

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

IN THE MATTER OF THE REVOCATION OF)	FINDINGS OF FACT AND
THE CERTIFICATE OF AUTHORITY OF)	CONCLUSIONS OF LAW;
UTILITY ANALYSTS, INC. D/B/A BASIC LONG)	NOTICE OF ENTRY OF
DISTANCE)	ORDER
)	TC98-068

South Dakota Compiled Laws section 49-31-3 authorizes the South Dakota Public Utilities Commission (Commission) to grant certificates of authority to telecommunications companies offering common carrier services within the state of South Dakota. Pursuant to this same section, the Commission is given general supervision and control of said companies and may suspend or revoke any certificate of authority for a willful violation of the laws of the state of South Dakota, a willful failure to comply with a rule or order of the Commission, or other good cause.

The matter of Utility Analysts, Inc. d/b/a Basic Long Distance (Basic Long Distance) was placed on the Commission agenda for its duly noticed meeting on December 18, 1997. No one from Basic Long Distance responded to the agenda item. The matter of the service of Basic Long Distance in South Dakota was again scheduled for February 3, 1998, before the Commission and it was postponed. A third scheduling for consideration of the service of Basic Long Distance was duly noticed for March 10, 1998, at which time the Commission voted to issue an Order to Show Cause and that a hearing be scheduled.

The Order for and Notice of Show Cause Hearing was issued April 3, 1998. The notice stated that the Commission's consumer representative has received one hundred thirty-nine consumer complaints against Basic Long Distance in late 1997, and to date in 1998, regarding questionable marketing practices and unauthorized switching of long distance carriers of telecommunications customers in South Dakota. The notice required Basic Long Distance to appear on April 16, 1998, at 9 A.M. (CDT) in Room 412, State Capitol Building, Pierre, South Dakota, to show cause why action should not be taken against the company for its marketing practices and unauthorized switching of long distance service of South Dakota telecommunications customers. The show cause hearing was held as scheduled. Additional documents were requested by the Commission and the Commission took the matter under advisement.

At its May 12, 1998, meeting, the Commission considered how to proceed with this matter. The Commission voted unanimously as follows: (1) Basic Long Distance is prohibited from acquiring or contacting any new South Dakota customers; (2) Basic Long Distance shall credit the accounts or reimburse all charges it billed to all South Dakota customers that notify the company or the Commission that they did not knowingly choose Basic Long Distance as their toll provider; (3) the Commission will compose a letter notifying all of Basic Long Distance's South Dakota customers of the outcome of the hearing and verify that they have agreed to be a customer of Basic Long Distance; (4) Basic Long Distance shall reimburse the Commission for the cost of the mailing; (5) Basic Long Distance is prohibited from resuming marketing to new South Dakota customers unless specifically allowed by the Commission; and (6) if Basic Long Distance applies to the Commission to resume marketing to new customers, it will, at a minimum, be required to have any scripts that it uses, including the scripts used by its third party verifier, approved by the Commission.

Based on the evidence and testimony presented to the Commission, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On July 22, 1996, Utility Analysts, Inc. d/b/a Basic Long Distance (Basic Long Distance) filed an application with the Commission for a certificate of authority to provide telecommunications services within the state of South Dakota. Exhibit 1. Basic Long Distance was granted a certificate of authority by order dated September 18, 1996. Id.

2. An Order for and Notice of Show Cause Hearing was issued April 3, 1998. The notice stated that the Commission's consumer representative has received one hundred thirty-nine consumer complaints against Basic Long Distance in late 1997, and to date in 1998, regarding questionable marketing practices and unauthorized switching of long distance carriers of telecommunications customers in South Dakota. The hearing was set for April 16, 1998, and was held as scheduled.

3. The Commission's Director of Consumer Affairs, Leni Healy, began to receive a large number of complaints against Basic Long Distance in November and December of 1997. Tr. at 11. She received 47 complaints in 1997. Exhibit 2. In 1997, Basic Long Distance responded to the complaints by saying that it had done nothing wrong and would not issue any credits. Tr. at 20.

4. From January 1, 1998, until April 15, 1998, 105 complaints were received. Tr. at 37; Exhibit 3. Basic Long Distance has been more responsive to complaints in 1998. Tr. at 20.

5. Basic Long Distance currently has 1,664 customers. Tr. at 67; Exhibit A. The Commission finds that 152 complaints filed in six months against a company with 1,664 current customers is excessive. No company has received close to the number of complaints that Basic Long Distance had with the exception of a company that later voluntarily withdrew from offering service in South Dakota. Tr. at 29-30. Brian Somerville, principal and officer of Basic Long Distance, agreed that, given its current number of customers, his company has too many complaints in South Dakota. Tr. at 56, 113.

6. Even after the original billings had ceased, a number of complainants had to contact the Commission again after they thought the problem had been resolved because new billings were generated. Tr. at 20, 33-34.

