

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

IN THE MATTER OF THE COMPLAINT FILED)	FINDINGS OF FACT AND
BY JUDY RAKER, RAPID CITY, SOUTH)	CONCLUSIONS OF LAW;
DAKOTA, AGAINST U S WEST)	NOTICE OF ENTRY OF
COMMUNICATIONS, INC. REGARDING)	ORDER
DELAYED SERVICE)	CT99-026

On August 5, 1999, the Public Utilities Commission (Commission) received a complaint filed by Judy Raker, Rapid City, South Dakota (Complainant), against U S WEST Communications, Inc. (U S WEST). The Complainant requested telephone service to her new home and trucking business in a new development the first part of June 1999. The Complainant stated she was promised service on July 14, 1999. The Complainant did not receive all of the telephone lines she requested on that date. The Complainant stated that several commitments for service were missed. As a result, the Complainant rented office space in Rapid City to run the trucking business. The Complainant further stated that complete telephone service to the office space in Rapid City was also delayed. The Complainant sought damages to compensate for the rented office space in Rapid City, installation costs for the line to the Rapid City office, and related expenses for delay and "total lack of concern for a small South Dakota business."

Pursuant to ARSD 20:10:01:08.01 and 20:10:01:09, if a complaint cannot be settled without formal action, the Commission shall determine if the complaint shows probable cause of an unlawful or unreasonable act, rate, practice or omission to go forward with the complaint.

On August 17, 1999, at a duly noticed meeting, the Complainant presented her position to the Commission. U S WEST stated that this was a new development with no facilities and that facilities should be in place by the end of September. The Commission voted unanimously to find probable cause.

A hearing was held as scheduled at 1:00 p.m. (MST), on November 17, 1999, in the Bear Butte Room at the Ramkota Hotel and Conference Center, 2211 LaCrosse Street, Rapid City, South Dakota. The parties submitted briefs following the hearing.

At its February 29, 2000, meeting, the Commission voted unanimously to deny the Complainant's request for damages.

Based on the evidence presented at the hearing, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 5, 1999, the Commission received a complaint filed by Judy Raker, Rapid City, South Dakota against U S WEST.
2. Judy Raker is a registered nurse who works full time at Rapid City Regional Hospital. Tr. at 18. Her husband, Michael Raker, is the owner/operator of Raker Trucking. Tr. at 18-19. Raker Trucking hauls dry vanloads across the nation. Tr. at 19. The Rakers ran the business out of their home by using the internet, faxes, and the telephone. Tr. at 20. Raker Trucking currently has eight trucks. *Id.*
3. The Rakers sold their home in Rockerville on May 7, 1999. Tr. at 21. They subsequently purchased a 40 acre tract located approximately eight miles north of Rapid City (hereafter referred to as Black Hawk residence). Tr. at 46-47. They intended to run their business out of their new home. Tr. at 23. The Rakers arranged for a temporary residence in Box Elder until such time as their new home was ready to move into. Tr. at 22. They were only able to get two telephone lines at their temporary Box Elder residence. Tr. at 22-23. They had to vacate the Box Elder residence by July 31, 1999. Tr. at 28. However, the Box Elder telephone numbers were not disconnected until August 11, 1999. Tr. at 149. International long distance charges that were charged on that telephone on August 10, 1999, were later credited by AT&T in the amount of \$677.17. Exhibit 22.
4. U S WEST received the physical address for the new Black Hawk address on June 28, 1999, and accepted the Rakers' order for six lines. Tr. at 159. The Rakers were given an installation date of July 14, 1999. Tr. at 26. When they moved into their Black Hawk residence they realized they had only one telephone line. Tr. at 26-27. At the end of July, the Rakers were told that their additional lines could not be provided until October of 1999. Tr. at 28.
5. The Rakers then rented an office for their business at 1575 LaCrosse Street, Rapid City (hereafter referred to as LaCrosse office). Tr. at 29. However, when they moved to their new office, they only had two telephone lines instead of the requested four telephone lines. Tr. at 31. According to Ms. Raker, all four lines were working by August 20, 1999, at the latest (Tr. at 104), although U S WEST records show they were connected on August 7, 1999. Tr. at 150.
6. The additional lines for the Black Hawk residence were available September 24, 1999. Tr. at 49; Exhibit 9. At the time of the hearing, the Rakers had not yet decided whether they would order the additional lines. Tr. at 50-51.
7. At the hearing, the Rakers claimed damages in the amount of \$139,668.62. Exhibit 13. Following the hearing, the Rakers revised their damages to \$81,359.86. Attachment to brief. The difference between the amounts was the deletion of \$58,308.62 related to the Rakers' projected lost revenues due to telephone problems in October.

