

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

<b>IN THE MATTER OF THE COMPLAINT FILED )</b>	<b>)</b>	<b>FINDINGS OF FACT AND</b>
<b>BY GAYLE G. FOUNTAIN, FLANDREAU, )</b>	<b>)</b>	<b>CONCLUSIONS OF LAW;</b>
<b>SOUTH DAKOTA, AGAINST DIRECT ONE )</b>	<b>)</b>	<b>NOTICE OF ENTRY OF</b>
<b>COM.LONG DISTANCE REGARDING )</b>	<b>)</b>	<b>ORDER</b>
<b>UNAUTHORIZED BILLING FOR SERVICES )</b>	<b>)</b>	<b>CT01-029</b>

On July 12, 2001, the Public Utilities Commission (Commission) received a complaint filed by Gayle G. Fountain, Flandreau, South Dakota, against Direct One Com.Long Distance (Direct One) regarding unauthorized billing for services.

On July 12, 2001, the complaint was faxed to Direct One. Pursuant to ARSD 20:10:01:09, Direct One was notified that it must satisfy the complaint or file an answer in writing with the Commission by August 1, 2001. By order dated September 12, 2001, a hearing in this matter was scheduled for October 10, 2001. On October 3, 2001, the Commission received an Answer and Motion for Continuance from Direct One. The hearing was held as scheduled. On November 8, 2001, the Commission received a Motion to Reopen Record from Commission Staff. Staff requested the record be reopened for the purpose of receiving into evidence documentation of Ms. Fountain's costs for travel, food, lost wages and any other costs associated with appearing at the hearing. On November 26, 2001, the Commission received Direct One's stipulation to reopen the record. Direct One stated in its stipulation "that the Motion to Reopen the Record for the stated purposes may be granted without further notice or hearing."

At its November 27, 2001, meeting, the Commission voted to grant the Motion to Reopen Record to receive into evidence documentation of Ms. Fountain's costs for travel, food, lost wages and any other costs associated with appearing at the hearing.

At its February 5, 2001, meeting, the Commission considered this matter. The Commission voted to find that Direct One billed Ms. Fountain for unauthorized telecommunications services and ordered Direct One to pay Ms. Fountain \$1000.00 but denied her request for reimbursement of her expenses incurred to attend the hearing (Commissioner Nelson dissenting on the denial of expenses).

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

**FINDINGS OF FACT**

---

1. On July 12, 2001, the Commission received a complaint filed by Gayle G. Fountain, Flandreau, South Dakota, against Direct One regarding unauthorized billing for services. Ms. Fountain lives at 701 South Crescent Street in Flandreau. TR. at 4.

2. On July 12, 2001, the complaint was faxed to Direct One. Pursuant to ARSD 20:10:01:09, Direct One was notified that it must satisfy the complaint or file an answer in writing with the Commission by August 1, 2001. By order dated September 12, 2001, a hearing in this matter was scheduled for October 10, 2001. On October 3, 2001, the Commission received an Answer and Motion for Continuance from Direct One. The hearing was held as scheduled on October 10, 2001.

3. At the hearing, Ms. Fountain testified that she was charged for long distance service by Direct One on her credit card. TR. at 4-5; Exhibit 1. She stated that prior to receiving the charge on her credit card she had received a letter from Direct One which thanked her for enrolling in Direct One's long distance plan. TR. at 5; Exhibit 2. She tried to call the 800 number listed but was unable to get through. TR. at 5. Later Direct One agreed to remove the charge. TR. at 6. She stated she had never asked for the service and never gave the company her credit card number. Id. She also stated that Direct One had attempted to debit her account after it had removed the charge. TR. at 7-8. The charge was denied because Ms. Fountain had reported her credit card as stolen and so the account was cancelled. TR. at 16. She also received a second welcome letter from Direct One. TR. at 17.

4. Bill Karlman, vice-president of marketing operations for Direct One, testified that Direct One offers long distance services through marketing partners. TR. at 21. When a consumer calls to order a product through one of Direct One's marketing partners, the consumer is also offered a free trial of Direct One's long distance service. If the consumer does not cancel the service, a monthly charge is billed to the consumer's credit card. TR. at 22. The consumer's long distance carrier is not changed. Id. The consumer accesses the service by dialing an 800 number and entering a personal identification number. TR. at 23.

5. Mr. Karlman stated that Direct One does not provide intrastate calling, only interstate calling. TR. at 33. However, the recording of a sales pitch and the introductory material sent to consumers do not mention that the domestic long distance offered by Direct One only applies to interstate calls. TR. at 28-29; Exhibits 2, D.

6. Mr. Karlman presented a tape on which a male voice stated he lived at 701 South Crescent Street, Flandreau, South Dakota, 57028. TR. at 29; Exhibit D. Ms. Fountain did not recognize the male voice. TR. at 49.

7. On November 8, 2001, the Commission received a Motion to Reopen Record from Commission Staff. Staff requested the record be reopened for the purpose of receiving into evidence documentation of Complainant's costs for travel, food, lost wages and any other costs associated with appearing at the hearing. On November 26, 2001, the Commission received Direct One's Stipulation to Reopen the Record. Direct One stated in its stipulation ". . . that the Motion to Reopen the Record for the stated purposes may be granted without further notice or hearing."

8. At its November 27, 2001, meeting, the Commission granted the Motion to Reopen Record to receive into evidence documentation of Complainant's costs for travel, food, lost wages and any other costs associated with appearing at the hearing. The documentation submitted included receipts for meals and gas for the day of the hearing and a pay stub which demonstrated that her salary for one day was \$130.00 or, if benefits were included, the day's pay was approximately \$170.00.

