

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

IN THE MATTER OF THE COMPLAINTS FILED BY CUSTOMERS OF S&S COMMUNICATIONS)	ORDER GRANTING MOTIONS TO CONSOLIDATE; MOTIONS TO DISMISS; MOTIONS TO DISMISS IN PART; AND MOTION FOR SUMMARY DISPOSITION CT05-005
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On April 15, 2005, Staff (Staff) of the South Dakota Public Utilities Commission (Commission) filed with the Commission a Motion to Consolidate the pending dockets involving complaints filed by customers of S&S Communications (S&S) for loss of pre-paid telecommunications services. The dockets Staff requested be consolidated were: CT03-010 through CT03-096, CT03-098 through CT03-130, CT03-132 through CT03-147, CT03-149 through CT03-153 and CT03-156 through CT03-159. Staff requested that the Commission: (i) grant its Motion to Consolidate the complaints into one docket which Staff has opened as CT05-005; (ii) order that any subsequently filed complaints against S&S involving the same subject matter be consolidated into the consolidated Docket CT05-005; (iii) order that the individual complaint dockets be closed and deemed merged into the consolidated proceeding, Docket CT05-005; and (iv) order that the individual complaint docket files be transferred to the consolidated docket and retained as working files in the consolidated proceeding for purposes of organizing filings pertaining to individual complaints. On April 15, 2005, the Motion to Consolidate and Notice of Hearing on Motion to Consolidate were mailed to counsel for S&S and to the Complainants who had filed the above referenced formal complaints. At its May 10, 2005, meeting, the Commission granted the Motion to Consolidate.

On September 15, 2008, Commission Staff filed the following documents: Order for and Notice of Hearing on Motions to Dismiss and Consolidate and Motion for Summary Disposition; Notice of Dispute and Request for Hearing; Staff's Recommended Disposition of Complaint; Motion for Summary Disposition; Motion to Dismiss with Respect to Matt Swearingen; Motion to Consolidate CT03-011, CT03-012 and CT03-013; Motion to Consolidate CT03-099 and CT03-126; Motions to Dismiss CT03-073, CT03-087, CT03-133, CT03-136, CT03-138, CT03-141, CT03-143 and CT03-144; and Motions to Dismiss in Part CT03-040, CT03-059, CT03-061 and CT03-083.

The Motion for Summary Disposition requested that the Commission issue an order granting summary disposition pursuant to SDCL 1-26-18 in favor of each Complainant in each of the Complaints against S&S consolidated in this Docket, except those complaints which have been dismissed or consolidated prior to the entry of such order, and ordering S&S to pay damages to each such Complainant or group of Complainants in the amount set forth on the spreadsheet attached as Exhibit C entitled Recommended Damages Award.

A hearing on the motions was scheduled for October 21, 2008, in Room 423 of the State Capitol Building in Pierre. The issues to be decided at the hearing were (i) whether this case should be dismissed as against Matt Swearingen because of his discharge in bankruptcy, (ii) whether each Complaint should be allowed, denied, dismissed or consolidated with another Complaint and (iii) what Damages Award and Judgment Fraction, if any, each Complainant should be entitled to in the

event the Commission is able to obtain collection from S&S or its remaining non-discharged general partner on any judgment entered in this case.

The Commission has authority and jurisdiction over the matters at issue in this Docket pursuant to SDCL Chapters 49-31 and 49-13, particularly 49-13-1, 49-13-1.1 and 49-13-14, and Chapter 1-26, particularly 1-26-18.

The hearing on the motions was held as scheduled. No parties filed a Notice of Dispute and Request for Hearing. No parties objected to any of the motions filed by Staff. Staff explained the motions and requested that the Commission grant the motions. The Commission voted to grant Staff's Motion to Dismiss with Respect to Matt Swearingen. The Commission voted to grant Staff's Motion to Consolidate CT03-011, CT03-012 and CT03-013 and the Motion to Consolidate CT03-099 and CT03-126. The Commission voted to grant Staff's Motions to Dismiss CT03-073, CT03-087, CT03-133, CT03-136, CT03-138, CT03-141, CT03-143, and CT03-144. The Commission voted to grant Staff's Motions to Dismiss in Part CT03-040, CT03-059, CT03-061, and CT03-083. The Commission voted to grant the Motion for Summary Disposition.

