

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

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IN THE MATTER OF THE COMPLAINT  
FILED BY CHRISTOPHER A. CUTLER  
ON BEHALF OF RECREATIONAL ADVENTURES  
COMPANY, HILL CITY, SOUTH DAKOTA,  
AGAINST AT&T COMMUNICATIONS OF THE  
MIDWEST, INCORPORATED REGARDING  
FAILURE TO PROVIDE SERVICES

CT02-021

**ORIGINAL**

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Transcription of Cassette Tapes of  
Proceedings held on January 2, 2003

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
JIM BURG, CHAIRMAN  
PAM NELSON, VICE CHAIRMAN  
ROBERT SAHR, COMMISSIONER

COMMISSION STAFF  
John Smith  
Rolayne Ailts Wiest  
Karen Cremer  
Greg Rislov  
Mary Healy  
Harlan Best  
Keith Senger  
Michele Farris  
Heather Forney  
Debra Elofson  
Tina Douglas

APPEARANCES  
Steven Weigler, on behalf of AT&T  
Richard Gregerson, on behalf of AT&T

**PRECISION REPORTING**

L I M I T E D

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25 Mary Healy  
26 Harlan Best  
27 Keith Senger  
28 Michele Farris  
29 Heather Forney  
30 Debra Elofson  
31 Tina Douglas  
32  
33 APPEARANCES  
34 Steven Weigler, on behalf of AT&T  
35 Richard Gregerson, on behalf of AT&T  
36 Meredith Moore (by telephone), on behalf of  
37 the Complainant  
38  
39 Reported By Cheri McCemsey Wittler, RPR

1 TRANSCRIPT OF TAPE RECORDED PROCEEDINGS, held 2  
2 in the above-entitled matter, at the South Dakota State  
3 Capitol, Room 464, 500 East Capitol Avenue, Pierre,  
4 South Dakota, on the 2nd day of January 2003,  
5 commencing at 9 o'clock a.m.  
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1 CHAIRMAN BURG: Okay. I'll open the 3  
2 hearing then in CT02-021 In The Matter of the  
3 Complaint Filed By Christopher A. Cutler on Behalf  
4 of Recreational Adventures Company, Hill City,  
5 South Dakota, against AT&T Communications of the  
6 Midwest, Incorporated Regarding Failure To Provide  
7 Services.  
8 The questions that are before the Commission  
9 today is shall the Commission grant AT&T's Motion  
10 to resist or in the alternative -- or a summary  
11 judgment.  
12 With that, I'll let AT&T argue their  
13 motions -- or reasons for summary judgment, I  
14 guess.  
15 MR. WEIGLER: There's just one  
16 thing. We don't -- AT&T initially filed a Motion  
17 to Dismiss in the alternative for summary judgment.  
18 Upon reading further case law, we don't believe  
19 that this Commission has the jurisdiction to look  
20 at the summary judgment issue because it would be  
21 looking at and interpreting the content. So AT&T is  
22 at this time is removing -- removing that portion  
23 of this Motion.  
24 In it's refibering -- AT&T has done a  
25 refibering and -- and if this Commission does find

1 it has jurisdiction, we're going to take this 4  
2 matter to the U.S. District Court because we  
3 believe firmly, strongly, that the Commission has  
4 no jurisdiction for two reasons.  
5 And so we would instead supplement -- our  
6 Motion would be today for -- to dismiss and in the  
7 alternative we need a stay so we can take this  
8 matter to the U.S. District Court.  
9 CHAIRMAN BURG: You're removing your  
10 request for summary judgment?  
11 MR. WEIGLER: Yes. Exactly. We  
12 believe that the Commission --  
13 CHAIRMAN BURG: Excuse me. I  
14 probably got ahead of myself.  
15 MR. WEIGLER: Sure.  
16 CHAIRMAN BURG: I need to check.  
17 Meredith Moore, are you on the phone?  
18 MS. MOORE: Yes, I am.  
19 CHAIRMAN BURG: Okay. I forgot,  
20 make sure you were. I assumed. And then will you  
21 identify yourself.  
22 MR. WEIGLER: Sure.  
23 MR. GREGERSON: Dick Gregerson with  
24 the firm of Woods, Fuller, Shultz & Smith,  
25 Sioux Falls, South Dakota, representing AT&T.

1 MR. WEIGLER: And Steven Weigler,  
2 senior attorney for AT&T from Denver, Colorado.  
3 CHAIRMAN BURG: And then I guess  
4 I'll have you introduce yourself too, Meredith.  
5 MS. MOORE: Certainly. I'm  
6 Meredith Moore from the law firm of Cutler and  
7 Donahue in Sioux Falls, South Dakota, and I  
8 represent Mr. Christopher Cutler and Recreational  
9 Adventures.  
10 CHAIRMAN BURG: And before we move  
11 forward, do you have any comment on their move to  
12 dismiss or to remove the summary judgment portion?  
13 MS. MOORE: That would be fine with  
14 me. I certainly have no comment on that.  
15 CHAIRMAN BURG: Okay. You may go  
16 ahead with your arguments for dismissal.  
17 MR. WEIGLER: Chairman Burg,  
18 Commissioner Nelson, Commissioner Sahr, what I'd  
19 like to do is do a basic description of --  
20 (Inaudible) -- and then go into the state law  
21 issues, which Mr. Gregerson will handle, and then I  
22 will handle the interstate and intrastate issue, if  
23 that's okay with the Commission.  
24 This is a dispute that Claimant brings to this  
25 Commission based on a contract that incorporates

1 federal tariffs that AT&T and the Claimant entered  
2 into. And they bring this to the Commission where  
3 there's, number one, no due process, I mean -- or  
4 we don't have the right to a jury trial. We don't  
5 have a right -- it's basically the wrong forum for  
6 a lot of those issues too. But it's a contract.  
7 There's a contract out there.  
8 There's something called a parole evidence  
9 rule that says what's in the contract is -- unless  
10 it's ambiguous, it shouldn't -- you don't look  
11 outside the terms of the contract. That's basic  
12 seminal contract law. And they say the acts of the  
13 party in forming this contract should be taken into  
14 consideration.  
15 And the acts of the parties, I mean, there's a  
16 dispute on what the acts of the parties are, but  
17 what Claimant says is that our representatives made  
18 some representations that there could be T-1  
19 service provided and, therefore, they bought some  
20 equipment.  
21 But -- and what they state in their  
22 contract is -- I'm sorry, their brief, is that  
23 there was a contract entered into between the  
24 parties. The contract also incorporates federal  
25 tariff terms. What is this a contract for? This

1 is a contract for a T-1 line.  
2 And a T-1 line, if I could explain -- because  
3 if you delve a lot into the jurisdictional  
4 issues -- and I drew it up on the board.  
5 CHAIRMAN BURG: Do you want to turn  
6 one of those on and make it available?  
7 MR. WEIGLER: Sure. And I'll  
8 describe it for Ms. Moore too. What this is, for  
9 Ms. Moore, is it's a map of the 14 states, Qwest  
10 region, I take it, or -- part of it. It took me  
11 awhile to figure out exactly what it was. But I  
12 used it. There's a -- AT&T is -- and I'm focusing  
13 on what is South Dakota here.  
14 AT&T isn't a local service provider, as this  
15 Commission knows. AT&T doesn't provide local phone  
16 service through its lines. That was -- in 1984  
17 that was deregulated and demonopolized and the  
18 local does provide the local lines into everyone's  
19 home and let's you have an alternative such as a  
20 cell phone or whatever. But the lines are actually  
21 provided by Qwest Corporation, local service  
22 provider.  
23 AT&T has a long distance -- a network. But we  
24 have to get to our network. So the T-1 line we  
25 contract with Qwest Corporation to provide because

1 they're the ones that own the local line. We have  
2 to -- so when someone contracts with AT&T for data  
3 services they're contracting for AT&T's network.  
4 But we have to get to AT&T's network. And so  
5 that -- for that, AT&T and the customer rely on  
6 Qwest Corporation.  
7 So what we have here is -- the campground that  
8 we're talking about is near Rapid City. Now I know  
9 Rapid City's closer to down here, but when I drew  
10 it I was just drawing it kind of -- (Inaudible).  
11 The campground -- AT&T doesn't provide T-1  
12 service to the campground. And who provides it is  
13 Qwest Corporation, if the facilities are available.  
14 AT&T needs to rely on Qwest Corporation to provide  
15 the T-1 service to get to AT&T's network.  
16 Once it gets to AT&T's network, then AT&T  
17 could provide the data services all over the  
18 continental United States and the world. But these  
19 aren't AT&T's facilities. The T-1 service is  
20 something that is relied -- either they have the  
21 facilities or the facilities aren't available to go  
22 from the Qwest Corporation line to AT&T's network.  
23 If we can't get to AT&T's network, which we  
24 own, we can't provide the service. And that's the  
25 situation that happened here. Because AT&T's

1 network is here and the campground is here and  
2 Qwest doesn't have the facilities here, AT&T can't  
3 provide the service.

