

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

IN THE MATTER OF THE COMPLAINT FILED)	FINDINGS OF FACT AND
BY DON JIRACEK ON BEHALF OF G.S.A.)	CONCLUSIONS OF LAW;
INC., RAPID CITY, SOUTH DAKOTA, AGAINST)	NOTICE OF ENTRY OF
MCLEODUSA TELECOMMUNICATIONS)	ORDER
SERVICES, INC. REGARDING INADEQUATE)	
SERVICE)	TC98-196

On November 2, 1998, the Public Utilities Commission (Commission) received a complaint filed by Don Jiracek on behalf of G.S.A. Inc., Rapid City, South Dakota (Complainant), against McLeodUSA Telecommunications Services, Inc. (McLeod). Complainant alleges a variety of service interruptions and customer service issues against McLeod, and argues a breach of contract. The Complainant is requesting that it be reimbursed for its business losses.

Pursuant to ARSD 20:10:01:08.01 and 20:10:01:09, if a complaint cannot be settled without formal action, the Commission shall determine if the complaint shows probable cause of an unlawful or unreasonable act, rate, practice or omission to go forward with the complaint.

On December 7, 1998, the Commission considered this matter. The Commission voted unanimously to find probable cause and served the complaint on McLeod. An Amended Complaint was filed on December 10, 1998. The Commission permitted the filing of the Amended Complaint by Order dated December 18, 1998. McLeod filed its Answer to Complaint on January 7, 1999.

A hearing on this matter was held April 15, 1999, before the Commission in Rapid City, South Dakota, and a Transcript of Hearing (H.T.) was incorporated into G.S.A.'s Post-Hearing Brief, received by the Commission on May 6, 1999, and G.S.A.'s Reply Brief received by the Commission on June 3, 1999. In its Reply Brief, G.S.A., at page 7 thereof, states "At the same time, McLeod knows that the other telecommunications carriers all have similar language in their contracts," adding, "See, e.g., the U S WEST contract attached at [sic] Exhibit A and incorporated herein by this reference." McLeod, on June 11, 1999, filed a Motion to Strike any reference to Exhibit A, purportedly a U S WEST Communications, Inc. (U S WEST) contract. On June 18, 1999, G.S.A., in its Response to Motion to Strike conceded that "Exhibit A was not attached to Claimant's Reply Brief and agrees to strike the reference to Exhibit A" The Commission, on July 16, 1999, entered an Order Granting Motion to Strike.

During arguments concerning the Motion to Strike, heard by the Commission at its regularly scheduled meeting on July 13, 1999, G.S.A. asked the Commission to take "administrative notice" that all telecommunications providers doing business in G.S.A.'s market area include in their tariffs on file with the Commission, and in their special customer contracts, language limiting their liability in a manner similar to the limitation of liability language cited at page 12 of McLeod's "Brief of Respondent." Further, G.S.A., at page 3 of its Reply Brief, contends that "McLeod's contractual attempt to limit its liability for breach is an unenforceable contract of adhesion and is otherwise against the public policy of this state."

Based upon the evidence of record, the Commission makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Claimant, G.S.A., Inc., is a wholesale supply company primarily doing business with federal agencies, "representing 1,000 different manufacturers, everything from pumps, generators, linens,

shares, carpet, tables, safety . . .," and conducting such business "just by phone and fax." (H.T. at 6). G.S.A. is, therefore, heavily dependent upon telecommunications services for the conduct of its business.

2. McLeod representatives solicited business from G.S.A. They represented to G.S.A. that they would provide expanded services at rates lower than currently being paid to U S West for local services (20%); that long-distance services would be lower (\$.08 per minute); and that McLeod would deliver international calls at a rate equal to or lower than G.S.A.'s current carrier, N.O.S. Don Jiracek, owner of G.S.A., relying in part on such oral representations, signed a service agreement, dated August 18, 1998. (H.T. at 9, 14). On August 21, 1998, Mr. Jiracek signed an addendum containing the special international pricing. (H.T. at 17).

3. McLeod did not provide Don Jiracek with a copy of Page 2, (Telecommunications Service Agreement Terms and Conditions), Page 3 (Directory Information), Page 4 (Reporting Options Special Order Form) and Page 6 of the McLeodUSA Service Agreement. (H.T. at 16-19, 67; Exhibit 1-1). McLeod did not present testimony or sworn statements of McLeod representatives to contradict Mr. Jiracek's testimony.

4. The McLeodUSA Service Agreement is silent concerning dates for switching local and long-distance services to McLeod. (H.T. at 119; Exhibit 1-1).

