  
25 When it appears to a court or to an agency that the issues

1 raised by the motions go beyond the precise parameters of a  
2 Motion to Dismiss and wander a little bit into factual  
3 territory, then it's appropriate for a tribunal to consider that  
4 Motion as a Motion for Summary Judgment. And that's done not  
5 infrequently in the court system. And we did that here.

6 And that particular notice was on behalf of the  
7 Commission itself, that we gave notice to everyone, including  
8 Complainant, that we were -- to the extent necessary that we  
9 were going to consider these Motions to Dismiss as Motions for  
10 Summary Judgment. So just to make that clear, that that's the  
11 nature of what we have here and we've noticed for today.

12 COMMISSIONER KOLBECK: Okay. And, Commissioner  
13 Hanson, you're on the line; correct?

14 COMMISSIONER HANSON: That's correct. I'm here.

15 COMMISSIONER KOLBECK: Okay. I just wanted to make  
16 sure.

17 COMMISSIONER HANSON: I appreciate your checking.

18 COMMISSIONER JOHNSON: Commissioner Kolbeck, you know,  
19 before we dive into the merits let's double-check from staff to  
20 make sure we didn't hear anything from Mr. Loudner about him not  
21 being able to join at this time. We want to make reasonable  
22 accommodation if such needed.

23 MS. SEMMLER: Mr. Loudner did call yesterday and left  
24 a message on the main office line, and he indicated he will not  
25 be participating today. He may seek relief in a different court

1 he indicated, but he will not be here today.

2 COMMISSIONER KOLBECK: So his telephone's definitely  
3 working, and he has power after the blizzard so he could have  
4 made an effort to be here today?

5 MS. SEMMLER: Correct. Correct.

6 COMMISSIONER JOHNSON: Did he give any reasoning for  
7 why he felt as though this arena wasn't the best place for him  
8 to seek relief?

9 MS. SEMMLER: That it was a waste of time, that he  
10 would be humiliated and didn't care to do that, and he does not  
11 believe that your phone system works well enough to participate  
12 telephonically.

13 COMMISSIONER JOHNSON: Okay. Thanks.

14 COMMISSIONER KOLBECK: All right. With that, we'll  
15 turn to the phone line here. Ms. Hagan, if you'd like to  
16 comment on the Black Hills Power -- on the 08-001 Complaint,  
17 you're welcome to.

18 MS. HAGAN: Yes. This is Kenna Hagan representing  
19 Black Hills Power. We had filed our Motion to Dismiss on  
20 June 30, and citing basically -- you know, the Complaint fails  
21 to state a claim for which relief can be granted and pursuant to  
22 our Black Hills Power tariff we're not required and we do not  
23 guarantee, you know, continuity of electrical service. So, as a  
24 matter of law his Complaint fails.

25 We also followed up with a Motion for Summary Judgment

1 after the last open meeting that was held. That was filed on  
2 November 7. And even taking into account that the allegations  
3 set forth in this Complaint for the purpose of the pleading if  
4 you were to say all that were true, it still fails as a matter  
5 of law, and relief cannot be granted.

6 So pursuant to our motions we request that our  
7 Motion to Dismiss or any alternative Motion for Summary Judgment  
8 be granted against the Complaint filed by Mr. Loudner.

9 COMMISSIONER KOLBECK: All right. Thank you. One  
10 thing I forgot to mention is we do have a court reporter on site  
11 here. She is taking notes so please try to speak clearly and  
12 loudly into your phone and also the microphone here at the  
13 Capitol. Should we go on to the next Complaint then?

14 In the matter of the Complaint by Mr. Loudner against  
15 Midcontinent Telecommunications regarding telephone outage.

16 Mr. Koenecke, would you like to comment?

17 MR. KOENECKE: Good morning, Commissioners and staff.  
18 Brett Koenecke for Midcontinent Communications. We filed a  
19 Motion to Dismiss and attached a filing or a document created by  
20 Tom Simmons on behalf of Midcontinent. We would ask that you  
21 would consider that as a Motion for Summary Judgment under  
22 Rule 56 and as found in the Commission's Notice of Hearing and  
23 Notice of the manner in which it would consider Mr. Loudner's  
24 Complaint we would ask you to follow through. We believe  
25 there's absolutely no issue of material fact in the judgment as

1 a matter of law would lie for Midcontinent.