4 COMMISSIONER NELSON: Except you're  
5 supposed to be a real phone provider. And don't  
6 you have some burden to determine whether or not  
7 you have a network that hooks up with somebody  
8 else's when you tell them that they can have  
9 services?

10 MR. WEIGLER: First of all,  
11 Commissioner Nelson, that's in dispute and we  
12 didn't -- our position is we didn't guarantee that  
13 we would provide services. That's an issue in  
14 dispute and would have to be decided by the federal  
15 court.

16 COMMISSIONER NELSON: Are you saying  
17 there's a difference between guaranteeing it and  
18 telling people that you can have it?

19 MR. WEIGLER: No. I'm saying that  
20 the representations that the AT&T representative  
21 made and what the Complainant made are in dispute.

22 So, Commissioner Nelson, the fact that you're  
23 saying that AT&T actually told the person that we  
24 had --

25 COMMISSIONER NELSON: No. I'm not

1 saying that. I'm asking you.

2 MR. WEIGLER: -- the services,  
3 that's in dispute and AT&T denies that. That's not  
4 on the record, and that's not something you should  
5 be considering today.

6 COMMISSIONER NELSON: I guess  
7 inquiring minds like to know. And I didn't say you  
8 told them. I'm asking you did you tell them.

9 MR. WEIGLER: No.

10 COMMISSIONER NELSON: I guess you're  
11 saying that's not an appropriate question for  
12 today.

13 MR. WEIGLER: That's an  
14 inappropriate question for today. Today we're  
15 dealing with jurisdiction, and it's something that  
16 is in dispute.

17 COMMISSIONER NELSON: Thank you.

18 MR. WEIGLER: Sure. Now the  
19 Commission -- because this is a -- there's  
20 something else that goes with this diagram, and  
21 it's the fact that the AT&T network goes to all of  
22 these states and the entire world, unless -- the  
23 FCC says unless there's more than 10 percent of the  
24 services that's -- unless there's less than  
25 10 percent of the services that go interstate,

1 meaning around the other states, that the FCC has  
2 exclusive jurisdiction --

3 This is called special access, the entire  
4 thing, because we're using access to get to AT&T's  
5 network. And unless there's 10 percent -- or less  
6 than 10 percent interstate traffic, that the FCC  
7 has exclusive jurisdiction on special access.

8 And that's under FCC regulation. It's  
9 documented in numerous cases. If the Commission  
10 needs more cases, I'd be glad -- there's a plethora  
11 of cases out there that says the FCC has exclusive  
12 jurisdiction on special access. It's called the 90  
13 percent rule.

14 And even in the Claimant's claim they say the  
15 campground is using the services to get to a  
16 reservation center in Idaho. I believe it's Idaho  
17 or Montana. So if they are, there's no dispute  
18 that they're using the services to go interstate.  
19 And the FCC has exclusive jurisdiction on that.

20 We'll get into that a little later, but I  
21 wanted to show you on this diagram in kind of a  
22 geographic term what's going on here.

23 Now the Claimant claims that this is a  
24 contract claim and not a tariff claim, which is  
25 fine. To AT&T it's a contract and tariff claim.

1 And because of the 90 percent rule and because  
2 there's interstate jurisdictional issues and  
3 because this is a contract claim involving the --  
4 the Commission is going to have to interpret this  
5 contract under parole evidence rule. There's no  
6 way of getting around it. It's a contract claim.

7 So under those two -- for those two reasons  
8 this claim belongs in court, and because it's a  
9 federal jurisdictional issue, because it involves  
10 interstate traffic and it involves FCC rulings and  
11 it's something that the FCC has jurisdiction on,  
12 it's something that should be in U.S. District  
13 Court as opposed to South Dakota State Court.

14 There's also a choice of law provision in the  
15 contract that says this involves New York  
16 substantive law. Is this Commission -- first they  
17 have to determine if they are going to use -- what  
18 substantive law they're going to use. Because the  
19 contract says New York substantive law.

20 Is the Commission going to determine that  
21 they're not going to use New York substantive law?  
22 I mean, it's right there on the contract that  
23 New York -- and they entered into the contract that  
24 New York substantive law should be used.

25 Regardless, that's getting a little ahead of

1 myself. But the issue -- if this Commission finds  
2 that it's a contract dispute, the law is clear that  
3 this Commission doesn't have jurisdiction. They  
4 don't have to go into the interstate jurisdiction  
5 argument.

6 The same holds true if this Commission  
7 determines that it's an interstate service, which  
8 it's so clear it is. Special access, we order it  
9 off Qwest tariffs, federal tariffs, right there.  
10 We ordered it off -- again, I'm going to repeat  
11 this. We have to order this --

12 CHAIRMAN BURG: Meredith, can you  
13 hear the arguments?

14 MS. MOORE: I'm sorry. I missed  
15 that last --

16 CHAIRMAN BURG: Yeah. You're  
17 getting way away from the mike. You need that  
18 mike.

19 MS. MOORE: Thank you.

20 MR. WEIGLER: We order the service  
21 off Qwest federal tariffs. And I'll repeat that.  
22 We order the service off Qwest federal tariffs.  
23 Why? Because Qwest considers it and the FCC  
24 considers it an interstate service. It's  
25 interstate special access. It's in front of the

1 FCC right now that everything that's clear within  
2 all the parties is interstate special access.

3 Regardless, if the Commission finds that,  
4 well, this isn't a contract dispute but it's an  
5 interstate service, the Commission still doesn't  
6 have jurisdiction. In other words, that just --  
7 it's not a both. You don't have to find both.  
8 It's an either. Either one or the other, you don't  
9 have jurisdiction. And here both sides are so  
10 clear that it's an issue that should be in the  
11 federal courts.

12 Now AT&T isn't saying, Ms. Moore, don't bring  
13 a claim or we won't continue discussing this. But  
14 to bring a claim in the wrong jurisdiction thinking  
15 that AT&T's going to just bow down and not do  
16 anything is absolutely wrong.

17 The case should be decided -- it should be  
18 handled in a normal process, but it should be  
19 handled in either U.S. District Court or if the  
20 Claimant wants to bring it in state court, we'll  
21 remove it to U.S. District Court. But there -- but  
22 those are, number one, where contractual disputes  
23 under your -- South Dakota Constitution says it,  
24 that contractual disputes should be determined in a  
25 court of law.

1 And there we have -- number one, that we have  
2 the right to a jury, which we're going to want.  
3 Number two, we have procedural due process, which  
4 we're going to need. And, number three, there's  
5 alternative dispute resolution proceedings that we  
6 can take advantage of. Number four, we believe  
7 that we -- under our theory, if you go on, which  
8 I'm not doing today, we feel we're going to win in  
9 court.

10 Regardless, these are -- that's the nature of  
11 this dispute. The contract -- the Claimant  
12 attached the contract to its Complaint. The  
13 Claimant did, not -- and the Claimant claims that  
14 there's a contract -- (Inaudible). We say it's a  
15 contract governed by federal tariff, which is a  
16 matter of law. It should be interpreted as a  
17 matter of law.

18 But if they don't think it's a contract  
19 tariff, that's fine. But it's a contract.  
20 Otherwise, we don't have any obligation. What  
21 obligations would we have if we didn't contract?  
22 We don't have obligations to provide everyone phone  
23 service. We don't even own the lines. It has to  
24 be a contract.

25 And with that, I'm going to turn over the law

1 to discuss the law on federal contract -- on state  
2 contract claims to Mr. Gregerson.

3 MR. GREGERSON: Morning.

4 COMMISSIONER NELSON: Morning.

5 MR. GREGERSON: First of all, I --

6 we were only recently involved in this case last  
7 month and the involvement -- our involvement so far  
8 has been limited basically to South Dakota Law.  
9 And we asked for a continuance last month, and I  
10 want to again thank the Commission for the courtesy  
11 you extended to me as the time limit was short.