---

9. ~~The Commission finds that Ms. Fountain never requested Direct One's service. Despite the lack of request, Direct One billed Ms. Fountain for long distance services that she did not request and never used. Thus, the Commission finds that Direct One billed Ms. Fountain for unauthorized services in violation of SDCL 49-31-89. The Commission denies Ms. Fountain's expenses for attending the hearing.~~

CONCLUSIONS OF LAW

1. The Commission finds that it has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-13, including 49-13-1 through 49-13-14, inclusive, and SDCL Chapter 49-31, including 49-31-3, 49-31-7, 49-31-7.1, 49-31-7.2, 49-31-7.3, 49-31-7.4, 49-31-10, 49-31-11, 49-31-38, 49-31-38.1, 49-31-38.2, 49-31-38.3, 49-31-89 through 49-31-97, inclusive, and ARSD Chapters 20:10:01 and 20:10:34.

2. The Commission finds that Direct One billed Ms. Fountain for unauthorized services in violation of SDCL 49-31-89. Pursuant to SDCL 49-31-93, Direct One shall pay Ms. Fountain \$1000.00. The Commission denies Ms. Fountain's expenses for attending the hearing.

It is therefore

ORDERED, that Direct One shall pay Ms. Fountain \$1000.00; and it is

FURTHER ORDERED, that Ms. Fountain's request for \$160.20 in expenses is denied.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 26<sup>th</sup> day of February, 2002. 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 26<sup>th</sup> day of February, 2002.

<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, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Melaine Kalbo</u>
Date:	<u>2/26/02</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg  
JAMES A. BURG, Chairman

Pam Nelson  
PAM NELSON, Commissioner  
(dissenting as to denial of expenses)

Robert K. Sahr  
ROBERT K. SAHR, Commissioner

CONCURRENCE OF COMMISSIONER SAHR

The first question in awarding damages, costs, or expenses must be whether the legal authority exists to make such an award. Despite some questionable conduct by Direct One Com.Long, the PUC does not have the authority to award the costs or expenses requested by Ms. Fountain.

In cases such as this one, SDCL 49-31-93 provides that subscribers are not liable for charges and shall be paid \$1,000. SDCL 49-13-14 permits compensation for injury or damages.

No statute allows the award of costs and other associated expenses of bringing litigation such as mileage, meals, and the like. Under these circumstances, the case law is clear:

*In Re Estate of O'Keefe*, 1998 S.D. 92, P 18, holds:

The authority to tax such costs should not be implied, but must rest upon a clear legislative grant of power to do so.

*Dail v. S.D. Real Estate Commission*, 257 N.W.2d 709, 714 (1977) holds:

"Costs, as such, were unknown to the common law, and the courts are without inherent power to tax costs. One claiming the right to costs must be able to point to a specific statute authorizing the award." [citing *Buckingham Transp. Co. of Colorado, Inc. v. Black Hills Transp. Co.*, 66 S.D. 433, 285 N.W. 300 (1939)]. Generally, there is no authority to tax costs in an administrative proceeding.

To award the requested costs or expenses in this case would be to usurp the South Dakota State Legislature and to ignore well-settled case law. While I applaud Ms. Fountain for bringing this matter to our attention, we can only award her what the law provides. Accordingly, I second Chairman Burg's motion to award \$1,000.

## DISSENT OF COMMISSIONER NELSON

Gayle Fountain's credit card was charged for an unknown, unwanted, and unsolicited telecommunications service. The informational mailing informing her of her "new" service appeared to be trash-destined junk mail. Once Ms. Fountain put two-and-two together, she made futile attempts to contact Direct One Com.Long Distance (Direct One) through the advertised 1-800 number. Ms. Fountain ultimately contacted her credit card company for answers, and eventually extricated herself from Direct One. Unfortunately, Direct One, or perhaps Direct One's computer was persistent. Her credit card billing came and once again she was billed for this service. A complaint was filed with us, a hearing was scheduled and held even though Direct One offered the statutory \$1,000 to Ms. Fountain before the hearing.

Ms. Fountain could have stayed home with her \$1,000 check. But Ms. Fountain, who thought the public should be warned, went through the inconvenience of being excused from work and driving 250 miles to Pierre. Ms. Fountain was distressed that Direct One could so easily bill for an unauthorized and unwanted service. The error, according to Ms. Fountain, could have easily gone unnoticed. Ms. Fountain's distress was magnified when she found the offending company's customer service number useless. Finally, Ms. Fountain felt a civic obligation to both inform and warn the public about this telecommunications practice.

Ms. Fountain requested damages totaling \$1,160.20. The \$160.20 increment was her cost representation for the trip to Pierre, and included lost wages for a missed workday. The majority voted to limit Ms. Fountain's award to the \$1,000 as designated in SDCL 49-31-93. The majority cited both legal reasons and the fact that Direct One had previously offered Ms. Fountain the \$1,000, so a hearing could have been avoided.

Ms. Fountain was obviously not seeking to get rich. Her claimed expenses are approximately the bare cost, at thirty cents per mile, of driving to Pierre. Yet, she didn't ask for her mileage. She asked to be reimbursed for her lost workday and a couple of snacks along the way. She didn't include lodging, extravagant meals, attorney fees, preparation costs, telephone, her time, filing a formal PUC complaint, or any other costs incident to preparing her hearing case.

Does SDCL 49-31-93 and all the other cited statutes limit reimbursement to \$1,000? I don't have the final answer, but I believe we should have advanced the question before taking the unprecedented step of self-limiting our authority. What is clear is that Ms. Fountain bravely and selflessly performed a public service. I applaud her for bringing to light a matter of considerable concern to me in what must have been intimidating circumstances. I regret that she is now unable to recover the very modest portion of "incremental" expense she requested for doing so.