The Commission finds, in accordance with SDCL 15-6-56(c)(l), that there is no genuine issue for hearing as to the following facts based upon the Affidavits of Keith Senger and James Mehlhaff, Exhibits B and E, the spreadsheet analyses, revised Exhibits C and D, and the other Exhibits and documents referenced below in the findings below. The Commission finds:

1. Prior to its ceasing operations in 2003, S&S was a South Dakota general partnership that provided both wireline and wireless telecommunications services to customers in South Dakota and in other states. Ex J, Complaint.
2. Les Sumption and Matt Swearingen were the sole general partners of S&S. "S&S Communications" was also a fictitious name registered in Brown County, South Dakota for Matt Swearingen and Les Sumption as individuals. Ex J, Complaint.
3. On December 21, 2000 in Docket No. TC00-114, the Commission issued an order granting a certificate of authority to S&S Communications (COA Order). Ex I, Ex 385.
4. S&S had sold and collected a significant dollar amount of pre-payments for telecommunications services to customers in this state prior to applying for and receiving a certificate of authority. Ex H, Hearing Transcript Vol. II, p. 41 et seq.; Docket pp. 385 et seq.
5. Prior to June 3, 2003, S&S continued to sell and collect pre-payments for telecommunications services in South Dakota and in other states. S&S failed to maintain full bond coverage for these prepayments. Ex H and 1. For this and other reasons, on August 28, 2003, the Commission issued its Order in Docket TC02-166 revoking S&S's certificate of authority and levying a \$13,400 fine against S&S. Ex I, Ex 387.
6. A portion of the services for which Complainants in the following Complaints pre-paid were for services to be provided in states other than South Dakota: CT03-040, CT03-059 and CT03-083. The spreadsheet values for the portions of such services to be provided within South Dakota are correctly set forth in the section of revised Exhibits C and D entitled "Recommend Approval of Damages Awards." The spreadsheet values for the portions of such services to be provided outside

South Dakota are correctly set forth in the sections of revised Exhibits C and D entitled "Recommended Dismissal in Part, Out-of-State Service Portion." Ex I, Ex 120, 341, 342 and 347.

7. All of the services for which Complainants in the following Complaints pre-paid were for services to be provided in states other than South Dakota: CT03-138, CT03-141, CT03-143 and CT03-144. The spreadsheet values for the portions of such services to be provided outside South Dakota are correctly set forth in the section of revised Exhibits C and D entitled "Recommend Dismissal, Out-of-State Service." Ex I, Ex 337, 343, 353 and 354.

8. Encercept, Inc., the Claimant in CT03-073 and Benchmark Foam, the Claimant in CT03-136, received insurance proceeds totaling the full amount of the claims alleged in their Complaints as set forth in the sections of revised Exhibits C and D entitled "Recommend Dismissal, Insurance Recovery – Claimant Requesting Dismissal," and the Secretary/Treasurer for both Claimants requested via a phone conversation and a follow-up email to Staff that these Complaints be dismissed. Ex I, Ex 16 and Ex 46 and Hearing Transcript pp. 35 et seq.

9. The claims alleged in CT03-012 and CT03-013, set forth in the section of revised Exhibits C and D entitled "Recommend Consolidation, Duplicate Claims" arise out of the same contract and are in all respects the same claim as the claim alleged in CT03-011. Ex I, Ex 293, 294 and 333.

10. With respect to S&S, the matters asserted in CT03-126, set forth in the sections of revised Exhibits C and D entitled "Recommend Consolidation, Duplicate Claims," arise out of the same contract as the claim asserted in CT03-099. Although Complainant in CT03-126 alleges additional facts involving a billing issue with Qwest, which was related to the contract forming the basis of the Complaint in CT03-099 and ultimately resulted in a one day disconnection of service for Complainant, Complainant in CT03-126 did not in the end incur any direct monetary loss as a result of this problem, and the billing, service interruption and other inconvenience issues alleged in CT03-126 are the same kinds of subjective, incidental and consequential claim allegations contained in a great many of the Complaints. It is reasonable and appropriate for these types of allegations contained in CT03-126 to be considered in connection with the contract to which they were related and treated the same as all other Complaints containing similar allegations. Ex I, Ex 172 and 304.