12 So I appreciate it very much. And I know the  
13 Claimant's counsel too didn't resist too  
14 vigorously. So she was also somewhat cooperative.

15 I think the issue here really as far as our  
16 goal is concerned is does the Commission have  
17 jurisdiction in this case or does it belong in  
18 another forum.

19 Now I think we have a pretty strong case but  
20 really that's not the issue here today, whether  
21 we're going to win or lose. The question is who  
22 should decide who wins and who loses. And I think  
23 it's also important that we're not saying that the  
24 Claimant does not have a remedy.

25 If this was the only remedy they had, and we

1 were trying to throw them out, that would be one  
2 issue. We're saying, no, they have a remedy if  
3 they can prove their case, but it belongs in a  
4 forum other than the PUC.

5 And the basis for that, I think there's  
6 South Dakota Law which strongly supports the  
7 proposition that the PUC in this type of case does  
8 not have jurisdiction to decide rights and  
9 obligations under contracts, contract law. And so  
10 you've got that issue.

11 You've also got the issue it appears to be  
12 this is an interstate commerce issue. And don't  
13 think the PUC has a jurisdiction on that ground  
14 either. So we have two basic issues really; it's  
15 interstate commerce, you don't have jurisdiction,  
16 and it's a contract action, and you don't have  
17 jurisdiction in that case.

18 This is not a case like you're determining  
19 fairness of tariffs and things of that nature.  
20 This is an individual -- this is a dispute between  
21 two individuals. So for that reason I think that  
22 the PUC should grant our Motion to Dismiss.

23 I recognize this is an important decision. I  
24 don't know if the PUC -- when I was looking at this  
25 case, does the PUC want to get into the business of

1 determining rights and obligations of the  
2 contracts? Do you want to get into determining  
3 damages? That's really not -- I wouldn't think the  
4 function of the PUC is to be the adjudicatory body  
5 for private contract actions. I think that -- I  
6 would assume that would be an important question  
7 for the PUC.

8 You might have to -- take a bigger staff here  
9 if you're going to start taking on these --

10 CHAIRMAN BURG: May convince us.

11 MR. GREGERSON: What's that?

12 CHAIRMAN BURG: (Inaudible) -- may  
13 convince us.

14 COMMISSIONER NELSON: Are you  
15 agreeing with AT&T?

16 MR. GREGERSON: What's that?

17 (Inaudible)

18 COMMISSIONER NELSON: Oh, okay.  
19 Got it. He's with you.

20 MR. GREGERSON: Yeah. Well, I'm  
21 saying that it seems to me that this is a very  
22 important decision. Believe me, that's not the  
23 point I'm trying to make.

24 But I think South Dakota Law is very clear on  
25 the issue that you do not have jurisdiction and

1 that it belongs in the federal court or in the  
2 state court but not here.

3 And for that reason we would request that the  
4 claims be dismissed and go on to another forum.

5 MR. WEIGLER: And with the  
6 Commission's permission, I'd like to just read that  
7 law into the record. The South Dakota Supreme  
8 Court states that Article 7 -- or 6, my Roman  
9 Numeral reading isn't that good, subparagraph 20 of  
10 the South Dakota Constitution prescribes that  
11 "Remedial action for alleged contract or in tort  
12 wrongs are to be handled in a court of law. And  
13 that's cited in Rosenboom versus Northwestern Bell  
14 Telephone Company, 358 N.W. 2d 241, November 14,  
15 1984."

16 That court further stated that -- and this is  
17 just so -- (Inaudible). "The PUC cannot become a  
18 body to regulate claims for damages brought in  
19 private contract. To regulate tariff schedules,  
20 directories, and listings is one thing, but to  
21 adjudicate on monetary rights arising thereunder is  
22 conceptually different." And that's page 245 to  
23 246.

24 And it's also cited in another Supreme Court  
25 case, Mobile Electronic Services, Inc. versus

1 Firstel Inc., 649 N.W.2d 603, 606, July 24, 2002.  
2 So it's a -- it's not like this is an antique  
3 case. It just got decided.

4 The Complainant also cites another case from  
5 another state to demonstrate the broad authority of  
6 the Commission. It's a North Dakota case and I  
7 realize they're called the sister state but it's a  
8 completely different state. But even that case you  
9 look at "Jurisdiction of the public service  
10 Commission does not extend into enforcement of  
11 contract, a judicial function that is rooted  
12 in tradition Constitution and statute.

13 So South Dakota Law is clear if it's contract  
14 claim, it's supposed to be handled in a court of  
15 law. And I guess if we were sitting in  
16 North Dakota, I could cite -- cite a North Dakota  
17 case too.

18 Now you have to look at your jurisdiction  
19 also, what your state statute says about  
20 jurisdiction. And state statute says you have the  
21 jurisdiction to extend such business that's not  
22 otherwise regulated by federal law or regulations.  
23 And that's South Dakota CL 49-31-3. That's your  
24 enabling statute. So you have pretty broad  
25 jurisdiction. But if it's to the extent such

21

1 business is not otherwise regulated by federal law  
2 regulations.

3 Again, this was a service that was ordered off  
4 Qwest's federal tariffs and ordered by the Claimant  
5 off AT&T's federal tariffs, if the Claimant likes  
6 it or not. And it's something that's under the  
7 Statute 47 -- or I'm sorry, the Regs 147 C.F.R.  
8 36.154 was ordered under -- has jurisdiction with  
9 the Federal Communications Commission unless  
10 there's less than 10 percent interstate traffic.

11 And here again the Claimant -- there's no --  
12 first of all, in most cases that means you're never  
13 going to call out of state or use the data services  
14 out the state. Here they were running a  
15 reservation service for them to link up to Idaho.  
16 So that's not even in dispute, I can't imagine.  
17 But in most cases you don't make -- you don't get  
18 data services or even long distance services to  
19 hook up to AT&T unless you're going to call out of  
20 state. So the 90 percent rule is -- the FCC's  
21 90 percent rule is clearly in effect in this case.

22 And so unless there's a dominimous amount of  
23 interstate traffic on these lines, this is outside  
24 the jurisdiction of this Commission under your  
25 state's enabling statute. So you have to find that

22

1 for some reason -- in order to hear this claim you  
2 have to find for some reason that this special  
3 access service is outside the federal jurisdiction.

4 And it's not. Special access -- and there's a  
5 proceeding in front of the FCC right now, and I'm  
6 repeating myself, where every party agrees, AT&T  
7 agrees, the Qwest, the whole -- everyone agrees  
8 that this is part of the federal jurisdiction.

9 So we haven't brought these issues. If we  
10 could bring special access issues in front of the  
11 state, we would love to because we rely on Qwest  
12 for this and we're not having such luck up at the  
13 FCC with this issue. But as far as getting a  
14 reduction in cost from the FCC -- but it's a  
15 federal issue. And this is a federal service. So  
16 you have to find that for some reason you can get  
17 around 49-31-3.

18 So if you look at your own enabling statute,  
19 if it's regulated by the federal government and the  
20 FCC, you just don't have jurisdiction over the  
21 issue. And there's a case out of Illinois that  
22 finds you don't have jurisdiction over this  
23 issue -- or at least that they didn't have  
24 jurisdiction because it's a special access issue.

25 I can provide this Commission with a more --

23

1 if you need more cases -- I mean, this is fairly  
2 well-documented that this is a -- special access is  
3 a federal issue unless you can find the dominimous  
4 exception. And this just doesn't fall under the  
5 dominimous exception.

6 If they said, well, our reservation center was  
7 in, I don't know, Pierre and all we're going to do  
8 is link up to the reservation system, our  
9 interstate argument would be out the window. But  
10 this is an interstate transportation service.  
11 That's what the special access is.

12 So in summary on that argument you have to  
13 look at your South Dakota enabling statute and once  
14 you look at that you can determine that unless it's  
15 governed -- the service that is in dispute is  
16 governed by -- exclusively by state statute or  
17 state regulation and hasn't been preempted by any  
18 federal agency, it belongs in front of either the  
19 FCC or they can certainly do a claim in the court  
20 of law.

21 CHAIRMAN BURG: Thank you.

22 Questions for AT&T?

23 MR. SMITH: I have a couple. Is  
24 the --

25 CHAIRMAN BURG: Why don't you

24

1 identify yourself.

