

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

<b>IN THE MATTER OF THE COMPLAINT FILED )</b>	<b>FINDINGS OF FACT AND</b>
<b>BY NANCY MANNING AND ELIZABETH )</b>	<b>CONCLUSIONS OF LAW;</b>
<b>FREDERICK, RAPID CITY, SOUTH DAKOTA, )</b>	<b>NOTICE OF ENTRY OF</b>
<b>AGAINST U S WEST COMMUNICATIONS, INC. )</b>	<b>ORDER</b>
<b>AND MCLEODUSA TELECOMMUNICATIONS )</b>	
<b>SERVICES, INC. REGARDING THE INABILITY )</b>	<b>CT99-005</b>
<b>TO PROVIDE SERVICE )</b>	

On May 27, 1999, the Public Utilities Commission (Commission) received a complaint from Nancy Manning and Elizabeth Frederick, Rapid City, South Dakota (Complainants), against U S WEST Communications, Inc. (U S WEST) and McLeodUSA Telecommunications Services, Inc. (McLeod) regarding the inability to provide telephone service. Complainants outlined the problems they were having establishing new service. Complainants asked for immediate telephone service, reimbursement for expenses, reimbursement for loss of business, that an independent contractor be allowed to enter U S WEST's pedestal to confirm the lack of lines, and an explanation of why they cannot use another office's lines.

On June 1, 1999, at an ad hoc meeting, Complainants, a representative from U S WEST and a representative from McLeod appeared before the Commission. Unresolved factual issues arose following statements from each party. Pursuant to ARSD 20:10:01:09, the Commission found there was probable cause of an unlawful or unreasonable act, rate, practice or omission and the complaint was forwarded to U S WEST and McLeod, and U S WEST and McLeod had within twenty (20) days of service of the order to either satisfy the complaint or answer it in writing. U S WEST filed its answer on July 12, 1999. McLeod failed to file its answer within the 20 days. McLeod filed its answer on July 28, 1999.

A hearing was held as scheduled on August 26, 1999, beginning at 1:00 o'clock P.M. (CDT), in Room 412, State Capitol Building, Pierre, South Dakota. At the hearing, a number of objections were taken under advisement. Following the hearing, briefs were submitted by the parties.

At its February 29, 2000, meeting, the Commission made its decision in this matter. First, the Commission ruled on the objections taken under advisement at the hearing. The Commission unanimously ruled as follows: (1) Ms. Manning's motion to amend her complaint for additional damages, loss of income, emotional distress, and punitive damages is granted; (2) U S WEST's and McLeod's objections to Exhibits 29 and 30 are overruled; (3) U S WEST's objection to Ms. Frederick's testimony as to her percentage of overhead is overruled; (4) U S WEST's objection to Ms. Frederick's testimony on what a McLeod representative stated at the probable cause hearing is overruled; (5) U S WEST's motion for the Commission to take administrative notice of the Jiracek order is granted; (6) Ms. Manning's objection to Exhibit 45 is overruled; (7) McLeod's objection to questions regarding McLeod's terms and conditions is overruled; and (8) U S WEST's objection to the admission by Ms. Frederick of a profit and loss statement following the hearing is moot since no profit and loss statement was filed with the Commission following the hearing. Finally, since the record is unclear as to whether Exhibit 46 was ever admitted, the Commission clarifies that it was admitted.

With respect to the merits of the complaint, the Commission ruled as follows: (1) McLeod breached its contract with the Complainants by failing to provide them with service; (2) McLeod's

limitation of liability language in its tariff relates only to "failure of transmission" for a call and not to failure to timely provision local exchange service; (3) McLeod's limitation of liability language in its contracts with the Complainants was not given to the Complainants and thus failed to become part of the contract; (4) U S WEST's limitation of liability language specifically limits liability for damages with respect to provisioning of service to customers or others and, therefore, U S WEST is not liable for damages under the facts of this case; (5) The Commission finds Nancy Manning was damaged in the amount of \$6,652.15 by McLeod and Elizabeth Frederick was damaged in the amount of \$4,085.74 by McLeod; (6) The Commission finds no legal basis for the awarding of attorney's fees, punitive damages, or damages related to negligent infliction of emotional distress. Commissioner Schoenfelder dissented.

