

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

**IN THE MATTER OF S&S ) ORDER TO SHOW CAUSE  
COMMUNICATIONS/ALTERNA-CELL'S ) AND NOTICE OF HEARING  
COMPLIANCE WITH COMMISSION ORDER ) TC02-166**

On June 6, 2003, the Public Utilities Commission (Commission) received a Motion for Order to Show Cause and Notice of Hearing (Motion) from Commission Staff. In the Motion, the Commission Staff moved that the Commission issue an Order to Show Cause against S&S Communications/Alterna-Cell (S&S) pursuant to ARSD 20:10:01:45 and a Notice of Hearing pursuant to ARSD 20:10:24:04.03. Staff requested that the Commission consider the following issues at the show cause hearing: 1) whether the Certificate of Authority of S&S should be revoked; 2) whether fines or penalties should be imposed if S&S is found to have acted in violation of the Commission's March 20, 2003 Order and/or the COA Order; 3) whether an Order to Compel should be issued requiring S&S to produce books and records as provided in SDCL 49-31-7.1; and 4) whether other appropriate relief should be granted by the Commission.

On June 11, 2003, the Commission received a Supplement to Motion for Order to Show Cause and Notice of Hearing (Supplemental Motion) from Commission Staff. In the Supplemental Motion, Staff requested that Les Sumption and Matt Swearingen be prohibited from ever possessing any authority to provide any telecommunications services in the state if the Commission revokes S&S' COA. Staff also requested that the Commission permit Staff to take action against any bonds and the letter of credit issued by the Aberdeen Finance Corporation. In addition, Staff requested that the Commission compel S&S to release the 800 numbers of any customers requesting the release so that customers may maintain their 800 numbers when they seek service from another provider.

At its June 13, 2003, ad hoc meeting, the Commission considered the motions. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 49-13 and 49-31, specifically 49-13-4, 49-13-5, 49-13-13, 49-31-3, 49-31-7, 49-31-7.1, 49-31-7.4, 49-31-11, 49-31-38, and 49-31-38.1, and ARSD 20:10:01:28, 20:10:01:45, 20:10:24:02, 20:10:24:03, 20:10:24:04, 20:10:24:04.02, 20:10:24:04.03, and 20:10:24:04.04. At the meeting, the Commission heard from Commission Staff and Jon Frankel, attorney for S&S. S&S' attorney did not object to the issuance of an Order to Show Cause and Notice of Hearing. The Commission unanimously voted to issue an Order to Show Cause and Notice of Hearing on the following issues:

1. Whether the Certificate of Authority of S&S should be revoked or suspended if S&S is found to have acted in violation of any of the Commission's orders, rules, or state law;
2. Whether fines or penalties should be imposed if S&S is found to have acted in violation of any of the Commission's orders, rules, or state law;
3. Whether an Order to Compel should be issued requiring S&S to produce books and records as provided in SDCL 49-31-7.1;
4. Whether S&S should be ordered to release 800 numbers if requested by the customer that has been assigned the 800 number;

5. Whether the Commission should take action against any bonds and the letter of credit issued by Aberdeen Finance Corporation;
6. Whether Les Sumption and/or Matt Swearingen should be barred from providing telecommunications services in South Dakota in the future if the Commission determines that they have violated any Commission orders, rules, or state law; and
7. Any other appropriate relief that may be granted by the Commission.

In addition, the Commission directed Staff to attempt to obtain the bond proceeds and the proceeds from the Irrevocable Letter of Credit issued by Aberdeen Finance Corporation.

The Commission recites the following in support of its Order to Show Cause and Notice of Hearing:

1. On July 21, 2000, the Commission, in accordance with SDCL 49-31-3 and ARSD 20:10:24:02, received an application for a certificate of authority from S&S. S&S' application was docketed as TC00-114. S&S sought authority to provide interstate and intrastate long distance, voice mail services, 800 number services, and calling card services. A proposed tariff was filed by S&S.
2. On December 21, 2000, the Commission issued an Order Granting Certificate of Authority in Docket TC00-114, granting S&S a certificate of authority, subject to the following conditions:
  - a. Aberdeen Finance Corporation (AFC) and S&S sending a letter to all of S&S' long distance customers for which AFC holds financing agreements informing them of the collateral agreement;
  - b. A continuous \$50,000 (at a minimum) surety bond; and
  - c. S&S reporting to the Commission the current level of prepaid customers and updating its bond every six months to provide 100% coverage of the prepaid amounts not covered under the collateral agreement.

