

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

IN THE MATTER OF THE COMPLAINT FILED BY)	FINAL DECISION AND ORDER;
JOHN M. RICE ON BEHALF OF RICE INSURANCE)	NOTICE OF ENTRY OF ORDER
AGENCY, INC., SIOUX FALLS, SOUTH DAKOTA,)	
AGAINST MCLEODUSA TELECOMMUNICATIONS)	CT02-034
SERVICES, INC. REGARDING TELEPHONE BOOK)	
LISTING, POOR SERVICE, CONTRACT DISPUTE)	
AND NO LONG DISTANCE OR 800 NUMBER)	
SERVICE)	

On August 26, 2002, the Public Utilities Commission (Commission) received a complaint filed by John M. Rice on behalf of Rice Insurance Agency, Inc., Sioux Falls, South Dakota (Complainant), against McLeodUSA Telecommunications Services, Inc. (McLeod) regarding telephone book listing, poor service, contract dispute and no long distance or 800 number service.

On August 27, 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 September 16, 2002. On September 23, 2002, the Commission received an answer from McLeod. On October 21, 2002, the Commission received a response to answer from Complainant. On November 26, 2002, the Commission issued an Order for and Notice of Hearing setting this matter for hearing on December 16, 2002, in Sioux Falls, South Dakota.

The hearing was held as scheduled on December 16, 2002, in the Minnehaha County Commission Room, Sioux Falls, South Dakota. Complainant, McLeod and Commission Staff appeared as parties in the proceeding. The Commission scheduled the matter for decision at its regular meeting on December 19, 2002. The Commission voted unanimously to find in favor of Complainant and against McLeodUSA Telecommunications Services, Inc. and to issue a final decision and order granting the relief requested by Complainant.

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. Complainant owns and operates an insurance agency in Sioux Falls, South Dakota. A key component of Complainant's business consists of health plans for colleges and universities in a five-state area. TR 26; 39. The ability of Complainant to call this clientele and even more importantly the ability of this clientele to reliably reach Complainant via toll free 800 service to address coverage issues and other problems and concerns is critical to Complainant's business. TR 26. Moreover, Complainant has a contractual obligation to his customers to maintain an 800 number for customer service purposes. TR 33.
2. On April 11, 2000, Complainant initiated telephone service with McLeod for his business by signing the McLeodUSA Service Agreement and Checklist. TR 86; Ex A. The Service Agreement and Checklist states that "This Agreement consists of the documents below: . . . 12 Customer has received and read General Terms and Conditions with the Checklist." Ex A. The second page of McLeod's Exhibit A is a copy of the Telecommunications Service Agreement General Terms and Conditions (General Terms) used by McLeod at the time Complainant contracted for service.

Complainant's Exhibit JR-7 is a subsequent version sent to the Commission by McLeod after Complainant registered his complaint. It was not in use by McLeod at the time Complainant contracted for service. TR 86-89.

3. McLeod promised to provide Complainant superior and excellent customer service. TR 62.

4. Complainant experienced several problems with McLeod's service. The first of these occurred in connection with Complainant's relocation of his business. In April of 2001, Complainant relocated his insurance business from South Garfield Avenue to South Minnesota Avenue in Sioux Falls. TR 9-10. Complainant contacted McLeod about the move and was assured that the new site would be ready for hook up on the transition date. TR 9-10.

5. On the move date appointed for the transfer of service to Complainant's new address, Complainant was waiting at the new address for a McLeod technician to arrive to hook up the new service and he never did. TR 63. Complainant's phone service did not work at the new address. TR 13. McLeod's billing invoice for the move contains an incorrect address for the new service location. TR 12; Ex JR-1. Complainant contacted the Commission because of his concern over the interruption in service, and McLeod then dispatched a technician who completed the transfer. TR 12. As a result of this mix-up, Complainant was without full service for at least one day. TR 63. McLeod credited Complainant \$285.75 of the \$349.80 billing charged for the office switch. TR 64.

6. Following this incident, Complainant discovered that he had misplaced his "travel" calling cards during the move, which Complainant utilized for his phone service while traveling. McLeod failed to provide new travel cards after Complainant requested them. TR 14.

7. Another incident involved McLeod's failure to include Complainant's new address in its white pages listing. TR 16 & 17; Ex JR-2. Complainant testified that McLeod's salesperson informed him that the closing date for information was March 23, 2001. TR 15. Although McLeod's witness testified on direct examination that the "issue" date for the McLeod directory was March 23, 2001, TR 96, she later agreed that March 23, 2001, was actually the closing date for directory information. TR 137-139, 142. Complainant testified that he called McLeod and advised them of his new address on the Monday following the date that he signed and paid for his yellow pages ad. TR 15. Complainant paid for the yellow pages ad on March 8, 2001. TR 15-17; Ex JR-2. The Commission takes judicial notice that March 8, 2001, was a Thursday. Complainant therefore called McLeod with the new address information on March 12, 2001.

8. Complainant did not believe that the problem with the white pages address listing was enough in itself to justify terminating his McLeod service without penalty. TR 16.

9. The series of problems with McLeod's service impeded Complainant from doing business and caused him to spend time and money to resolve service and billing issues. TR 16, 36-37.

10. Complainant called McLeod several times during the period from late 2001 through January 2002, concerning offers he had received to get a better rate from another local carrier. McLeod's customer service representative stated that someone would call Complainant, but no one from McLeod ever called Complainant. TR 19; 75. These calls were made more than 30 days prior to Complainant's switch of service. TR 75.

11. On January 24, 2002, Complainant sent a letter to McLeod along with his payment expressing dismay that McLeod had failed to return his calls about matching a competing offer and

informing McLeod that he planned to change providers in March or April. TR 19-21. Complainant sent this letter to the address provided by McLeod on its billings for payment of the bills which was the only address Complainant was aware of in regards to his phone service. TR 51-53. This letter was sent more than 30 days prior to Complainant's switch of service. TR 75.

12. Complainant received no reply to his letter and no telephone or personal contact from McLeod. TR 21.

13. Paragraph 6 of the General Terms, entitled "Most Favored Customer" states:

In the event voice products and services that are currently purchased by Customer from McLeodUSA under this Agreement . . . become generally available from a competitor after the term of this agreement is initiated, as determined by McLeodUSA, McLeodUSA may elect to match the competitor's offer. . . . If McLeodUSA is unable to match . . . , McLeodUSA will release CUSTOMER from this agreement without any termination charge. Ex A.

Complainant's understanding was that if he were offered a better deal from another carrier and McLeod failed to match the better offer, he could switch service to the other carrier without penalty. TR 18.

14. Neither Paragraph 6 of the General Terms nor any other provision of the McLeod agreement provided a specific procedure as to how the "Most Preferred Customer" process was to be implemented by the customer. Ex A. McLeod's witness agreed that Section 6 of the customer agreement is vague about the customers' duties and the procedures to be followed to inform McLeod about a better rate offer. TR 133.

15. Neither the McLeodUSA Service Agreement and Checklist nor the General Terms specify an official address to which the notices provided for in the General Terms were to be sent. Ex A. There is no evidence in the record that an official address for the giving of such notices was set forth in any other document or otherwise provided to Complainant.

16. Complainant's own business experience led him to believe that sending the correspondence to the billing address was appropriate. Although Complainant's customers pay their bills directly to the insurance carriers, if a customer sends the bill to his office with a letter regarding an issue, he makes a copy of the letter for his file, and then forwards the payment and the original letter to the carrier. TR 55-56.

17. Complainant's letter went to a bill payment lockbox and was not read. TR 25. McLeod's witness testified that McLeod did not receive any of the letters sent by Complainant along with bill payments. TR 116, 117; Ex JR-4, JR-5, JR-6.

18. Sioux Falls McLeodUSA representative Bobbi Ellingson, the salesperson who dealt with Complainant when he signed the McLeod agreement, never contacted Complainant again regarding his service. TR 52.

19. Complainant switched local service to Qwest on March 15, 2002. TR 21. Complainant's reasons for switching included both the services problems that he had experienced, the less expensive rates offered by Qwest for local service and McLeod's lack of response to Complainant's communications to McLeod regarding the availability of more favorable rates. TR 76; Ex JR-3.

20. Following Complainant's switch of local phone service from McLeod to Qwest, McLeod assessed and billed Complainant for an early termination charge. TR 29, 36,76. There is no formal evidence in the hearing record to establish either precisely what the original amount of this charge was or what finance charges were assessed upon outstanding balances attributable to this amount over the period it remained unpaid. In a colloquy between the parties and the Commission prior to the swearing in of Complainant, however, Complainant stated that he paid an outstanding balance of \$3,330.05 by credit card. TR 7. Complainant confirmed that this was the amount that he had had to pay to restore his service when it was disconnected in July 2002. TR 77. The record indicates that this amount was comprised of the following amounts:

Correctly calculated early termination fee	\$1,721.17	(Ex B)
Collection agency "vendor" fee	\$ 80.00	(TR 77, 7)
Credit card payment fee	\$ 5.00	(TR 119)
Amount stipulated by McLeod as overpaid	<u>\$1,523.88</u>	(TR 7)
TOTAL	\$3,330.05	(TR 7, 77)

Although McLeod's witness presented some dispute as to whether all of this amount was attributable solely to early termination charges and associated fees and charges, her testimony did not state an amount of such other charges, and her testimony did not imply that the amount that could have been attributable to other things was large. TR 119. Complainant's testimony that he paid all charges attributable to local service provided prior to the March 15, 2002 termination date and all long distance charges contradicts the implication of McLeod's witness; TR 22-26, 65-66, 78-79. The Commission finds that the amount of early termination charges and associated finance charges and fees assessed against and paid by Complainant was \$3,330.05.

21. Following his switch of providers, Complainant, in response to continued receipt of local service billings, sent letters explaining that his business was no longer a McLeod local service customer. TR 22-24; Ex JR-4, JR-5, JR-6.

22. When Complainant refused to pay the disputed early termination charge, McLeod twice disconnected his long distance service, including his 1-800 service, even though Complainant continued to pay his long distance bills. TR 26, 78. A McLeod representative named Phil had assured Complainant that his 800 number would not be shut down, but it was. McLeod indicated that Phil did not have authority to make that decision. TR 27-28, 31. Complainant's clients located at colleges and universities in a five-state area could not call in using his 800 number, creating havoc in his operation. TR 26. McLeod's disconnection of long distance service motivated Complainant to switch long distance carriers. TR 28.

23. Although McLeod subsequently "released" Complainant's long distance service, McLeod would not release Complainant's 800 number until the local service termination fee and associated finance charges and collection fees of \$3,330.05 was paid. TR 29, 77. McLeod stipulated at the commencement of the hearing that the termination charge assessed against Mr. Rice had been incorrectly calculated and that McLeod owed Complainant \$1,523.88. TR 7.

24. After Complainant paid the local service termination fee, McLeod sent Complainant a bill of over \$10,000.00 for the long distance termination liability fee. McLeod later rescinded this claim. TR 34-35.

25. The Commission finds that Complainant's understanding of the "most favored customer" clause, paragraph 6 of the General Terms, was reasonable given the less than clear language of the

clause, what Complainant had understood the clause to mean from the time he initiated service with McLeod and the commonly understood purpose of such a clause.

26. Although McLeod's witness testified that McLeod did not have an opportunity to meet the new rate offered to Complainant, TR 113, we find that it did have such an opportunity to engage Complainant in a dialogue on the issue by responding to Complainant's phone calls on the subject. We further find that if McLeod didn't receive written notice of the competing offer, McLeod must bear responsibility for its own failure to give customers notice of the proper procedure and address for correspondence on this issue and of the unacceptability of notice to the address stated on the bills and to provide for the forwarding by the lock box administrator of customer correspondence on to McLeod's customer service department.

27. The Commission finds that the General Terms did not clearly specify the procedure that Complainant was to follow to exercise his rights under the most favored customer clause and that the steps Complainant took of calling McLeod and sending a letter to the address set forth on his monthly bills more than 30 days prior to switching his service were reasonable attempts by Complainant to provide McLeod with the opportunity to match a competing offer.

28. The Commission finds that although none of the service problems experienced by Complainant may alone have justified Complainant in terminating his service without penalty, the combination of these problems, coupled with McLeod's non-responsiveness to Complainant's attempts at communication regarding his competitive offer under the most favored customer covenant, soured the relationship between Complainant and McLeod to the point where it was not a reasonable practice to compel Complainant to continue the relationship by force of contract. The Commission finds that McLeod's imposition of the early termination charge under the circumstances presented in this case was accordingly unreasonable.

29. The Commission finds that Complainant gave McLeod more than 30 days written notice of his intention to terminate service unless McLeod met the terms of his competitive offer and that this notice substantially complied with the notice provisions of paragraph 5. "TERMINATION" of the General Terms.

30. The Commission finds that the imposition by McLeod and/or its collection agency of an early termination charge and associated finance charges and associated collection and other fees in the amount of \$3,330.05 was unreasonable under the facts of this case and that such amount should be refunded by McLeod to Complainant.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26, 49-13, including 49-13-1 through 49-13-14, inclusive, and 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, 49-31-10 and 49-31-85, and ARSD Chapters 20:10:01 and 20:10:33.

2. McLeod's General Terms did not clearly specify the procedure that Complainant was to follow to exercise his rights under the most favored customer clause and the steps Complainant took of calling McLeod and sending a letter to the address set forth on his monthly bills more than 30 days prior to switching his service were reasonable attempts by Complainant to provide McLeod with the opportunity to match a competing offer.

3. Complainant gave McLeod more than 30 days written notice of his intention to terminate service unless McLeod met the terms of his competitive offer and that this notice substantially complied with the notice provisions of paragraph 5. "TERMINATION" of the General Terms.

4. In light of the service problems experienced by Complainant and McLeod's non-responsiveness to Complainant's attempts at communication regarding his competitive offer under the most favored customer covenant, McLeod's imposition of the early termination charge was an unreasonable practice.

5. McLeod stipulated that the termination charge assessed against Complainant had been incorrectly calculated and that McLeod owed Complainant \$1,523.88 of the \$3,330.05 in early termination charges and associated charges assessed against Complainant.

6. 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. The Commission finds that the imposition by McLeod and/or its collection agency of an early termination charge and associated finance charges and associated collection and other fees in the amount of \$3,330.05 was unreasonable under the facts of this case and that such amount must be refunded by McLeod to Complainant to the extent that McLeod has not already made such refund.

7. Any reports of Complainant's delinquency in payment made by McLeod or anyone acting on either of its behalf to any credit reporting agency are unreasonable and unjustified.

8. 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 and paid by McLeod.

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 \$3,330.05 and 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 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 shall refund to Complainant such portion of the \$3,330.05 paid by Complainant in early termination charges and associated fees and charges that McLeod has not refunded as of the date of this order; 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.

PLEASE TAKE NOTICE that this Final Decision and Order was duly entered on this 7th day of March, 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 7th day of March, 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>Delaine Kalbs</u>
Date: <u>3/7/03</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