

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

**IN THE MATTER OF THE COMPLAINT FILED) FINAL DECISION AND
BY KRISTA HEEREN-GRABER ON BEHALF) ORDER; NOTICE OF ENTRY
OF S.D. NETWORK AGAINST FAMILY) OF DECISION AND ORDER
VIOLENCE & SEXUAL ASSAULT, SIOUX)
FALLS, SOUTH DAKOTA, AGAINST) CT02-038
MCLEODUSA TELECOMMUNICATIONS)
SERVICES, INC. REGARDING A CONTRACT)
DISPUTE)**

On September 26, 2002, the Public Utilities Commission (Commission) received a complaint filed by Krista Heeren-Graber on behalf of S.D. Network Against Family Violence & Sexual Assault, Sioux Falls, South Dakota (Complainant), against McLeodUSA Telecommunications Services, Inc. (McLeod) regarding a contract dispute. On September 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 October 17, 2002. On October 17, 2002, the Commission received an answer and counterclaim from McLeod. On December 3, 2002, the Commission issued an Order for and Notice of Hearing setting this matter for hearing on December 17, 2002, in Sioux Falls, South Dakota.

The hearing was held as scheduled on December 17, 2002, in the Ronning Branch Library Meeting Room, Sioux Falls, South Dakota. Complainant, McLeod and Commission Staff appeared as parties in the proceeding. At the hearing, the Commission granted Complainant's motion to dismiss McLeod's counterclaim on the grounds that the Commission lacks jurisdiction to determine claims other than those asserted against a telecommunications company. The Commission scheduled the remaining issues for decision at its regular meeting on December 19, 2002. The Commission voted unanimously to find in favor of Complainant and against McLeod and to issue a final decision and order granting the relief requested by Complainant. The Commission also voted unanimously to deny Complainant's request that attorney fees be taxed 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. The complaint was properly filed by Complainant and docketed by the Commission. Notice of the complaint was provided to McLeod in accordance with the Commission's rules and McLeod filed a timely answer. The complaint was properly before the Commission for decision.
2. McLeod filed a counterclaim against Complainant simultaneously with its answer.
3. On September 22, 1999, McLeod transmitted a service agreement form to Complainant via fax (Service Agreement). Complainant signed the Service Agreement and faxed it back to McLeod. Although Complainant may have met with a McLeod sales representative prior to this date, there was no physical meeting between Complainant and McLeod on the date the Service Agreement was faxed back and forth between the parties. TR at 13-15; Ex D and F.

4. The Service Agreement states in a box immediately above the signature line, "The undersigned has read this Application, WHICH INCLUDES THE GENERAL TERMS AND CONDITIONS . . ." Ex D and F.

5. Complainant's witness Krista Heeren-Graber, who received and executed the fax of the Service Agreement, testified that no document containing "general terms and conditions" other than the basic service selection terms set forth on the two pages comprising Exhibit D was faxed to her on September 22, 1999, and that no such additional general terms and conditions were subsequently provided to Complainant until after Complainant had cancelled its service with McLeod. TR at 17-18, 34-35.

6. Although McLeod's witness testified that the company's general practice was to provide the "general terms and conditions" referred to in the Services Agreement as the back side of the Services Agreement, McLeod offered no evidence that a document entitled "General Terms and Conditions" or containing a recitation of general terms and conditions other than those set forth on the two pages comprising Exhibit D was ever faxed or otherwise provided to Complainant. TR at 96, 113, 118, 119-120, 125, 146. When McLeod's witness was twice asked whether, when she reviewed Complainant's contract file, the file contained the document containing the general terms and conditions, she stated, "I don't recall." TR at 137, 149. Given the witness' memory of other details of what was in the file and the demeanor of the witness in answering these questions, the Commission finds this testimony not to be credible. The Commission rather finds that the file did not contain such a document.

7. McLeod has experienced numerous similar complaints concerning customers never receiving a copy of the contract and concerning termination charges. TR at 115-116.

8. The document entitled "MASTER SERVICES AGREEMENT" faxed to Complainant by McLeod in July 2002, but which bears a fax transmission date of November 24, 2000, contains a notation at the bottom stating "Rev. 3/22/02." TR at 33; Ex C. The Commission finds that this document was not in existence in such form as of September 22, 1999, when Complainant executed the Services Agreement and that this later document is not entitled "General Terms and Conditions."

