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STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF HUGHES

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION SIXTH JUDICIAL CIRCUIT

In the Matter of the Petitions of Armour Independent Telephone Company, Bridgewater-Canistota Telephone Company, Golden West Telecommunications Cooperative, Inc., Kadoka Telephone Company, Sioux Valley Telephone Company, Union Telephone Company, and Vivian Telephone Company (collectively the "Golden West Companies") for Arbitration Pursuant to the Telecommunications Act of 1996 to Resolve Issues Relating to Interconnection Agreements with WWC License L.L.C. ("Western Wireless").

Civ. 06-_____

BRIEF IN SUPPORT OF APPLICATION FOR STAY FROM ORDER OF THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION TRANSFERRING PROCEEDINGS TO THE OFFICE OF HEARING EXAMINERS

This matter is before the Court upon the Application of the above-named Petitioners (the "Golden West Companies") for a stay of that portion of the South Dakota Public Utilities Commission's ("PUC") Order dated July 14, 2006, directing transfer of these arbitration proceedings to the Office of Hearing Examiners, and further staying the taking of any action of the Office of Hearing Examiners in these matters, pending a determination on the Application for Reconsideration filed with the PUC. This brief is respectfully submitted in support of the Application for Stay.

BACKGROUND

Each of the above-named Golden West Companies is an incumbent local exchange carrier engaged in the provision of telephone exchange service in portions of the State of South Dakota pursuant to a certificate of convenience and necessity granted by the PUC. WWC License, L.L.C ("WWC") is a commercial mobile radio service ("CMRS") provider serving South Dakota which holds licenses to provide cellular telecommunications service in the State.

Prior to the commencement of the above-captioned matter before the PUC, the Golden West Companies and WWC exchanged telecommunications traffic pursuant to the terms of

Reciprocal Interconnection, Transport and Termination Agreements (the “Agreements”) which, among other items, established the appropriate rates for the exchange of the parties’ traffic. On October 21, 2005, WWC gave notice of its intent to terminate the Agreements effective as of December 31, 2005, and also initially requested that the Golden West Companies enter into negotiations with WWC to establish new interconnection agreements for the transport and termination of telecommunications traffic between the parties.

On May 3, 2006, each of the above-named Golden West Companies filed separate petitions for arbitration before the PUC to arbitrate certain unresolved terms and conditions of proposed interconnection agreements between each of the Golden West Companies and WWC (collectively referred to as “Arbitration Proceedings”). The arbitration proceedings were commenced pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.*) (the “Act”), SDCL § 49-31-81, and A.R.S.D. 20:10:32:29. See Affidavit of Counsel dated July 28, 2006 (“Aff. Counsel”) at ¶2.

Pursuant to a motion filed by the Golden West Companies, the PUC, on June 5, 2006, entered its Order consolidating the Arbitration Proceedings, and on June 9, 2006, the PUC entered its further Order setting a procedural schedule and hearing. See Aff. Counsel at Exhibit B. On June 16, 2006, WWC, pursuant to SDCL § 1-26-18.3, filed a Request with the PUC seeking to have the above-captioned matters directed to the Office of Hearing Examiners. See Aff. Counsel at Exhibit C. Briefs were filed by the parties and oral argument was held before the Commission on July 11, 2006, at which time the Commission granted the Request of WWC, and by Order dated July 14, 2006, transferred the Arbitration Proceedings to the Office of Hearing Examiners. See Aff. Counsel at Exhibit A.

By correspondence dated July 20, 2006, the PUC transferred the file pertaining to the above-captioned matters to the Office of Hearing Examiners. See Aff. Counsel at Exhibit D. The parties were notified through correspondence on both July 24 and July 25 2006, that a hearing examiner had been assigned to the file and that they were invited to participate in a prehearing conference call in early August prior to the commencement of any arbitration proceedings. See Aff. Counsel at Exhibit E.

ARGUMENT AND ANALYSIS

SDCL § 1-26-32 provides in relevant part:

Any agency decision in a contested case is effective ten days after the date of receipt or failure to accept delivery of the decision by the parties. An application to the circuit court for a stay of the agency's decision may be made only within ten days of the date of receipt or failure to accept delivery of the agency's decision. *Upon receiving a timely application for a stay and notice of hearing thereon, the court may enter a temporary stay pending a hearing on the application.*

Following a hearing, the court may order a further stay, pending final decision of the court. The court, as a condition to granting a stay, may require the appellant to furnish a bond or other such security or order supervision as the court may direct to indemnify or protect the state or agency or any person from loss, damage, or costs which may occur during the stay. (emphasis added).

The decision whether to grant or deny a stay is within the sound discretion of the court. See Webb v. R. Roland & Co., Inc., 800 F.2d 803, 808 (8th Cir. 1986).

The Golden West Companies vigorously defended against the Request of WWC to transfer these arbitration proceedings to the Office of Hearing Examiners, instead requesting that the PUC retain jurisdiction over the entirety of the proceedings, including the hearing, the drafting or proposed findings and conclusions of law, as well as the issuance of the final decisions. Because of their vigorous opposition and belief that the PUC did not base its decision on sound law, the Golden West Companies have filed contemporaneously herewith an Application requesting the PUC to reconsider its transfer of the arbitration proceedings to the Office of Hearing Examiners in light of

basic, entrenched due process, procedural and practical issues. See Affidavit of Counsel at Exhibit F.

Pursuant to the applicable administrative provisions, the Golden West Companies must file, and have done so, their Application for Reconsideration within thirty (30) days after the issuance of the PUC's order. See A.R.S.D. 20:10:01:29 and 20:10:01:30.01. WWC will then have twenty days to respond to the same. It is believed that WWC's response would be due on or before August 17, 2006. The Golden West Companies have requested an opportunity to present oral argument on their Application for Reconsideration, and it is presumed that the PUC will allow such argument at a date to be determined following the filing of WWC's response to the Application for Reconsideration. As outlined above, these arbitration proceedings have now been transferred to the Office of Hearing Examiners and the hearing examiner assigned to the matter has contacted the parties for purposes of scheduling a prehearing conference in early August, most likely prior to WWC's response date.

As a practical matter, there is simply no way in which the PUC will have an opportunity to consider, much less rule on the Application currently before it, prior to the commencement of proceedings, even if limited to procedural matters, before the Office of Hearing Examiners. Accordingly, the interests of judicial economy and the Golden West Companies' rights to due process dictate the grant of a stay of the July 14, 2006 Order and a stay of any further proceedings before the Office of Hearing Examiners regarding these cases pending the decision of the PUC on the Golden West Companies' Application for Reconsideration. The concept of judicial economy is quite simple, yet extremely important in the judicial system and its application to a matter such as this is exceedingly appropriate. Judicial economy relates to "the efficient use of scarce judicial resources." Colo. River Water Conservation Dist. v. U.S., 424

U.S. 800, 817. 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976). It involves “considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation ... and the desirability of avoiding piecemeal litigation.” Id.

Allowing the Office of Hearing Examiners to commence with the arbitration of these proceedings before the PUC has an opportunity to fully consider the Application for Reconsideration risks wasting the parties’ time and other resources. See, e.g., Rosenbauer America, LLC v. Advantech Service & Parts, LLC, --- F.Supp. 2d ---, 2006 WL 1975762, *2 (D.S.D.,2006) (determining granting motion for stay warranted in interests of not wasting “the time and resources devoted by the Court, parties and witnesses”). This is particularly the case given the complex and time-consuming nature of the arbitration proceedings at issue. The proceedings will not only require a significant amount of time and attention from both the parties, but also from the Office of Hearing Examiners. Simply stated, should the PUC reconsider its decision to transfer the matter and rescind its previous Order, it would render any future involvement by the Officer of Hearing Examiners unnecessary.

Most significantly, the issues which the Golden West Companies seek to address with the PUC pertain to basic principles of due process. Despite the fact that the PUC’s written Order of July 14, 2006, was adverse to the Golden West Companies, there is potential for likelihood of success on appeal given there is no definitive, controlling statutory or decisional authority governing this matter. The Golden West Companies are concerned that the arbitration of the above-captioned matters before the Office of Hearing Examiners, rather than before the PUC, could result in the deprivation of basic due process. See, e.g., Matter of Application No. 5189-3 to Extend Time, 467 N.W.2d 907, 912 (S.D. 1991) (citing In re Cancellation of Stabio Ditch Water Right, 417 N.W.2d 391, 394 (S.D. 1987) (recognizing that “the constitutional guarantee of due

process was applicable to administrative proceedings and that the opportunity to be heard was a fundamental requisite of due process.”). Only two of the three Commissioners constituting the PUC were present to hear oral argument of WWC’s Request on July 11, and due to the importance of the subject matter involved, it is critical that all Commissioners be present to participate in the decision concerning the Application for Reconsideration. It is believed that the PUC did not have a full opportunity at the time of the hearing on this matter to fully understand this potential deprivation of due process or other unintended consequences of its decision. As such, the potential damage that may be caused by the commencement of the arbitration proceedings in this case before the Office of Hearing Examiners pending the PUC’s reconsideration of its previous Order will be irreparable if the Golden West Companies are successful in the pursuit of their Application for Reconsideration.

