

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

IN THE MATTER OF THE COMPLAINT)	FINAL DECISION AND ORDER
FILED BY GARY LOUDNER, BLACK)	GRANTING SUMMARY
HAWK, SOUTH DAKOTA, AGAINST)	DISPOSITION AND NOTICE OF
SDN COMMUNICATIONS REGARDING)	DECISION
TELEPHONE OUTAGES)	CT08-005

On June 9, 2008, Complainant Gary Loudner filed a Complaint with the South Dakota Public Utilities Commission (Commission) against Midcontinent Communications (Midcontinent), Black Hills Corporation (Black Hills) and Qwest Corporation (Qwest) alleging that one or more telephone outages had occurred. On July 14, 2008, Complainant filed a Motion to Not Consider the Telco's Motion to Dismiss and Amend Complaint to Include Golden West and SDN. As a result of this filing, the Commission opened complaint Dockets CT08-005 and CT08-006 to address allegations involving South Dakota Network, LLC (SDN) and Golden West Telecommunications Cooperative, Inc. (Golden West). On August 4, 2008, SDN filed an Answer to Complaint and Motion to Dismiss (Motion). On October 2, 2008, the Commission received a Request by Commission Staff to Schedule Motions to Dismiss, which motion included SDN's Motion. On October 21, 2008, at a regularly scheduled meeting, the Commission voted unanimously to grant the Request by Commission Staff to Schedule Motions to Dismiss and to serve notice that the Commission would consider SDN's Motion in whole or in part as a motion for summary disposition under SDCL 1-26-18 and 15-6-56. On October 29, 2008, the Notice of Intent to Treat Motion to Dismiss as Motion for Summary Disposition; Order for and Notice of Hearing (Notice) was served on Complainant and SDN. The Notice provided that the parties could participate in the hearing telephonically.

The Commission held the hearing on the Motion as noticed on November 12, 2008. Complainant did not appear at the hearing either in person or telephonically. SDN appeared. In response to a question from the Commission, counsel for the Commission's Staff (Staff) stated that on November 11, 2008, the state's Veterans Day holiday, Complainant recorded a voice mail on the Commission's central voice mail advising the Commission that he did not intend to appear either in person or telephonically at the hearing. After hearing from SDN and Staff, the Commission voted unanimously to grant summary disposition in favor of SDN on the Complaint.

Having considered the Motion, the pleadings of the parties including documentary attachments thereto and/or references therein, the affidavits filed by the parties and the oral arguments of the parties present at the hearing, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

The Commission finds that there is no genuine issue of fact regarding the following facts and accordingly makes the following findings of fact:

1. On June 9, 2008, Complainant filed a Complaint with the Commission against Midcontinent, Black Hills and Qwest alleging that Complainant and his wife experienced three different telephone service outages. As a result of this Complaint, the Commission opened Dockets CE08-001, CT08-003 and CT08-004 to address the allegations involving Black Hills, Midcontinent and Qwest, respectively.

2. On July 14, 2008, Complainant filed a Motion to Not Consider the Telco's Motion to Dismiss and Amend Complaint to Include Golden West and SDN. As a result of this filing, the Commission opened complaint Dockets CT08-005 and CT08-006 to address allegations involving SDN and Golden West.

3. On August 4, 2008, SDN filed an Answer to Complaint and Motion to Dismiss (Motion).

4. On October 2, 2008, the Commission received a Request by Commission Staff to Schedule Motions to Dismiss, which motion included SDN's Motion. After notice to Complainant evidenced by a certified mail receipt, the Commission considered this motion at a regularly scheduled meeting on October 21, 2008. Complainant did not appear either in person or telephonically. The Commission finds that Complainant had notice of the meeting and elected not to appear either in person or telephonically. The Commission voted unanimously to grant the Request by Commission Staff to Schedule Motions to Dismiss and to serve notice upon the parties of the Commission's intent to treat the Motion in whole or in part as a motion for summary disposition.

5. On October 29, 2008, the Commission served on Complainant its Notice of Intent to Treat Motion to Dismiss as Motion for Summary Disposition; Order for and Notice of Hearing, which set November 12, 2008 as the date for hearing on the Motion. The Notice provided that the parties could participate in the hearing telephonically. SDN appeared. In response to a question from the Commission at the hearing held on the Motion on November 12, 2008, counsel for Staff stated that on November 11, 2008, the state's Veterans Day holiday, Complainant recorded a voice mail on the Commission's central voice mail advising the Commission that he did not intend to appear either in person or telephonically at the hearing. Complainant did not appear at the hearing either in person or telephonically. The Commission finds that Complainant had notice of the hearing and elected not to appear either in person or telephonically.

