BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED BY TELE-TECH, INC. AND LONG LINE, INC., SIOUX FALLS, SOUTH DAKOTA, AGAINST U S WEST COMMUNICATIONS, INC. REGARDING OVERCHARGES FOR TELECOMMUNICATIONS SERVICES	))))))	**FINDINGS OF FACT AND CONCLUSIONS OF LAW; NOTICE OF ENTRY OF ORDER** **CT99-006**

On June 3, 1999, the Public Utilities Commission (Commission) received a complaint filed by Tele-Tech, Inc. and Long Line, Inc., Sioux Falls, South Dakota (hereafter referred to collectively as Companies), against U S West Communications, Inc. (U S WEST), regarding overbilling.

Pursuant to ARSD 20:10:01:08.01 and 20:10:01:09, if a complaint cannot be settled without formal action, the Commission shall determine if the complaint shows probable cause of an unlawful or unreasonable act, rate, practice or omission to go forward with the complaint.

At its regularly scheduled meeting of June 22, 1999, the Commission reviewed the Companies' filing. The Commission voted unanimously to find probable cause. U S WEST filed its answer on July 22, 1999.

A hearing was held as scheduled at 1:00 p.m., on November 1, 1999, in Room 412, State Capitol Building, 500 East Capitol, Pierre, South Dakota. On December 6, 1999, the Commission received a Stipulation for an extension of time until December 16, 1999, for the filing of the Companies' brief. The Stipulation was signed by the attorneys representing the Companies and Respondent. The parties requested approval of the Stipulation by the Commission. On December 6, 1999, the Commission approved the Stipulation and granted the Companies an extension of time to file its initial brief.

On January 14, 2000, the Commission received a Stipulation for an extension of time until January 25, 2000, for the filing of the Respondent's reply brief. The Stipulation was signed by the attorneys representing the Companies and Respondent. The parties requested approval of the Stipulation by the Commission. On January 19, 2000, the Commission approved the Stipulation and granted the Respondent an extension of time to file its reply brief.

On February 15, 2000, U S WEST filed a Motion to Strike. The Companies filed a reply on March 7, 2000.

At its May 30, 2000, meeting, the Commission considered this matter. The Commission voted unanimously to deny U S WEST's Motion to Strike. The Commission voted to find U S WEST did not commit an unreasonable act, rate, practice, or omission in its billing of services to the Companies (Commissioner Schoenfelder, dissenting).

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On June 3, 1999, the Commission received a complaint filed by the Companies against U S WEST, regarding overbilling.

2. The Companies were telecommunications companies providing long distance services. Tr. at 46, 121. At some point, the two Companies were merged together with Tele-Tech the surviving entity. Tr. at 47. The Companies purchased wholesale services from U S WEST, including 91 FGA lines in order to provide long distance services to their customers. Tr. at 17, 120.

3. In 1994, the Companies needed to upgrade their switch in order to offer full equal access. Tr. at 13-16. The South Dakota Network (SDN) had changed to a centralized equal access provider which prevented U S WEST from terminating telephone calls made by the Companies' customers to areas served by SDN over Feature Group A (FGA) lines. Tr. at 33, 131. The new switch would also allow the Companies to serve additional areas in South Dakota and their customers would no longer need to use customer premise equipment, referred to as dialers. Tr. at 16. The Companies intended to eliminate all but seven or eight of their FGA lines and use Feature Group D (FGD) trunks. Tr. at 16-17, 21.

4. Ron Leiferman, an employee of Tele-Tech, stated that he discussed with U S WEST employee, Nancy German, what services would be needed from U S WEST after the Companies installed the new switch. Tr. at 23. He also sent to U S WEST a document that described how the Companies were going to change from its old switch to the new switch. Tr. at 14, Exhibit A. At the end of July of 1994, he faxed an access service request (ASR) to Nancy German requesting the connection of 48 FGD trunks. Tr. at 17-18; Exhibit G. He stated that he sent the ASR because "[a]ll requests that we have to make with U S WEST requesting new service, either it be a change, disconnect or move or anything had to be presented to U S WEST on an ASR." Tr. at 18. However, later he testified that he was told by Ms. German that he could make changes to ASRs over the telephone, without any follow-up in writing. Tr. at 31.

5. Mr. Leiferman stated he followed up the fax with a call to Ms. German to confirm her receipt of the ASR. Tr. at 18. During that conversation, he stated Ms. German told him that when FGA lines are upgraded to FGD trunks U S WEST would eliminate the installation costs of the trunk side connections. Tr. at 18. He stated he made a verbal request to process that upgrade and she requested a list of the numbers. Tr. at 19. He stated he then faxed to her a list of 48 numbers, 24 numbers for Long Lines and 24 numbers for Tele-Tech. Tr. at 19. He stated that he was told that Ms. German would change the ASR to show an upgrade from FGA lines to FGD trunks. Tr. at 39. He stated that he wanted to delay the actual disconnect of the 48 FGA lines for 30 days after the installation of FGD trunks to allow for a transition period. Tr. at 20. He stated that he considered the list of 48 numbers to be an amendment to the ASR requesting the connection of 48 FGD trunks. Tr. at 40.