2 COMMISSIONER KOLBECK: Thank you, Mr. Koenecke. The  
3 next one is in the matter of the Complaint filed by Mr. Gary  
4 Loudner against Qwest Corporation regarding a telephone outage.

5 Is Qwest represented, Ms. Sevold?

6 MR. THOMSON: Good morning, Mr. Chairman,  
7 Commissioners. This is George Thomson. I'm in-house counsel  
8 with Qwest. I don't have much to add to the pleading that's  
9 already been filed with the Commission. And certainly do not  
10 object to the Commission treating this as a Motion for Summary  
11 Judgment vice our Motion to Dismiss the Complaint.

12 I would point out that although Mr. Loudner has had  
13 plenty of opportunities to identify facts which would support  
14 his Complaint, he has to date failed to do so. I would remind  
15 the Commission that Ms. Sevold executed an affidavit in this  
16 matter where she has sworn that she contacted Qwest network  
17 personnel and public policy personnel responsible for monitoring  
18 and reporting E911 outages, and those personnel have reported  
19 there was no Qwest E911 outage in Pennington County and/or  
20 Rapid City during the month of February 2008.

21 I'm sorry. You had a question, Commissioner?

22 COMMISSIONER KOLBECK: No. I didn't say anything.

23 MR. THOMSON: In any event, I would also reference  
24 Mr. Simmons' letter to the Commission in which he supports  
25 Qwest's position in this case as well. And having said all of



1 that, Commissioners, Mr. Chairman, I'd ask that you grant the  
2 Motion for Summary Judgment.

3 COMMISSIONER KOLBECK: All right. Thank you. We will  
4 continue on then in the matter of the Complaint filed by  
5 Mr. Gary Loudner against SDN Communications. And this is  
6 regarding the telephone outage also.

7 MS. NORTHRUP: Thank you. Good morning. This is  
8 Margo Northrup from the Riter Rogers Law Firm in Pierre. I am  
9 here on behalf of South Dakota Network, LLC doing business as  
10 SDN Communications and also Golden West Telephone. And,  
11 Mr. Commissioner, with your permission I would address both of  
12 those at this time.

13 COMMISSIONER KOLBECK: Absolutely.

14 MS. NORTHRUP: Thank you. I also have Bill Heaston  
15 with me today. He's the director of business development from  
16 SDN Communications if you have any questions for him.

17 I just want to mirror what the rest of the parties  
18 have said in this matter. We have filed this pleading pursuant  
19 to 15-6-12B, which is the Motion to Dismiss or in the  
20 alternative the Summary Judgment standard. We have also  
21 included supporting affidavits in both the Golden West and SDN  
22 matter. I think you can consider those affidavits under the  
23 Summary Judgment statute.

24 What those affidavits say is that Mr. Loudner is not a  
25 customer of either SDN or Golden West, and there is no cause of

1 action that he has identified or could identify that would allow  
2 him to seek relief. So we are asking that you would grant the  
3 Summary Judgment Motion for both SDN and Golden West.

4 Thank you.

5 COMMISSIONER KOLBECK: All right. Thank you,  
6 Ms. Northrup. And that completes all of the companies that are  
7 named in these dockets.

8 Is there anyone else wishing to comment on any of  
9 these dockets?

10 If not, Commissioner questions?

11 COMMISSIONER JOHNSON: I would ask for staff's take,  
12 if they have a different take than what's been stated.

13 COMMISSIONER KOLBECK: Ms. Semmler.

14 MS. SEMMLER: Thank you. I agree with the statements  
15 made by the parties. I agree with their filings. I believe  
16 Mr. Loudner had every opportunity to present facts, to make a  
17 case. He was notified. We have proof of service. He knew  
18 about this process.

19 Deb Gregg could certainly speak to the education she  
20 tried to provide over the phone regarding what this process is  
21 and what it takes to have a viable claim -- cause of action. I  
22 believe it's very appropriate to dismiss all of these  
23 Complaints.