6. Complainant's failure to appear at the November 12, 2008 hearing on the Motion constitutes a default.

7. The Complaint alleges that Complainant and his wife are Midcontinent customers and that they experienced three telephone service outages. The Complaint further alleges that they are both chronically ill and require uninterrupted telephone service.

8. The only allegations in the Complaint that involve SDN are those alleging that in either February 2008 or in November 2007, "Qwest Communications E-911 network interconnect went down during this time with the Pennington County/City of (Rapid) City, South Dakota E-911 dispatch communication center."

9. With respect to the February 2008 and November 2007 alleged occurrences, the Response of Midcontinent in related Docket TC08-003 states as follows:

Again, while searching all records, the Midcontinent Network Operations Center found no 911 issues recorded in the month of February 2008.

An event occurred on November 13, 2007 that caused concern over E911 availability. One of two circuits carrying traffic from Sioux Falls to Rapid City failed, causing an overload on the other circuit. It was first believed that loss of one of the circuits would impact local phone traffic and 911 service for an unacceptably long period of time. However, Midcontinent technicians executed a backup plan and

rerouted traffic for local calls to the PSAP, restoring service in all cases within 30 minutes of the initial outage report. The earliest internal reports suggested the problem was with a Qwest circuit. Through the cooperation of a number of vendors it was determined that the initial circuit overload was triggered by a Golden West circuit that impacted one of the two main circuits leased from SDN. Qwest had no part in this issue other than offering their cooperation to help Midcontinent's team eliminate Qwest circuits as part of the problem. Golden West, SDN and Qwest supported a large Midcontinent team to resolve the issue with limited impact on customers. A full report of this issue was filed with the Commission on November 14, 2007.

10. The affidavit of Mark Shlanta in support of SDN's Answer to Complaint and Motion to Dismiss states that Complainant is not an SDN customer. The affidavit further states that "SDN has no record of any SDN circuit problem in the Hills area on November 13, 2007."

11. No party produced any offer of evidence to refute SDN's and Midcontinent's versions of events in February 2008 and November 2007. Viewing the evidence most favorably to Complainant, the Commission finds that SDN did not have or cause a failure of Midcontinent's 911 service in February 2008 that would have impacted Complainant. The Commission further finds that although a brief problem did occur with respect to Midcontinent's access to E-911 service on November 13, 2008, there is no offer of evidence in this record on which the Commission could base a finding that this problem was caused by SDN and the evidence that does exist demonstrates that SDN in fact assisted the other involved companies in resolving the problem.

12. The Commission finds for SDN and against Complainant on the Motion to Dismiss considered in whole or in part as a motion for summary judgment.

Based on the foregoing Findings of Fact, the Commission hereby makes the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-31 and 49-3.

2. Based upon the Commission's Findings of Fact set forth in this decision, the Commission concludes that SDN had no responsibility in connection with the outage incidents alleged by Complainant, including the E-911 access issue alleged to have occurred in either February 2008 or November 2009.

3. Complainant's failure to either appear at the hearing or otherwise offer any facts or other substantive response to the Motion or to the Commission's Notice of Intent to Treat Motion to Dismiss as Motion for Summary Disposition; Order for and Notice of Hearing constituted a default. The Commission accordingly concludes that this Complaint against SDN should be dismissed on the grounds of default pursuant to SDCL 1-26-20.

4. The standard for decision on summary judgment was recently reiterated in *Jacobson v. Leisinger*, 2008 SD 19, 24, 746 NW 2d 739, 745 as follows:

The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving

party, however, must present specific facts showing that a genuine, material issue for trial exists. (emphasis supplied).

5. No genuine issue of material fact was raised by Complainant which would require this matter to go to evidentiary hearing.

6. Viewing the evidence most favorably to Complainant, the material facts as to which no genuine issue exists demonstrate that SDN did not fail to furnish adequate, efficient, and reasonable service and that SDN is entitled to judgment as a matter of law on substantive grounds as well as default.

7. SDN's Motion to Dismiss, considered in whole or in part as a motion for summary disposition, is granted.

It is therefore

ORDERED, that Complainant's Complaint is dismissed on grounds of default; and it is further

ORDERED, that SDN's Motion to Dismiss, considered in whole or in part as a motion for summary disposition, is granted.

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

PLEASE TAKE NOTICE that this Final Decision and Order was duly issued and entered on the 20th day of January, 2009. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 20th day of January, 2009.

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>Deldine Kaelbo</u>
Date:	<u>1/20/09</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Dustin M. Johnson
DUSTIN M. JOHNSON, Chairman

Steve Kolbeck
STEVE KOLBECK, Commissioner

Gary Hanson
GARY HANSON, Commissioner