6. The Companies did not have a copy of the faxed list of 48 numbers. Tr. at 20.

7. In October of 1994, Tele-Tech sent an ASR to U S WEST to disconnect 12 FGA lines and to connect 12 FGD trunks. Tr. at 21, 29; Exhibits 12, 13. The 12 FGA lines that were to be disconnected were part of the 91 FGA lines. Tr. at 29-30.

8. Mr. Leiferman stated that the new switch could only handle eight FGA lines. Tr. at 23. The new switch was cut-over in July of 1994. Tr. at 26. He stated that after the cut-over to the new switch in July of 1994, there was no usage on the FGA lines except for the seven lines connected to the new switch. Tr. at 32.

9. Mr. Leiferman stated that he looked over the summaries of the bills and he agreed that the bill summaries clearly indicated the amounts for fixed charges and usage charges for FGA lines. Tr. at 33.

10. From December of 1994 through August of 1997, the Companies claimed they were billed for 84 FGA lines that they did not want or use. Tr. at 68-69. The billing of those lines was discovered by an employee of FirsTel during the time Tele-Tech was being merged into FirsTel. Tr. at 53. An ASR was sent to disconnect all FGA lines in December of 1997, and the lines were disconnected. Tr. at 87, 133; Exhibit 3.

11. With respect to the October of 1994 ASR for disconnection of 12 FGA lines, it was discovered that only six of the twelve lines had been disconnected. Tr. at 55-56; Exhibits 12, 13. U S WEST issued a check for the six lines it had not disconnected. Tr. at 154. U S WEST noted that the ASR only listed the BAN number for Tele-Tech, and six of the lines requested to be disconnected were lines listed on Long Lines' account. Tr. at 56, 171.

12. Jerry Noonan, an officer of the Companies and a certified public accountant, stated that he did not believe the company had any responsibility to read the U S WEST bills. Tr. at 84. Mr. Noonan stated that U S WEST understood that the Companies wanted only seven FGA lines and that U S WEST should have assisted the Companies in making sure that was done. Tr. at 103. Mr. Noonan requested that U S WEST refund to the Companies the money paid by the Companies for 84 lines from December of 1994, until the termination of all of the FGA lines in August of 1997. Tr. at 69, 76, 89. Mr. Noonan reduced the amount originally requested by eliminating the billings from January of 1994 through November of 1994, because the Companies were using FGA lines during that period. Tr. at 71. Mr. Noonan also reduced the amount for the seven lines that he said the Companies had intended to keep. Tr. at 72. The amount requested was $73,037.29 plus interest. Tr. at 72; Exhibit H-1. Mr. Noonan calculated the amount of interest using two different interest rates. He used a rate of .04006 per day compounded daily which he stated was the interest rate contained in U S WEST's tariff for an interest amount of $43,451.92. Tr. at 73; Exhibit H. He also used a 10% straight percentage for an interest amount of $29,701.48. Tr at 71-72; Exhibit H-1.

13. FGA lines and FGD trunks are provisioned differently and offer different services. Tr. at 124. The FGA lines provided by U S WEST to the Companies were dedicated to the Companies and U S WEST could not have used those lines for any other customer. Tr. at 152, 154. A company can use both FGD trunks and FGA lines. Tr. at 124-125.

14. The monthly U S WEST bills received by the Companies contained a summary of the charges for the FGA lines. Tr. at 146; Exhibit 15. Each bill lists the monthly fixed access charges and usage charges. Id. The fixed access charges are based on the number of lines. Tr. at 81. In addition to the summary of charges, each monthly bill lists the telephone numbers the customer is being billed for. Tr. at 147; Exhibit 15.

15. U S WEST's tariff requires connection and disconnection of access services to be in writing. Exhibit 10. With respect to disconnections, section 5.2.8 of the tariff reads as follows:

> A customer may cancel an Access Service at any time. The Company requires 2 business days' notice for the cancellation of an Access Service. The notice can be written or verbal, however, a verbal notice must be followed by written confirmation within 10 days. The notice period will begin at the time of the verbal notice. If there is no verbal notice, the notice period begins at the time the written notice is received

16. U S WEST requires connections and disconnections of access service to be accomplished through an ASR. Tr. at 125; Exhibit 16. No ASR was sent to disconnect any of the 91 FGA lines prior to December of 1997, with the exception of the request for disconnection of 12 lines in October of 1994. Tr. at 132-133. U S WEST requires an ASR due to the complexity of providing access services. Tr. at 126, 134. The Companies were aware of the need to file an ASR. Tr. at 18.

17. The Commission finds that Mr. Leiferman's recollection of events does not correspond with the written evidence or Mr. Noonan's testimony. Mr. Leiferman stated that the new switch was cut-over in July and it was only capable of handling a maximum of eight FGA lines. Tr. at 23, 26. He claimed that the old switch was disconnected in July of 1994, and the plan was for the elimination of all of the FGA lines, except for seven, right after that disconnection. Tr. at 44. He also testified that the only usage of FGA lines after July of 1994, was for seven lines connected to the new switch. Tr. at 32. However, Mr. Noonan stated that the Companies were not requesting a refund for charges until beginning in December of 1994, because the Companies were still using FGA lines up until that time. Tr. at 71. This statement is supported by the usage shown for FGA lines through October of 1994. Exhibit 5. For example, October of 1994, shows there was still $9,680.76 worth of usage for the Companies which drops to $1,855.37 worth of usage in December of 1994. *Id.* Moreover, the ASR for the connection of 48 FGD trunks appears to have a requested connection date of September 2, 1994. Exhibit G.

