

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

IN THE MATTER OF THE COMPLAINT) FILED BY RANDY KIEFFER, STURGIS,) SOUTH DAKOTA, AGAINST U S WEST) COMMUNICATIONS, INC. REGARDING) SERVICE PROBLEMS)	STAFF'S REBUTTAL BRIEF TC98-176
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Staff relies upon its authority submitted in its hearing brief and in addition submits the following:

1. The right of Randy Kieffer to claim damages is not limited by administrative rule or U S WEST's tariff.

U S WEST in its attempt to avoid responsibility initially puts up two defenses: (1) the Commission rule 20:10:07:05 and (2) the tariff at 2.4.1 limits the exposure which was approved by the Commission. This position fails for several reasons.

First, ARSD 20:10:07:05 applies only where service is out for over 24 hours. It does not address such service quality issues as the inability to get Caller ID (TR 17), 911 problems (TR 34, et seq.), billing problems (TR 36), static on the lines (TR 37), or service interruptions of less than 24 hours (TR 37).

Further, the administrative rule does not say that the pro rata refund is an exclusive remedy. In other words, it does not prohibit the award of other damages. "It is a general proposition that administrative rules are subject to the same rules of construction as statutes." Estate of Crow v. Jensen, 494 N.W.2d 186 (S.D. 1992). Statutes are to be given their plain and ordinary meaning. State Farm Mutual Auto Insurance Co. v. Ragatz, 1997 S.D. 123, ¶ 22, 571 N.W.2d 155. If the rule would have limited damages to reimbursement for a pro rata share of a subscriber's bill, it would have said so. It did not. The rule is not the final determinant of damages.

The tariff's infirmity is discussed in staff's hearing brief. U S WEST interjects that

approval of the tariff by the Commission bestows sanctity upon it. In support of its position it cites SDCL 49-31-12.2 and 49-31-16 as the statutory bases for this filed rate doctrine. Actually, SDCL 49-31-12.1 is the filed rate doctrine. That point aside, these statutes only create presumptions. SDCL 49-31-12.1 creates a presumption that a rate or price is fair and reasonable. SDCL 49-31-16 creates a presumption of the validity of a Commission order.

While an order itself approving a tariff may be valid, that fact alone does not address whether or not, under the filed rate doctrine, the tariff itself is fair and reasonable.

It is to be noted that any presumption of fairness or reasonableness created by SDCL 49-31-12.1 only applies to a rate or price. For reasons stated in staff's hearing brief, a limitation on liability is not a rate or price. Therefore, it follows that no presumption is created in favor of a limitation of liability.

Second, the Commission is authorized in complaint cases to look at actions of telecommunications companies and their tariffs - whether they are reasonable, discriminatory or in violation of the laws of this state, among other reasons:

49-13-13. If, after a hearing pursuant to this chapter, it appears to the satisfaction of the commission that anything has been done or omitted to be done in violation of the provisions of laws of this state, or that any individual or joint rate or charge demanded, charged, collected, or received by any telecommunications company or motor carrier subject to the provisions of this title, or that any individual or joint classifications, regulations, or practices of a telecommunications company or motor carrier are unjust, unreasonable, unjustly discriminatory, unduly preferential, prejudicial, or otherwise in violation of the laws of this state, or that any injury or damage has been sustained by any person, the commission may determine and prescribe the just and reasonable charge, to be observed as the maximum to be charged. The commission shall also determine what classification, regulation, or practice is just, fair, and reasonable to be thereafter followed, and to make an order that such telecommunications company or motor carrier shall cease and desist from the violations to the

extent that the commission finds them to exist. The telecommunications company or motor carrier may not thereafter publish, demand, collect, or receive any rate or charge for in excess of the maximum rate or charge prescribed and they shall adopt the classification and conform and abide by the regulations or practices prescribed by the commission. (emphasis supplied)

The question then becomes: how is U S WEST's tariff unreasonable or in violation of other laws of the state?

If U S WEST's actions are a tort, then it is responsible for damages it causes pursuant to SDCL 20-9-1:

Every person is responsible for injury to the person, property, or rights of another caused by his willful acts or caused by his want of ordinary care or skill, subject in the latter cases to the defense of contributory negligence.

If U S WEST has caused damage as a result of breach of contract, it is likewise liable under SDCL 21-2-1:

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin. (emphasis supplied)

It is submitted that as the tariff limits the right to claim damages by an injured party, it is unreasonable because the two statutes cited above, §§ 20-9-1 and 21-2-1, allow recovery of all damages suffered. Further, by attempting to limit the amount of recovery, the tariff violates these two provisions of law which allow full recovery arising either as a matter of tort or contract. Under the authority of § 49-13-13, the Commission may prescribe what is reasonable, just and fair. The tariff is not cast in stone, it is subject to challenge and it is not beyond reproach.

