



Bob Sahr, Chair
Dustin Johnson, Vice-Chair
Gary Hanson, Commissioner

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August 8, 2006

Honorable Max A. Gors
Circuit Court Judge
P. O. Box 1238
Pierre, SD 57501-1238

Re: Golden West Companies/WWC License
Civ.06-302

Dear Judge Gors:

Enclosed you will find an original and copy of Brief in Opposition of Application for Stay from Order of the South Dakota Public Utilities Commission Transferring Proceedings to the Office of Hearing Examiners with reference to the above captioned matter. I apologize if this is late. I was not informed by one of the parties until yesterday afternoon that Western Wireless and the Golden West Companies had agreed that responses would be filed by noon today. I plan on attending the hearing which has been set for Thursday at 1:30 p.m.

Very truly yours,

Rolayne Ailts Wiest
Special Assistant Attorney General

Enc.



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Re: Golden West Companies/WWC License
Civ. 06-302

Dear Folks:

Enclosed each of you will find a copy of Brief in Opposition of Application for Stay from Order of the South Dakota Public Utilities Commission Transferring Proceedings to the

Mr. Ryan J. Taylor
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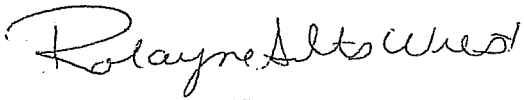
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Mr. Leo Disburg
Chief Hearing Examiner
Office of Hearing Examiners
210 East 4th Avenue
Pierre, SD 57501

Office of Hearing Examiners with reference to the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

A handwritten signature in cursive script that reads "Rolayne Ailts Wiest". The signature is written in dark ink and is positioned above the printed name.

Rolayne Ailts Wiest
Special Assistant Attorney General

Enc.

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF HUGHES

SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE PETITIONS OF)
 ARMOUR INDEPENDENT TELEPHONE)
 COMPANY, BRIDGEWATER-CANISTOTA)
 INDEPENDENT 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))

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

Civ. 06-302

The South Dakota Public Utilities Commission ("Commission") files this brief in opposition to the Application for Stay From Order of the South Dakota Public Utilities Commission Transferring Proceedings to the Office of Hearing Examiners ("Application for Stay") filed by Armour Independent Telephone Company, Bridgewater-Canistota Independent 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"). The Commission respectfully requests that the Court deny the Application for Stay for the reasons set forth below.

BACKGROUND

The Commission will not repeat the procedural background since it has already been stated in the Golden West Companies' Brief in Support of Application for Stay.

ARGUMENT

I. The Court Lacks Jurisdiction to Grant the Stay.

The Golden West Companies filed their Application for Stay pursuant to SDCL 1-26-32. Notably, the Golden West Companies have not filed an appeal of the Commission's decision granting

the request of WWC License, LLC ("WWC") to use the Office of Hearing Examiners. Instead, the Golden West Companies have only filed for a stay. The Application for Stay requests that this Court "immediately enter a temporary stay of the Commission's Order transferring these Dockets to the Office of Hearing Examiners and the Commission's Order Setting Procedural Schedule,¹ as well as any action by the Office of Hearing Examiners relating to OHE File No. PUC 6-06, pending resolution of the PUC's consideration of the Motion for Reconsideration filed by the Golden West Companies pursuant to A.R.S.D. 20:10:01:29 and 20:10:01:30.01."

The Commission submits that this Court lacks the jurisdiction to entertain a request for a stay pursuant to SDCL 1-26-32 when the stay is not filed in conjunction with a notice of appeal. This statute clearly contemplates that a request for a stay of an agency decision can be made only if the party requesting the stay is appealing the underlying order. The statute reads as follows:

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.

SDCL 1-26-32 (*emphasis added*). As explained by the United States Court of Appeals, District of Columbia Circuit, a court may not entertain a motion for stay that is not accompanied by a petition to review the underlying order. *In re GTE Service Corporation, et al.*, 762 F.2d 1024, 1026. The Court stated that "[i]t is beyond dispute that a court does not have jurisdiction to review an agency order unless a petition for review of the order has been filed with that court." *Id.* The Court further explained that "because the petitioners did not file a petition for review,

¹ The Commission points out that it granted the Golden West Companies' Motion to Suspend Procedural Schedule at its Commission meeting held this morning, August 8th.

there was no ongoing proceeding in this court in which a motion for stay could have been filed and thus the court did not have jurisdiction to grant the motion for stay." *Id.*

Further, the South Dakota Supreme Court has declared that "[w]hen the legislature provides for appeal to circuit court from an administrative agency, the circuit court's appellate jurisdiction depends on compliance with conditions precedent set by the legislature." *Clagget v. Dept. of Revenue*, 464 N.W.2d 212, 214 (S.D. 1990). The Commission asserts that the condition precedent for the Court to have jurisdiction over the granting of a stay is the filing of an appeal. See SDCL 1-26-32. This position is supported by the fact that the Golden West Companies' own arguments, when arguing that the stay should be granted, briefly mention the potential for the likelihood of "success on appeal." Golden West Brief at 5. This begs the question: what appeal? How can the factors regarding whether to grant a stay be considered when there is no appeal on which to evaluate those factors?²

This is not to say that if the Golden West Companies were to now file an actual appeal of the Commission's order granting the request to use the OHE, that this Court would then have jurisdiction. It would not. This Court would still lack the necessary jurisdiction to hear this request for a stay of the Commission's ruling and would be required to dismiss both the appeal and the application for stay.

As mentioned above, this Court's appellate jurisdiction is dependent on complying with any conditions precedent that have been set by the legislature. The conditions precedent regarding judicial review of an agency decision can be found in SDCL 1-26-30 which provides as follows:

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 all 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

² The factors are: (1) the likelihood of success on the merits; (2) whether the petitioner will suffer irreparable injury unless a stay is granted; (3) the absence of substantial harm to other interested persons if a stay is granted; and (4) the absence of harm to the public if a stay is granted. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 241-242 (8th Cir. 1970).

preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Under the statute, a condition precedent is that the person has exhausted all administrative remedies. Although a party is not *required* to request reconsideration in order to exhaust administrative remedies, the Golden West Companies have *chosen* to continue to pursue administrative remedies by filing the Motion for Reconsideration with the Commission. A party should not be allowed to simultaneously request an agency to reconsider its order while at the same time asking a court for a stay and review of the same order. As one court has noted "a party that stays before an agency to seek reconsideration of an order cannot at the same time appear before a court to seek review of that same order, any more than the party could literally be in two places at the same time. *BellSouth Corporation v. FCC*, 17 F.3d 1487, 1489 (U.S. App. D.C. (1994)). As stated by the South Dakota Supreme Court, the failure to exhaust administrative remedies is a jurisdictional defect. *South Dakota Board of Regents v. Heege*, 428 N.W.2d 535, 539 (S.D. 1988). The Court explained that "[a] practical reason for this requirement is that the dispute may be resolved at the administrative level, thus avoiding judicial involvement in the matter." *Id.*

Another condition precedent referenced in SDCL 1-26-30 for obtaining judicial review is that the decision must be a final decision. The Golden West Companies have not met this condition either. The rulings at issue in this case are not final decisions. One of the orders at issue is an order transferring the dockets to the OHE in order that the OHE would act as a hearing examiner for these cases. In a very similar case, the United States Court of Appeals, District of Columbia Circuit heard a party's challenge to an order of the Interstate Commerce Commission ("ICC"). The ICC declined to hear a case itself, instead finding that arbitration was the proper procedure for the dispute. *American Train Dispatchers Association v. Interstate Commerce Commission*, 949 F.2d 413 (U.S. App. D.C. 1991). The Court found the following:

Wherever the outer boundary of the finality doctrine may lie, it is clear that a procedural ruling – an agency order that a party proceed "in one fashion rather than another" – is not a final order. *Aluminum Co. of America v. United States*, 790 F.2d 938, 942 (D.C. Circuit

1986) (*Alcoa*). ("[]f the denial of a procedural right constitutes final agency action, then the doctrine of finality is indeed an empty box.").

Id. at 414.

Moreover, the fact the Golden West Companies have filed for reconsideration has left no doubt that the order is not final. As stated by the Court of Appeals, District of Columbia Circuit, "once a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party. The alternative presents too great a risk of wasting judicial resources without creating any significant benefit." *BellSouth*, 17 F.3d at 1489-1490.

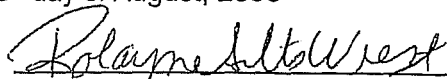
The Commission notes that SDCL 1-26-30 does provide that a party may obtain review of a nonfinal agency ruling, but the condition precedent to obtaining review of such a ruling requires the Golden West Companies to show that "review of the final agency decision would not provide an adequate remedy." The Commission asserts that the Golden West Companies would be unable make this showing.

This discussion regarding whether the Court could hear an appeal of the Commission's decision regarding the OHE brings us full circle to the Commission's initial point regarding the need for an appeal of the underlying decision before the Court can consider a stay: if the Court lacks the jurisdiction to hear an *appeal* of the Commission's decision, how could this Court possibly have the necessary jurisdiction to grant a *stay* of that same decision? The Commission believes that the simple answer is that the Court does not have such jurisdiction.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the Court deny the Golden West Companies' Application for Stay.

Dated at Pierre, South Dakota, this 8th day of August, 2006



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CERTIFICATE OF SERVICE

I hereby certify that the original and a copy of Brief in Opposition of Application for Stay from Order of the South Dakota Public Utilities Commission Transferring Proceedings to the Office of Hearing Examiners were delivered to Judge Max A. Gors and copies were served on the following electronically and by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 8th day of August, 2006.

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