

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED BY CHRISTOPHER A. CUTLER ON BEHALF OF RECREATIONAL ADVENTURES CO., HILL CITY, SOUTH DAKOTA, AGAINST AT&T COMMUNICATIONS OF THE MIDWEST, INC. REGARDING FAILURE TO PROVIDE SERVICE) FINAL DECISION AND ORDER GRANTING MOTION TO DISMISS; NOTICE OF ENTRY OF DECISION AND ORDER CT02-021
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PROCEDURAL HISTORY

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.

AT&T's Motion had raised the issue of the Commission's lack of jurisdiction to hear the case on the grounds that the telecommunications service at issue in the case, fragmented T-1 service, was to be an interstate special access service subject to exclusive FCC and federal court jurisdiction. On February 21, 2003, the Commission, in conformity with *Richards v. Lenz*, 539 N.W.2d 80 (S.D. 1995), issued and served a Notice of Intent to Treat Motion in Part as Motion for Summary Judgment and Order for and Notice of Hearing, giving notice to the parties of the Commission's intent: (i) to determine whether a genuine issue of material fact was presented as to whether the fragmented T-1 service ordered by Complainant was to have been an interstate or intrastate special access service, and more particularly, whether ten percent or less of the traffic to be carried by the service was to have been interstate traffic and to produce affidavits and/or other showing of a genuine issue of material fact; (ii) if a genuine issue of material fact was not presented, to treat 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 Commission had jurisdiction over the service or whether federal law pre-empts the jurisdiction of the Commission to hear the merits of the Complaint; and (iii) if a genuine issue of material fact was presented, to hold an evidentiary hearing on the nature of Complainant's proposed service to enable the Commission to determine whether it had jurisdiction over the service. The Commission's notice scheduled the matter for hearing on March 4, 2003, which was continued until March 14, 2003.

On March 14, 2003, the Commission held a hearing on the issue of whether the T-1 service to be provided by AT&T to Complainant was an interstate special access service and, if so, whether the Commission could nevertheless properly exercise jurisdiction and hear and determine the case on the merits. The parties appeared through counsel and presented testimony. Following the hearing the parties submitted briefs. At its regular meeting on June 17, 2003, the Commission voted unanimously (i) to find that the T-1 service at issue in the case was an interstate special access service, that the Commission lacked jurisdiction to order the relief requested by Complainant and that the Commission was accordingly not the appropriate forum for adjudicating the issues raised by the Complaint and (ii) to dismiss the Complaint without prejudice.

Having considered the Motion, the pleadings of the parties including documentary attachments thereto, the affidavits filed by the parties, the evidence adduced at the March 14, 2003 hearing, and the oral arguments and briefs of the parties, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

1. Complainant's Complaint was duly filed with the Commission on June 17, 2002. On July 8, 2002, the Commission received an answer from AT&T. On October 24, 2002, AT&T filed the Motion with the Commission. On February 21, 2003, the Commission issued and served a Notice of Intent to Treat Motion in Part as Motion for Summary Judgment and Order for and Notice of Hearing. On March 14, 2003, the Commission held a preliminary factual hearing on the issue of the nature of Complainant's service for purposes of determining whether the Commission had jurisdiction to hear and decide the issues raised by the Complaint.

2. Complainant, Recreational Adventures Co., is a South Dakota corporation with its corporate headquarters in Hill City, South Dakota that operates campground and hotel facilities in South Dakota and in eight other states. TR 9, 13-14, 17-18, 37, 41; April 18, 2002 letter attachment to Complaint; Affidavit of Christopher Cutler received into evidence as Exhibit 1 ("Affidavit") 3. Complainant is affiliated with KCJ based in Hill City and has an affiliate-type relationship with Forest Recreation Management of Hill City which provides campground management services on a contract basis to the state of South Dakota. TR 10.

3. Complainant's principal officers, stockholders, bank, and registered agent are located in Sioux Falls and Brookings, South Dakota. Affidavit 7-10; TR 10.

4. Respondent, AT&T Communications of the Midwest, Inc., is registered with the Commission to provide both local and intrastate, interexchange services in South Dakota. Commission Docket TC96-038.

5. Sometime prior to March 14, 2002, Complainant recognized that it needed to upgrade its telecommunications system to provide additional guest phone lines, access a new regional KOA reservation system, operate its administrative functions more efficiently and take advantage of new opportunities that might be afforded by the Internet. Affidavit 12, 13, 14, 15, 16; TR 12-14.

6. Sometime prior to March 14, 2002, Complainant was advised by "the computer geek at KOA" that it needed a fragmented T-1 access service. TR 41; Affidavit 13. After being advised by both Qwest and MCI that they could not provide a fragmented T-1, Complainant commenced discussions with a sales representative of AT&T concerning AT&T's provision to Complainant of fragmented T-1 service to Complainant's headquarters facility located near Hill City. TR 41-42. These discussions

ultimately led to Complainant's ordering a fragmented T-1 line from AT&T on or about March 14, 2002 (the "Service"). April 18, 2002 letter attachment to Complaint. Complainant's "request for service" was confirmed in a March 20, 2002 e-mail from Roxann Hitzel, AT&T's sales representative, to Complainant and his consultants. Attachment to Complaint.

7. On April 16, 2002, AT&T advised Complainant that it could not provide the Service because Qwest, the underlying carrier, was unable to provision the Service. Complaint, p. 1. Complainant expended \$150,000 in phone, Internet and data system upgrades in anticipation of the Service. Complaint, p. 1; April 18, 2002 letter attachment to Complaint.

8. The Service was intended to allow Complainant to make telephone calls and data downloads via the Internet with the other campgrounds owned by the company in eight other states. TR 9, 18, 37-39, 45.

9. The Service was intended to be used to connect the Complainant at its Hill City location with KOA's new registration system located in Billings, Montana. Affidavit 14; TR 18, 37.

10. The Service was to accommodate communications not to one dedicated point of termination but to termination points on the public network that might be selected, by dialing, by either Complainant or its guests. TR 20-28, 33, 40; Affidavit 13. The Service was therefore intended to provide access to the public switched interexchange network and accordingly was to be an interexchange service.

11. The Service was to provide a dedicated 24 channel private line connection between Complainant's Hill City headquarters facility and AT&T's interexchange network. TR 20, 48.

12. T-1 is a special access service. TR 48.

13. A "fragmented T-1" service is a special access service in which the separate channels are assigned and configured to serve either data or voice communications. TR 48-49; Affidavit 13.

14. The Service was to be used for both data transmission via the Internet and voice communications. Affidavit 13-16.

15. The Service was to be a private line, special access service. TR 48; Conclusions of Law 6, 9.

16. The Service was to be used for both intrastate and interstate communications. TR 9-11; Affidavit 12.

17. The Service was to be a "mixed usage" service. TR 59; Conclusions of Law 6, 8.

18. The fragmented T-1 special access service that Complainant ordered from AT&T was to have had 8 channels, or 33.33% of its capacity, assigned to and configured for Internet access, 15 channels, or 62.5% of its capacity, assigned to Megacom voice communication and 1 channel assigned to intrastate ISDN service. TR 20, 51,77.

19. The 62.5% of the line's capacity assigned to voice communications would carry both interstate and intrastate telephone calls. TR 61.

20. Although a precise percentage of the voice communications over Complainant's fragmented T-1 line cannot be determined from the evidence in the record, at least some substantial percentage of the voice communications were to have been interstate reservation calls, interstate communications with Complainant's out-of-state facilities, interstate calls by guests and other miscellaneous interstate calls. TR 18, 26-27.

21. Internet channels are jurisdictionally interstate communications. TR 53, 64; Conclusion of Law 12.

22. The assignment and configuration of a fragmented T-1 special access service channel to Internet data service indicates that such portion of the special access service was to be devoted to an interstate service. TR 53, 56, 60; Conclusion of Law 12.

23. The 33½% of the Service to be dedicated to Internet data service together with the significant portion of the voice channel service to be used for interstate voice communications demonstrates that more than 10% of the Service was to be used for interstate traffic, and the interstate portion of Complainant's use of the Service was therefore to be more than *de minimis*. Findings 18-22; Conclusions of Law 10-11.

24. The preferred remedy sought by Complainant is the ordering of AT&T to provide the Service. Complaint, p. 2. Although the Complaint can be read to request damages as an alternative remedy, this remedy is not the primary relief requested by Complainant, and Complainant affirmed to the Commission in its argument on the Motion that the relief it primarily seeks in bringing its Complaint to the Commission is not damages. Transcript of motion hearing held January 2, 2003, at 42.

CONCLUSIONS OF LAW

1. The Complaint was properly filed. Notice of the filing of the Complaint was duly and effectively given to AT&T. After being afforded the opportunity to satisfy the Complaint as provided in ARSD 20:10:01:10, AT&T timely filed an answer to the Complaint. AT&T's Motion was duly and properly filed.

2. The Commission is required to determine its jurisdiction to notice a matter for hearing. SDCL 1-26-17(2). In *Zar v. South Dakota Bd. of Examiners of Psychologists*, 376 N.W.2d 54 (1985), the South Dakota Supreme Court held that "an administrative agency, a branch of the executive department is empowered to determine its own jurisdiction."