5. G.S.A. sent a facsimile letter to McLeod on September 17, 1998, stating that McLeod was not meeting N.O.S.' long-distance rates. (H.T. at 25, 45; Exhibit 1-A). G.S.A. sent a letter to McLeod on September 21, 1998, terminating the long-distance service because McLeod could not meet N.O.S.' rates. (H.T. at 25, 45; Exhibit 1-A). G.S.A. requested McLeod to continue with local service only, per letter of September 21, 1998, to McLeod.

6. G.S.A. became aware in late September 1998, that McLeod had switched G.S.A.'s long-distance service to McLeod in August 1998, despite G.S.A.'s desire to have the long distance service switched in late September 1998. (H.T. at 28-29). G.S.A. lost one month of free long-distance service from N.O.S.

7. G.S.A.'s local service was switched from U S WEST to McLeod on September 23, 1998.

8. G.S.A.'s letter, dated September 21, 1998, is a written ratification of the oral request of Don Jiracek, made concurrent with the August 18, 1998, signing of the Service Agreement, to delay long-distance service with McLeod until G.S.A. utilized the one-month bonus service pursuant to its "plus" contract with N.O.S. (H.T. at 28-29).

9. Beginning on September 24 or 25, 1998, G.S.A. began to experience telephone and facsimile problems. (H.T. at 29-30, 31-32).

10. G.S.A. was without main line service from September 25, 1998, through September 28, 1998. (H.T. at 112, 156). During such time G.S.A. was without toll free service. (H.T. at 177).

11. G.S.A. was unable to receive "1-800" calls from September 28, 1998, through September 30, 1998. (H.T. at 112; Exhibit 1-K).

12. From October 1, 1998, through October 7, 1998, G.S.A. continued to experience telephone service problems. (H.T. at 32, 161-162). G.S.A. experienced telephone service problems from October 7, 1998, through October 13, 1998. (H.T. at 88-91, 114). G.S.A. also experienced service problems in early December 1998. (H.T. at 40, 160).

13. McLeod admitted that G.S.A. incurred service problems. (Exhibit 1-K). McLeod admitted G.S.A.'s business was impacted by the service problems. (H.T. at 155). McLeod admitted responsibility for service problems sustained by G.S.A. (H.T. at 172-173, 184).

14. McLeod failed to provide a written response to G.S.A.'s multiple oral and written complaints. (H.T. at 107).

15. McLeod was responsible for repeated instances of "failure of transmission" related to its August 18, 1998, Service Agreement with G.S.A., and G.S.A. was as a result damaged in the amount of \$4.38.

16. McLeod failed in its customer service responsibility to G.S.A. by not responding in a timely manner to G.S.A.'s repeated requests for corrective action, forcing G.S.A. to seek the assistance of the Commission to correct a situation that jeopardized G.S.A.'s business, and imposing upon G.S.A. frustration, time and expense in seeking relief in this matter, and G.S.A. was as a result damaged in the amount of \$2,000.00.

17. McLeod switched G.S.A. to its long-distance service in a manner that deprived G.S.A. of a one-month period of free service from N.O.S., and G.S.A. was thereby damaged in the amount of \$1,083.54.

18. G.S.A. thereby sustained losses totaling \$3,087.92.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26, 49-2, 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, 49-31-10, 49-31-11, 49-31-38, 49-31-38.1, 49-31-38.2, 49-31-38.3, 49-31-60 through 49-31-68, inclusive, and ARSD 20:10:01:07.01 through 20:10:01:28, inclusive.

2. The Commission has the statutory authority to award the types of damages sought by G.S.A. SDCL 49-13-14 states, "The commission may determine the extent of any injury or damage which it finds to have been sustained by any person, telecommunications or motor carrier. If the commission determines that any person is entitled to reparation or to an award of damages, the commission shall make an order directing the telecommunications company or motor carrier to pay to such person the sum of money to which he may be entitled, on or before a named day." This section together with the citations of Paragraph 1 above permit the Commission to award damages of the type sought herein.

3. This matter sounds in contract, seeking damages for breach of contract. Complaints concerning service outage are collateral and in addition to the allegations of breach of contract.

4. McLeod contends that the Commission's regulation at ARSD 20:10:07:05, expressly limits a telecommunications company's liability for service outage to a pro rata refund of the monthly charge. The Commission finds that McLeod serves fewer than 50,000 local exchange subscribers, and therefore, pursuant to ARSD 20:10:05:01, is exempt from Chapters 20:10:05 to 20:10:10, including ARSD 20:10:07:05. (See SDCL 49-31-5.1).