24 COMMISSIONER KOLBECK: Thank you. Now, I'm sorry, I  
25 should have asked for your opinion there, Kara, sooner. Any

1 Commissioner questions?

2 COMMISSIONER JOHNSON: Ms. Gregg or Ms. Semmler, I  
3 mean, did Mr. Loudner understand that we've got, you know, a  
4 tradition of people not having to hire attorneys to, you know,  
5 participate in our process? We have pro se interveners and  
6 complainants not infrequently?

7 He wasn't under the impression that he needed to hire  
8 legal counsel, was he?

9 MS. GREGG: This is Deb Gregg from staff. No. He was  
10 not under that impression. We told him that -- we actually  
11 wrote out a separate Complaint for him, process, explained how  
12 he had to do everything and even put out a list of questions  
13 that he might want to ask. None of that information was  
14 returned to us completed so -- he did receive the information.

15 COMMISSIONER JOHNSON: I have one more, if that's  
16 okay, Mr. Chairman.

17 So, Ms. Semmler, given that, you know, we have the  
18 affidavits from the Respondents and given Mr. Loudner didn't  
19 appear today, from a legal position then you don't think there's  
20 any question of material fact? I mean, a Motion to Dismiss  
21 would be acceptable?

22 MS. SEMMLER: I believe that there -- in Black Hills  
23 Power's Complaints it might be appropriate to -- there is some  
24 facts whether adequacy of service was provided. Clearly when  
25 looking at their tariff they don't have an obligation to

1 provide, 24 hours 365-days-a-year service.

2 So that's the one situation where I think possibly a  
3 Summary Judgment Motion is appropriate, and Ms. Hagan did file  
4 for that request.

5 COMMISSIONER JOHNSON: Mr. Smith, I'm understanding  
6 those legal standards right as far as when the Motion to Dismiss  
7 would be appropriate as opposed to Motion for Summary Judgment?

8 MR. SMITH: Well, I think the issue is do you have to  
9 consider anything in the nature of a fact. You know, if  
10 anything contained, for example, in the Affidavit -- I mean, to  
11 me an important document for me was the Affidavit of  
12 Mr. Simmons. Not merely with respect to his own Complaint but  
13 with respect to all of them wherein I think -- and to me, I  
14 mean, the other --

15 Just for example, just the Affidavit of George  
16 Strandell or -- I forgot who did the one for SDN.

17 MS. NORTHRUP: Mark Shlanta.

18 MR. SMITH: Just the fact that he's not a customer is  
19 a fact. I mean, unless we want to take the position that he  
20 failed to allege, you know, in his Complaint that he was a  
21 customer. But I don't know. I guess the other side of it too  
22 is, you guys, is maybe that -- you know, we've noticed it as a  
23 Motion for Summary Judgment.

24 Affidavits, factual information has been presented by  
25 the various Respondents, and it occurs to me that with a Motion

1 for Summary Judgment that we end up adjudicating this on the  
2 merits. I mean, we're basically -- we're ruling that this is  
3 over.

4 With a Motion to Dismiss you've always got that --  
5 that problem with you can come back in. You know, you can start  
6 all over again and just have a -- if it's on the grounds that  
7 you failed to state a claim. It's not always the case that you  
8 have a -- you have prejudice in that case.

9 So my own belief would be that in all of these, I  
10 mean, some element of factual finding, most assuredly with  
11 respect to Midco, and I think all the other ones involved, some  
12 element of stating that some factual information's been  
13 presented by all of these companies to state that they committed  
14 no violation of a law or a rule, that they didn't damage  
15 Mr. Loudner, and the advantage of a Motion for Summary Judgment  
16 in that case is I think it -- I think the parties then get an  
17 adjudication on the merits, which if he's threatening now to go  
18 into a different forum at least gives these guys a reason to  
19 argue that this case has already been heard in that other forum.  
20 If that makes sense.