2 MR. SMITH: This is John Smith. I'm  
3 one of the Commission counsel. I guess a question  
4 I have, and maybe this is for you, Steve, is the  
5 federal -- is your federal tariff still in effect?  
6 Do you still have a federal special access tariff  
7 that would cover this service?

8 MR. WEIGLER: In the summer of 2001  
9 the FCC indicated that you are supposed to replace  
10 your tariffs with service guides. And so it's the  
11 same tariff, but it's a -- it's the same thing, but  
12 it's communicating directly with customers. It can  
13 be found on our website. I referenced that in my  
14 brief.

15 However, this contract, because part of the  
16 Deadwood Gaming Association, was entered into  
17 before that came into effect.

18 MR. SMITH: Is that -- is there --  
19 I'm just asking. Do you have a citation to the  
20 order that did that, that did --

21 MR. WEIGLER: I can get it. I  
22 didn't bring it.

23 MR. SMITH: Could you provide that?

24 MR. WEIGLER: Sure. And you have to  
25 look at it --

1 MR. SMITH: I mean, I've looked and  
2 looked and looked, and I can't find it.

3 MR. WEIGLER: Sure. There's two.  
4 There's two orders. And the rationale behind that  
5 was that they wanted more direct -- like, for  
6 example, Ms. Moore had trouble finding the federal  
7 tariff, which is still on the AT&T website. But on  
8 the same website the FCC wanted more direct  
9 communication with the customer. And so tariffs to  
10 customers are now called service guides. But you  
11 have to look at it there's two tariffs, both that  
12 involve interstate jurisdiction. One you could  
13 call -- this is between customer and AT&T and --  
14 (Inaudible).

15 MS. MOORE: I'm sorry to interrupt,  
16 Mr. Weigler, but I can't hear you.

17 MR. WEIGLER: Oh, sure.

18 MR. SMITH: Could you give him that?

19 MR. WEIGLER: Sure. Can you hear me  
20 now, Ms. Moore?

21 MS. MOORE: I can. Thank you.

22 MR. WEIGLER: The first -- I drew --

23 Ms. Moore, I drew two arrows, one between the  
24 customer and AT&T -- or you could even call it  
25 campground and AT&T and one between AT&T and Qwest.

1 This is -- that order doesn't affect this -- this  
2 is still a tariff. AT&T orders from Qwest special  
3 access services on a federal tariff. The Order  
4 changed this to a -- between the customer and AT&T,  
5 they changed that from a tariff to something called  
6 a service order. Summer, I believe, summer of  
7 1991 -- 2000, sorry. So about 10 years.

8 So that's the situation. Between the -- but  
9 this is still under federal tariff. We order our  
10 services under the federal tariff because it's  
11 interstate.

12 COMMISSIONER NELSON: You're not  
13 required to do that, though. Isn't it true that  
14 you have the option to provide them yourself?

15 MR. WEIGLER: We can't provide them  
16 ourselves.

17 COMMISSIONER NELSON: You could put  
18 in T-1s yourself -- (Inaudible) -- right?

19 MR. WEIGLER: We're not a local  
20 service provider. We don't have the equipment or  
21 the facilities to do that. You could too,  
22 Commissioner Nelson. I could call you. Could you  
23 provide a T-1 service to our house? What would you  
24 say? I don't have the equipment.

25 COMMISSIONER NELSON: (Inaudible).

1 MR. WEIGLER: Well, Commissioner  
2 Nelson, and I'd just say this for the record,  
3 you're assuming that what the Complainant put in  
4 the record is the truth, and AT&T is denying those  
5 allegations.

6 MS. DOUGLAS: Can you stop for a  
7 moment, just a second here. I've got to turn the  
8 tape over.

9 (End of side 1, tape 1)

10 (Beginning of side 2, tape 1)

11 MS. DOUGLAS: Okay.

12 MR. SMITH: Thank you.

13 MR. WEIGLER: If we get into the  
14 merits of the Complaint, which we shouldn't be  
15 doing today, there are two sides to this story and  
16 the second side to the story is that we deny the  
17 allegations in the Claimant's Complaint, and we  
18 have a perfectly reasonable explanation for our  
19 conduct in determining -- in our discussions with  
20 the Complainant.

21 MR. SMITH: I'd like to take just a  
22 moment here to absolutely assure you that the  
23 questions we're asking here today, there's not in  
24 any way a determination -- or you shouldn't take  
25 them as an implication that the Commission has in

1 any way decided factual issues.

2 I think we're just -- you know, the process is  
3 a difficult issue, and we're just wrestling with  
4 where the limits are here. But the only thing  
5 we're talking about today is jurisdiction, and  
6 that's absolutely all we're talking about, assuming  
7 we were to take jurisdiction and we haven't decided  
8 that.

9 But if we did, I absolutely assure you that  
10 there has been no prejudging whatsoever, and there  
11 will be a full evidentiary hearing. Again, I'm not  
12 presuming we're going to take jurisdiction, but I  
13 give you that absolute assurance that if you have a  
14 hearing in front of this Commission, it will be a  
15 fair one without anyone having made any  
16 preconceived judgments about that. So we know the  
17 factual issues in this case are going to be very  
18 intricate, and we'll wait and see what the evidence  
19 shows, if we get that far.

20 MR. WEIGLER: And I appreciate that.  
21 I just have to clarify that for you.

22 CHAIRMAN BURG: Any other questions,  
23 John?

24 MR. SMITH: I don't think so. Just  
25 one other. I looked through all the cases that



1 were in the briefs and I read them and there's some  
2 cases that involve the interstate services out  
3 there and the effect of that on state jurisdiction.

4 I couldn't find a case that -- the Illinois  
5 case is probably fairly close, but I couldn't find  
6 one at the federal level that out and out held that  
7 states are preempted on the -- on the special  
8 access service issue.

9 Is there such a case? Has that gone to -- has  
10 a preemption on special access gone to the federal  
11 court system yet?

12 MR. WEIGLER: The reason -- what  
13 would have to happen is -- the C.F.R. is a  
14 regulation.

15 MR. SMITH: I know that.

16 MR. WEIGLER: And so someone would  
17 have to challenge -- the C.F.R. is the FCC saying  
18 we have jurisdiction. Someone would have to  
19 challenge the FCC's jurisdiction, and the only  
20 place people have done that is in state court. It  
21 just -- it hasn't been coming -- I mean, if you  
22 take jurisdiction, you might be setting up the  
23 issue because we'd probably take it up.

24 But we don't want to do that. I mean, it's  
25 just a pretty -- someone would have to go to

1 federal court, and that would create a federal  
2 case.

3 MR. SMITH: All I -- I was just  
4 asking is there a case because if was one --

5 MR. WEIGLER: (Inaudible).

6 MR. SMITH: -- I would look at it.  
7 If there isn't one, then there isn't, you know.

8 MR. WEIGLER: You know, and as this  
9 Commission knows, I'm a little jack-of-all-trades  
10 as far as telecom, and we have a specialist that  
11 I'd be glad to find out and -- (Inaudible).

12 MR. SMITH: Yeah. If there's a case  
13 that's right on the money involving special access  
14 services, per se, it would be very useful and --

15 MR. WEIGLER: I could provide that  
16 in a day or two.

17 MR. SMITH: Thank you. Do you have  
18 anything?

19 MR. GREGERSON: As far as -- may I  
20 just -- (Inaudible) -- one thing. I think, based  
21 upon South Dakota Law, I think it's clear that the  
22 PUC does not have jurisdiction to regulate  
23 conduct -- (Inaudible) -- private contracts in  
24 terms of the FCC. I just don't think they can do  
25 it. So that would be the crux of my argument. And

1 I think South Dakota Law is fairly clear on that.

2 CHAIRMAN BURG: I think that's true.  
3 I agree with you the decision that we would have  
4 then is this strictly contract law, or is there a  
5 service quality dispute.

6 MR. GREGERSON: Commissioner Burg,  
7 but the thing is I think, first of all, you --  
8 wouldn't the Commission would have to determine  
9 whether there is a contract or not?

10 If there's no contract, there's no obligation.  
11 The only obligation here is the contract. And, of  
12 course, what they're trying to do, I would assume,  
13 is get around the contract too by, first of all,  
14 challenging -- the contract -- (Inaudible) -- but  
15 they're trying to get around them by parole  
16 evidence.

17 And that would be another issue, is the parole  
18 evidence allowed to -- allowed to determine the  
19 contract. That would be another issue would be  
20 before whatever body's going to determine.

21 CHAIRMAN BURG: Ms. Moore, now I'll  
22 leave it up to you -- first of all, I suppose the  
23 question I have is why, given the arguments we just  
24 heard, did you bring the issue before the PUC, and  
25 then also any argument that you have in the

1 discussion of what you heard from AT&T.

2 MS. MOORE: Certainly.  
3 Mr. Chairman, Commissioners, thank you for this  
4 opportunity to be heard. First of all, I wasn't  
5 involved in this dispute from the beginning. I'm  
6 fairly new to private practice and extremely new to  
7 administrative practice so I certainly don't claim  
8 to be an expert in any area at this point.

9 This Complaint was filed by my client in  
10 July of 2001 prior to my joining this law firm. So  
11 I have basically taken on the role since then in  
12 attempting to obtain jurisdiction for that matter.

13 I believe, however, that at the core of this  
14 matter is a dispute between a South Dakota consumer  
15 and a telecommunications carrier duly authorized to  
16 conduct business in South Dakota.

17 Clearly AT&T has repeatedly denied any  
18 liability in this case. The fact remains, however,  
19 that my client has suffered a disservice, and the  
20 stance that AT&T has taken with respect to the  
21 tariff and the contract issues which we have  
22 presented to you today and in their briefs thus far  
23 would effectively deprive my client of any remedy  
24 for the harm that it has suffered. And I don't  
25 believe that that's the intention of the

1 legislature in delegating the authority to this  
2 Commission to provide a redress for wrongs.  
3 Admittedly this Commission, the PUC, is not a  
4 body to enforce contractual obligations. However,  
5 I think the issue is being defined too narrowly  
6 with respect to those contracts. Every time a  
7 consumer requests phone service from a  
8 telecommunications provider or some other sort of  
9 telecommunications service that consumer enters  
10 into a contract with that telecommunications  
11 provider.

12 I think it is both illogical  
13 and impractical to demand that every consumer who  
14 encounters any sort of problem with telephone  
15 services or other telecommunications services to  
16 litigate his or her claim in a state or a federal  
17 court.

18 With respect to the federal tariff issue, I  
19 believe those federal tariffs are inapplicable.  
20 Number 11 addresses credit allowances for  
21 interruptions. Number 1 -- numbers 1 and number 9,  
22 which are cited to as dispositive in this case, I  
23 have not seen. I made a request to Mr. Lovald when  
24 he was local counsel for further citation, and I've  
25 never heard back from him.

1 And I was rather naive in my understanding of  
2 the very sheer volume of federal tariffs and wasn't  
3 able to obtain those myself. So I have to admit  
4 that I have not seen numbers 1 and number 9.  
5 However, I do not believe that those are  
6 dispositive.

7 With respect to the interstate versus  
8 intrastate issue, which AT&T believes is integral  
9 to its claim, the United States Supreme Court has  
10 taken a look at this issue, and it has recognized  
11 the tension that does exist between state and  
12 federal authorities when addressing issues of  
13 intrastate versus interstate communications. And  
14 they did that in Louisiana Public Service's  
15 Commission versus the FCC. That's 476 U.S. 355.

16 In that case the United States Supreme Court  
17 stated that the question to be addressed is whether  
18 the assumption of jurisdiction would stand as an  
19 obstacle to the accomplishment and execution of the  
20 full purposes and objectives of Congress.

21 And in that decision as well the court  
22 recognized that under 47 U.S.C. 152 subsection B  
23 the FCC is deprived of regulatory power over  
24 telephone services which in their nature are  
25 separable from and do not substantially affect the

1 conduct or development of interstate communication.  
2 There are other cases out there, both state  
3 and federal, which recognize that anymore it's very  
4 difficult to have a purely intrastate  
5 communication. Almost everything has an interstate  
6 component at this point in time. And I think that  
7 certainly my client will be using this for both  
8 intrastate and interstate purposes. However, I do  
9 not believe that the dispute currently before this  
10 Commission represents an obstacle to the objectives  
11 of Congress for a matter which affects the conduct  
12 or development of interstate communication in any  
13 way.

14 The logical extension of AT&T's argument here  
15 would effectively rest from the PUC jurisdiction  
16 over virtually any Complaint involving a long  
17 distance carrier. And, again, I think that the  
18 focus here has been too narrowly defined on either  
19 the contract or the tariffs that are in issue.

20 And I think that we need to take a look at the  
21 bigger picture, which is the dispute between my  
22 client, the South Dakota consumer, and a  
23 telecommunications carrier, over the conduct that  
24 has occurred thus far.

25 And obviously, as Mr. Weigler pointed out, we

1 have different expectations than they do, and we  
2 have different versions of the facts than they do.  
3 So I don't mean to interject that. But I do  
4 believe that what's at stake here or the very heart  
5 of this issue is a consumer issue, which the  
6 legislature has certainly delegated to this  
7 Commission the authority to protect the welfare of  
8 the consumer and the South Dakota public consumer.

9 And the Northwestern Bell Telephone Company  
10 versus Hagen, which is a North Dakota case I admit,  
11 however, it has been cited approvingly in  
12 South Dakota cases, specifically Northwestern Bell  
13 Telephone Company versus Chicago Northwest  
14 Transportation Company, which is 245 N.W.2d 639.

15 And all of those cases have indicated that the  
16 very purpose of the Public Utilities Commission is  
17 to safeguard the welfare of the South Dakota  
18 consumer. And I believe that that is at issue  
19 here, and my client has suffered a disservice as a  
20 result of the representations that were made on  
21 behalf of AT&T. My client expended a significant  
22 amount of money and felt that it has been done a  
23 disservice as a result of the communications, the  
24 misrepresentations, and the services which were  
25 made.

37

1 So I believe that is what characterizes this  
2 dispute as not just a contract issue, not just a  
3 tariff issue, but a consumer issue. And I  
4 certainly don't want to rehash my brief or AT&T's  
5 brief so at this time I would respectfully request  
6 that the Commission deny AT&T's Motion to Dismiss  
7 and retain jurisdiction over this dispute. And I  
8 thank you for your time.

9 CHAIRMAN BURG: Any questions for  
10 Ms. Moore?

11 COMMISSIONER SAHR: I do have a  
12 couple. Ms. Moore, this is Commissioner Sahr.

13 MS. MOORE: Yes.

14 COMMISSIONER SAHR: If your client  
15 is not able to pursue the matter at the PUC, would  
16 they not have the alternative to bring the case  
17 forward in federal or state court?

18 MS. MOORE: I do believe that we  
19 have that opportunity. However, that was not the  
20 avenue that my client chose to take at the time.  
21 And I do believe that we can receive the proper  
22 redress from the Commission, should the Commission  
23 choose to retain jurisdiction.

24 COMMISSIONER SAHR: And that sort of  
25 leads to the following question. You know, a lot

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1 of times a party might have multiple forums in  
2 which it can pursue a remedy. And in this case  
3 dealing with the -- dealing with the issues that we  
4 are dealing with, do you think it would be  
5 appropriate to have a federal court or have the  
6 opportunity to have a jury trial to look into those  
7 issues as opposed to being before a Commission  
8 which is part of Mr. Weigler's argument here today?

9 And I'm thinking of the doctrine of primary  
10 jurisdiction where we don't necessarily have to  
11 give up jurisdiction but we can say that another  
12 authority, another forum, might have the better  
13 means to look at a particular issue. What do you  
14 say to that argument?

15 MS. MOORE: Well, and I certainly do  
16 understand your point. It's my client's  
17 contention, however, and mine as well that  
18 South Dakota Law, specifically Title 49,  
19 Chapters 7, 13, and 31, vests extensive powers in  
20 the PUC for the supervision of public utilities.  
21 And it's my belief and my client's belief that the  
22 Public Utilities Commission is the appropriate body  
23 to look at this because it is characterized as a  
24 consumer issue and a quality of service issue as  
25 opposed to just a contract or a tariff issue.

39

1 COMMISSIONER SAHR: And I do  
2 appreciate that, and I do believe that the consumer  
3 issue is an important one to consider. At the same  
4 time, it does seem like we're going to be dealing  
5 with a lot of contract issues that typically would  
6 be better off handled through the court system or  
7 in front of a jury.

8 So do you have any suggestions on how we would  
9 handle those type of issues at the PUC?

10 MS. MOORE: That's a good question.  
11 I don't believe that the contract needs to be  
12 delved into to the extent that AT&T does. There is  
13 a contract for service here which was entered into  
14 on March 14 of 2002 or at least an agreement for  
15 services. There was a preexisting contract because  
16 of the other facts and circumstances involved in  
17 this case. And I believe that the contract was to  
18 provide services to my client.

19 There were representations made that those  
20 services would be provided, and they were not. And  
21 there's some dispute as to whether that's an  
22 impossibility or just an impracticality. And  
23 obviously that's a factual question, and this is a  
24 fact-finding body, which would be the appropriate  
25 body to determine that question, should it choose

40

1 to retain jurisdiction.

2 But I don't believe the contract claim needs  
3 to be as complicated as what it's being made out to  
4 be.

5 COMMISSIONER SAHR: So are you  
6 saying that this is more of a quality of service  
7 case or a contract case or both?

8 MS. MOORE: I believe ultimately it  
9 lies in a services claim and a quality of services  
10 claim, and the contract is what those service  
11 issues center around.

12 COMMISSIONER SAHR: Well, if they  
13 supplied you -- let's say, for instance, that they  
14 supplied you with a T-1 and then you had  
15 difficulties utilizing that service. I think that  
16 would be a quality of service issue. It may be a  
17 contract issue. In this case they haven't provided  
18 you with a line; correct, or -- (Inaudible)?

19 MS. MOORE: That's correct.

20 COMMISSIONER SAHR: So it almost  
21 seems like we're going to definitely be handling a  
22 contract issue, then, along with a potential  
23 quality of service issue.

24 MS. MOORE: That's true. There's  
25 also the conduct issue, which we believe is --

1 would be before this Commission at that time. And,  
2 again, I don't mean to repeat myself. However, I  
3 believe that the contract issue is that services  
4 were to be provided. And, again, I believe that  
5 this Commission has probably looked at -- in other  
6 things not similar to this but on a lesser scale in  
7 terms of when any consumer contacts a  
8 telecommunications company and requests services  
9 they enter into a contract.

10 And certainly there are other cases in which  
11 the quality of service, the conduct, and the things  
12 associated therewith are examined by this  
13 Commission.

14 COMMISSIONER SAHR: And I appreciate  
15 you repeating yourself because I'm grappling with  
16 these issues as well, as we normally do with  
17 jurisdictional issues. And I also wonder if we  
18 start getting into type of reliance arguments and  
19 those type of things will we end up getting under  
20 some sort of equitable relief arguments that again  
21 may not be the sort of things that are normally  
22 handled by a Commission such as ours?

23 MS. MOORE: That's true. And we  
24 would certainly recognize that South Dakota Law is  
25 clear in that damage issues, reliance issues, those

1 sorts of things shouldn't be undertaken by the  
2 Commission, that those things are more  
3 appropriately venued in a court.

4 However, at this time we're not asking for  
5 damages. And, again, my inexperience here I may  
6 have been very remiss in not amending the Complaint  
7 because I do recognize that the Complaint seems to  
8 be more centered in a damage issue. Whereas, now  
9 what we are asking is that this Commission take a  
10 look at what has happened throughout the course of  
11 my client's dealings with AT&T and to come to an  
12 appropriate resolution that does not include  
13 damages at this time but would essentially order  
14 AT&T and Qwest to reach some sort of resolution  
15 which may be satisfactory to my client.

16 And if nothing comes about as a result of  
17 that, hypothetically speaking, then we would  
18 obviously have to move on to another forum, if  
19 that's what my client decides at that time.

20 COMMISSIONER SAHR: And that's kind  
21 of what I'm wondering. I'm certainly not telling  
22 your client where to file a claim or you at all,  
23 but with contract issues and equitable issues I do  
24 have to wonder if the court isn't better off or a  
25 jury isn't better off resolving those sort of

1 issues.

2 MS. MOORE: And that certainly may  
3 be the case. However, I don't believe that we're  
4 at that point yet. I think this Commission does  
5 have the jurisdiction under South Dakota Codified  
6 Law and also common law, which has been articulated  
7 in numerous South Dakota Supreme Court cases, to  
8 take a look at the conduct and the services issues  
9 that stem from that contract that was reached  
10 between my client and AT&T.

11 COMMISSIONER SAHR: Well, couldn't I  
12 as a Commissioner, though, decide that we still do  
13 have jurisdiction but also under that doctrine of  
14 primary jurisdiction look to see if another forum  
15 might be an appropriate -- or a more appropriate  
16 place to have the case heard?

17 MS. MOORE: I do believe you have  
18 that power. However, I would request that you  
19 retain jurisdiction as the more appropriate body to  
20 take a look at the issues here.

21 COMMISSIONER SAHR: What are the  
22 factors that would point to us being the more  
23 appropriate body?

24 MS. MOORE: The PUC is the  
25 administrative body that is authorized to deal with

1 the conduct of telecommunications carriers, such as  
2 AT&T. My client is a South Dakota consumer. The  
3 South Dakota Supreme Court has been very clear in  
4 that a Commission has been delegated the authority  
5 to examine any Complaints and to provide remedies  
6 for the redress of any wrongs inflicted upon  
7 South Dakota consumers by telecommunications  
8 companies.

9 And I believe at this point in time you have  
10 the expertise to look at that. What we have here  
11 is a company, AT&T, a telecommunications provider,  
12 which has held itself out as someone who can  
13 provide certain telecommunications services and who  
14 is an expert on those issues. And we have my  
15 client who approached AT&T with a request for the  
16 provision of those services.

17 And I think that is well within the  
18 jurisdiction of the PUC to take a look at the  
19 issues stemming from that association.

20 COMMISSIONER NELSON: It seems to me  
21 I hear you saying that asking for \$150,000 would  
22 imply that you thought you would be able to get the  
23 damages. However, you seem to be talking on a  
24 regular basis -- and then when I read your brief,  
25 relied heavily on providing the services.

1 So if you're not asking for damages, which I  
2 would assume would be the \$150,000 and maybe more  
3 if you could determine that you lost business or  
4 whatever -- but you seem to think that perhaps  
5 because the alternatives to money or damages would  
6 be that they cough up the services. Or is that not  
7 correct?

8 MS. MOORE: I would agree somewhat  
9 with your characterization, Commissioner. I  
10 believe that what my client wants most here is the  
11 services. He needs those services for the  
12 implementation of his registration system. And he  
13 has pursued other avenues for various  
14 telecommunication services prior to contacting AT&T  
15 and had determined that those other means of  
16 providing similar services were unsatisfactory for  
17 his company's needs at that time.

18 So ultimately, yes, he would like the  
19 services. And it's our understanding that it isn't  
20 an impossibility that these services be provided,  
21 that it may be an issue more of cost and that it  
22 would cost more. Obviously these are factual  
23 issues, and I'm -- certainly AT&T would disagree  
24 with me on this, but it's my understanding that  
25 it's not an impossibility so we would request that

1 all avenues be exhausted before we be thrown out  
2 and essentially have to go after any damages remedy  
3 that we may have in another body -- or in another  
4 venue, excuse me.

5 COMMISSIONER SAHR: Do you think the  
6 South Dakota PUC has the authority to order  
7 specific components?

8 MS. MOORE: Under -- okay. Excuse  
9 me. Under SDCL 49-31-7.1 subsections 1 and 2 that  
10 statute sets forth the powers and the duties of the  
11 PUC and the available remedies. And  
12 subsection 2 basically requires any  
13 telecommunications company doing business in this  
14 state to install any facility necessary for the  
15 accommodation of the public.

16 And the subsection 1 gives the PUC the power  
17 to examine and inspect the condition of each  
18 telecommunications company in the state and have  
19 its equipment and the manner of its conduct and  
20 management with reference to the safety,  
21 accommodation and convenience of the public.

22 And I do believe that the legislature and the  
23 common law gives the power to the PUC to do that.

24 COMMISSIONER SAHR: Thank you. And  
25 I appreciate your assistance in flushing out some

1 of those issues.

2 CHAIRMAN BURG: Let me ask her one  
3 question first in response. Does it affect you at  
4 all, Ms. Moore, on the fact that you have already  
5 heard AT&T argue that if we do assume jurisdiction  
6 and take this case, that they would appeal it -- on  
7 a jurisdiction basis?

8 MS. MOORE: Yes. It's something  
9 that we've been aware of from the beginning from my  
10 first communications with Mr. Weigler that it was  
11 his intention and AT&T's intention to take this to  
12 whatever level they believed necessary.