7. The complainants were characterized as having been slammed through deceptive marketing practices. Tr. at 38. Slamming is the unauthorized switching of a person's telecommunications carrier. The use of the assumed name "Basic Long Distance" is part of the problem because the telephone bills show an itemized category headed BASIC LONG DISTANCE and many customers believe it is a generic term, not a company name, thus remaining unaware that their long distance company has changed. Tr. at 38-39.

8. The script to be used by Basic Long Distance telemarketers was introduced as Exhibit 9. However, the evidence showed that this script was not always followed. Ms. Healy testified that the Basic Long Distance script was not the same script that the complainants recall. Tr. at 28, 42. Ms. Healy stated that either the complainants did not remember being called or they remembered a call where the telemarketer represented himself or herself as from the local telephone company and asked if the customer wanted a single bill. Tr. at 42.

9. Further confirmation that the script was not being used was provided by Sue Cichos, Business Manager for the Commission. She testified that she received a call where the person represented himself as from U S WEST and asked if she wanted to continue to receive one bill. Tr. at 51. She remembered that the words "basic long distance" were used but believed the person was

talking about a service not a company. Id. When she later talked to a third party verifier she realized she had been switched. Tr. at 52. She was charged a \$5.00 switching fee that she refused to pay since she had not agreed to be switched to Basic Long Distance. Tr. at 154. She also submitted her January and February telephone bills which showed that she was being charged a monthly fee of \$2.50 by Basic Long Distance even though she thought that she had been switched back from Basic Long Distance in October of 1997. Tr. at 155; Exhibits 10, 11.

10. The evidence shows that the script as set forth in Exhibit 9 was not always followed and instead customers were led to believe that U S WEST was calling to ask if the customer wanted to continue to receive one bill. The Commission finds that Basic Long Distance telemarketers used deceptive marketing practices when calling on behalf of Basic Long Distance and switched consumers without authorization.

11. The evidence further showed that even if the script is followed, it is misleading. First, the marketing strategy is based on an unverified premise. Brian Somerville stated that the company's selling point was that it offers only one bill. Tr. at 63. He admitted that his company was not competitive on costs since it charges \$.25 per minute for residential customers. Tr. at 124-126. According to the telemarketing script, the potential customer is told that "AT&T, MCI [sic] and Sprint are beginning to separate [sic] from **Lec**". Do you want to pay them separately [sic] or would you like to continue consolidated billing?" Exhibit 9. However, he stated that he did not know whether the companies were actually doing separate billing for residential customers in South Dakota. Tr. at 140. The statement was based on a marketing strategy used in a non-U S WEST state by a local exchange company. Id. No evidence was presented to support the statement that AT&T, MCI, and Sprint were going to do their own billing in South Dakota.

12. Even more significant is the fact that the customer is never asked whether he or she wants to switch to Basic Long Distance. Exhibit 9. Instead, after asking whether the customer wants to continue to receive consolidated billing, (which most customers will naturally say yes to), it is assumed that the customer has agreed to the switch and the representative asks for the person's name, title, and date of birth. Tr. at 141-143. Mr. Somerville referred to this as an "assumptive close." Tr. at 142. Mr. Somerville agreed to work with the Commission on changing the phrasing. Tr. at 148. The Commission finds that the marketing script is misleading and that the customer never affirmatively agrees to change his or her long distance provider.

13. The verification process is also misleading. At the hearing, a taped transcript of an actual verification conversation was provided by Basic Long Distance. Exhibit E. Following the hearing, Basic Long Distance submitted its verification script as requested by the Commission. Late-filed exhibit dated May 11, 1998. The verification script states the following: "At this time we are confirming that you are the authorized person, and we do have your permission to transfer the present billing for local and long distance, to one bill from you [sic] local phone company, with long distance service provided by Basic Long Distance, is that correct?" Id. (emphasis added). Although this may still be misleading due to the company being named Basic Long Distance and the fact that the script suggests that the customer is receiving two bills and will now receive one bill, at least it mentions that a transfer will occur. However, in actual practice, the telemarketer did not use the word "transfer." Instead the statement was as follows: "We have your permission to keep everything in one bill from your local phone company. Long distance provided by Basic Long Distance. Correct?" Exhibit E. By not using the word "transfer" it now appears that the customer is confirming that the status quo will continue. No mention is made of any change, transfer, or switch from the customer's current long distance provider. The Commission finds that the verification process is also misleading and deceptive.

14. The verification script states that a customer's service will start in five to ten days. Late-filed exhibit dated May 11, 1998. Mr. Somerville stated that it typically should take two to three weeks to provision service from the time the company receives third party verification from a new customer. Tr. at 108-109. When it was pointed out at the hearing that two customer records showed verification occurred in October with provisioning not until the following February, Mr. Somerville conceded that this was very slow. Tr. at 109.