21 COMMISSIONER HANSON: Mr. Chair.

22 COMMISSIONER KOLBECK: Absolutely. Commissioner  
23 Hanson.

24 CHAIRMAN HANSON: I would agree with Mr. Smith. I  
25 think that makes a great deal of sense to go to that -- go that

1 direction to that extent. It's extraordinary that someone would  
2 bring all of these Complaints and bring them against businesses  
3 that they aren't even doing business with and to have it  
4 explained to them repeatedly and then to simply not show up for  
5 any of the hearings.

6           It's -- well, if we're looking at fairness above and  
7 beyond justice, from the standpoint of making it difficult for  
8 businesses to actually do the business that they're -- that  
9 they're attempting to do and to provide the service that the  
10 customers -- as a Commissioner, I'm concerned that this type of  
11 a -- short of calling it a racket, that someone could contact  
12 businesses and place them into a situation where they have to  
13 expend so much time that obviously that they -- I'm sure they're  
14 still taking care of the business that they're supposed to, but  
15 it takes away, detracts from them being able to do the  
16 100 percent job that they want to to provide that good quality  
17 service to the other consumers.

18           So it's really counterproductive when someone does  
19 something of this nature. Apparently, it's almost like a whim  
20 because, as I understand from Ms. Gregg and please correct me if  
21 I'm wrong, it was explained to him several times that he's not  
22 even doing business with these companies that he's bringing --  
23 that he's alleging that they didn't provide him service.

24           Well, of course they're not providing service to him  
25 if he's never received a bill and he's not contracted with them

1 to provide service. It's just got to be incredibly frustrating  
2 to work with an individual of this nature who is bringing  
3 Complaints against a party that he just simply has no reason to  
4 bring a Complaint against.

5 And, like I say, it's potentially harmful to other  
6 consumers. So I'm frustrated by this. I don't know what legal  
7 recourse there is for the companies that have in my -- at least  
8 from my reading of this and hearing what little testimony  
9 there's been but reading through all the Complaints and  
10 information I would think Mr. Loudner owes an apology to these  
11 companies.

12 Thank you, Mr. Chair.

13 COMMISSIONER KOLBECK: All right. Thank you,  
14 Commissioner Hanson. Just to make it very clear, there are some  
15 people on the phone who have not spoke. Anyone in the audience  
16 who would like to address any of these items on the phone or  
17 here in person, please speak up now.

18 All right. Hearing none, I think that we have given  
19 ample time and plenty of opportunity for anyone who wishes to  
20 speak on these a chance to speak. And if Commissioners do not  
21 have any other concerns or questions, I think Commissioner  
22 Hanson summed up my concerns very nicely, I'll look for an  
23 action from any of the Commissioners on these dockets.

24 COMMISSIONER HANSON: Do you wish to take all the  
25 dockets as one item, Mr. Smith -- or Commissioner Kolbeck?

1           COMMISSIONER KOLBECK: I would imagine since the  
2 Complainant is --

3           MR. KOENECKE: I think separately would be preferable.

4           COMMISSIONER KOLBECK: Separately. Okay. Do we have  
5 a comment from the audience on that?

6           MR. KOENECKE: Brett Koenecke from Midcontinent. I  
7 think separately would be preferable, certainly from my client  
8 and I would expect from the rest as well. Thank you.

9           COMMISSIONER KOLBECK: Okay. Any objection to  
10 handling them separately?

11           Hearing none, I'll make the Motion in the first one.  
12 I believe it is CT, not CE as listed on here. It is CE?

13           MR. SMITH: That's Black Hills Power so that is  
14 electric.

15           COMMISSIONER KOLBECK: Absolutely. Consumer electric.  
16 CE08-001, In the matter of the Complaint filed by Gary Loudner,  
17 Black Hawk, South Dakota against Black Hills Corporation  
18 regarding electrical outages, I have a Motion that the  
19 Commission grant a Motion of Summary Judgment to this Docket.

20           Any discussion?

21           COMMISSIONER HANSON: I am only curious, Mr. Chair. I  
22 think that's a proper Motion. I'm just curious from what  
23 Mr. Smith's statements were earlier if that satisfies the  
24 statements that he was making.