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

### **FINDINGS OF FACT**

1. On May 27, 1999, the Commission received a complaint from Nancy Manning and Elizabeth Frederick, Rapid City, South Dakota, against U S WEST and McLeod regarding problems they were having establishing telephone service.
2. McLeod is a telecommunications company and provides local exchange service to its customers by purchasing U S WEST's Centrex service and reselling it to its customers. Tr. at 169.
3. U S WEST is a telecommunications company and provides both retail and wholesale services. Tr. at 165.
4. Ms. Frederick entered into a contract with McLeod in May of 1998. Exhibit 25. Pursuant to the contract McLeod would provide Ms. Frederick's law office with local and long distance telephone service. Ms. Manning also entered into a contract with McLeod in May of 1998 for local and long distance service. Exhibit 17.
5. Ms. Manning and Ms. Frederick shared office space along with two other attorneys in Rapid City, Rena Atchison and Ronda Miller. Tr. at 12-13, 133. The four attorneys subsequently decided to move to a larger office space. Tr. at 98. On May 3, 1999, the Complainants informed McLeod that they were moving and would need telephone service at their new location on May 14, 1999. Tr. at 13. Ms. Manning requested two voice lines and a fax line and Ms. Frederick requested two voice lines. Tr. at 184.
6. On May 13, 1999, McLeod confirmed that U S WEST would hook up the requested telephone lines between 8:00 a.m. and 12:00 a.m. on May 14, 1999. Tr. at 96. However, in the afternoon of May 13, 1999, the Complainants were informed that installation of their telephone service would be delayed until the following week. Tr. at 96-97.
7. On May 14, 1999, the Complainants were informed that their telephone service would be delayed indefinitely because there was a facilities hold, or, in other words, there were not sufficient telephone lines to serve the Complainants. Tr. at 99.
8. The other two attorneys in the office, Ms. Atchison and Ms. Miller, were U S WEST customers and received service as requested on May 14, 1999. Tr. at 180-81. Although the Complainants and the other two attorneys had all requested service on the same day, May 3, 1999, the Atchison and

Miller orders were processed first because U S WEST received their orders first. Tr. at 181; Exhibits 34, 35. McLeod, as a reseller of U S WEST's Centrex service, faxed service orders for the Complainants to U S WEST on May 5, 1999. Exhibits 32, 33.

9. While attempting to process the Complainants' orders for five lines, U S WEST erroneously determined that the 50 pair cable that served the building the Complainants moved to was full, except for one pair that was defective. Tr. at 221-22. A U S WEST engineer confirmed this. Tr. at 222-23. However, the engineer had erroneously determined that three of the lines were unavailable for use by the Complainants because the lines showed they had pending orders in effect. Tr. at 223-24. But, as was later determined, those three lines were reserved for the Complainants which is why the lines showed pending orders. Tr. at 223-24. Thus, the Complainants could have had three of their requested lines on May 14, 1999.

10. The Complainants were told that since no additional cable pairs were available for the building in which their office was located, it was the customer's responsibility to provide the conduit for the additional pairs. Tr. at 225-26. Pursuant to U S WEST's tariff, service entrance facilities are to be provided by the owner of the building. Tr. at 226-27; Exhibit 43. The Complainants' landlord provided the conduit but refused to provide the trenching and so the Complainants arranged for the conduit to be trenched at a cost of \$435.00. Tr. at 37; Exhibits 4, 11. The conduit was placed by May 29, 1999. Tr. at 23.

11. On May 27, 1999, Ms. Frederick was able to get Eugene McCracken, an employee of U S WEST, to assist her in attempting to receive telephone service. Tr. at 233-34. Mr. McCracken was able to determine that the three cable pairs that had orders pending against them had in fact been assigned to the Complainants. Tr. at 234. Thus, on May 27, 1999, U S WEST partially filled the Complainants' orders by providing one line to Ms. Manning and two lines to Ms. Frederick. Tr. at 234-35.

12. Around May 27, 1999, Ms. Atchison gave Ms. Manning her second line. Tr. at 25.

13. U S WEST installed the additional cable pairs in the newly installed conduit and the new cable was working on June 14, 1999. Tr. at 240. Ms. Manning received her fax line on June 14, 1999, which completed the Complainants' original request for five lines. Ms. Atchison was then able to replace her second line that she had given to Ms. Manning. Tr. at 241.