11. A significant number of the Complaints, including CT03-126, allege facts and request relief related to consequential and incidental "damages" arising from things such as (i) the loss of productivity, including potential losses of sales, due to a period of service interruption, in all cases limited to a day or two, following S&S's cessation of service, (ii) the inconvenience and expenditure of time in procuring alternative service, (iii) the incrementally higher cost of the alternative service procured following S&S's cessation of service, and (iv) in a few cases, hassles with other service providers over switch over and related billing issues. The Commission's Consumer Staff was very actively involved in assisting S&S's customers, including Complainants, in resolving the third party provider issues on a basis that was non-penalizing financially to the customers. To the knowledge of Staff, all such issues were resolved without any material monetary consequences to Complainants. Staff received no follow-up information from any Complainants or otherwise affording any objective basis for establishing monetary values for these alleged consequential losses such as loss of sales or the need to procure alternative services at a cost above the then current market rate for such "cover" services. Ex E, Affidavit of James Mehlhaff. There is no objective basis contained within the Complaints or the information provided in support of them upon which the Commission can establish monetary damages awards with reasonable certainty for any of the alleged incidental and consequential damage claims in any of the Complaints.

12. The contracts executed and the claims alleged in Complaints CT03-061, CT03-087 and CT03-133 listed on revised Exhibits C and D under the section entitled "Recommend Dismissal, Investments," were not for pre-paid telecommunications services but rather were loans or investments made to S&S. Although "free" telecommunications service may have been promised by S&S in connection with these loans or investments, these instruments clearly provided for repayment by S&S and were commercial loan agreements with, or investments in, S&S and not pre-paid telecommunications service contracts. Ex I, Ex 374, 377, 378 and 384.

13. With the exception of Complaints CT03-061, CT03-087 and CT03-133 or the portions thereof listed on Exhibits C and D under the sections entitled "Recommended Dismissal in Part, Investment Portion" and "Recommend Dismissal, Investments" and Complaint CT03-126 described above in paragraph 10, each Complainant listed on revised Exhibits C and D entered into a contract for prepaid telecommunications services with S&S and pre-paid the amount or amounts for such services set forth in the column on revised Exhibits C and D entitled "Total Contract Amount." Ex I, Ex 1 - 384.

14. With the exception of Complaints CT03-061, CT03-087 and CT03-133 or the portions thereof listed on Exhibits C and D under the sections entitled "Recommended Dismissal in Part, Investment Portion" and "Recommend Dismissal, Investors" and Complaint CT03-126 discussed above in paragraph 10, the term of each Complainant's contract for prepaid telecommunications services with S&S was as set forth in the column on revised Exhibits C and D entitled "Contract Term" and the contract origination date was the date set forth in the column entitled "Date Contract Signed." Ex I, Ex I - 384.

15. Although there were variations in the date service was actually commenced under Complainants' contracts relative to the signature date, with the exception of CT03-103, these deviations were not significant, are very difficult to determine with specificity, and will not have a material effect on the Recommended Judgment Amount for any claim. The use of contract execution date as a proxy for actual service initiation date is reasonable, practicable and fair and equitable to all Complainants. Ex I, Ex 1- 384.

16. The imputation of a commencement date of January 13, 2003, the date 45 days after contract execution, is reasonable in the case of the contract that forms the basis for the Complaint in CT03-103 based upon the following specific facts:

a. The services to be provided and the nature of the contract differ materially from those stated in the other Complaints arising from pre-paid telecommunications services.

b. The contract in this Complaint was for specialized, high volume TI 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 45 days.

c. In the Complainant's case in CT03-103, numerous number switch-over and other glitches occurred, and full service initiation was not finally completed until April 14, 2003, three months after the 45 day contract "grace period" expired. In this case, service was not fully initiated until four and a half months after contract execution and terminated soon after service initiation. Ex I, Ex 59.

17. On or about June 3, 2003, S&S ceased providing telecommunications services. All of the Complainants in the section of revised Exhibits C and D entitled "Recommend Approval of Damages Awards" lost their telecommunications services for which they had pre-paid on or about June 3, 2003. Although there may have been Complainants whose service ended a day or so earlier or a day or so later, and in a few cases wireless service continued for a somewhat longer period, these slight variations are not material, and June 3, 2003, is a reasonable date for determining the service termination date for all such Complaints. Ex I, Ex I - 384.

