

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

<b>IN THE MATTER OF THE COMPLAINT FILED BY )</b>	<b>FINAL DECISION AND ORDER</b>
<b>JACK AND CINDY BRUNSON, EDGEMONT, )</b>	<b>GRANTING SUMMARY</b>
<b>SOUTH DAKOTA, AGAINST GOLDEN WEST )</b>	<b>JUDGMENT</b>
<b>TELECOMMUNICATIONS COOPERATIVE )</b>	
<b>REGARDING TELECOMMUNICATIONS )</b>	<b>CT07-006</b>
<b>SERVICES )</b>	

On December 13, 2007, Jack and Cindy Brunson ("Complainants" or "Brunsons") filed a Complaint with the South Dakota Public Utilities Commission ("Commission") against Golden West Telecommunications Cooperative ("Golden West") alleging that Golden West had refused to extend and connect phone service to a hunting lodge under development by them as requested and asking the Commission for a determination that they are entitled to have service extended and hooked up as requested. On January 2, 2008, Golden West filed an Answer to Complaint and Motion to Dismiss. The Commission's Staff ("Staff") filed a letter to the Brunsons on July 7, 2009. On July 9, 2009, the Brunsons filed a letter responding to Staff's letter, and on October 22, 2009, the Brunson's filed a letter addressed to Margo Northrup, counsel for Golden West, dated October 14, 2009. On April 13, 2010, Golden West filed a Motion to Dismiss or for Summary Judgment and supporting documents ("Motion"). On April 20, 2010, the Brunsons filed a letter to the Commission dated April 19, 2010. On April 21, 2011, the Commission issued and served on the parties an Order for and Notice of Hearing on Motion to Dismiss or for Summary Judgment ("Notice"). The Notice permitted telephonic participation. On May 2, 2011, Golden West filed a Supplemental Affidavit, Revised Supplemental Affidavit and supporting documentation.

The Commission held the hearing on the Motion as noticed on May 3, 2011. Neither Complainant appeared at the hearing, either in person or telephonically. Golden West appeared. After hearing from Golden West and Staff, the Commission voted unanimously to grant summary disposition in favor of Golden West on the Complaint.

Having considered the Motion, the pleadings and other filings 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 December 13, 2007, Complainants filed a Complaint with the Commission alleging that Golden West had refused to extend and connect phone service to a hunting lodge under development by them as requested and asking the Commission for a determination that they are entitled to have service extended and hooked up as requested. On December 13, 2007, the Commission served a Notice of Complaint; Deadline for Answer and copy of the Complaint on Golden West advising Golden West that it had until January 2, 2008, to settle the matter or file its answer to the Complaint.

2. On January 2, 2008, Golden West filed an Answer to Complaint and Motion to Dismiss. As described in more detail above, a number of pieces of correspondence among the

parties were filed between March 17, 2008, and April 20, 2010. On April 13, 2010, Golden West filed a Motion to Dismiss or for Summary Judgment and supporting Brief, Affidavit and Statement of Undisputed Material Facts.

3. On April 21, 2011, the Commission issued and served on the parties an Order for and Notice of Hearing on Motion to Dismiss or for Summary Judgment. On May 2, 2011, Golden West filed a Supplemental Affidavit, Revised Supplemental Affidavit and supporting documentation. The Commission held the hearing on the Motion as noticed on May 3, 2011.

4. The Commission served its Order for and Notice of Hearing on Motion to Dismiss or for Summary Judgment on Complainants by certified mail. On April 29, 2011, the Commission received the return receipt indicating delivery of the Notice. The Notice set May 3, 2011, as the date for hearing on the Motion. The Notice provided that the parties could participate in the hearing telephonically. Golden West appeared. Neither of Complainants appeared at the hearing, either in person or telephonically. The Commission finds that Complainants had notice of the hearing and did not appear either in person or telephonically.

5. The Complaint alleges that in the spring of 2006, Complainants requested telephone service to a former schoolhouse owned by the Brunsons. This building is also referred to by the parties as the "hunting lodge" and reference is made in the Complaint to construction beginning in 2004. The Commission's understanding is that the Brunsons either have converted or are in the process of converting the schoolhouse for use as a hunting lodge.

6. Denny Law is the General Manager and Chief Executive Officer of Golden West Telecommunications Cooperative, Inc. Affidavits of Mr. Law and supporting Exhibits were filed in support of the Motion on April 13, 2010, and May 2, 2011. These Affidavits and supporting documents were not contested with any substantive information or documentation by Complainants. The Commission accordingly finds that there is no genuine issue of fact with respect to Mr. Law's assertions in his Affidavits.

7. It is the policy of Golden West to obtain the consent of the property owner in the form of a sufficient easement before extending facilities to a customer. The Commission finds this policy to be a reasonable policy.

8. To the knowledge of Mr. Law, a valid recorded easement is not on file with the Register of Deeds that would allow Golden West to utilize the Brunsons' property to provide the requested service.

9. Golden West remains ready, willing and able to provide service to the Brunsons' hunting lodge at a mutually convenient time as soon as a valid easement is executed.

10. Beginning in December of 2007, Golden West engaged in settlement negotiations with Pat Ginsbach, an attorney in Hot Springs, South Dakota, who held himself out to be the attorney for the Brunsons. In the fall of 2008, Golden West believed that a resolution had been reached. Pat Ginsbach then notified the Commission in early 2009 that he no longer represented Complainants. Since that time, Golden West has made attempts to engage in settlement negotiations with the Brunsons directly, but has not been able to reach a satisfactory resolution.

11. Since April 13, 2010, when Golden West filed its Motion, there has been limited activity in this docket, which includes limited settlement negotiations, all of which were initiated by Golden West, and responses by Golden West to informal discovery propounded by Staff.

12. On November 12, 2010, Golden West sent another letter to the Brunsons which reiterated its position that it would need to have a valid, sufficient easement in place in order to provide the requested service. Golden West again sent a proposed easement as well as a map that showed the route it was proposing in the easement. The easement was limited to service to the hunting lodge and is the standard easement used by Golden West. Golden West has received no direct response to this request.

13. The Commission finds Complainants' allegations that Golden West did not offer a reasonable easement to be unsubstantiated. Although initially Golden West did request an easement that would allow it to serve not only the hunting lodge with fiber optic cable, but also bring fiber optic cable to the Igloo subdivision, a landlocked parcel of property adjacent to the Brunson property, the Brunsons did not agree to that proposal, and Golden West subsequently agreed to limit its easement to what was necessary to serve the hunting lodge. This is demonstrated by the correspondence and easement attached as Exhibit B to the Law Supplemental Affidavit.

14. In settlement negotiations, the Brunsons also proposed to install their own copper line to the hunting lodge and to have it connected at the Golden West pedestal. This is not a workable solution for Golden West for several reasons. First of all, Golden West has recently upgraded to fiber optic cable in the area and does not intend to continue to support copper lines. Approximately eight miles of copper line would need to be maintained to serve the hunting lodge. Second, Golden West follows industry standards in regard to the equipment and fiber it uses. Golden West would be subjecting itself to liability if the proper industry standards were not followed. Third, without a valid easement, Golden West would not be able to properly maintain the phone service to the hunting lodge including any maintenance issues that may arise. It is highly likely that service issues will arise on equipment that is not professionally installed. Finally, Golden West does not have any policy or procedure in place that allows such activity. The Commission does not find Golden West's position on the pedestal installation to be unreasonable.

15. This docket has been before the Commission for more than three years and there has been no activity but for the settlement negotiations attempted by Golden West.

16. The Commission finds that Complainants have not raised a genuine issue of material fact requiring hearing and that the facts concerning which there is no genuine issue support Golden West. The Commission accordingly finds for Golden West and against Complainants on the merits of the Complaint.

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 49-13.

2. Based upon the Commission's Findings of Fact set forth in this decision, the Commission concludes that Golden West acted reasonably in conditioning its extension of facilities to the Complainants' hunting lodge on Complainants' execution of an easement sufficient to afford Golden West the access necessary to install and maintain the facilities.

3. 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.

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

5. Viewing the evidence most favorably to Complainants, the material facts as to which no genuine issue exists demonstrate that Golden West did not act unreasonably when it did not extend facilities for providing service to Complainants in the absence of a valid easement providing access rights sufficient to accommodate installation and maintenance of the facilities and that Golden West is entitled to judgment as a matter of law on the merits.

6. Golden West's Motion for Summary Judgment is granted.

It is therefore

ORDERED, that Golden West's Motion for Summary Judgment is granted.

### NOTICE OF ENTRY AND OF RIGHT TO APPEAL

PLEASE TAKE NOTICE that this Final Decision and Order Granting Summary Judgment was duly issued and entered on the 20<sup>th</sup> day of May, 2011. 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 Granting Summary Judgment. 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 20<sup>th</sup> day of May, 2011.

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>Leann Arclade</u>
Date:	<u>5-20-11</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Steve Kolbeck  
STEVE KOLBECK, Chairman

Gary Hanson  
GARY HANSON, Commissioner

Chris Nelson  
CHRIS NELSON, Commissioner