9. The Commission finds that a preponderance of the evidence supports a finding that a written memorandum containing the "general terms and conditions" referenced on the signature page of the Service Agreement was not provided to Complainant prior to her delivery by fax of the executed Service Agreement to McLeod and that no such document was provided to Complainant until July 2002 -- after Complainant had cancelled service with McLeod and received a bill containing a termination charge. TR at 32-33; Ex E.

10. Complainant's witness Krista Heeren-Graber testified that she was not advised prior to executing and delivering the Service Agreement that Complainant was making an irrevocable commitment for a 60 month term or that there would be a penalty for early termination. TR at 19, 39, 53. McLeod offered no evidence to show that, in this particular case, Complainant was advised prior to executing the Services Agreement that it would be bound to a 60 month commitment with a substantial penalty for early termination. TR 113.

11. The Commission finds that a preponderance of the evidence supports a finding that Complainant was not made aware of an early termination penalty term prior to executing the Service Agreement, that Complainant did not knowingly accept such a term and that there was no meeting of the minds and no agreement as to such a term. TR at 77.

12. Complainant experienced the inability to call toll-free (8XX) numbers. The ability to call toll-free numbers is important to Complainant when doing statewide work and work with out-of-state coalitions. TR at 27-28; 68-69, 81. After reporting the problem to McLeod, Complainant continued to experience these problems for more than a month. TR at 27, 117; Ex B-1. Because of this problem, Complainant was required to consume valuable staff time to get the problem corrected, and Complainant's office manager was required to incur the expense of making the calls on her personal cell phone that would have been toll free to Complainant. TR at 27-29, 68-69, 81; Ex B.

13. McLeod billed Complainant for Iowa sales tax over a ten month period even though Complainant never maintained an address or any operations in Iowa. TR at 21-23, 64, 67, 134, 141; Ex A-1, A-2, A-3. These problems took repeated complaints by Complainant over a ten month period before McLeod took action to correct the problem. TR at 21-23, 64; Ex A-1, A-2, A-3.

14. McLeod billed Complainant over a ten month period for South Dakota sales tax despite having been provided an exemption certificate in February 2001. TR at 21-23, 67; Ex A-1. It took repeated written and verbal entreaties by Complainant, which included copies of its exemption certificate, over a ten month period before McLeod finally corrected its billing errors. TR at 21-23; Ex A-2, A-3.

15. Complainant was compelled to consume many hours of staff time to deal with McLeod to obtain correction of these tax billing issues. TR at 69.

16. In addition to the toll-free access problems and the sales tax problem, Complainant experienced problems with its voice mail service and other service problems with McLeod's service that both caused accessibility and operational problems and consumed staff time. TR at 58, 125.

17. McLeod's service deficiencies, consisting of the non-functioning access to toll-free numbers, tax billing errors, voice mail problems and other problems, provided Complainant with a reasonable justification to elect to terminate telephone service with McLeod. TR at 76, 128-129.

18. Complainant terminated its telephone service with McLeod in June 2002. On its July 2002 bill to Complainant, McLeod included an early termination charge in the amount of \$2,052.75. The July bill also included a federal excise tax charge of \$60.37, which was attributable except for a *de minimus* amount to the federal excise tax on the early termination charge. Except for \$.07 of the federal excise tax, Complainant disputed the remainder of these two charges and did not pay them. Complainant did pay the remaining \$55.30 due on the July bill for telephone service (plus the \$.07 of the excise tax). This left \$2,113.05 disputed and unpaid.

19. McLeod's August bill to Complainant included the \$2,113.05 carried forward from the July bill and a finance charge on such amount of \$31.70. The bill also included a charge of \$27.70 for enhanced services, consisting of a \$14.95 Internet service provider charge and a \$12.75 voice mail box host charge. Complainant paid the \$14.95 ISP charge. Ex C. Complainant contested the \$12.75 voice mail host charge, the \$2,113.05 termination charge carried forward from the July bill and the \$31.70 finance charge on this balance carried forward. Ex C.

20. On November 29, 2002, Complainant received a notice from Dun & Bradstreet (D&B) indicating that Complainant's account with McLeod had been placed with D&B for collection. The notice stated that the amount due was \$2,843.31, consisting of the unpaid "principal" from McLeod in the amount of \$2,217.78 and a collection fee of \$625.53. Ex G. Although there is no evidence in the record to explain the precise calculation of the \$2,217.78 amount, this amount is approximately

equal to (+/- \$10) the \$2,157.88 disputed and remaining unpaid on the August bill (due 9/17/02) plus two additional months of late-payment finance charges.