8. The Rakers claimed damages for charges for telephone services at the Black Hawk and Box Elder residences and the LaCrosse office. Attachment to brief. They also requested reimbursement for their six months of rent for the LaCrosse office, printed delivery receipts, mileage back and forth from their residence to their LaCrosse office from August 1 through September 10, 1999, moving expenses incurred in moving to their LaCrosse office, and projected lost revenues for August and September. *Id.*

9. Mr. Raker stated that his business brokers were not aware of how to contact them and therefore Raker Trucking incurred business losses. Tr. at 90-92. However, there was an intercept message placed on the old telephone number each time the Rakers changed their telephone number. Tr. at 154-55. An intercept message tells callers that the number they dialed has been disconnected and gives the new telephone number. *Id.* In addition, Mr. Raker stated that in July, August, September, and October, there was not any time that his trucks were not hauling loads. Tr. at 99. He also testified that his cash flow was better in 1999 than in 1998. Tr. at 107.

10. Based on conversations with U S WEST, the Rakers believed that they would be able to have their Rockerville number roll over to their new Box Elder number. Tr. at 22-23. Tr. at 35-36. However, Colleen Sevold, U S WEST employee, testified that the services that were ordered would only roll over at the same location. Tr. at 162-163. Ms. Sevold stated that she was unaware of a service that would allow a call that rings at an old telephone number to roll over to a new telephone number. Tr. at 163.

11. The Rakers were issued over \$300.00 in credits by U S WEST for services that they paid for but stated they did not want. Tr. at 150; Exhibit 27.

12. The Rakers used per truck revenues for the month of July, comparing July of 1998 with July of 1999, to calculate projected revenue losses for August and September. The month of July had a 64% increase from 1998 to 1999. However, for the first six months of 1999, per truck revenues were less than 1998 revenues for three of the six months. Moreover, the months of January through April, when telephone service was not a factor, showed only a 4.7% increase from 1998 to 1999. The Commission finds that choosing one month's revenue and then choosing the one month that showed the highest percentage increase from the following year to calculate projected revenue losses is not a reliable method to determine revenue losses.

13. The Commission finds that the Rakers had telephone service at all times, but they did not have the desired amount of lines. The Commission finds that U S WEST failed to timely provision the Rakers with all of their requested telephone lines at their Black Hawk residence. U S WEST did not have the facilities necessary to provide the Rakers with all of the lines they requested within a reasonable amount of time. See ARSD 20:10:33:13.

14. The Commission also finds that 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).

15. The Commission finds that the tariff liability language prevents the Commission from awarding the damages as requested by the Rakers.

16. The Commission rejects the proposed 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 49-13-1 through 49-13-14.1, 49-31-3, 49-31-7, 49-31-7.1, 49-31-11, 49-31-60, and 49-31-61, and ARSD 20:10:01:07.01 through 20:10:01:15.01, inclusive, and ARSD Chapter 20:10:33.

2. The Commission finds that U S WEST failed to timely provision the Rakers with their requested service at their Black Hawk residence. U S WEST did not have the facilities necessary to provide the Rakers with all of the lines they requested within a reasonable amount of time. See ARSD 20:10:33:13.

3. However, the Commission also finds that U S WEST's tariff limits damages for U S WEST's failure to timely provision services. 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., et al. v. American Tel. & Tel. Co.*, 884 F. Supp. 220, 222 (W.D. La. 1995). Therefore, the Commission denies Rakers' request for damages.

4. The Commission rejects the proposed findings of fact and conclusions of law submitted by U S WEST.

It is therefore

ORDERED, that the Rakers' claim for damages is denied.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 31st day of March, 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.

Dated at Pierre, South Dakota, this 31st day of March, 2000.

<p style="text-align: center;">CERTIFICATE OF SERVICE</p> <p>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.</p> <p>By: _____</p> <p>Date: _____</p> <p style="text-align: center;">(OFFICIAL SEAL)</p>

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

LASKA SCHOENFELDER, Commissioner