Statutes are to be read in such a manner as to make them harmonious and workable, Welcome Wagon International v. South Dakota Department of Revenue, 318 N.W.2d 5 (S.D. 1982). Here, a tariff that attempts to limit U S WEST's liability must necessarily be considered in light of § 49-1-1.1. It must be considered in light of the fairness and reasonableness standard of § 49-13-13. It must be considered in the light of violation of other sections of the law under § 49-13-13; does it frustrate statutory rights of recovery? Finally, it must be considered in a very fundamental sense: is a limitation of liability a rate or price under § 49-31-12?

Considering all of these statutes together, it is submitted that U S WEST's tariff which attempts to limit its liability is invalid and unenforceable.

2. The facts do sustain Kieffer's right to damages.

Kieffer's proof of damage comes from a couple of sources: Exhibit 3 and his testimony. Exhibit 3 was admitted without objection (TR 6). His testimony regarding the elements of damage was not objected to (TR 5-17). In particular, Exhibit 3 gives specific incidents of inconvenience suffered by Kieffer like dates of service problems, how the service interruptions affected his professional and personal life and calculations as to the dollar amounts for these elements of damage. Comparisons are made as foundation for his opinion (TR 15-17).

While U S WEST attempted to make light of Kieffer's damage situation, the facts remain that in his work he deals with people who are developmentally disabled (TR 19) and that situations he faces can be so severe as to involve suicides (TR 18) and other crises in their lives (TR 34).

Consistent throughout Kieffer's testimony was his opinion of what damages he

suffered - whether those damages be for mileage, the worth of his time or what it would take to compensate him for inconvenience caused by U S WEST. Even the examples cited by U S WEST at page 7 of their brief show a consistency that this was his opinion of damages suffered. This is succinctly stated in his testimony - at page 35 - these are amounts which would make him whole for inconvenience and distress he suffered.

The record contains sufficient facts upon which to award damages for personal inconvenience, see Koenig v. Weber, 174 N.W.2d 218 (S.D. 1970). The trips that were necessitated and time that was wasted by U S WEST's conduct of affairs are likewise documented. U S WEST offered no evidence on these issues. It is submitted that Kieffer, having actually experienced these economic losses, inconvenience and stress, is best qualified to express an opinion as to the extent of these injuries and what it would take to fairly compensate him. This is not speculation; it is based on the witness' personal knowledge, see §19-14-2. Even lay witnesses are entitled to express opinions, see §19-15-1.

3. U S WEST FAILED TO PROVIDE LATE FILED EXHIBITS.

U S WEST has not provided information as late filed and it should now be excluded from the record:

- (1) the wage of a technician for U S WEST in South Dakota (TR 121)
- (2) how many South Dakota customers are on analog carriers (TR 123)
- (3) how many South Dakota customers are on copper carriers (TR 123-4)
- (4) what was U S WEST's problem between 8/17 and 8/23/98, and what was done to fix it (TR 128)
- (5) U S WEST records about Kieffer's Caller ID complaint (TR 119)

- (6) history of complaints from this (Sturgis) system (TR 118)
- (7) history of cable installation on this system (TR 102)
- (8) number of customers in U S WEST exchanges without class services (TR 105).

CONCLUSION

U S WEST may not hide behind its tariff which purports to limit its liability. The Commission may award damages in excess of the tariff provision. Consumers have an unqualified right to claim damages. The Commission is not constrained by the filed rate doctrine for several reasons. Limitations on liability are not rates or prices. Tariffs are subject to a reasonableness test and they are subject to the law. General law provides that one may recover his damages, whether in tort or contract. U S WEST is not exempt from fulfilling that basic statutory guarantee.

Randy Kieffer and his family suffered inconvenience, stress and out-of-pocket expense because U S WEST didn't maintain their phone system. Yet, he paid the same rate as people who have good phone service (TR 125). This is not right. His opinion of what it would take to fairly compensate him for this disservice should be given great weight. After all, who better than Randy Kieffer can know what was suffered?

Finally, U S WEST, just before the hearing in this case, takes the matter seriously and wants to do testing to see what the problem is. This is not responsiveness and it should not be rewarded. Testing should have been accomplished long before this rose to a complaint. South Dakotans depend on their phones. Randy Kieffer and his family should also be able to do so like anyone else.

Dated this _____ day of February, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that copies of Staff's Rebuttal Brief were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the address shown below on this the _____ day of February, 1999.

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