

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

IN THE MATTER OF THE COMPLAINT FILED)	NOTICE OF INTENT TO
BY CHRISTOPHER A. CUTLER ON BEHALF)	TREAT MOTION IN PART AS
OF RECREATIONAL ADVENTURES CO., HILL)	MOTION FOR SUMMARY
CITY, SOUTH DAKOTA, AGAINST AT&T)	JUDGMENT; ORDER FOR
COMMUNICATIONS OF THE MIDWEST, INC.)	AND NOTICE OF HEARING
REGARDING FAILURE TO PROVIDE SERVICE)	CT02-021

On June 17, 2002, the Public Utilities Commission (Commission) received a complaint filed by Christopher A. Cutler on behalf of Recreational Adventures Co., Hill City, South Dakota (Complainant), against AT&T Communications of the Midwest, Inc. (AT&T) regarding failure to provide service (Complaint).

On June 17, 2002, the Complaint was faxed to AT&T. Pursuant to ARSD 20:10:01:09, AT&T was notified that it must satisfy the Complaint or file an answer in writing with the Commission by July 8, 2002. On July 8, 2002, the Commission received an answer from AT&T. On October 24, 2002, the Commission received a motion to dismiss and in the alternative for summary judgment from AT&T (Motion). On November 15, 2002, the Commission received a response to AT&T's Motion from Complainant. The Commission scheduled the Motion for hearing at its regular meeting on December 19, 2002. On December 9, 2002, the Commission received a motion for continuance from AT&T. On December 17, 2002, the Commission held a hearing on the motion for continuance and continued the hearing on the Motion until January 2, 2003. On December 19, 2002, the Commission received AT&T's reply brief on the Motion and AT&T's contingent motion for a stay. On December 23, 2002, the Commission received a notice of hearing from AT&T on the Motion. On January 2, 2003, the Commission held a hearing on AT&T's Motion. At the hearing, AT&T stipulated that it was withdrawing that part of its Motion that was an alternative motion for summary judgment on the merits of the complaint.

Having considered the Motion and the briefs and arguments of the parties on the Motion, the Commission finds and concludes that a preliminary issue of material fact must be determined before the Commission can render a decision on the issue of whether federal law may preempt the jurisdiction of the state to hear the Complaint. The Commission therefore serves notice, in conformity with *Richards v. Lenz*, 539 N.W.2d 80 (S.D. 1995), that it will consider AT&T's motion to dismiss as a motion for summary judgment under SDCL 1-26-18 and 15-6-56 as to the issue of whether the special access service ordered by Complainant was to have been an interstate or intrastate service, and more particularly, whether less than ten percent of the traffic to be carried by the special access service was to have been interstate traffic. The Commission will hold a hearing on the Motion on March 4, 2003. Prior to the hearing, the parties may file and serve on the other parties such affidavits as they deem necessary to demonstrate that a genuine issue exists as to this material fact. At the hearing, if a genuine issue of fact is presented, the parties will have the opportunity to present sworn testimony on the issue of the nature of the special access service to have been provided in this case. Lastly, the Commission requests that the parties present any argument and authority they may have on the issue of what effect, if any, the FCC's decision in *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730 (1996) (De-Tariffing Order) has on the issue of the Commission's jurisdiction to hear this case.

A hearing will be held on the motion for summary for summary judgment and the issues set forth herein on March 4, 2003, beginning at 10:30 AM, at the Governor's Inn, 700 West Sioux

Avenue, Pierre, South Dakota. All persons testifying will be subject to cross-examination by the parties. The parties and their witnesses may appear either in person or by conference call. The call-in number is (605) 773-6154. The Complainant shall notify the Commission if it desires the Commission to initiate calls to its representative or witnesses.

The issues at the hearing are: (i) what percentage of the telecommunications traffic to have been carried on the special access service ordered by Complainant from AT&T was to have been interstate; (ii) whether such special access service was therefore to have been an interstate or intrastate service; and (iii) the effect of such determinations on the jurisdiction of the Commission in the light of the De-Tariffing Order and other applicable law.

The hearing shall be an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to be present and to be represented by an attorney. These rights and other due process rights may be forfeited if not exercised at the hearing. The Commission will consider all evidence and arguments presented at the hearing. To the extent allowed by law for appeals of interlocutory decisions, the Commission's decision may be appealed by the parties to the circuit court and the state Supreme Court as provided by law. It is therefore

ORDERED, that a hearing shall be held at the time and place and in the manner specified above, on the issues set forth above.

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

Dated at Pierre, South Dakota, this 21st day of February, 2003.

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:	<u>Melaine Kolbo</u>
Date:	<u>2/21/03</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Robert K. Sahr
ROBERT K. SAHR, Chairman

Gary Hanson
GARY HANSON, Commissioner

James A. Burg
JAMES A. BURG, Commissioner