13 And while it's certainly not something I  
14 relish, if that's the course that they wish to  
15 take, that's something that I will address at that  
16 time. And obviously the ultimate decision lies  
17 with my client as to what path we travel. But thus  
18 far he has indicated a willingness to take this  
19 wherever it needs to be taken.

20 CHAIRMAN BURG: But you're  
21 indicating at this point -- this is what I was  
22 looking for. You're indicating at this point do  
23 you think even if that would be what happened, it  
24 would be important that the Commission first make a  
25 determination of quality of service which you've

1 requested?

2 MS. MOORE: Yes.

3 CHAIRMAN BURG: Okay. I just wanted  
4 to clarify that.

5 MS. MOORE: Yes.

6 CHAIRMAN BURG: Response?

7 MR. SMITH: Just a minute, Jim.

8 CHAIRMAN BURG: Excuse me.

9 MR. SMITH: Can I -- Ms. Moore, this  
10 is John Smith. I'm one of the Commission counsel.

11 MS. MOORE: Yes.

12 MR. SMITH: Do you have an argument  
13 concerning the interstate characterization of the  
14 service, or do you basically concede that it is  
15 that?

16 MS. MOORE: I would have to concede  
17 that there certainly is interstate communication  
18 involved here, and my client indicates that as  
19 well, that this is an interstate campground  
20 registration system, which would involve  
21 communicating with the various campgrounds around  
22 the state.

23 However, it would be my argument that the --

24 MR. SMITH: Just hold on a minute.  
25 Our tape -- is our tape up?

1 MS. DOUGLAS: Yes.  
 2 MR. SMITH: I'm sorry.  
 3 (End of side 2, tape 1)  
 4 (Beginning of side 1, tape 2)  
 5 MS. DOUGLAS: Okay. I'm sorry.  
 6 MR. SMITH: I mean, just looking at  
 7 your brief and the facts that were recited in the  
 8 Complaint, it looked like it was just absolutely  
 9 not arguable that this would not fall within the  
 10 10 percent or less dominimous interstate use  
 11 category. And what I'm hearing you say is that  
 12 that's the truth and that there probably isn't any  
 13 question that this is an interstate service.  
 14 MS. MOORE: No. You are correct in  
 15 that fact. I don't believe that I can argue that  
 16 this is purely interstate because it isn't. It's  
 17 my contention, however, that that U.S. Supreme  
 18 Court case be -- and the accompanying U.S. Code  
 19 provision would be more applicable here and that  
 20 the question is whether the retention of  
 21 jurisdiction would have -- would present an  
 22 obstacle to the objectives of Congress or have a  
 23 profound impact on the development of interstate  
 24 commerce.  
 25 And it would be my contention that despite the

1 interstate communications that would be carried out  
 2 through this T-1, that that isn't the type of  
 3 interstate communication that Congress would have  
 4 envisioned as an obstacle to its -- its intention.  
 5 MR. SMITH: And would the reason for  
 6 that be because it's primarily just a private  
 7 service between you and AT&T?  
 8 MS. MOORE: That's correct. And  
 9 it's a private company with campgrounds, and it's  
 10 not a -- technically a nationwide or something that  
 11 would impact every other service down the road.  
 12 MR. SMITH: Following up a little  
 13 bit on Commissioner Sahr's question about -- I  
 14 think one of the concerns that I have just looking  
 15 at this -- and this is more on the primary  
 16 jurisdiction thing.  
 17 MS. MOORE: Okay.  
 18 MR. SMITH: And I don't know if I'm  
 19 trying to talk you into anything here or not, but I  
 20 guess one of the concerns that I have just looking  
 21 at this and looking at how one would approach --  
 22 and I realize you weren't involved when your client  
 23 first filed this thing, in fact, not for some time.  
 24 MS. MOORE: That's correct.  
 25 MR. SMITH: And just looking at it,

1 it looked like the type of situation where if a  
 2 lawyer were filing this in the first instance  
 3 rather than a citizen Complainant, that alternative  
 4 avenues might be sought. And Commissioner Sahr got  
 5 on that a little bit but, you know, causes of  
 6 action such as some -- well, like we said, some  
 7 form of reliance-based estoppel type of basis for  
 8 recovery, perhaps even a tort-based recovery  
 9 mechanism remedy that might be sought.  
 10 And I guess with that -- and looking at it  
 11 that way -- and I can't tell really whether there's  
 12 been a total concession in this case as to whether  
 13 there is or is not a contract. Just looking at it,  
 14 it wasn't that clear to me as to how the contract  
 15 came into existence here and as to whether it's  
 16 absolutely cut and dried that there is a contract  
 17 that is totally controlling here.  
 18 It occurs to me that that may be an issue in  
 19 the case. And I guess when we -- if it looks like  
 20 this thing to get -- your client to get, you know,  
 21 a really full hearing of the various ramifications  
 22 and the whole panoply of remedies that might come  
 23 into play here, I mean, is it possible that we  
 24 would be doing a disservice to your client by even  
 25 taking jurisdiction of this and that maybe he might

1 be better off in a forum where a court has broad  
 2 jurisdiction to take a look at this from a more  
 3 broadly pleaded standpoint, if that's the way you  
 4 as an attorney chose to approach it?  
 5 MS. MOORE: Certainly. And I do  
 6 understand your concerns. I've done a significant  
 7 amount of Monday morning quarterbacking since my  
 8 involvement in this case. And I believe that what  
 9 we would like the Commission to do is take a look  
 10 at what has happened thus far in the relationship.  
 11 And I don't believe at this time that it's  
 12 necessary to go into all the contractual issues,  
 13 the reliance issues, the estoppel issues, those  
 14 sorts of things. Obviously should the -- I don't  
 15 believe this Commission would be doing a disservice  
 16 to my client by retaining jurisdiction. And if --  
 17 because there's no guarantee that you would decide  
 18 in my client's favor at any point along the way.  
 19 And at that point we would clearly need to  
 20 pursue other remedies, and that's certainly  
 21 something that I have thought about on numerous  
 22 occasions since filing this -- or, excuse me, since  
 23 my client filed this and since my involvement in  
 24 this.  
 25 However, at this time I do believe that I

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1 would like and my client would like this Commission  
 2 to retain jurisdiction over this matter and to take  
 3 a look at what has happened thus far. This  
 4 Commission is a fact-finding body and may be best  
 5 able to determine some of those things which have  
 6 happened throughout my client's relationship with  
 7 AT&T.

8 MR. SMITH: Okay.

9 CHAIRMAN BURG: No more questions  
 10 for Ms. Moore at this time.

11 MR. SMITH: Okay. Responses?

12 MR. GREGERSON: Could we have a  
 13 break for about five minutes -- (Inaudible)?  
 14 (A short recess is taken)

15 CHAIRMAN BURG: Response from AT&T.

16 MR. GREGERSON: It seems to me that  
 17 we're getting outside the scope of the original  
 18 Complaint. We're just shifting gears here. And,  
 19 of course, that makes me a little nervous and --  
 20 (Inaudible). And I recognize -- (Inaudible). But  
 21 it seems to me if you would adopt the suggestion  
 22 you've made here, then -- but you're back in the  
 23 same boat.

24 You still have to determine the contract.  
 25 There's no quality of service to look at if there's

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1 no obligation in the first instance. And so we're  
 2 right back where we were in the beginning. I don't  
 3 see how this suggestion that you retain  
 4 jurisdiction and look what's going on is having any  
 5 merit because, like I say, you still have to  
 6 look -- the first step you have to take is that  
 7 contract.

8 And then we talked about, you know, the  
 9 primary jurisdiction doctrine in our brief, and it  
 10 seems to me all the things you look at, for  
 11 instance, primary -- let me just read some facts  
 12 you can take into account. "Whether the question  
 13 at issue is within the conventional experience of  
 14 judges or whether it involves technical or policy  
 15 considerations within the administrative agency's  
 16 particular field of experience."

17 You're not using any technical knowledge here  
 18 as far as this contract is concerned. And I think  
 19 the judge is better able to determine that  
 20 contract. We're not looking to you for expertise  
 21 in your area. And the primary restriction is does  
 22 not extend to --

23 There's four points that were raised, whether  
 24 there exists a danger of inconsistent rulings and  
 25 so forth, whether the question at issue is

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1 particularly within the agency's discretion. It's  
 2 not.

3 So I think all the criteria of the primary  
 4 jurisdiction questions also look to the courts  
 5 to -- (Inaudible). I would resist them trying to  
 6 get around our arguments. Now they say, well, just  
 7 retain jurisdiction and look at the quality of  
 8 service because I don't think you can do it.  
 9 There's nothing to look at until  
 10 you look -- (Inaudible).

11 MR. WEIGLER: If I could just  
 12 continue with just a couple of minutes to rebut.

13 CHAIRMAN BURG: Be sure she can hear  
 14 you.

15 MR. WEIGLER: Sure. With a couple  
 16 of things to rebut what Ms. Moore has said.

17 Ms. Moore, it's like -- her whole argument is  
 18 sweep this under the rug, sweep this under the rug,  
 19 sweep this under the rug, don't worry about this  
 20 but you have jurisdiction, but don't worry about  
 21 the little factors, don't worry about the facts in  
 22 this case, just look at some broad statute that  
 23 says you have jurisdiction, don't worry that it's  
 24 special access, don't worry that it's controlled by  
 25 interstate jurisdiction and is interstate service,

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1 don't worry if there was a contract involved in  
 2 this case or at least a formulation of a contract,  
 3 don't worry about the parole evidence rule, but you  
 4 have this broad jurisdiction, and we don't want  
 5 damages.

6 Then what are -- what are we arguing -- I  
 7 mean, they wanted damages in the Complaint. What  
 8 are we arguing about here?

9 A couple of things. She compared this with a  
 10 retail customer, a retail customer's contract, and  
 11 that everyone contracts with the PUC. Well, that's  
 12 not -- that's not necessarily -- can you hear me,  
 13 Ms. Moore? Hello.

14 MS. MOORE: I'm sorry. I missed  
 15 that last portion.

16 MR. WEIGLER: Okay. That's not  
 17 necessarily true and the fact that not -- this is a  
 18 complicated business transaction with a business  
 19 customer. If a retail customer calls and asked  
 20 AT&T for service, AT&T has service guidelines that  
 21 it provides, that it has a website that it  
 22 provides, and then if the customer has Complaints,  
 23 they would call the FCC or sue in a court of law  
 24 and the the determination would be made.  
 25 Same with Qwest and local service. They have

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1 service guidelines. They don't send -- they don't  
2 enter into a written contract. They have service  
3 guidelines. They go to the website. They look at  
4 the service guidelines if they want to. If they're  
5 too lazy or they didn't look at the contract or  
6 they don't want to, they don't do it.

7 But they get phone service, and there's just  
8 service guidelines that -- and then there's no  
9 formal written contract between the two parties.  
10 It's service guidelines.

11 Here you have a situation where there's  
12 actually a contract entered into after discussions  
13 between the parties there's a contract entered  
14 into. Well, that invokes something called the  
15 parole evidence rule, and that says that this  
16 Commission -- I mean, that's common law going back  
17 to King Henry.

18 CHAIRMAN BURG: I must not be the  
19 right king.

20 MR. WEIGLER: It's going back to --  
21 it's coming back to the common law, the British  
22 common law, that says unless there's ambiguities in  
23 the contract, you need to look at the contract.  
24 It's called the parole evidence rule. It's common  
25 law in this state. It's common law in every other

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1 state, and it's common law in even Britain.

2 So that's one thing that Ms. Moore hasn't  
3 discussed is that there's a parole evidence rule  
4 issue here. There's also -- oh, let the Commission  
5 look into AT&T's conduct. Well, if you let --  
6 that's something called res judicata. That's  
7 another concept. It brings up just a plethora of  
8 legal issues. If you look into AT&T's conduct and  
9 the construction of the contract and AT&T's a party  
10 to that, you're essentially deciding the issue and  
11 nobody can go to a different court of law because  
12 the issue's been decided.

13 It's an issue called res judicata. That means  
14 if they lose, they can't, if we lose, we can't. So  
15 that's just a joke that we're going to get our due  
16 process considerations once this Commission looks  
17 into the conduct of the parties.

18 And then what happens if this Commission does  
19 look into the conduct of the parties? Well, they  
20 don't want remedies. They want AT&T to provide the  
21 services. Well, talk about being raked over the  
22 coals and also that something that has an objective  
23 of Congress in mind -- what these people are asking  
24 you is they say it's a private dispute, but they're  
25 asking you to make AT&T, a long distance company, a

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1 pack and switch data company, to dig a trench from  
2 basically Sioux Falls to Rapid City.

3 Does that deal with telecommunications  
4 services and the rights of parties that didn't  
5 start at Congress and Congressional objectives that  
6 South Dakota can make anyone dig trenches across  
7 the state to provide one person service? You  
8 better believe it. Because no one's going to be in  
9 the telephone business.

10 So as far as objectives of Congress -- and  
11 then you look at -- also you look at one other  
12 thing. You look at the case that they keep on  
13 citing, the U.S.A. versus Louisiana, a 1986 case  
14 that's right around the time that AT&T was being  
15 demonopolized because different monopolies were  
16 being created.

17 U.S.A. versus Louisiana doesn't deal with the  
18 issue of the 10 percent rule. It just doesn't deal  
19 with the issue. Because after U.S. versus  
20 Louisiana the FCC preempted special access on the  
21 10 percent rule. That's after U.S.A. versus  
22 Louisiana. So U.S.A. - Louisiana has nothing to do  
23 with an FCC preemption of a specific issue, which  
24 Ms. Moore has acknowledged is interstate in nature.

25 And so U.S.A. versus Louisiana has absolutely

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1 no conduct here -- no applicability here.

2 And also the issue of equitable relief,  
3 equitable relief is part of contractual relief,  
4 plus it's dealt with in the contract. So this  
5 Commission's going to have to, number one, look at  
6 is it part of the contract, is it in the contract,  
7 is it written in the contract, is it a part that  
8 needs to be voided from the contract because it's  
9 unequitable to be in the contract.

10 But all the remedies are placed forward in the  
11 contract. That means you're going to have to  
12 review the contract and determine if those parts of  
13 the contract are either valid or not valid.

14 And that's the -- I realize I  
15 was -- (Inaudible) -- consciousness, but I really  
16 had to rebut certain points Ms. Moore made.

17 In conclusion you can't sweep all of these  
18 things under the rug and just look at some -- and  
19 look at one statute that says that -- that has to  
20 do with public safety to determine that this  
21 Commission has jurisdiction. You're sweeping way  
22 too much under the rug. And if you do so, we have  
23 really no remedy but going up to the federal court  
24 level. Thank you.

25 CHAIRMAN BURG: Ms. Moore, any



1 response?

2 MS. MOORE: Mr. Weigler and I are  
3 going to disagree on many points, obviously, or we  
4 wouldn't be having this dispute. However, I don't  
5 believe that we're asking that anything be swept  
6 under the rug.

7 We are asking that the bigger picture be  
8 looked at, which is the overall relationship  
9 between these two parties since the beginning.

10 And I believe the issue has been too narrowly  
11 defined in both contract and tariff. And I don't  
12 think that it's inconsistent that we ask this  
13 Commission to retain jurisdiction. I don't think  
14 it inevitably results in a disservice to my client.  
15 I certainly understand the complexity of the issues  
16 that have been raised before the Commission in this  
17 Motion.

18 It's something that I've grappled with on a  
19 daily basis and second-guessed myself and it's  
20 difficult and I certainly understand that.  
21 However, at the core of this matter, at the heart  
22 of this matter, what my client believes is that  
23 this is a dispute between a South Dakota consumer  
24 and a telecommunication provider that's been  
25 authorized to conduct business in South Dakota and

1 the relationship that has arisen therein.

2 And so I would request that AT&T's Motion be  
3 denied. Thank you.

4 CHAIRMAN BURG: Anything else? The  
5 Commission is going to defer decision on the  
6 question of granting dismissal or an alternative  
7 summary judgment. We're deferring the decision on  
8 both of those. So if there isn't anything else, we  
9 will just make an announcement that decision will  
10 be made. Thank you.

11 Thank you, Ms. Moore, for joining us.

12 MS. MOORE: Thank you very much for  
13 your time.  
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1 STATE OF SOUTH DAKOTA )

2 :SS CERTIFICATE

3 COUNTY OF HUGHES )  
4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter and Notary Public in and for the  
7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I transcribed, to the best of my  
10 ability, the cassette tapes of the foregoing  
11 proceedings.

12 Dated at Pierre, South Dakota this 8th day  
13 of January 2003.  
14  
15  
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17

18 Cheri McComsey Wittler,  
19 Notary Public and  
Registered Professional Reporter  
20  
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