5. The limitation of liability Paragraph (8) found at page 2 of Exhibit 1-1, the McLeod-G.S.A. Agreement was challenged by G.S.A. on two grounds: (1) That a copy of page 2 was not provided to Don Jiracek and therefore cannot be considered a part of the contract, and (2) The limitation of liability paragraph is unenforceable because it is a contract of adhesion, contrary to public policy, and

therefore unenforceable. On the other hand, McLeod contends "That our contract provides that we are immune from liability for the service outages." (H.T. at 52). The paragraph states:

LIMITATION OF LIABILITY. MCLEODUSA SHALL NOT BE LIABLE TO CUSTOMER FOR ANY INCIDENTAL, INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT. Any McLeodUSA liability to customer for any damages of any kind under this agreement shall not exceed, in amount, a sum equivalent to the applicable out-of-service credit under the governing Tariff and/or catalogue/price list. Remedies under this agreement are exclusive and limited to those expressly described herein. **NO WARRANTIES. THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

6. The Commission will not take administrative notice that all telecommunications contracts existing in the Rapid City market on or about August 18, 1998, contained language similar in scope to the Limitation of Liability Paragraph (8) quoted above. The Commission does not have on file copies of special contracts negotiated between telecommunications carriers and customers. However, Paragraph (8) references the tariff McLeod had on file with the Commission in August 1998 to limit its liability: "Any McLeodUSA liability to customer for any damages of any kind under this agreement shall not exceed, in amount, a sum equivalent to the applicable out-of-service credit under the governing tariff and/or catalogue/price list." (emphasis added)

7. The governing tariff on file on August 18, 1998, with the Commission stated:

"McLeod's liability due to any failure of the transmission shall not exceed an amount equal to the charges provided for by the applicable tariff (for regulated services) and applicable price list, catalogue, and/or contract (for all other services) for the call."

8. This matter was initially brought before the Commission as a service issue, then ripened into a breach of contract case. McLeod contends the Commission is without jurisdiction to adjudicate alleged breaches of contract. The Commission, at paragraphs 1 and 2 of the Conclusions of Law section of this Order, has determined that it does. This determination is significant. It controls the scope of damages the Commission may award to G.S.A.

McLeod's tariff limitations pertain only to "failure of transmission" and not to allegations of breaches of specific promises or representations concerning rates, price, service, or an agreement not to connect long-distance service, as alleged in this matter. Accordingly, damages in this matter, as related to "any failure of transmission," cannot exceed a refund of McLeod's charges to G.S.A. for its local services. Damages beyond that amount must be predicated upon McLeod's alleged breach of contract or other conduct outside the "failure of transmission." (emphasis added)

9. G.S.A. contends that the contract was void for breach based upon failure to meet the price. (H.T. at 70). Basic contract law provides that when a party materially breaches an agreement, the injured party has the right to rescind the contract. (See 726, 17A Am.Jur. 2d). Under this principle, McLeod's acknowledged pricing failure would constitute the alleged breach, leaving G.S.A. with a right to rescind the contract, thereby leaving McLeod without the protection of its Paragraph (8). However supportable this position may be, McLeod's tariff limitations remain troublesome for G.S.A. A breach of contract may render an agreement voidable, but it does not erase a tariff approved by the Commission. The Commission is bound by its approved tariff language.

DAMAGES

In determining damages the Commission is limited as follows:

- (1) The Commission does not have jurisdiction over international services.
- (2) The McLeod tariff, approved by the Commission, limits damages for "any failure of transmission" to a pro-rata refund or credit of charges.
- (3) Damages beyond those permitted by the tariff must be limited to harm related to conduct outside the scope of "failure of transmission."

It is therefore

ORDERED, for damages related to "failure of transmission," as limited by McLeod's filed tariff, McLeod is directed to pay G.S.A. the sum of \$4.38; and it is

FURTHER ORDERED, for damages related to McLeod's failure to respond in a timely manner to G.S.A.'s repeated requests for corrective action, forcing G.S.A. to seek the assistance of the Commission to correct a situation that jeopardized G.S.A.'s business, and imposing upon G.S.A. substantial frustration, time and expense in seeking relief in this matter, McLeod is directed to pay G.S.A. the sum of \$2,000.00; and it is

FURTHER ORDERED, for damages related to McLeod's switching G.S.A. to its long-distance service in a manner that deprived G.S.A. of a one-month period of free service from N.O.S., McLeod is directed to pay G.S.A. the sum of \$1,083.54.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 18th day of August, 1999. 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 18th day of August, 1999.

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 Kaelo</u>
Date:	<u>8/18/99</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER

