

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

IN THE MATTER OF THE COMPLAINT FILED)	FINAL DECISION AND
BY SUNNY HOLLOWAY ON BEHALF OF)	ORDER; NOTICE OF ENTRY
MAINSTREET DANCE, FORT PIERRE, SOUTH)	OF DECISION AND ORDER
DAKOTA, AGAINST MCLEODUSA)	
TELECOMMUNICATIONS SERVICES, INC.)	CT02-025
REGARDING A CONTRACT DISPUTE)	

On July 9, 2002, the Public Utilities Commission (Commission) received a complaint filed by Sunny Holloway on behalf of MainStreet Dance, Fort Pierre, South Dakota (Complainant), against McLeodUSA Telecommunications Services, Inc. (McLeod) regarding a contract dispute. On July 9, 2002, the complaint was faxed to McLeod. Pursuant to ARSD 20:10:01:09, McLeod was notified that it must satisfy the complaint or file an answer in writing with the Commission by July 29, 2002. On July 29, 2002, the Commission received an answer from McLeod.

On August 14, 2002, the Commission served an Order for and Notice of Hearing setting the matter for hearing, and on September 5, 2002, at approximately 8:30 a.m., the hearing was held as noticed in Room 412 of the State Capitol Building. Complainant, McLeod and Commission Staff appeared. At the conclusion of the evidence, the Commission took the matter under advisement and deferred decision to a date to be determined. The Commission scheduled and noticed the matter for decision at its regular meeting on December 19, 2002, at which time the Commission voted unanimously in favor of Complainant and against McLeod.

Having considered the evidence of record and applicable law, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

1. On July 9, 2002, Complainant filed a complaint with the Commission on behalf of MainStreet Dance, Fort Pierre, South Dakota, against McLeod. The Complaint seeks relief from termination charges assessed by McLeod against Complainant as a result of Complainant's termination of telecommunications services by McLeod. McLeod filed its Answer to the Complaint on July 29, 2002. In its Answer, McLeod alleged that Complainant had signed a service agreement with a 60 month term under which Complainant is legally obligated to pay McLeod \$660.68 for terminating service prior to the end of the term.
2. On February 21, 2001, McLeod's salesperson, Ken Winthers, went to Complainant's dance studio and presented Complainant with a package of documents whose purpose was to select and authorize McLeod to provide various telecommunications services to Complainant and obtain certain information relative to Complainant and the services requested ("Service Agreement"). TR at 9, 66. Two pages of the Service Agreement, the

"McLeodUSA Service Agreement Addendum" and the "McLeodUSA Preferred Carrier Selection Freeze" required Complainant's signature, and Complainant signed these pages on February 21, 2001. Exhibits A and B.

3. The page entitled "Preferred Carrier Selection Freeze" contains the following statement:

A preferred carrier freeze will prevent a change in your selected carrier for each of the services listed below. You will be unable to make a change in carrier selection while the freeze is in effect. The freeze can be lifted by providing us with written authorization, or by calling us. This procedure is necessary in addition to any other verification procedures needed for a change in preferred carrier selection. (emphasis supplied).

Below this statement, it states, "I would like to freeze my preferred carrier selection for the following services." Immediately below this statement are located four check boxes with the following four labels: "Local Exchange Service," "IntraLATA Service," "International Service" and "InterLATA Service." Each of the four check boxes adjacent to these service types is checked with an "X." Exhibit B.

4. On or about April 18, 2002, Complainant switched her service over to Qwest by calling Qwest. She did not call or write McLeod to switch the service. The service was switched by Qwest within three days. TR at 51.

5. There is no evidence in the record that anyone from either McLeod or Qwest notified Complainant at the time she switched her service to Qwest that she had a preferred carrier freeze on all of her telephone services and that such services could not be switched without following the procedures for authorization and verification provided for in the Preferred Carrier Selection Freeze that Complainant had executed with McLeod. TR at 14.

6. McLeod's witness admitted that if the preferred carrier freeze had been executed as provided in the Preferred Carrier Selection Freeze, Complainant should have received some customer service contact before she made the switch of service and should have been advised that she could incur termination penalties. TR at 90-92. Complainant testified that when she spoke with Wendy Stevenson, McLeod's customer service representative, after she received the termination penalty charge, she was told that the freeze only applied to long distance service despite the clear language of the agreement and that Ms. Stevenson would check the matter out and get back to her. McLeod never got back to Complainant. TR at 13-16.

7. The Commission finds that McLeod failed to carry out the preferred carrier freeze that the company had committed to provide Complainant, that such failure was a breach of McLeod's obligations to Complainant and that such breach materially prejudiced

Complainant's interest by depriving her of the protection the freeze was designed for, namely what happened to Complainant in this case.

8. The Commission further finds that it was an unreasonable practice for McLeod to charge Complainant with an early termination fee under these circumstances when McLeod itself had breached its obligation to Complainant to carry out the preferred carrier freeze, which was designed to prevent just such an occurrence as happened in this case.

9. No document was introduced by any party entitled "General Terms and Conditions." McLeod's witness testified that on the back side of the page entitled Service Agreement Addendum was printed a set of contract terms and conditions. TR at 70. Page 2 of Exhibit A is a set of contract terms and conditions entitled "Master Services Agreement." The page entitled "Master Services Agreement" does not contain a signature or a date indicating when it was prepared. Exhibit A.

10. The evidence is in dispute concerning whether Complainant was provided a copy of McLeod's Service Agreement package at the time she signed the Service Agreement documents. Complainant testified that she was not given a copy of the service agreement and that her file on the subject did not contain a copy of either the pages that she signed or the "general terms and conditions." TR at 9, 11, 13. McLeod's witness testified that his standard practice was to leave a copy of the Service Agreement with the customer at the time of signing and that for this reason, he believed he would have left a copy with Complainant on the day she signed. TR at 75.

11. Because we find that McLeod's breach of its obligation to Complainant to perform its preferred carrier freeze covenants is dispositive of this case, we deem it unnecessary to address the issues of whether Complainant knowingly agreed to a 60 month term or to the "general terms and conditions," whether a meeting of the minds was reached and a contractual obligation arose concerning these provisions or whether these terms are unconscionable or otherwise unenforceable under the circumstances presented in this case.

12. Complainant received a notice from Dun & Bradstreet ("D&B") dated August 24, 2002, stating that Complainant's account had been placed with D&B for collection and that Complainant owed \$859.76, consisting of "principle" [sic] in the amount of \$670.59 and a collection fee in the amount of \$189.17. The Commission finds that the entirety of the stated principal amount of \$670.59 is comprised of early termination charges and taxes and finance charges thereon, except for a \$.70 finance charge on Complainant's May bill which Complainant did not pay. The Commission finds that the \$.70 Complainant owes McLeod should be forgiven and discharged as damages for Complainant's costs and inconvenience in dealing with the termination charges. The Commission accordingly finds that the entirety of the \$859.76 in charges stated on the D&B collection notice are unreasonable and unjustified charges and shall be cancelled and void.

13. The Commission further finds that any adverse credit report that McLeod, D&B or anyone else acting on either of their behalf may have made to any credit reporting agency was based upon an unjustified claim and accordingly was unjustified.

CONCLUSIONS OF LAW

1. The Commission finds that it has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-13, including 49-13-1 through 49-13-14, inclusive, and SDCL Chapter 49-31, including 49-31-3, 49-31-7, 49-31-7.1, 49-31-7.2, 49-31-7.3, 49-31-7.4 and 49-31-85 inclusive, and ARSD Chapters 20:10:01 and 20:10:33.
2. The charging of an early termination fee by McLeod under the circumstances of this case constituted an unreasonable practice, and Complainant is not liable for the termination charge or the taxes, finance charges and collection fees associated with the termination charge.
3. Complainant is not liable to McLeod for either the \$670.59 in "principle" [sic] or the \$189.17 in collection fees claimed by McLeod and D&B to be owing to McLeod, and McLeod's and D&B's billings and claims for such amounts are cancelled.
4. Any reports of Complainant's delinquency in payment made by McLeod, D&B or anyone acting on either of their behalf to any credit reporting agency are unreasonable and unjustified.
5. Complainant is entitled to the relief requested in the Complaint in the form of a cancellation of the termination charges and associated taxes, finance charges and collection fees asserted by McLeod and, to the extent that such charges include an incidental amount not precisely attributable to the termination charge, Complainant is entitled to such incidental amount as damages.

It is therefore

ORDERED, that the early termination charges assessed by McLeod against Complainant and associated taxes, late fees, interest, finance charges and/or penalties in the amount of \$670.59 or any amount subsequently accrued by McLeod and claimed to be due from Complainant and any associated collection charges whether assessed by McLeod or a third party acting on McLeod's behalf or pursuant to an assignment of interest by McLeod, including the \$189.17 claimed by Dun & Bradstreet are hereby cancelled, and neither McLeod nor its agent or assignee shall take any further action to collect such amounts; and it is further

ORDERED, that McLeod or its agent or assignee shall make such notice to credit reporting agencies to whom information of Complainant's non-payment of any of the above amounts may have been communicated as is necessary to effect the removal from

Complainant's credit history of entries reflecting Complainant's liability for and non-payment of such charges; and it is further

ORDERED, that McLeod confirm that the above actions have been taken by letter to the Complainant with a copy to the Commission.

PLEASE TAKE NOTICE that this Final Decision and Order was duly entered on this 13th day of February, 2003. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition therefor and ten copies with the Commission within 30 days from the date of issuance of this Final Decision and Order. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision within thirty (30) days after the date of service of this Notice of Decision and Order.

Dated at Pierre, South Dakota, this 13th day of February, 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:	<u>Neiline Kalbo</u>
Date:	<u>2/14/03</u>
(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