3. The Commission's procedures are to "conform to those used in South Dakota courts." SDCL 49-1-11(4). The Commission may summarily dispose of any claim "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and a party is entitled to a judgment as a matter of law." SDCL 1-26-18. If a genuine issue of material fact is presented related to the Commission's jurisdiction, the Commission may decide such jurisdictional facts following an evidentiary hearing noticed for such purpose. SDCL 15-6-12(d).

4. The Commission's Notice of Hearing issued on February 21, 2003, was sufficient notice (i) of the Commission's intent to decide the facts necessary for a determination of the Commission's jurisdiction to hear and render a decision on the Complaint and (ii) to afford the parties the opportunity to present evidence as to such jurisdictional facts.

FEDERAL PRE-EMPTION

5. 47 CFR 69.2(b) defines "access service" as including "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."

6. There are two categories of access service: switched and special. Switched access services share the local switch to route originating and terminating interstate toll calls. Special access services, by contrast, generally provide a dedicated, or private line, path between an end user and an IXC's point of presence. *In the Matter of GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 13 F.C.C.R. 22,466 (1998).

7. Complainant did not contest or raise an issue of fact concerning whether the Service was to be a special access service, and the Commission concludes that the Service was to be a special access service.

8. The special access service to be provided to Complainant by AT&T was to be used for both interstate and intrastate communications and was accordingly a jurisdictionally mixed service.

9. 47 CFR 69.2(dd) defines "private line" as "a line that is used exclusively for an interexchange service other than MTS, WATS or an MTS-WATS equivalent service, including a line that is used at the closed end of an FX WATS or CCSA service or any service that is substantially equivalent to a CCSA service." Special access services include private line and dedicated WATS access service. *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum and Order, 97 F.C.C. 2d 682 (1983), pp. 14-15, ¶¶ 50-54.

10. Adopted in *In the Matter of MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 F.C.C.R. 5660 (1889) ("10% Order"), 47 CFR § 36.154 defines interstate and intrastate special access lines, for purposes of jurisdictional separation of jurisdictionally mixed services, as follows:

Subcategory 1.1--State private lines and state WATS lines. This subcategory shall include all private lines and WATS lines carrying exclusively state traffic as well as private lines and WATS lines carrying exclusively interstate traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes ten percent or less of the total traffic on the line.

Subcategory 1.2--Interstate private lines and interstate WATS lines. This subcategory shall include all private lines and WATS lines that carry exclusively interstate traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line.

This rule is known as the 10% Rule.

11. In *Qwest Corporation v. Scott*, 2003 WL 79054 (D.Minn., 2003), the District Court for the District of Minnesota held:

Accordingly, by adopting the 10% Rule, the FCC has facilitated the dual regulation of mixed-use special access circuits, assigning circuits with 10% or less interstate traffic to the intrastate jurisdiction and other circuits to the intrastate jurisdiction.

* * *

The FCC's exclusive jurisdiction over interstate communications is established and is unchallenged in this proceeding. The FCC has determined that mixed-use special access is to be classified as interstate unless it contains 10% or less interstate traffic. 10% Order ¶¶ 2,8. This establishes express pre-emption by virtue of the Act's bestowal upon the federal government of control over "all interstate and foreign communication." 47 U.S.C. § 152(a).

See also *MTS and WATS Market Structure*, CC Docket No. 78-72, Third Report and Order, 93 F.C.C. 2d 241 (1983) ("Access Charge Order"), modified, 97 F.C.C. 2d 682 (1983) ("Reconsideration Order"), further modified, 97 F.C.C. 2d 834 (1984), aff'd in principal part and remanded in part sub nom. *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985); *Smith v. Illinois Bell Telephone*, 282 U.S. 133 (1930); *In the Matter of GTE Telephone Operating Cos.*, 13 F.C.C.R. 22,466 (1998).

12. Special access service for access to the Internet is an interstate service. *In the Matter of GTE Telephone Operating Cos.*, Id. at p.11, ¶ 19.

13. Based upon Finding of Fact 23, more than 10% of Complainant's use of the Service was to be for interstate communications. The interstate component of the service was more than de minimis. The Service was accordingly an interstate special access service.

14. Because the Service was to be an interstate service, the Commission's regulatory jurisdiction over the Service is pre-empted by federal law. *Qwest v. Scott, supra*.

EFFECT OF FCC DETARIFFING ORDER

15. Special access service is an interexchange service. *Access Charge Order*, Id., *Reconsideration Order*, pp. 14-5, ¶¶ 50-54.

16. The FCC has prohibited the tariffing of interstate, interexchange services provided by non-dominant carriers in favor of a competitive market approach to such services. *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 F.C.C.R. 20730 (1996) ("Detariffing Order"). Among the services subject to detariffing under the Detariffing Order were interstate special access services. *In the Matter of Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 F.C.C.R. 5880 (1991); *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Notice of Proposed Rulemaking, 11 F.C.C.R. 7141 (1996), ¶¶ 11, 12.