15. A close review of Basic Long Distance's customer records shows numerous instances of unacceptable lag time between verification and provisioning. Exhibit A. Almost 650 of the company's current customers numbering 1,664 were switched to Basic Long Distance 90 days or more after the records showed the switch was verified. Id. Also disturbing is that over 150 of those customers had a lag time of more than 10 months. Id. Further, for some reason, the time lags that were around 12 months in length (approximately 122) were not provisioned until the end of February of 1998. Id. Thus, although Basic Long Distance stated it stopped marketing the end of January 1998, it then began to provision service to people in February of 1998, who allegedly verified that they wanted to switch to Basic Long Distance in February of 1997, a full year after the alleged verification. The Commission finds these time periods to be unacceptable and without justification.

16. Mr. Somerville stated that Basic Long Distance had stopped marketing to South Dakota residents as of January 31, 1998. Tr. at 113-114. At the hearing, Mr. Somerville agreed that before resuming marketing, he would get permission from the Commission. Tr. at 145. Mr. Somerville further stated that he would credit the customers who complained for all charges billed by Basic Long Distance. Tr. at 146.

17. Due to its misleading and deceptive marketing practices, the Commission prohibits Basic Long Distance from acquiring or contacting any new South Dakota customers. If Basic Long Distance applies to the Commission to resume marketing to new customers, it will, at a minimum, be required to have any scripts that it uses approved by the Commission. This includes all scripts used in its marketing efforts and those scripts used by its third party verifier.

18. Due to its misleading and deceptive marketing practices, Basic Long Distance shall credit the accounts or reimburse all charges it billed to all South Dakota customers that notify the company or the Commission that they did not knowingly choose Basic Long Distance as their toll provider.

19. Further, the Commission shall compose a letter asking all of Basic Long Distance's current customers whether they realize that Basic Long Distance is their toll provider and whether they knowingly chose Basic Long Distance as their toll provider. Basic Long Distance shall reimburse the Commission for the cost of this mailing. The Commission finds that this is necessary to protect the public interest and is necessary, reasonable, and expedient in order to promote the safety, convenience, and accommodation of the public. Based on the evidence presented at the hearing, the Commission finds that it is questionable as to whether the company's customers knowingly chose Basic Long Distance as their toll provider due to the deceptive and misleading marketing practices used by its telemarketers. In addition, the Commission finds that a number of current customers may not yet have realized that they were switched to Basic Long Distance since the company's records show that although many of the customers allegedly authorized the switch in February of 1997, the customers did not begin receiving the service from Basic Long Distance until the end of February of 1998.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-1A, 49-13, and 49-31, specifically, 49-13-1, 49-13-3, 49-13-4, 49-13-5, 49-13-13, 49-13-14, 49-31-3, 49-31-7, 49-31-7.1, and ARSD 20:10:01:45.

2. The Commission finds that Basic Long Distance has engaged in deceptive and misleading marketing practices. Further, the Commission finds that even if its current customers knowingly chose Basic Long Distance as their toll provider, Basic Long Distance has failed to timely provision its services to a large number of its current customers.

3. The Commission finds that Basic Long Distance actions are detrimental to the public interest. The Commission hereby orders as follows: (1) Basic Long Distance is prohibited from acquiring or contacting any new South Dakota customers; (2) Basic Long Distance shall credit the accounts or reimburse all charges it billed to all South Dakota customers that notify the company or the Commission that they did not knowingly choose Basic Long Distance as their toll provider; (3) the Commission will compose a letter notifying all of Basic Long Distance's South Dakota customers of the outcome of the hearing and verify that they have agreed to be a customer of Basic Long Distance; (4) Basic Long Distance shall reimburse the Commission for the cost of the mailing; (5) Basic Long Distance is prohibited from resuming marketing to new South Dakota customers unless specifically allowed by the Commission; and (6) if Basic Long Distance applies to the Commission to resume marketing to new customers, it will, at a minimum, be required to have any scripts that it uses, including the scripts used by its third party verifier, approved by the Commission.

4. The Commission finds these actions are necessary to protect the public interest. See SDCL 49-31-7. The Commission finds that these actions are necessary for the improvement of telecommunications service and the convenience of the public. The Commission further finds these actions are necessary, reasonable, and expedient in order to promote the safety, convenience and accommodation of the public.

It is therefore

ORDERED, that the Commission prohibits Basic Long Distance from acquiring or contacting any new South Dakota customers; and it is

FURTHER ORDERED, that Basic Long Distance is prohibited from resuming marketing to new South Dakota customers unless specifically allowed by the Commission. If Basic Long Distance applies to the Commission to resume marketing to new customers, it will, at a minimum, be required to have any scripts that it uses, including the scripts used by its third party verifier, approved by the Commission; and it is

FURTHER ORDERED, that Basic Long Distance shall credit the accounts or reimburse all charges it billed to all South Dakota customers that notify the company or the Commission that they did not knowingly choose Basic Long Distance as their toll provider; and it is

FURTHER ORDERED, that the Commission shall compose a letter asking all of Basic Long Distance's current customers whether they realize that Basic Long Distance is their toll provider and whether they knowingly chose Basic Long Distance as their toll provider. Basic Long Distance shall reimburse the Commission for the cost of this mailing.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 11th day of June, 1998. 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 11th day of June, 1998.

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>Nelaine Kaelos</u>
Date:	<u>6/12/98</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner