

**GUNDERSON, PALMER, GOODSSELL & NELSON, LLP**

**ATTORNEYS AT LAW**

J. CRISMAN PALMER  
G. VERNE GOODSSELL  
JAMES S. NELSON  
DANIEL E. ASHMORE  
TERENCE R. QUINN  
DONALD P. KNUDSEN  
PATRICK G. GOETZINGER  
TALBOT J. WIECZOREK  
MARK J. CONNOT  
JENNIFER K. TRUCANO  
DAVID E. LUST

ASSURANT BUILDING  
440 MT. RUSHMORE ROAD  
POST OFFICE BOX 8045  
RAPID CITY, SOUTH DAKOTA 57709-8045  
TELEPHONE (605) 342-1078 • FAX (605) 342-0480  
www.gundersonpalmer.com

ATTORNEYS LICENSED TO PRACTICE IN  
SOUTH DAKOTA, NORTH DAKOTA, IOWA, NEBRASKA  
COLORADO, MONTANA, WYOMING & MINNESOTA

THOMAS E. SIMMONS  
TERRI LEE WILLIAMS  
PAMELA SNYDER-VAHNS  
SARA FRANKENSTEIN  
AMY K. KOENIG  
JASON M. SMILEY  
SHANE C. PENFIELD  
JONATHAN M. OOSTRA

WYNN A. GUNDERSON  
*Of Counsel*

August 8, 2006

**ELECTRONICALLY FILED**

**DATE** AUG 08 2006

Via Fax 605-773-3875  
and U.S. Mail  
Hughes County Clerk of Courts  
PO Box 1238  
Pierre, South Dakota 57501

RE: Alltel Communications and its wholly owned subsidiary WWC License, LLC –  
Arbitration consolidation  
SDPUC Docket File Numbers TC 06-036 thru TC 06-042  
GPGN File No. 5925.060285  
Civil No. 06-302

Greetings:

Enclosed for filing in the above matter, please find the original WWC License, LLC's Resistance to Application for Stay From Order of the South Dakota Public Utilities Commission Transferring Proceeding to the Office of Hearing Examiner. The original letter and brief will be sent by U.S. Mail. By copy of same, opposing counsel have been served.

If you have any questions, please call me.

Sincerely,



Talbot J. Wieczorek

TJW:klw

Enclosures

c: Clients  
Meredith Moore  
Paul Schudel  
Rich Coit  
Sara Greff  
Rolayne Wiest

# GUNDERSON, PALMER, GOODSSELL & NELSON, LLP

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AMY K. KOENIG  
JASON M. SMILEY  
SHANE C. PENFIELD  
JONATHAN M. OOSTRA

WYNN A. GUNDERSON  
*Of Counsel*

August 8, 2006

VIA FAX: 605-773-6492

Honorable Max Gors  
Circuit Court Judge  
Hughes County Clerk of Courts  
PO Box 1238  
Pierre, South Dakota 57501

RE: Alltel Communications and its wholly owned subsidiary WWC License, LLC –  
Arbitration consolidation  
SDPUC Docket File Numbers TC 06-036 through TC 06-042  
GPGN File No. 5925.060285. Civil No. 06-302

Dear Judge Gors:

Attached is a courtesy copy of WWC License, LLC's Resistance to Application for Stay From Order of the South Dakota Public Utilities Commission Transferring Proceeding to the Office of Hearing Examiner. This matter has been set for a hearing Thursday at 1:30 p.m., central time. It is my understanding that you court reporter will call me and Ms. Moore. It is also my understanding that PUC counsel may be present at your chambers for the argument. If the Court needs anything else, please let me know.

I have filed the original with the Clerk of Courts.

Sincerely,



Talbot J. Wieczorek

TJW:klw

Enclosures

c: Clients  
Meredith Moore via email  
Paul M. Schudel via email  
Rich Coit via email  
Rolayne Wiest via email  
Sara Greff via email



In response, on July 28, 2006, Golden West Companies simultaneously filed both an application for reconsideration with the PUC, and an application for stay with this court. *See* Exhibits attached to Affidavit of Counsel in Support of Application for Stay. However, this Court may only obtain jurisdiction over this matter in specific limited circumstances. S.D.C.L. § 1-26-30. To illustrate, this Court only obtains jurisdiction if Golden West Companies has exhausted its administrative remedies or if it is aggrieved by a final decision,

*A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.* If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

*Id.* (*emphasis added*). Notably, Golden West Companies have not exhausted their administrative remedies nor are they aggrieved by a final decision.