*Order Granting Certificate of Authority (Attachment A) [hereafter referred to as COA Order].*

3. On September 27, 2002, the Commission received a Motion from Staff requesting that the Commission issue an Order to Show Cause to S&S as to why S&S should not be found in violation of the Order Granting Certificate of Authority in Docket TC00-114 and of the laws of the state of South Dakota, including but not limited to SDCL 49-31-7.1 and ARSD 20:10:01:28, 20:10:06:05, and 20:10:24:05.05. On October 28, 2002, the Commission issued an Order Granting Motion to Issue Order to Show Cause. *Order Granting Motion to Issue Order to Show Cause (Attachment B).*
4. At its March 18, 2003, meeting, Staff and S&S jointly recommended that the Commission reconsider the terms and conditions of S&S' certificate of authority and impose a new restriction that S&S not offer any prepaid services (including a prepaid calling card) or require or accept deposits or advance payments without prior approval of the Commission. On March 20, 2003, the Commission issued an order amending the certificate of authority by adding the condition that S&S not offer prepaid services to, or require or accept deposits or advances payments from, South Dakota customers without prior approval of the Commission, and that all conditions contained in the

original certificate of authority granted in Docket TC00-114 remain in effect and subject to enforcement by the Commission. *Order Granting Amended Certificate of Authority* (Attachment C).

5. On May 27, 2003, the Commission received from Staff a Motion for Order to Amend Certificate of Authority to Clarify and Add Reporting Requirements. In the Motion, Staff requested that the Commission require S&S to provide in its reports to the Commission on or before June 21 and December 21 of each year, commencing with June 21, 2003, a number of documents, statements, and information. *Motion for Order to Amend Certificate of Authority to Clarify and Add Reporting Requirements* (Attachment D).

6. At its June 3, 2003, meeting, the Commission considered Staff's Motion. At the meeting, S&S stated that it did not object to the Commission granting Staff's Motion. The Commission voted to grant the Motion. On June 3, 2003, the Commission issued its order granting the motion and ordered that S&S' Certificate of Authority is amended to include the following requirements:

- a) A list (electronic and hard copy) of all South Dakota pre-paid customers. Each individual customer listing shall include: customer's name; customer's complete mailing address; customer's telephone number; customer's account number; type of contract (tariffed service offering); number of contracts; contract start date; contract expiration date; amount received per contract (including tax); total amount received (including tax); indication if amount was paid in cash or financed through the Aberdeen Finance Corporation or other source; total (original) customer principal amount financed by the Aberdeen Finance Corporation; current customer principal amount owed to the Aberdeen Finance Corporation; a letter signed by an Aberdeen Finance Corporation officer verifying and concurring with the per customer amounts; S&S' unearned revenue - calculated by dividing the total amount received by the term of the contract and multiplying by the remaining term of the contract; customer principal amount at risk - this amount is the difference between the unearned revenue and the current customer Aberdeen Finance Corporation principal when the Aberdeen Finance Corporation principal is greater than the unearned revenue; and the calculated bond amount - this amount is the sum of the unearned revenue for all non-Aberdeen Finance Corporation financed customers and the customer principal at risk;
- b) A bond totaling the sum of the individual customers' calculated bond amounts;
- c) A list (electronic and hard copy) of all South Dakota postpaid customers including: customer's name; customer's complete mailing address; customer telephone number; customer account number; and type of service (tariffed service offering); and
- d) Generally Accepted Accounting Principles (GAAP) compliant financial statements for S&S, including a balance sheet, income statement, and statement of cash flow for the most recent 12 month period.

See *Order Granting Motion to Amend Certificate of Authority to Clarify and Add Reporting Requirements* (Attachment E).