17. AT&T is a non-dominant carrier. *In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 F.C.C.R. 3271 (1995). AT&T's interstate, interexchange services are therefore governed by the *Detariffing Order*.

18. The *Detariffing Order* removed interstate, interexchange services, including the Services, from the federal tariffing regime and the federal filed rate doctrine. The FCC stated that "[i]n the absence of such tariffs, consumers will not only have our complaint process, but will also be able to pursue remedies under state consumer protection and contract laws." *Detariffing Order*, 20753, ¶ 42. The FCC further stated that "[a]bsent filed tariffs, the legal relationship between carriers and

customers will much more closely resemble the legal relationship between service providers and customers in an unregulated environment." *Detariffing Order*, 20762, ¶ 55.

19. The FCC's decision to no longer require or permit the filing of federal tariffs for interstate, interexchange telecommunications services and its statements in the *Detariffing Order* regarding the availability to consumers of state consumer protection and contract laws were intended neither as a delegation to state commissions of authority to regulate such interstate services nor an abnegation of the FCC's jurisdiction. Rather, it was the intention of the FCC in detariffing such services to retain jurisdiction over such services but to refrain from applying tariff-based regulation.

20. The FCC's affording of the availability of "state consumer protection and contract law" remedies to detariffed services was not intended to subject such services to the general regulatory jurisdiction of state commissions over telecommunications companies, but rather to the general contract and consumer protection laws of the state that are applicable to all businesses.

21. The jurisdiction of an administrative agency consists of the powers granted to it by statute. *Thies v. Renner*, 78 S.D. 617, 106 N.W.2d 253 (1960). In *O'Toole v. Board of Trustees of the South Dakota Retirement System*, 2002 S.D. 77, 648 N.W.2d 342 (2002), the Supreme Court further explained the general limits of the jurisdiction of administrative agencies in South Dakota:

The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute. [citations omitted]. Furthermore, "[an administrative agency] may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void." [internal citations omitted]. An agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction. [internal citations omitted] 2002 S.D. at ¶ 15, 648 N.W.2d at 346.

22. The Commission has jurisdiction to hear and decide complaints against telecommunications companies in South Dakota pursuant to SDCL 49-13-1 and 49-13-1.1. SDCL 49-13-1 involves complaints alleging a violation of Title 49 without specification as to remedy, and SDCL 49-13-1.1 gives the Commission jurisdiction to hear a complaint by any person claiming to be damaged by any telecommunications company. SDCL 49-31-3 gives the Commission broad supervisory and regulatory authority over telecommunications companies operating in South Dakota.

23. Because the Commission's authority to impose a remedy other than damages under SDCL 49-13-1 is grounded in its regulatory authority to enforce the provisions of SDCL Title 49 and does not derive from the broad organic powers of a court of general jurisdiction, the Commission's jurisdiction to order relief in the nature of specific performance or injunctive relief under SDCL 49-13-1 against an interstate, interexchange carrier is pre-empted by federal law absent a delegation of federal authority over such matter.

PRIMARY JURISDICTION

24. In *Mordhorst v. Egert*, 88 S.D. 527, 223 N.W.2d 501 (1974), the Supreme Court held:

The presence of constitutional questions coupled with a sufficient showing of the inadequacy of administrative relief and impending irreparable harm flowing from delay

incident to following the prescribed administrative procedures is sufficient to overcome the claim that administrative proceedings must first be exhausted.

25. Although Commission has been unable to find legal authority precisely addressing the issue of whether the Commission may or should exercise jurisdiction over a complaint which seeks, as its primary relief, a remedy which the Commission lacks jurisdiction to award due to federal pre-emption, the Commission concludes that under principles of primary jurisdiction, the Commission should, in such a situation, defer to the jurisdiction of the appropriate state or federal forum having jurisdiction to determine the entirety of the controversy and award the requested relief. *Mordhorst, supra*; *Zar, supra*.

26. The issues presented by the Complaint are predominantly contract formation or equitable reliance issues as to which the special expertise of the Commission concerning telecommunications services is largely inapplicable, and where such traditional legal and equitable issues significantly preponderate, the matter is more appropriately within the province of the legal expertise and general jurisdiction of the courts.

27. Complainant's Complaint should be dismissed without prejudice so that Complainant may seek relief from the FCC or in the appropriate state or federal court having jurisdiction to hear the entirety of Complainant's claims and to award the full range of remedies that may be justified by the facts and the law in this case.

It is therefore

ORDERED, that the Complaint in CT02-021 is dismissed without prejudice.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 26th day of September, 2003. 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 26th day of September, 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: Melvin Kalbo

Date: 9/26/03

(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