18. The percentages in the column of revised Exhibits C and D entitled "Percent of Contract Remaining" was determined for all Complaints arising from pre-paid telecommunications services by subtracting the number of days from the Date Contract Signed until June 3, 2003, from the total days in the Contract Term and dividing that difference by the total number of days in the Contract Term. Ex B, Senger Affidavit.

19. The dollar amounts set forth in the column of revised Exhibits C and D entitled "Contract Remaining Value" were determined for all telecommunications services claims by multiplying the Total Contract Amount by the Percent of Contract Remaining. Ex B, Senger Affidavit.

20. The dollar amounts set forth in the column of revised Exhibits C and D entitled "Amount Financed and Forgiven or Insured" accurately state the amounts that Complainants either (i) financed through loans from Aberdeen Finance Corporation ("AFC"), which were forgiven as a result of the nonrecourse or "collateral" agreement incorporated in S&S's certificate of authority or through financing arrangements with Midland Leasing or Carroll Credit, which were deemed by these lessors/lenders to be uncollectible due to the lease and installment-sales nature of these financing instruments and the total failure of the consideration for which these lease and installment debt obligation's were incurred, as a result of S&S's cessation of the provision of the services; or (ii) covered by insurance. Ex I, Ex 1 - 384.

21. The dollar amounts set forth in the column of revised Exhibits C and D entitled "Contract Remaining Value Less Loan Amounts Forgiven" accurately state for each Complaint the difference obtained by subtracting the Amount Financed and Forgiven or Insured from the Contract Remaining Value. The dollar amounts set forth in the column of revised Exhibits C and D entitled "Recommended Net Claim Amount" are the same for each claim as the amounts set forth in Contract Remaining Value Less Loan Amounts Forgiven except that they are never less than zero. Ex B, Senger Affidavit.

22. The columns of revised Exhibits C and D entitled "Recommended Disposition" and "Reason for Dismissal or Denial Recommendation" correctly display Staff's recommended disposition of each Complaint or specified claim portion thereof and the reasons for these recommendations, respectively. Ex B, Senger Affidavit.

23. The column of revised Exhibits C and D entitled "Bond Proceeds Amount" correctly sets forth the bond proceeds received by the Complainant(s) for each Complaint or claim portion thereof in Docket TC05-047. Ex B, Senger Affidavit.

24. The column of revised Exhibits C and D entitled "Recommended Damages Award" sets forth for each Complaint or specified claim portion thereof the amount obtained by subtracting the Bond Proceeds Amount from Recommended Net Claim Amount in conformity with Staff's

recommendation for determining the damages, if any, to be awarded on each Complaint or specified claim portion thereof. Ex B, Senger Affidavit.

25. In its decision in Docket TC05-047, the Commission approved the straight-line allocation method to determine the claim fraction to which each claimant was entitled to proceeds. The use of the straight line allocation method as so approved by the Commission is also the most straight forward and fairest method for determining the Complainants' entitlement to any collections that may occur as a result of the Commission's damages award or any judgment of the Court ensuing from the Commission's decision. The column of revised Exhibits C and D entitled "Recommended Judgment Fraction" accurately sets forth the fraction, calculated on a straight line basis and expressed as a decimal to four places, to which each Recommended Damages Award would entitle each Complainant of any moneys received in satisfaction of the Commission's order awarding damages or any resulting judgment of the Court. Ex B, Senger Affidavit.

26. The column of revised Exhibits C and D entitled "Prejudgment Interest from 6/3/03 to 7/13/07" accurately reflects the calculation of simple interest on the Net Claim Amount at the statutory prejudgment interest rate of ten percent from the date of S&S's cessation of service until the date bond proceeds were mailed out by the Commission in Docket TC05-047. The column of revised Exhibits C and D entitled "Prejudgment Interest from 7/14/07 to 10/21/08" accurately reflects the calculation of simple interest on the Recommended Damages Award from the day after bond proceeds were mailed out in TC05-047 until the date the Motion was scheduled for hearing. Ex B, Senger Affidavit

Based on these facts and the record in this proceeding, the Commission concludes and orders the following:

1. The Commission concludes that the facts as so found demonstrate that Complainants are entitled to judgment as a matter of law.
2. The Commission establishes the damages award that each Complainant or group of Complainants is entitled to recover under each Complaint ("Approved Damages Award").
3. The Commission bases the Approved Damages Awards for all Complaints on the same substantive and computational factors, consisting of (i) the total original amount of the Complainant's pre-paid contract amount for telecommunications services to be provided in South Dakota (ii) multiplied by the quotient of the number of days remaining unfulfilled on Complainant's contract divided by the total number of days on Complainant's contract (iii) less (a) the amount that Complainant financed through a loan, credit agreement, lease agreement or the like that Complainant has not repaid, and will not be required to repay, (b) any insurance proceeds received by Complainant on the loss and (c) the amount of bond proceeds received by Complainant as a result of Docket TC05-047.
4. The Commission excludes from the Approved Damages Award any claimed loss or damage arising from delay in service initiation, other ordinary service deficiencies, loss of business, procurement of alternative services, losses from funds provided to S&S on an investment basis, or other contractual, consequential or incidental loss, damage or expense. The Commission finds these claims lack reasonable certainty and no Complainant sought to dispute the damage amount as set forth by Staff or requested a hearing.

5. The Commission dismisses Matt Swearingen, finding that Matt Swearingen's debts have been discharged in bankruptcy proceedings. The Commission finds the consolidation of CT03-011, CT03-012 and CT03-013, and CT03-099 and CT03-126 is appropriate because the complaints involved the same contract for telecommunications. The Commission finds that dismissal is appropriate for Dockets CT03-073 and CT03-136 because the complainants had received reimbursement by insurance for the claims and the complainants agreed to dismissal. The Commission finds that dismissal is appropriate for CT03-087 and CT03-133 because the requested damages were for loans made to S&S and involve investment or general commercial transactions that are not within the Commission's complaint and damages jurisdiction under SDCL chapter 49-13. The Commission finds dismissal is appropriate for CT03-138, CT03-141, CT03-143, and CT04-144 because the telecommunications services were to be provided by S&S entirely in other states and thus involve the provisioning of services outside of the Commission's jurisdiction. The Commission finds dismissal in part is appropriate for CT03-040, CT03-059, and CT03-083 for the parts of the contracts that were for the provisioning of telecommunications services outside of South Dakota which is outside of the Commission's complaint and damages jurisdiction. The Commission finds dismissal in part is appropriate for CT03-061 because part of the damages requested were for loans made to S&S and involve investment or general commercial transactions that are not within the Commission's complaint and damages jurisdiction under SDCL chapter 49-13.

6. The Commission establishes the aggregate total amount of damages to be paid by S&S to all Complainants for all Complaints ("Total Damages") as set forth in revised Exhibit C and sets the date by which such damages are to be paid as January 1, 2009.

7. The Commission requires the payment of prejudgment interest on all Approved Damages Awards and approves the method for computation of such prejudgment interest proposed by Staff.

8. The Commission approves the straight-line apportionment method approved in Docket TC05-047 as the Damages Apportionment Method to be applied to Approved Damages Awards to establish the fractional share, expressed as a decimal, ("Approved Judgment Fraction") that each approved Complainant(s) shall be entitled to receive from any money paid to the Commission by S&S or its remaining partner to satisfy the Total Damages or received in satisfaction of any subsequent judgment entered in this matter by the Court.

9. The Commission provides for re-computation of the Total Damages and Approved Judgment Fraction in the event an excluded Complaint receives a non-conforming damages award following hearing.

10. The Commission authorizes the Staff to file a civil action on behalf of Complainants pursuant to SDCL 49-13-24 and 49-13-27 in the event S&S fails to satisfy the Total Damages awarded by January 1, 2009, and to pursue execution of any judgment entered as a consequence of such action.

11. The Commission authorizes the Executive Director or the Deputy Director, from time to time in their reasonable discretion, to disburse any proceeds received by the Commission in satisfaction of the Total Damages or the damages awarded by the Court to each Complainant having an Approved Damages Award in an amount equal to the then current cash proceeds in the possession of the Commission multiplied by the Complainant's Approved Judgment Fraction.

It is therefore

ORDERED, that Staff's motions are granted as set forth above.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 10th day of November, 2008. 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 10th day of November, 2008.

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: <u><i>Delaine Kolbo</i></u>
Date: <u><i>11/12/08</i></u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Gary Hanson
GARY HANSON, Chairman

Steve Kolbeck
STEVE KOLBECK, Commissioner

Dustin M. Johnson
DUSTIN M. JOHNSON, Commissioner
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