14. The Complainants attempted to use their personal cellular telephones and a cellular telephone loaned to Ms. Manning by McLeod, but they experienced many difficulties with trying to use cellular telephones to conduct their business. Tr. at 14, 39, 111-14.

15. McLeod reimbursed the Complainants for bills from Executone which is the Complainants' private telephone system vendor, in the amount of \$630.70. Exhibit 41; Tr. at 199. McLeod paid Ms. Manning's personal cellular telephone in the amount of \$262.85 and paid for the use of a McLeod cellular telephone in the amount of \$349.87. Exhibit 41. McLeod paid Ms. Frederick's personal cellular telephone in the amount of \$292.99. *Id.* McLeod credited Ms. Manning's account in the amount of \$336.26 and credited Ms. Frederick's account in the amount of \$330.97. *Id.* McLeod also issued a credit of \$281.00 for advertisement expenses in the telephone book. Tr. at 199. U S WEST gave the Complainants a pro rata credit for Yellow Page advertising from May 14 or 17 to May 27 or 28. Tr. at 41.

16. At the hearing, Ms. Manning sought compensatory damages of \$14,293.88 and emotional distress and punitive damages of \$5,000.00. Tr. at 79. Ms. Frederick requested compensatory damages of \$9,532.58 and emotional distress and punitive damages of \$10,000.00. Tr. at 129.

17. The Commission finds that U S WEST did not engage in willful misconduct or discrimination in the provisioning of service. Ms. Atchison's and Ms. Miller's orders for service were processed first because U S WEST received them first. See Finding of Fact 8. U S WEST did make a mistake when it determined that no lines were available when, in fact, three lines had been reserved for the Complainants' use. See Finding of Fact 9. The Complainants assert that even though there was no privity of contract and the Complainants were not customers of U S WEST, U S WEST was liable for damages under the tort of professional negligence. See *Muhlenkort v. Union County Land Trust*, 530 N.W.2d 658, 662-63 (S.D. 1995). However, the Commission finds that U S WEST's tariff precludes the award of damages as against U S WEST, thus, it need not reach the issue of whether U S WEST was negligent under the tort of professional negligence.

18. U S WEST's tariff limits damages for U S WEST's failure to timely provision services. The tariff reads as follows:

The Company's liability, if any, for its willful misconduct is not limited by this Tariff. With respect to any other claim or suit, by a customer, or by any others, for damages associated with the installation, provision, preemption, termination, maintenance, repair or restoration of service, the Company's liability, if any, shall not exceed an amount equal to the proportionate part of the monthly recurring charge for the service for the period during which the service was affected. This liability shall be in addition to any amounts that may otherwise be due the customer under this Tariff as an allowance for interruptions.

Exhibit 16, U S WEST Exchange and Network Services Tariff, Section 2, Page 25, Release 1, Section 2.4.1 (A)(1). This tariff language was approved by the Commission. Tariffs approved by a regulatory agency are not mere contracts but are considered to have the force and effect of law. *Corporate Investigative Div., Inc. v. American Tel. & Tel. Co.*, 884 F. Supp. 220, 222 (W.D. La. 1995). The Commission finds that U S WEST's tariff language specifically limits liability for damages relating to the installation or provision of service with respect to any claim or suit by a customer, or by others for damages. This case involved the installation and provisioning of service.

19. The Commission further finds that U S WEST did not waive its tariff's limitation of liability by crediting the Complainants' advertising account. The Complainants do not cite to any evidence that would show that they were misled into believing that U S WEST was waiving its tariff's limitation of liability when U S WEST credited the account. See 28 Am.Jur.2d, *Estoppel and Waiver* §173 (1966).

20. McLeod claimed its liability is limited by the contracts entered into between McLeod and the Complainants. The first page of each of the contracts signed by each Complainant states that the customer has agreed to the terms and conditions that are listed on the back of the first page of the contract. Exhibits 17, 25. McLeod introduced its own copies of the contracts with a copy of the terms and conditions attached. Exhibit 45. The Complainants testified that they were not given a copy of the terms and conditions. Tr. at 34, 91. McLeod acknowledged that the terms and conditions are not always on the back page of the first page because the contract can be computer generated. Tr. at 298. Although a McLeod employee stated that the person who gave the contract to the Complainants always gives a copy of the terms and conditions, McLeod did not have its employee who was actually involved in the transaction testify at the hearing that she did in fact

provide a copy of the terms and conditions to the Complainants. Tr. at 299. The Commission finds that the Complainants' testimony that they were not given a copy of the terms and conditions to be credible. Therefore, the terms and conditions limiting McLeod's liability were not a part of the contract and are not binding upon the Complainants.

