

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

**IN THE MATTER OF THE COMPLAINT)
FILED BY RANDY KIEFFER, STURGIS,)
SOUTH DAKOTA, AGAINST U S WEST)
COMMUNICATIONS, INC. REGARDING)
SERVICE PROBLEMS)**

STAFF BRIEF

TC98-176

This brief is provided to the Commission to assist it with the issue of damages as it may arise in this case.

1. Telecommunications customers have an unrestrained right to claim damages before the Public Utilities Commission.

SDCL 49-13-1.1 provides:

Any person claiming to be damaged by any telecommunications company or motor carrier may either make complaint to the commission or may bring suit on his own behalf for the recovery of damages in any court of competent jurisdiction in this state, but no person may pursue both remedies at the same time.

It is submitted that in clear language the Legislature has provided a remedy for any person claiming to be damaged by a telecommunications company. The statute does not otherwise impose conditions on that right.

2. U S WEST's tariffs which attempt to limit its liability are invalid and unenforceable.

a. First, for the reason stated in Section 1, above, the law provides an unrestrained right to claim damages from a telecommunications company.

b. Second, Section 2, page 25, Release 1, paragraph A of U S WEST's tariff is attached to its Answer in this case.

SDCL 49-31-12, as paraphrased, provides that the Commission is to make a schedule of reasonable fares and rates or prices for telecommunications companies. Under SDCL 49-31-12.1, rates and prices filed in tariffs are presumed fair and reasonable.

Companies' responsibilities regarding rates and prices are defined by SDCL 49-31-12.2. In other words, tariffs are to cover fares, rates and prices.

This tariff is a limitation of liability. It does not set a fare, a rate or a price. It attempts to shield U S WEST from contract and tort liability. It attempts to define what can be recovered from U S WEST when service is not provided for a variety of reasons. This has nothing to do with what U S WEST may charge customers as a fare, rate or price.

The statutes cited above are clear and unambiguous and should be given their plain meaning and intent. U S WEST Communications, Inc. v. Public Utilities Commission, 505 N.W.2d 115, 123 (S.D. 1993).

3. The measure of damages is an amount that will compensate an injured party for detriment suffered.

The measure of damages is provided for by statute. In contract, that standard as stated in SDCL 21-3-1 is:

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, 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. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin.

In tort, the standard is in SDCL 12-3-1:

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

4. A telecommunications company which does not properly provide service is liable for a wide range of damages.

As to damages which may be recovered when a telephone company does not properly provide service, a general statement of the law is found at 74 Am.Jur. 2d

TELECOMMUNICATIONS § 65:

The compensatory damages which may be recovered for failure of a telephone company to perform its duty to furnish telephone facilities and to render proper service are not necessarily limited to the mere monetary loss which the injured party may be able to prove as a result of this neglect or failure of the company, but may include such elements as annoyance, inconvenience, and loss of time, and in some cases even mental or physical suffering. There is no distinction between residence and business telephones with regard to the right to recover damages for annoyance, inconvenience, and loss of time naturally resulting from the interruption of the service. However, it has been held that in the absence of proof of any pecuniary loss, the measure of damages is the amount paid for the service for the time during which it is refused, and that in such a case, damages for mere inconvenience and annoyance cannot be recovered. (emphasis supplied).

There are two cases which, although of some age, discuss the awarding of damages for inconvenience in telephone service and they appear to form a basis for recovery of such damages either in contract or tort.

In Cumberland Telegraph & Telephone Co. v. Hobart, 42 S. 349 (Miss. 1906), the Court said:

The telephone has come to be a necessity. It is the thing which completes the use of a home. It is resorted to daily, and hourly, to such an extent as to be regarded as indispensable, yet, when it comes to taking pencil and paper and calculating day by day what pecuniary value it possesses, it is almost impossible. The inconvenience, the annoyance, and the trouble of being without one is a damage which no one can accurately estimate. It is such inconvenience and annoyance as is only to be fully appreciated when one is deprived of its use; its loss is a great and distinct damage, yet such damage as is not susceptible of exact measurement. at 350 (emphasis supplied).

The damage sustained by the loss of a telephone in its very nature is largely composed of inconvenience and annoyance. Supra, at 351.

In a tort action regarding a telephone company's discontinuance or suspension of service, it has been recognized that recovery for annoyance and inconvenience can be had, see Chesapeake & Potomac Telephone Co. of Virginia v. Carless, 102 S.E. 569 (VA, 1920). That, in order to recover this damage, it is proper for a trier of fact to consider all facts and circumstances which show the damage. Quoting Sedgwick on Damages, the Court adopted the following language:

And when, from the nature of the case, the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will admit. at 571.

In South Dakota, personal inconvenience has been recognized as a proper element of damage, for instance in personal injury type actions, see Koenig v. Weber, 174 N.W.2d 218 (S.D. 1970).

CONCLUSION

1. In South Dakota, telecommunications customers have an unrestricted right as a matter of law to claim damages from a telecommunications company.
2. Tariffs which attempt to limit a telecommunications company's liability are invalid and unenforceable.
3. The measure of damages is an amount which will fully compensate the injured party.
4. It is submitted that should the Commission find sufficient facts of inconvenience suffered by Randy Kieffer, that it may award damages for that inconvenience under SDCL 49-13-1.1.

Dated this _____ day of December, 1998.

Camron Hoseck
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
Telephone (605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Staff Brief were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the _____ day of December, 1998.

Mr. Randy Kieffer
HC 77, Box 260
Sturgis, SD 57785

Mr. Thomas J. Welk
Attorney at Law
Boyce, Murphy, McDowell & Greenfield, L.L.P.
P. O. Box 5015
Sioux Falls, SD 57117-5015

Camron Hoseck
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501