7. On June 6, 2003, the Commission received a Motion for Order to Show Cause and Notice of Hearing from Commission Staff. *Motion for Order to Show Cause and Notice of Hearing from Commission Staff* (Attachment F).

8. In the Motion, Staff alleged that S&S, either itself or through one or more agents, "[s]old pre-paid telephone service contracts to and collected prepayments from one or more customers in South Dakota following the effective date of the Commission's order issued on March 20, 2003 prohibiting S&S from offering pre-paid telephone services in South Dakota in violation of such order." In support of this allegation, Staff submitted an affidavit from James Mehlhaff, an employee of the Commission in its Consumer Affairs Division. *Affidavit of James Mehlhaff of the Consumer Affairs Division of the PUC* (Attachment G). In his affidavit, James Mehlhaff stated that "Legend Seeds has provided me a copy of a prepaid telecommunications contract that was signed on April 17, 2003, in the amount of \$11,700.28. . . ." The affidavit further asserted that Mehlhaff had received documentation from "Dakota Premium Hay, located in Meckling, South Dakota, indicating that S&S sold them prepaid telecommunications services on April 29, 2003, in the amount of \$3,360." The documents referenced in the affidavit were attached to the affidavit. See Attachment G.

9. Staff alleged that S&S "[f]ailed to make the report and bond upgrade required in the" COA Order for the December 21, 2001 reporting date.

10. Staff alleged that S&S "[f]ailed on one or more occasions to provide current prepaid customer information in accordance with" the COA Order.

11. Staff alleged that S&S "[p]rovided insufficient information from which the proper bond amount under the COA Order could be calculated."

12. Staff alleged that S&S "[p]rovided inaccurate information regarding the current amount of customer prepayments and amounts financed by Aberdeen Finance Corporation on one or more occasions."

13. Staff alleged that S&S "[f]ailed to provide a bond to effect 100% bond coverage of customer prepayments in excess of the amount covered by the collateral agreement."

14. Staff alleged that S&S "[r]efused to provide information deemed necessary, and requested of S&S in writing, by Commission Staff to enable the correct determination of the current amount of customer prepayments and resulting bond coverage requirement."

15. Staff alleged that S&S "[e]ngaged in deceptive sales practices by failing to disclose to customers the facts that S&S was subject to a Commission order prohibiting pre-paid service contracts, that S&S was not in compliance with the 100% bonding requirement of the COA order and that S&S was having financial problems that could result in its not being able to provide the services for which the customer was paying."

16. Staff alleged that S&S "[f]ailed to maintain financial books and records meeting customary standards of business prudence."

17. In its Supplemental Motion, Staff alleged that Les Sumption and Matt Swearingen acted in violation of ARSD 20:10:24:04.02 by failing to maintain accounts and records; failing to file all financial and other reports required by the Commission; failing to maintain on file all current tariffs and rates; failing to cooperate with Commission investigations or inquiries regarding customer complaints; and as officers or agents of a telecommunications company, furnished or made misleading or false statements or reports to the Commission. Staff requested that if the Commission revokes S&S' COA, the Commission should also prohibit Les Sumption and Matt Swearingen from

providing any telecommunications services in South Dakota for life, or until such time as the Commission deems appropriate.

18. In its Supplemental Motion, Staff requested that the Commission take action against the \$75,000.00 bond of S&S and the \$125,000.00 Letter of Credit issued by Aberdeen Finance Corporation. At the June 13, 2003, meeting, Staff stated that there are other bonds in addition to the \$75,000.00 bond issued by Star Insurance Company.

19. In its Supplemental Motion, Staff alleged that some S&S customers have been unable to get their 800 numbers released as they attempted to find a new long distance provider. *Supplement to Motion for Order to Show Cause and Notice of Hearing* (Attachment H). Thus, Staff requested that the Commission issue an order compelling S&S to release the 800 number of any and all customers so requesting so that they may maintain those numbers as they seek service from other providers.

20. At the June 13, 2003, meeting, James Mehlhaff stated that since June 2, 2003, the Consumer Affairs Division had received 112 complaints regarding S&S.