21. McLeod further asserts that its tariff limits McLeod's liability. It appears that McLeod is relying on the following tariff language: "McLeod's liability due to any failure of the transmission shall not exceed an amount equal to the charges provided for by the applicable tariff (for regulated services) and applicable price list, catalogue, and/or contract (for all other services) for the call." Exhibit 46.

22. As stated earlier, tariffs are considered to have the force and effect of law. The Commission must then determine whether McLeod's tariff language seeking to limit liability applies to the factual situation presented by this case. The Commission finds that tariff provisions attempting to limit liability should be strictly construed and not interpreted broadly. The Commission finds that McLeod's tariff language only references situations where there is a failure of transmission for a call. However, in this case, McLeod is the provider of local exchange and toll service and contractually obligated itself to provide those services to the Complainants. It is undisputed that McLeod failed to provide local exchange and toll service to the Complainants when requested and that the Complainants were without landline telephone service. This is not a failure of transmission of a call but a failure to install and provision service. The words "failure of the transmission. . . for the call" would mean that a customer had service that was, for whatever reason, interrupted, or, in other words, transmission of that call failed. In this case, there was never any service to begin with at the new location. The Commission finds that none of the other provisions listed in section 2.3 would be applicable in this situation. McLeod failed to limit its liability for damages in situations where it fails to provision or install telephone service.

23. Moreover, the tariff language, as contrasted with the language in the U S WEST tariff, does not refer to limitation of *damages*. The Commission notes that other provisions in that section refer specifically to limitation for damages. For example, the last paragraph states that "McLeod shall be [sic] not be liable to customers for incidental, indirect, special or consequential *damages* of any kind, including loss of use, loss of business, or loss of profit, arising from errors or omissions in directory listings." Exhibit 46 (emphasis added). In addition, the fifth paragraph in section 2.3 states that "McLeod shall not be liable for *damages* arising out of the use of McLeod's services for the transmission of anything other than voice grade service." *Id.* (emphasis added) (The Commission notes that this language does not limit liability for damages for voice grade service which is the type of service ordered by the Complainants.) McLeod's general reference to "liability" is vague and ambiguous and fails to inform its customers whether it is attempting to limit its liability for damages claims or stating the limits of its liability with respect to its refund policy. In addition, the Commission notes that a company may not disclaim liability for willful misconduct but McLeod's tariff language fails to acknowledge this statutory prohibition. See SDCL 49-2-9.

24. The Commission finds that McLeod breached its contract with the Complainants to provide them toll and local exchange service and thus is liable to the Complainants for compensatory damages for the time period of May 14 through May 28, 1999. The Commission finds there was no independent tort separate from the breach of contract claim to support a negligence claim. See *Sundt Corp., v. State of South Dakota*, 1997 S.D. 91, ¶ 9, 566 N.W.2d 476, 478 ("[T]here can be no cause of action sounding in negligence unless there is a legal duty which arises independent of the duties under the contract."). The Commission limits damages to this two week time period because that is when the Complainants were without any landline telephone service.

25. With respect to compensatory damages for Ms. Manning, the Commission finds that Ms. Manning suffered lost income due to the lack of landline telephone service of \$6,652.15. This amount is broken down as follows: \$4,000.00 (which represents lost revenues associated with giving a Social Security client to another attorney because she was unable to work on the case without a telephone) plus \$2,652.15 (which represents loss of three bankruptcy cases (\$1,500.00), one divorce case (\$425.00), and 1.33 social security cases (\$3,379.30) divided by one half to reflect the loss for two weeks as opposed to four weeks). Tr. at 29-31, 57-60; Exhibit 4. The Commission finds that since Ms. Manning's operating expenses were not materially affected by her caseload, these damages represent net profits lost. Tr. at 62-63.

26. The Commission finds that Ms. Manning's request for damages related to time spent trying to obtain telephone service during that two week period must be denied as double damages. The Commission's award of damages for lost income compensates Ms. Manning for her caseload and related revenues which were lost during the interval she was without landline telephone service. Therefore, Ms. Manning's time spent during this period to obtain adequate telephone service has already been fully compensated.