Finally, the PUC’s consideration of the Application for Reconsideration, as well as a stay if so granted by this Court, will have an impact on the Procedural Schedule previously entered by the PUC. See Aff. Counsel at Exhibit B. Given the nature of the proceedings and the complexity of the issues involved, it is a veritable impossibility that the parties’ agreed-upon procedural schedule can be followed at this point. To date, the parties have already engaged in extensive discovery with the preparation of pre-filed testimony scheduled in early August at approximately the same time as the prehearing conference is contemplated by the Office of Hearing Examiners. Because of these scheduling concerns, the Golden West Companies have filed with PUC a Motion to Suspend the Procedural Schedule. Suspension of the Procedural Schedule is required in order to provide the parties with confirmation that future requirements set forth in the Procedural Order such as the requirement to file prepared direct testimony and exhibits on August 11, 2006, have been deferred at least until such time that the Commission has

reached a decision in response to the Application for Reconsideration and the Commission or the Office of Hearing Examiners and the parties have thereafter had an opportunity to properly consider appropriate revisions to the procedural schedule. Because the Motion to Suspend is currently pending before the PUC, the Golden West Companies acknowledge that this issue may not be ripe for this Court to entertain. However, should the PUC refuse to grant the Motion to Suspend, the Golden West Companies would respectfully request that this Court suspend those deadlines as contained within the PUC's June 9, 2006 Order.

CONCLUSION

The Court's issuance of a stay pending appeal would thus faithfully serve the interests of all parties involved by ensuring that any continued litigation would proceed only after the reconsideration issues are settled. Based upon this foregoing analysis and authorities, the Golden West Companies respectfully request that the Court issue a stay of that portion of the South Dakota Public Utilities Commission's Order dated July 14, 2006, transferring these matters to the Office of Hearing Examiners, and further respectfully requests that the Court stay the Office of Hearing Examiners from taking any action in this case, pending the decision of the South Dakota Public Utilities Commission on the Motion for Reconsideration filed by the Golden West Companies. Finally, the Golden West Companies respectfully request that this Court stay those deadlines as outlined in the Procedural Schedule previously entered by the PUC in the event that the PUC should fail to suspend those deadlines in accordance with the Motion to Suspend currently pending before it.

Dated this 28th day of July 2006.

Respectfully submitted,
THE GOLDEN WEST COMPANIES

By: Meredith A Moore
Ryan & Taylor
Meredith A. Moore
Cutler & Donahoe, LLP
100 North Phillips Avenue 9th Floor
Sioux Falls, SD 57104
Tel. 605-335-4950
Fax 605-335-4961

and

Paul M. Schudel, NE Bar #13723
James A. Overcash, NE Bar #18627
WOODS & AITKEN LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
(402) 437-8500
(402) 437-8558
Their Attorneys

CERTIFICATE OF SERVICE

On this 28th day of July, 2006, a true and correct copy of the foregoing was served upon Talbot Wieczorek, of Gunderson, Palmer, Goodsell & Nelson, LLP, 440 Rushmore Road, Rapid City, SD 57701, Stephen B. Rowell, Mailstop 1269 B5-F11-C, One Allied Drive, Little Rock, AR 72202, legal counsel for WWC License L.L.C., Leo Disburg, Chief Hearing Examiner, Office of Hearing Examiners, 210 East 4th Avenue, Pierre, SD 57501, Rolayne Wiest of the South Dakota Public Utilities Commission at 500 East Capitol Avenue, 1st Floor, Pierre, South Dakota 57501, and to Sara Greff of the South Dakota Public Utilities Commission at 500 East Capitol Avenue, 1st Floor, Pierre, South Dakota 57501, by regular United States mail, first class postage prepaid.

Meredith A Moore
One of the Attorneys for Petitioners