Rather, they filed an application for reconsideration with the PUC on July 28, 2006. *See* Affidavit of Counsel in Support of Application for Stay. Filing an application for reconsideration with the PUC is permitted by ARSD 20:10:01:29, and is by definition an administrative remedy. As Golden West Companies have an administrative remedy available, their application fails to meet the jurisdictional pre-requisites of S.D.C.L. § 1-26-30. As a result, this Court lacks the requisite jurisdictional basis to grant the relief requested. *McElhaney v. Anderson*, 598 N.W.2d 203, 206 (S.D. 1999)(finding, “Any claim for judicial relief, concerning a cause over which an administrative agency has jurisdiction, constitutes a jurisdictional defect to the claim for judicial relief.”)

Nor can the Golden West Companies rely on the last sentence of S.D.C.L. § 1-26-30. That sentence allows an intermediate appeal only in cases where an immediate review is necessary to provide an adequate remedy. The Golden West Companies have not made any showing that an immediate review is necessary and, are not appealing an issue to this Court, but simply requesting a stay of any actions while a Motion for Reconsideration is pending in front of the PUC. If no issue is being appealed, no stay can be granted and the request for stay should have been made in front of the South Dakota PUC.

Furthermore, the plain language of S.D.C.L. § 1-26-32 demonstrates that Golden West Companies' reliance upon the same is misplaced. Golden West Companies' application for a stay is based solely upon S.D.C.L. § 1-26-32. Notably, the plain language of S.D.C.L. § 1-26-32 demonstrates it applies only in instances in which a party seeks a stay pending appeal,

**1-26-32. When agency decision in contested case becomes effective – Application for stay pending appeal – Time – Granting of further stay – Security or other supervision – Inapplicability to determinations of benefits under Title 61.**

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. This section does not apply to determinations of benefits made by the Department of Labor pursuant to Title 61.

*(emphasis added)*; See Also Claggett, 464 N.W.2d at 213 (concerning application for stay of proceedings pending appeal); In the Matter of Silver King Mines, Permit EX-5, 315 N.W.2d 689

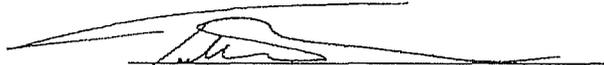
(S.D. 1982)(considering motion for stay pending the outcome of an appeal).<sup>1</sup> As Golden West Companies have not appealed the PUC's decision to transfer the pending proceedings to the office of hearing examiners, the plain language of S.D.C.L. § 1-26-32 renders it inapplicable to the facts before this Court. Therefore, denial of Golden West Companies' application for stay is appropriate because Golden West Companies have failed to provide the Court with a sufficient statutory or jurisdictional basis to award the same.

### CONCLUSION

Based upon the aforementioned arguments and authorities, WWC License, L.L.C., respectfully requests the Court deny Golden West Companies' Application for Stay from Order of the South Dakota Public Utilities Commission Transferring Proceedings to the Office of Hearing Examiners.

Dated this 8 day of August, 2006.

ATTORNEYS FOR  
ALTEL COMMUNICATIONS, INC.,  
WWC LICENSE L.L.C.



Talbot Wieczorek  
GUNDERSON, PALMER, GOODSSELL  
& Nelson, LLP  
440 Mt Rushmore Road, PO Box 8045  
Rapid City, South Dakota 57709  
Phone: 605-342-1078  
Fax: 605-342-0480

Stephen B. Rowell  
Alltel Communications, Inc.  
One Allied Drive  
Little Rock, Arkansas 72202

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<sup>1</sup> While the language of the statute has been amended since the cited decisions were rendered, the general nature of the statute still applies to applications for stay pending appeals.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8 day of August 2006, a true and correct copy of **RESISTANCE TO APPLICATION FOR STAY FROM THE ORDER OF THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION TRANSFERRING PROCEEDINGS TO THE OFFICE OF HEARING EXAMINERS** was electronically and by first-class, U.S. Mail, postage paid to:

[meredithm@cutlerlawfirm.com](mailto:meredithm@cutlerlawfirm.com)  
Meredith Moore  
Cutler & Donahoe, LLP  
100 N Phillips Avenue - 9th Floor  
Sioux Falls, SD 57104-6725

[sara.greff@state.sd.us](mailto:sara.greff@state.sd.us)  
Sara Greff  
Staff Counsel  
SDPUC  
500 E. Capitol  
Pierre SD 57501

[pschudel@woodsaitken.com](mailto:pschudel@woodsaitken.com)  
Paul M. Schudel  
Woods & Aitken, LLP  
301 S. 13<sup>th</sup> Street, Suite 500  
Lincoln NE 68508

[rich.coit@sdtaonline.com](mailto:rich.coit@sdtaonline.com)  
Richard Coit  
SDTA  
PO Box 57  
320 E. Capitol Avenue  
Pierre SD 57501



Palbot J. Wiczorek