27. The Commission finds that Ms. Manning is not entitled to compensation for time spent appealing to the Commission. See 22 Am.Jur.2d, *Damages* § 612 (1988) ("A prevailing plaintiff cannot recover the expenses incurred in preparing for trial.").

28. The Commission denies Ms. Manning's request for punitive damages since this is a breach of contract only. See *Grynberg v. Citation Oil and Gas Corp.*, 1997 S.D. 121, ¶¶ 17-18, 573 N.W.2d 493, 500 (Punitive damages are not ordinarily recoverable in actions for breach of contract, absent the finding of an independent tort that is separate and distinct from the breach of contract.).

29. The Commission denies Ms. Manning's request for damages for emotional distress. The Commission first notes that "[r]ecovery for mental anguish is not, as a general rule, allowed in actions for breach of contract." 22 Am.Jur.2d, *Damages* § 48 (1988). The Commission has found there was no separate tort that could give rise to possible damages for emotional distress. See Finding of Fact 24. The Commission further notes that Ms. Manning has failed to meet the elements necessary to sustain the claim of negligent or intentional infliction of emotional distress. See *Stene v. State Farm Mutual Automobile Ins. Co., Inc.*, 1998 S.D. 95, ¶¶ 30-31, 583 N.W.2d 399, 404 (Negligent infliction of emotional distress requires manifestation of physical symptoms; intentional infliction of emotional distress requires, as its first element, an act of extreme and outrageous conduct.).

30. The Commission denies the \$435.00 incurred by Ms. Manning for trenching for the conduit finding that the trenching was the responsibility of the owner of the building pursuant to U S WEST's tariff. See Finding of Fact 10.

31. The Commission denies the damages claimed for the amount of time Ms. Manning's secretary, Brooke Jacobson, spent dealing with the telephone problems. See Exhibit 4; Tr. at 31. The Commission finds that Ms. Jacobson's time was an overhead expense that did not change or increase because of the telephone problems.

32. With respect to compensatory damages for Ms. Frederick, the Commission finds that Ms. Frederick is entitled to loss of income in the amount of \$4,085.74. This amount is derived by taking Ms. Frederick's average income from January through May, dividing it by five, which equals \$9,877.86. Exhibit 24. Since Ms. Frederick stated that billing is done the next month (Tr. at 123),

the Commission took the average income of \$9,877.86 and subtracted actual June income of \$5,792.12, to reflect her May loss of telephone service, for a loss of income of \$4,085.74. Exhibit 24. The Commission does not give her any loss of income for June since she received her requested two lines by May 28, 1999. Tr. at 114. The Commission finds that since Ms. Frederick's operating expenses were not materially affected by her caseload, these damages represent net profits lost.

33. The Commission finds that Ms. Frederick's request for damages related to time spent trying to obtain telephone service during that two week period must be denied as double damages. The Commission's award of damages for lost income compensates Ms. Frederick for her caseload and related revenues which were lost during the interval she was without landline telephone service. Therefore, Ms. Frederick's time spent during this period to obtain adequate telephone service has already been fully compensated.

34. The Commission finds that Ms. Frederick is not entitled to compensation for time spent appealing to the Commission. See 22 Am.Jur.2d, *Damages* § 612 ("A prevailing plaintiff cannot recover the expenses incurred in preparing for trial.").

35. The Commission denies Ms. Frederick's claims for attorney's fees, finding they are not allowable under SDCL 49-13-14.1.

36. The Commission denies Ms. Frederick's request for punitive damages since this is a breach of contract only. See *Grynberg*, 997 S.D. 121, ¶¶ 17-18, 573 N.W.2d 493, 500 (Punitive damages are not ordinarily recoverable in actions for breach of contract, absent the finding of an independent tort that is separate and distinct from the breach of contract.).

37. The Commission denies Ms. Frederick's request for damages for emotional distress. The Commission first notes that "[r]ecovery for mental anguish is not, as a general rule, allowed in actions for breach of contract." 22 Am.Jur.2d, *Damages* § 48 (1988). The Commission has found there was no separate tort that could give rise to possible damages for emotional distress. See Finding of Fact 24. The Commission further notes that Ms. Frederick has failed to meet the elements necessary to sustain the claim of negligent or intentional infliction of emotional distress. See *Stene*, 1998 S.D. 95, ¶¶ 30-31, 583 N.W.2d 399, 404 (Negligent infliction of emotional distress requires manifestation of physical symptoms; intentional infliction of emotional distress requires, as its first element, an act of extreme and outrageous conduct.).