18. In addition, Mr. Leiferman stated the Companies did not want the 48 FGA lines to be disconnected until 30 days following the connection of the FGD trunks. The Commission finds it makes no sense to request the continuation of more than eight FGA lines after July if the new switch was operational at that time and could only handle eight lines. It is also inconsistent for Mr. Leiferman to have requested the disconnection of 12 FGA lines in October of 1994, through an ASR if Mr. Leiferman believed the Companies were only using, and only capable of using, seven lines after July of 1994. *See* Exhibit 13. Under Mr. Leiferman's version of events, he should have requested that all of the FGA lines except for seven be disconnected by August.

19. In addition, when disconnecting the 12 FGA lines and requesting 12 more FGD trunks, Mr. Leiferman filled out two ASRs, one to disconnect and the other to connect. Exhibits 12, 13. These actions are consistent with his testimony that "[a]ll requests that we have to make with U S WEST requesting new service, either it be a change, disconnect or move or anything had to be presented to U S WEST on an ASR." Tr. at 18.

20. The Commission further finds that there is no explanation by the Companies concerning the disconnection of 24 of the 91 FGA lines except for some general testimony that U S WEST knew what the Companies wanted to accomplish after installing the new switch. Tr. at 103.

21. The Commission finds that the Companies failed to show that U S WEST committed an unreasonable or unlawful act, rate, practice, or omission. The Companies failed to show that they properly requested the disconnection of all of their FGA lines, except for seven. Moreover, the Companies witnesses' recollection of events is inconsistent. In addition, the Companies were unable to produce the list of 48 numbers that Mr. Leiferman stated he faxed to U S WEST as an amendment to an ASR to connect 48 FGD trunks. The only ASR that the Companies submitted to U S WEST for disconnection of FGA lines prior to December of 1997, was the ASR sent in October of 1994, for the disconnection of 12 FGA lines. In that instance, U S WEST failed to disconnect six of the lines and has issued a check to reimburse the Companies for that failure to disconnect. Even though representatives of the Companies may have discussed their need for only seven FGA lines with U S WEST, the Companies were required by the tariff to request disconnection in writing and the Companies were also very familiar with the need to send in ASRs in order to disconnect access services.

22. In addition, the Companies failed to show that U S WEST was somehow unjustly enriched by the Companies' payment of the fixed access charges for the FGA lines. The Commission finds that the FGA lines were dedicated to the Companies and therefore U S WEST was not selling those lines to others and recovering double for the same lines.

23. In addition, the Commission finds that the Companies, as telecommunications companies, were capable of reading their U S WEST bills and discovering that they were being charged for considerably more than seven lines. Not only were more than seven telephone numbers listed in the bill, but the summary portions of the bills alone would show to someone knowledgeable in the area of telecommunications that the fixed charges for 91 FGA lines failed to decrease after the time the Companies asserted they should only have been charged for seven lines. And, in fact, the fixed charges for January of 1994, were even higher than the fixed charges for January of 1995. Exhibit 5. If U S WEST had been charging for seven lines, those fixed charges would have been drastically reduced. Tr. at 144-145.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL 49-13-1 through 49-13-14.1, inclusive, 49-31-3, 49-31-7, 49-31-7.1, and 49-31-11 and ARSD Chapter 20:10:33.

2. The Commission finds that the Companies failed to show that U S WEST committed an unreasonable or unlawful act, rate, practice or omission. The Companies failed to show that they properly requested the disconnection of all of their FGA lines, except for seven.

It is therefore

ORDERED, that U S WEST did not commit an unreasonable or unlawful act, rate, practice, or omission.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 21st day of June, 2000. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 21st day of June, 2000.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 6/21/00

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner, dissenting

DISSENT OF COMMISSIONER SCHOENFELDER

In Docket CT99-006, I find that I must respectfully dissent from the majority decision. Even though the complainants were telephone companies and should have been more capable of noting the overcharges on their bills than residential customers, the facts point out that they were charged for at least 48 lines that they had requested be disconnected.

Mr. Leiferman's testimony about the fax sent to Nancy German to disconnect the feature group A lines, and her verbal agreement to supplement the information on the ASR, was not proven to be in error. U S WEST should have called Ms. German as a witness. Instead, they called someone who only testified that the tariff requires an ASR and all amendments to be in writing. Since neither company could produce any written evidence and Mr. Leiferman's testimony is only disputed by hearsay evidence, I believe that U S WEST should have been ordered to compensate Tele-Tech and Long Lines for the 48 lines, plus interest figured at the tariffed rates.

Laska Schoenfelder

Laska Schoenfelder, Commissioner