21. Pursuant to SDCL 49-31-3, "[a]ny certificate of authority granted by the commission may be suspended or revoked pursuant to chapter 1-26 for a willful violation of the laws of this state, a willful failure to comply with a rule or order of the commission, or other good cause." In addition, ARSD 20:10:24:04.02 provides as follows:

Failure of any provider of interexchange service to comply with applicable requirements set forth in this chapter, other terms and conditions imposed on its certification by the commission, or applicable rules and laws, or for other good cause may result in the suspension or revocation of the provider's certificate of authority to provide interexchange services. Other good cause may include the following conduct:

- (1) Failure to maintain accounts and records as required by the commission;
- (2) Failure to file with the commission all financial and other reports that the commission may require, in a form and at such times as the commission may designate;
- (3) Failure to maintain on file with the commission all current tariffs and rates;
- (4) Failure to cooperate with commission investigations or inquiries regarding customer complaints; and
- (5) The furnishing or making of any misleading or false statement or report by an officer or agent of a telecommunications company, including those made by its legal counsel, to the commission.

Based on the information provided by Staff, the Commission finds that sufficient cause exists to issue an Order for Show Cause and Notice of Hearing and orders S&S and its owners, Les Sumption and Matt Swearingen, to appear before the Commission on June 30, 2003, beginning at 10:00 a.m., in Room 412 of the State Capitol, 500 East Capitol, Pierre, South Dakota, and show cause why one or more of the following remedies or penalties should not be imposed upon S&S and its owners:

1. Whether the Certificate of Authority of S&S should be revoked or suspended if S&S is found to have acted in violation of any of the Commission's orders, rules, or state law, pursuant to SDCL 49-31-3, 20:10:24:04.02, 20:10:24:04.03, and 20:10:24:04.04;

2. Whether fines or penalties should be imposed if S&S is found to have acted in violation of any of the Commission's orders, rules, or state law, pursuant to SDCL 49-31-7.4, 49-31-38, and 49-31-38.1;
3. Whether an Order to Compel should be issued requiring S&S to produce books and records as provided in SDCL 49-31-7.1;
4. Whether S&S should be ordered to release 800 numbers if requested by the customer that has been assigned the 800 number;
5. Whether the Commission should take action against the bonds and letter of credit issued by Aberdeen Finance Corporation;
6. Whether Les Sumption and/or Matt Swearingen should be barred from providing telecommunications services in South Dakota in the future if the Commission determines that they have violated any Commission orders, rules, or state law, pursuant to ARSD 20:10:24:04.02 and 20:10:24:04.04; and
7. Any other appropriate relief that may be granted by the Commission.

The issues at the hearing are whether any of the above-listed remedies or penalties should be imposed on S&S. The hearing is an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to attend and represent themselves or be represented by an attorney. However, such rights and other due process rights shall be forfeited if not exercised at the hearing. If you or your representative fail to appear at the time and place set for the hearing, the Final Decision will be based solely on testimony and evidence provided, if any, during the hearing or a Final Decision may be issued by default pursuant to SDCL 1-26-20.

The Commission, after examining the evidence and hearing testimony presented by the parties, shall make Findings of Fact, Conclusions of Law, and a Final Decision. As a result of the hearing, the Commission may order one or more of the remedies or penalties listed above. The Final Decision made by the Commission may be appealed by the parties to the Circuit Court and the South Dakota Supreme Court as provided by law.

It is therefore

ORDERED, that S&S and its owners, Les Sumption and Matt Swearingen, shall appear before the Commission on June 30, 2003, beginning at 10:00 a.m., in Room 412 of the State Capitol, 500 East Capitol, Pierre, South Dakota, and show cause why one or more of the above-listed remedies or penalties should not be imposed upon S&S and its owners.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 16th day of June, 2003.

<p style="text-align: center;"><b>CERTIFICATE OF SERVICE</b></p> <p>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.</p> <p>By: _____</p> <p>Date: _____</p> <p style="text-align: center;">(OFFICIAL SEAL)</p>
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BY ORDER OF THE COMMISSION:

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ROBERT K. SAHR, Chairman

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GARY HANSON, Commissioner

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JAMES A. BURG, Commissioner