38. The Commission denies the damages claimed for charges by Executone to fix telephone. Exhibit 30. Ms. Frederick stated that after U S WEST worked on her telephone lines the lines stopped working and Executone charged her \$53.00 to fix the lines. Tr. at 125. The Commission finds that these damages are also precluded by U S WEST's limitation of liability provision in its tariff. See Finding of Fact 18.

39. The Commission rejects the Findings of Fact and Conclusions of Law submitted by U S WEST.

### **CONCLUSIONS OF LAW**

1. The Commission finds that it has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-2, 49-13, and 49-31, specifically 49-13-1 through 49-13-14.1, inclusive, 49-31-3, 49-31-7, 49-31-7.1, 49-31-7.2, 49-31-10, 49-31-11, 49-31-38, 49-31-38.1, 49-31-38.2, and 49-31-38.3, and ARSD

20:10:01:08.01 and 20:10:01:09. The Commission may rely upon any or all of these or other laws of this state in making its determination.

2. The Commission finds that U S WEST did not engage in willful misconduct or discrimination in the provisioning of service. Ms. Atchison's and Ms. Miller's orders for service were processed first because U S WEST received them first. See Finding of Fact 6. U S WEST did make a mistake when it determined that no lines were available when, in fact, three lines had been reserved for the Complainants' use. See Finding of Fact 9. The Complainants assert that even though there was no privity of contract and the Complainants were not customers of U S WEST, U S WEST was liable for damages under the tort of professional negligence. See *Muhlenkort*, 530 N.W.2d 658 (S.D. 1995). However, the Commission finds that U S WEST's tariff precludes the award of damages as against U S WEST, thus, it need not reach the issue of whether U S WEST was negligent under the tort of professional negligence.

3. U S WEST's tariff limits damages for U S WEST's failure to timely provision services. The tariff reads as follows:

The Company's liability, if any, for its willful misconduct is not limited by this Tariff. With respect to any other claim or suit, by a customer, or by any others, for damages associated with the installation, provision, preemption, termination, maintenance, repair or restoration of service, the Company's liability, if any, shall not exceed an amount equal to the proportionate part of the monthly recurring charge for the service for the period during which the service was affected. This liability shall be in addition to any amounts that may otherwise be due the customer under this Tariff as an allowance for interruptions.

Exhibit 16, U S WEST Exchange and Network Services Tariff, Section 2, Page 25, Release 1, Section 2.4.1 (A)(1). This tariff language was approved by the Commission. Tariffs approved by a regulatory agency are not mere contracts but are considered to have the force and effect of law. *Corporate Investigative Div., Inc.*, 884 F. Supp. 220, 222 (W.D. La. 1995). The Commission finds that U S WEST's tariff language specifically limits liability for damages relating to the installation or provision of service with respect to any claim or suit by a customer, or by others for damages. This case involved the installation and provisioning of service.

4. The Commission further finds that U S WEST did not waive its tariff limitation of liability by crediting the Complainants' advertising account. The Complainants do not cite to any evidence that would show that they were misled into believing that US WEST was waiving its tariff limitation of liability when U S WEST credited the account. See 28 Am.Jur.2d, *Estoppel and Waiver* §173 (1996).

5. The Commission finds that McLeod's liability is not limited by the contracts entered into between McLeod and the Complainants. The Commission finds that the Complainants were not given a copy of the terms and conditions. Therefore, the terms and conditions limiting McLeod's liability were not a part of the contract and are not binding upon the Complainants. See Finding of Fact 20.

6. McLeod further asserts that its tariff limits McLeod's liability. It appears that McLeod is relying on the following tariff language: "McLeod's liability due to any failure of the transmission shall not exceed an amount equal to the charges provided for by the applicable tariff (for regulated services) and applicable price list, catalogue, and/or contract (for all other services) for the call." Exhibit 46.



