

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

<b>IN THE MATTER OF THE FILING BY U S WEST COMMUNICATIONS, INC. FOR APPROVAL OF REVISIONS TO ITS EXCHANGE AND NETWORK SERVICES TARIFF</b>	) ) ) ) ) )	<b>ORDER DENYING REVISIONS TO TARIFF  TC98-214</b>
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On December 24, 1998, the Public Utilities Commission (Commission) received a filing from U S WEST Communications, Inc. (U S WEST) to revise the following pages from its Exchange and Network Services Tariff:

Section	Page	Release
1	8	2
1	13	4
5	6	6
10	Index Page 1	2
10	6	1

According to the filing, "The purpose of these revisions is to assess a \$.17 per month surcharge on all Sioux Falls customer access lines for the elimination of toll services from Sioux Falls to Dell Rapids and Colton, South Dakota." U S WEST proposes that this charge be effective upon installation of the necessary facilities to offer the service. U S WEST did not request a hearing.

On June 3, 1998, the Commission ordered extended area service (EAS) between Colton and Sioux Falls and between Dell Rapids and Sioux Falls. Docket TC95-120, *In the Matter of the Petition of David Glader for Extended Area Service Between Colton, South Dakota and Sioux Falls, South Dakota* and Docket TC95-122, *In the Matter of the Petition for Extended Area Service between Dell Rapids, South Dakota and Sioux Falls, South Dakota*. Extended area service means that calls are essentially treated as local calls instead of toll calls.

At its regularly scheduled meeting of March 25, 1999, the Commission heard the matter. The Commission has jurisdiction over this matter pursuant to SDCL 49-31-1.1, 49-31-1.2, 49-31-2, 49-31-3, 49-31-4, 49-31-12.4, and 40-31-12.5. Commission staff recommended approval. The Commission took the matter under advisement. On April 26, 1999, at its regularly scheduled meeting, the Commission voted to deny the application.

The Commission finds that U S WEST is not attempting to recover any investment associated with the provisioning of EAS to Colton and Dell Rapids from Sioux Falls. Instead, it is attempting to recover alleged lost toll revenues. Toll is classified as an emerging competitive service. U S WEST filed for the recovery of its alleged lost toll revenues through a \$.17 per month surcharge which it classified as a noncompetitive service. The Commission finds that U S WEST should not be allowed to recover lost revenues associated with an emerging competitive service from a noncompetitive service. If, as a result of the provisioning of EAS to Dell Rapids and Colton, U S WEST was under-recovering for toll, then it should have filed to recover the lost toll revenues from its toll services.

The Commission further finds that this claim is barred by res judicata. "The doctrine of res judicata serves as claim preclusion to prevent relitigation of an issue actually litigated or which could have been properly raised and determined in a prior action." *Hogg v. Siebrecht*, 464 N.W.2d 209, 211 (S.D. 1990). On June 3, 1998, the Commission ordered EAS in Docket TC95-120, *In the Matter of the Petition of David Glader for Extended Area Service Between Colton, South Dakota and Sioux Falls, South Dakota* and Docket TC95-122, *In the Matter of the Petition for Extended Area Service between Dell Rapids, South Dakota and Sioux Falls, South Dakota*. In these dockets, U S WEST failed to properly present the issue of lost toll revenue to the Commission. On June 17, 1998, these decisions were appealed by U S WEST. *In the Matter of the Petition of David Glader for Extended Area*

*Service Between Colton, South Dakota and Sioux Falls, South Dakota; In the Matter of the Petition for Extended Area Service between Dell Rapids, South Dakota and Sioux Falls, South Dakota; U S WEST Communications, Inc. v. Public Utilities Commission of South Dakota, CIV. 98- 228, CIV. 98-229.* In its appeals, U S WEST raised the issue of the loss of toll revenue, claiming it was a taking. The Commission's decisions were affirmed by the Circuit Court, Sixth Judicial Circuit on October 28, 1998. U S WEST did not appeal to the Supreme Court. The Commission finds that U S WEST could have properly raised the issue of the loss of alleged toll revenues in Dockets TC95- 120 and TC95-122 but failed to do so and, therefore, U S WEST's application for recovery of alleged lost toll revenue in this docket is barred by res judicata.

It is therefore

ORDERED, that the above referenced tariff revisions are hereby denied.

Dated at Pierre, South Dakota, this 12th day of May, 1999.

**CERTIFICATE OF SERVICE**

**BY ORDER OF THE COMMISSION:**

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)

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JAMES A. BURG, Chairman

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PAM NELSON, Commissioner

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LASKA SCHOENFELDER,  
Commissioner