21. The Commission finds that based on McLeod's failure to provide Complainant with a copy of the "General Terms and Conditions" containing the early termination penalty, the absence of a meeting of the minds and agreement between Complainant and McLeod concerning the early termination penalty and the term of the Service Agreement and Complainant's recurring service problems, it was an unreasonable practice for McLeod to charge Complainant an early termination penalty and related taxes and finance charges when Complainant elected, out of frustration, to switch to an alternative provider.

22. The Commission finds that although there is some ambiguity in the record concerning the precise calculation of the \$2,217.78 claimed by McLeod to be due, the evidence justifies a finding that all but a *de minimis* amount of such sum is attributable to the termination charge plus taxes and finance charges thereon and that any other minor amounts that may be included in such amount are more than off-set by the time and expense incurred by Complainant to resolve the numerous service problems that it encountered. The Commission accordingly finds that McLeod is not entitled to the \$2,217.78 that it claims to be due and owing from Complainant.

23. The Commission further finds that Complainant is not liable for the \$625.53 collection fee charged by D&B for its services on McLeod's behalf.

24. 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 invalid claim and accordingly was unjustified.

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. The Commission is not a court of general jurisdiction and has only such jurisdiction as is specifically conferred upon it by statute. SDCL 49-13-1 and 49-13-1.1 provide only for complaints to the Commission against telecommunications companies or motor carriers. Accordingly, the Commission is without jurisdiction under SDCL 49-13-1 or 49-13-1.1 to entertain a counterclaim against a person who is not a "telecommunications company" as that term is defined in SDCL 49-31-1(26). Although matters that might be asserted in a counterclaim may be raised by a telecommunications company by way of defense in a claim against it under SDCL 49-13-1 or 49-13-1.1, the Commission is without jurisdiction to entertain a claim against a person other than a telecommunications company whether asserted in an original complaint or a counterclaim.

3. No acceptance by Complainant or meeting of the minds between Complainant and McLeod occurred regarding the "General Terms and Conditions" referred to in the Services Agreement and such general terms and conditions did not become part of the contract between McLeod and Complainant.

4. The service problems experienced by Complainant were breaches of McLeod's obligations to Complainant and justified Complainant in terminating its Service Agreement with McLeod and the telecommunications services provided by McLeod.

5. 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.

6. Complainant is not liable to McLeod for either the \$2,217.78 in "principal" or the \$625.53 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 and void.

7. 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.

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 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.

9. The Commission is without express statutory authority to tax costs or attorney fees in a complaint to the Commission against a telecommunications company. In the absence of such express statutory authority, the Commission is without jurisdiction to make such an award.

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 \$2,217.78 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 \$625.53 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 writing a letter to the Complainant with a copy to the Commission; and it is further

ORDERED, that McLeod's counterclaim against Complainant is dismissed and that Complainant's demand for costs and attorney fees is denied.

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:

Date:

(OFFICIAL SEAL)

Nelaino Kolbs
2/14/03

BY ORDER OF THE COMMISSION:

Robert K. Sahr

ROBERT K. SAHR, Chairman

Gary Hanson

GARY HANSON, Commissioner

James L. Burg

JIM BURG, Commissioner

TC01-165

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of)
)
Application by Qwest) WC Docket No. 03-11
Communications International, Inc.)
for Authorization to Provide In-)
Region, InterLATA Services in New)
Mexico, Oregon and South Dakota)

February 4, 2003

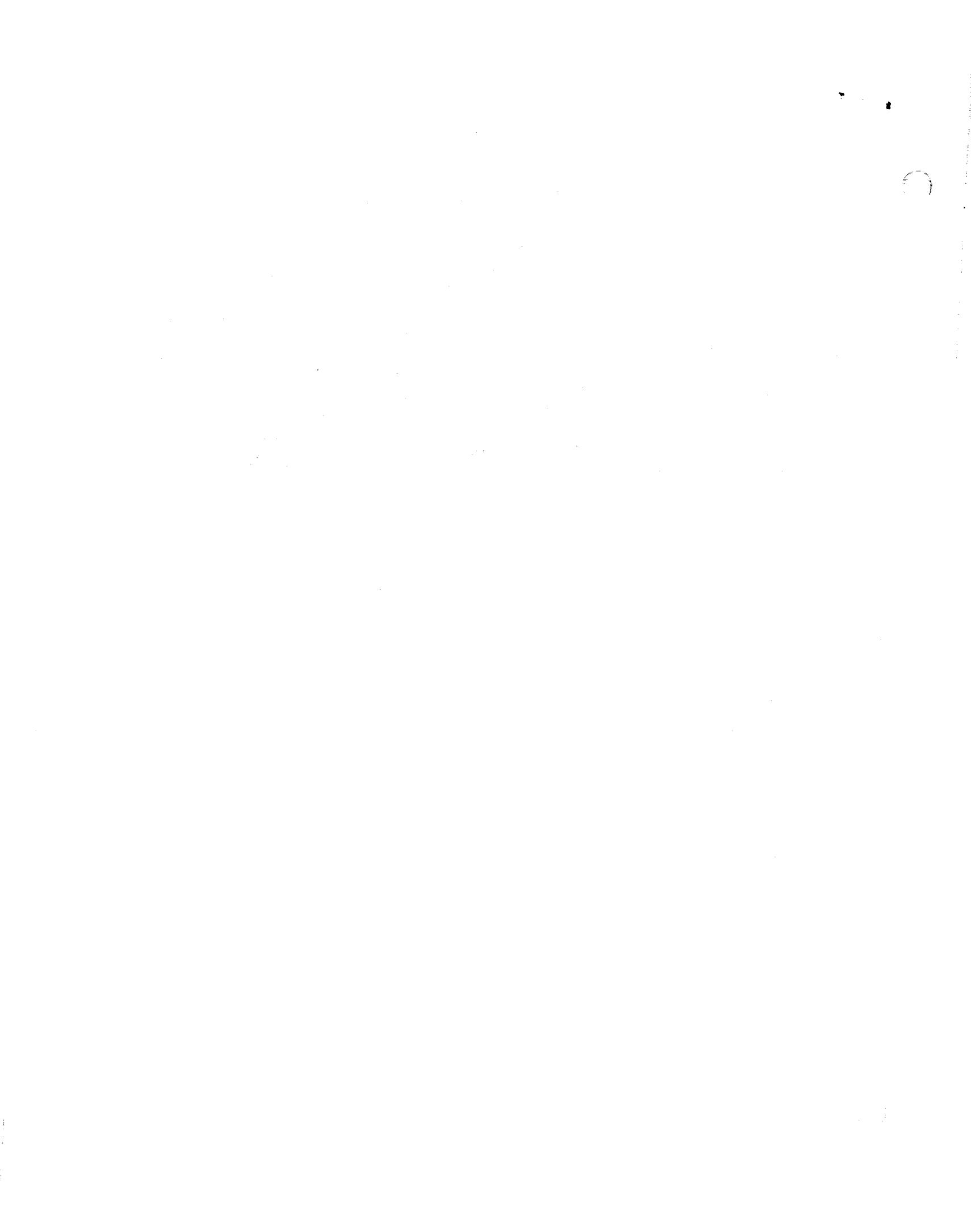
COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF SOUTH DAKOTA

Robert K. Sahr
Chairman

Gary Hanson
Commissioner

James A. Burg
Commissioner

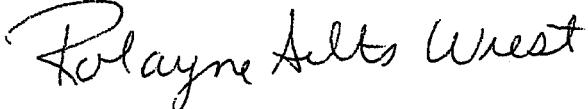
South Dakota Public Utilities
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COMMENTS

The South Dakota Public Utilities Commission ("SDPUC") submits its order entitled Order Regarding Compliance Filings and Recommendation to the FCC as its comments in WC Docket No. 03-11. The SDPUC's proceeding regarding Qwest's entry into the interLATA market has not yet been closed. As stated in the final paragraph of the SDPUC's order, although the SDPUC has determined that Qwest has met the 14 point checklist, the SDPUC is unable, at this time, to recommend to the FCC that the granting of section 271 approval to Qwest in South Dakota is in the public interest. The Commission has directed Qwest to make further changes to its QPAP and has ordered Qwest to file its revised QPAP on or before February 17, 2003. If Qwest complies with the Commission's order, the Commission would then recommend to the FCC, in a future filing, that it would be in the public interest to grant Qwest section 271 approval. The Commission further notes that the record before the SDPUC regarding whether Qwest has met the competitive checklist and other requirements of section 271 has already been included in Qwest's application to the FCC. This record includes the previous orders of the SDPUC.

Respectfully submitted,



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