

Service Date: November 26, 2002

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF Directory Service, Inc.,)	UTILITY DIVISION
Network Comm. Group, and Integretel Complaint)	
by the Montana Public Service Commission)	DOCKET NO. D2002.3.29
Regarding Unauthorized Charges on Customers')	
Telecommunications Bills)	ORDER NO. 6411c

ORDER DENYING DSI'S MOTION TO SET ASIDE DEFAULT JUDGMENT

On November 19, 2002, at a regularly scheduled work session, the Montana Public Service Commission (Commission) acted on DSI's Motion to Set Aside Default Judgment or in the Alternative for Relief From the Same (Default Judgment entered on June 20, 2002, by Order No. 6411b). DSI's motion to set aside the default judgment was filed with the Commission on November 1, 2002.

DISCUSSION

DSI's motion to set aside the default judgment is denied. DSI had recourse under the Administrative Rules of Montana to request the commission reconsider its order of June 20, 2002, DSI did not file a motion for reconsideration with the commission. Motions for reconsideration of a commission order shall be filed within ten days of the date an order is issued or decision has been made by the commission. ARM 38.2.4806(1). If no motion for reconsideration is filed, a commission order is final and appealable within thirty (30) days of its service. ARM 38.2.4806(6). The appropriate avenue for DSI to seek relief from the default judgment entered against it was to file either a motion for reconsideration, or to appeal the order. See, 69-3-402, MCA. DSI did not move for reconsideration, nor did DSI appeal the order.

Having failed to utilize the administrative procedural tools available to it, DSI argues that its motion to set aside the default judgment should be analyzed under Mont.R.Civ.Pro. 55(c) or 60(b)(4) and 60(b)(6). Regardless of whether Rule 55(c) and Rule 60(b) apply in this case, the motion to set aside the default judgment is not timely under those rules of

procedure. Under Mont.R.Civ.Pro. 55(c) a judgment by default may be set aside in accordance with Mont.R.Civ.Pro. 60(b). Motions made under Rule 60(b) must be made "within a reasonable time." A motion to set aside a default judgment filed four months after the judgment is entered is not "reasonable." *See, Schneider v. Ostwald*, 190 Mont. 29, 617 P.2d 1293 (1980). DSI did not appeal the default order entered on June 20, 2002, as allowed by ARM 38.2.4806(6). Failure to appeal is fatal to a motion to reopen judgment under Rule 60(b). Rule 60(b) is not a substitute for filing an appeal. *Koch v. Billings School District No. 2*, 253 Mont. 261, 271, 833 P.2d 181 (1992). When a party could have submitted evidence in support of its claim or defense, and chose not to do so, that party's "desire to retroactively argue a factual issue in the case" is not a sufficient reason justifying the setting aside of a judgment. *In re Marriage of Hopper*, 297 Mont. 225, 235, 991 P.2d 960 (1999)(internal citations omitted).

In this case, DSI was sporadically in contact with the Commission regarding the complaint filed against it on March 8, 2002. DSI chose not to respond to that complaint, and also chose not to respond to the default judgment entered on June 20, 2002. DSI's motion to set aside the default judgment, its first formal appearance in this docket, was filed more than four months after the default judgment was entered against it and nearly eight months after the initial complaint was filed against DSI. Rule 60(b) is designed to be an avenue of relief for a party wronged through no fault of its own. *In Re Marriage of Hopper*, 297 Mont. at 235. DSI knew of the proceeding against it, and did not present a defense when it was required to do so. Rule 60(b) is an inappropriate vehicle for relief in this case.

For the above reasons, DSI's motion to set aside the default judgment entered on June 20, 2002, is denied.

DONE AND DATED this 19th day of November, 2002, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)