25           MR. SMITH: I think it -- what I might add to it if



1 you want to is that the Motion for Summary Judgment in favor of  
2 Black Hills Corporation -- or was it power or corporation?  
3 Whichever -- whoever the Respondent is. I'm sorry. That it be  
4 in favor of Black Hills Corporation. To me that's -- then  
5 you're recommending that we enter Summary Judgment on substance  
6 in favor of Black Hills.

7 COMMISSIONER KOLBECK: All right. I will make my  
8 Motion clearer. In CE08-001 I would Motion today that the  
9 Commission grant the Motion for Summary Judgment in favor of  
10 Black Hills Power Corporation regarding the electrical outages  
11 in that above referenced Docket.

12 Discussion?

13 Hearing none, Commissioner Johnson.

14 COMMISSIONER JOHNSON: Aye.

15 COMMISSIONER KOLBECK: Commissioner Hanson.

16 COMMISSIONER HANSON: Aye.

17 COMMISSIONER KOLBECK: And Commissioner Kolbeck votes  
18 aye on that also.

19 The next item we'll look for action on CT08-003.

20 COMMISSIONER JOHNSON: Mr. Chairman, I would move that  
21 in CT08-003 that the Commission enter a Summary Judgment in  
22 favor of Midcontinent Communications.

23 COMMISSIONER KOLBECK: Discussion?

24 Hearing none, action. Commissioner Johnson.

25 COMMISSIONER JOHNSON: Aye.

1 COMMISSIONER KOLBECK: Commissioner Hanson.

2 COMMISSIONER HANSON: Aye.

3 COMMISSIONER KOLBECK: And Commissioner Kolbeck votes  
4 aye also.

5 The next item, CT08-004. Action on that.

6 COMMISSIONER HANSON: Mr. Chair, I would move that the  
7 Commission in CT08-004 support a Motion of Summary Judgment in  
8 substance in favor of Qwest Corporation.

9 COMMISSIONER KOLBECK: All right. Discussion?

10 COMMISSIONER HANSON: That's the entire Motion.

11 COMMISSIONER KOLBECK: All right. Thank you.

12 Discussion?

13 Action. Commissioner Johnson.

14 COMMISSIONER JOHNSON: Aye.

15 COMMISSIONER KOLBECK: Commissioner Hanson.

16 COMMISSIONER HANSON: Aye.

17 COMMISSIONER KOLBECK: And Commissioner Kolbeck votes  
18 aye also.

19 The next item action on CT08-005, I will Motion in the  
20 Complaint of Mr. Loudner against SDN Communications a Motion for  
21 Summary Judgment in favor of SDN Communications in the above  
22 referenced Docket.

23 Discussion.

24 Any action? Commissioner Johnson.

25 COMMISSIONER JOHNSON: Aye.

1 COMMISSIONER KOLBECK: Commissioner Hanson.

2 COMMISSIONER HANSON: Aye.

3 COMMISSIONER KOLBECK: And Commissioner Kolbeck votes  
4 aye on that also.

5 The next item CT08-006. Action.

6 COMMISSIONER JOHNSON: That Docket, Mr. Chair, I would  
7 move that the Commission enter an Order for Summary Judgment in  
8 favor of Golden West Telecommunications.

9 COMMISSIONER KOLBECK: All right. Discussion?  
10 Hearing none, Commissioner Johnson.

11 COMMISSIONER JOHNSON: Aye.

12 COMMISSIONER KOLBECK: Commissioner Hanson.

13 COMMISSIONER HANSON: Aye.

14 COMMISSIONER KOLBECK: And Commissioner Kolbeck votes  
15 aye also on that. That will conclude that hearing.

16 (The hearing is concluded at 10:58 a.m.)

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STATE OF SOUTH DAKOTA)

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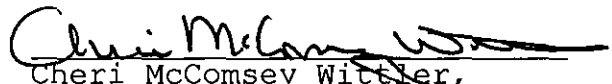
CERTIFICATE

COUNTY OF HUGHES )

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I took in shorthand the proceedings had in the above-entitled matter on the 12th day of November, 2008, and that the attached is a true and correct transcription of the proceedings so taken.

Dated at Pierre, South Dakota this 8th day of December, 2008.



Cheri McComsey Wittler,  
Notary Public and  
Registered Professional Reporter  
Certified Realtime Reporter