7. As stated earlier, tariffs are considered to have the force and effect of law. The Commission must then determine whether McLeod's tariff language seeking to limit liability applies to the factual situation presented by this case. The Commission finds that tariff provisions attempting to limit liability should be strictly construed and not interpreted broadly. The Commission finds that McLeod's tariff language only references situations where there is a failure of transmission for a call. However, in this case, McLeod is the provider of local exchange and toll service and contractually obligated itself to provide those services to the Complainants. It is undisputed that McLeod failed to provide local exchange and toll service to the Complainants when requested and that the Complainants were without landline telephone service. This is not a failure of transmission of a call but a failure to install and provision service. The words "failure of the transmission. . . for the call" would mean that a customer had service that was, for whatever reason, interrupted, or, in other words, transmission of that call failed. In this case, there was never any service to begin with at the new location. The Commission finds that none of the other provisions listed in section 2.3 would be applicable in this situation. McLeod failed to limit its liability for damages in situations where it fails to provision or install telephone service.

8. Moreover, the tariff language, as contrasted with the language in the U S WEST tariff, does not refer to limitation of *damages*. The Commission notes that other provisions in that section refer specifically to limitation for damages. For example, the last paragraph states that "McLeod shall be [sic] not be liable to customers for incidental, indirect, special or consequential *damages* of any kind, including loss of use, loss of business, or loss of profit, arising from errors or omissions in directory listings." Exhibit 46 (emphasis added). In addition, the fifth paragraph in section 2.3 states that "McLeod shall not be liable for *damages* arising out of the use of McLeod's services for the transmission of anything other than voice grade service." *Id.* (emphasis added). (The Commission notes that this language does not limit liability for damages for voice grade service which is the type of service ordered by the Complainants.) McLeod's general reference to "liability" is vague and ambiguous and fails to inform its customers whether it is attempting to limit its liability for damages claims or stating the limits of its liability with respect to its refund policy. In addition, the Commission notes that a company may not disclaim liability for willful misconduct but McLeod's tariff language fails to acknowledge this statutory prohibition. See SDCL 49-2-9.

9. The Commission finds that McLeod breached its contract with the Complainants to provide them toll and local exchange service and thus is liable to the Complainants for compensatory damages for the time period of May 14 through May 28, 1999. The Commission finds there was no independent tort separate from the breach of contract claim to support a negligence claim. See *Sundt Corp.*, 1997 S.D. 91, ¶ 9, 566 N.W.2d 476, 478 ("[T]here can be no cause of action sounding in negligence unless there is a legal duty which arises independent of the duties under the contract."). The Commission limits damages to this two week time period because that is when the Complainants were without any landline telephone service.

10. For a breach of contract claim, the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." SDCL 21-2-1. With respect to compensatory damages for Ms. Manning, the Commission finds that Ms. Manning suffered lost income due to the lack of landline telephone service of \$6,652.15. See Finding of Fact 25.

11. The Commission finds that Ms. Manning's request for damages related to time spent trying to obtain telephone service during that two week period must be denied as double damages. See Finding of Fact 26.

12. The general rule is that "[a] prevailing plaintiff cannot recover the expenses incurred in preparing for trial." 22 Am.Jur.2d, *Damages* § 612 (1988). Thus, the Commission finds that Ms. Manning is not entitled to compensation for time spent appealing to the Commission. See Finding of Fact 27.

13. The Commission denies Ms. Manning's request for punitive damages since this is a breach of contract only. See *Grynberg*, 1997 S.D. 121, ¶¶ 17-18, 573 N.W.2d 493, 500 (Punitive damages are not ordinarily recoverable in actions for breach of contract, absent the finding of an independent tort that is separate and distinct from the breach of contract.). See Finding of Fact 28.

14. The Commission denies Ms. Manning's request for damages for emotional distress. The Commission first notes that "[r]ecovery for mental anguish is not, as a general rule, allowed in actions for breach of contract." 22 Am.Jur.2d, *Damages* § 48 (1988). The Commission has found there was no separate tort that could give rise to possible damages for emotional distress. See Finding of Fact 24. The Commission further notes that Ms. Manning has failed to meet the elements necessary to sustain the claim of negligent or intentional infliction of emotional distress. See *Stene*, 1998 S.D. 95, ¶¶ 30-31, 583 N.W.2d 399, 404 (Negligent infliction of emotional distress requires manifestation of physical symptoms; intentional infliction of emotional distress requires, as its first element, an act of extreme and outrageous conduct.).

15. The Commission denies the \$435.00 incurred by Ms. Manning for trenching for the conduit, finding that the trenching was the responsibility of the owner of the building pursuant to U S WEST's tariff. See Findings of Fact 10, 30.

16. The Commission denies the damages claimed for the amount of time Ms. Manning's secretary, Brooke Jacobson, spent dealing with the telephone problems, finding Ms. Jacobson's time was an overhead expense that did not change or increase because of the telephone problems. See Finding of Fact 31.

17. For a breach of contract claim, the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." SDCL 21-2-1. With respect to compensatory damages for Ms. Frederick, the Commission finds that Ms. Frederick is entitled to loss of income in the amount of \$4,085.74. See Finding of Fact 32.

18. The Commission finds that Ms. Frederick's request for damages related to time spent trying to obtain telephone service during that two week period must be denied as double damages. See Finding of Fact 33.

19. The general rule is that "[a] prevailing plaintiff cannot recover the expenses incurred in preparing for trial." 22 Am.Jur.2d, *Damages* § 612 (1988). Thus, the Commission finds that Ms. Frederick is not entitled to compensation for time spent appealing to the Commission. See Finding of Fact 34.

20. Pursuant to SDCL 49-13-14.1, attorneys' fees are allowed if recovered by suit in court. The statute provides in pertinent part:

[I]f recovered by suit, such telecommunications company or motor carrier is liable to the person injured thereby for not to exceed twice the amount of damages sustained in consequence of any such violation complained of, together with costs of suit and a reasonable attorney fee, to be fixed by the court in which the suit is heard on appeal or otherwise, which shall be taxed and collected as part of the costs of the case.

The Commission finds that the use of the words "recovered by suit" means if recovered by filing a claim for damages in circuit court as opposed to filing a claim for damages before the Commission. The statute specifically refers to reasonable attorneys' fees "to be fixed by the court in which the suit is heard . . . ." SDCL 49-31-14.1 (emphasis added). Thus, the Commission denies Ms. Frederick's claims for attorneys' fees. See Finding of Fact 35.

21. The Commission denies Ms. Frederick's request for punitive damages since punitive damages are not ordinarily recoverable in actions for breach of contract, absent the finding of an independent tort that is separate and distinct from the breach of contract. See *Grynberg*, 997 S.D. 121, ¶¶ 17-18, 573 N.W.2d 493, 500. See Finding of Fact 36.

22. The Commission denies Ms. Frederick's request for damages for emotional distress. The Commission first notes that "[r]ecovery for mental anguish is not, as a general rule, allowed in actions for breach of contract." 22 Am.Jur. 2d, *Damages* § 48 (1988). The Commission has found there was no separate tort that could give rise to possible damages for emotional distress. See Finding of Fact 24. The Commission further notes that Ms. Frederick has failed to meet the elements necessary to sustain the claim of negligent or intentional infliction of emotional distress. See *Stene*, 1998 S.D. 95, ¶¶ 30-31, 583 N.W.2d 399,404 (Negligent infliction of emotional distress requires manifestation of physical symptoms; intentional infliction of emotional distress requires, as its first element, an act of extreme and outrageous conduct.).

23. The Commission denies the damages claimed for charges by Executone to fix telephone. See Finding of Fact 38.

24. The Commission rejects the Findings of Fact and Conclusions of Law submitted by U S WEST.

It is therefore

ORDERED, that McLeod shall pay Ms. Manning \$6,652.15 in damages; and it is

FURTHER ORDERED, that McLeod shall pay Ms. Frederick \$4,085.74 in damages.

#### NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 7th day of April, 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.

Pierre, South Dakota, this 7th day of April, 2000.

<b>CERTIFICATE OF SERVICE</b>
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: _____
Date: _____
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

\_\_\_\_\_  
JAMES A. BURG, Chairman

\_\_\_\_\_  
PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner,  
dissenting

## DISSENT OF COMMISSIONER SCHOENFELDER

I find that I must respectfully dissent from the majority decision.

First, I believe that McLeod and U S WEST have filed tariffs with this Commission, which the Commission has approved and are therefore bound by, that limits the liability of the companies involved.

Second, the record reveals that both Ms. Manning and Ms. Frederick have been reimbursed by McLeod for more money than the tariff requires. To award damages above the amount required by the tariff seems to me to go beyond the authority that this Commission would appear to have in this case.