GUNDERSON, PALMER, GOODSELL & NELSON, LLP

ATTORNEYS AT LAW

J. CRISMAN PALMER
G. VERNE GOODSELL
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-VARNS
SARA FRANKENSTEIN
AMY K. KOENIG
JASON M. SMILEY
SHANE C. PENFIELD
JONATHAN M. OOSTRA

WYNN A. GUNDERSON
Of Counsel

September 6, 2006

VIA FAX 605-773-3809
Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre SD 57501

VIA FAX 1-605-224-7102
Darla Pollman Rogers
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, South Dakota 57501

VIA FAX 1-605-773-3809
Rolayne Ailts Wiest
SD Public Utilities Commission
500 E Capitol Avenue
Pierre SD 57501

VIA FAX: 605-224-1637
Richard Coit
SD Telecommunications Association
PO Box 57
320 E Capitol Ave
Pierre SD 57501-0057

FROM: **Talbot J. Wieczorek**

RE: Western Wireless License LLC
GPGN File No. 5925.050089

NUMBER OF COPIES TRANSMITTED INCLUDING THIS SHEET: 37

COMMENTS:

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GUNDERSON, PALMER, GOODSELL & NELSON, LLP

ATTORNEYS AT LAW

J. CRISMAN PALMER
G. VERNE GOODSELL
JAMES S. NELSON
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SHANE C. PENFIELD
JONATHAN M. OOSTRA

WYNN A. GUNDERSON
Of Counsel

September 6, 2006

VIA FAX 605-773-3809
Patricia Van Gerpen
Executive Director
SD Public Utilities Commission
500 E Capitol Avenue
Pierre SD 57501

RE: WWC's Complaint against Golden West Companies Regarding Intercarrier Billings
Docket CT 05-001 GPGN File No. 5925.050089

Dear Ms. Van Gerpen:

Attached you will find WWC's Brief in Support of Its Amended Complaint. I will be providing you the original and ten copies via mail.

If you have any questions, please contact me.

Sincerely,

Talbot J. Wieczorek

TJW:klw
Enclosures
c: (w Encl) Darla Pollman Rogers via fax 605-224-7102
Rich Coit via fax 605-224-1637
Rolayne Wiest via fax 605-773-3809
Client

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Complaint WWC License LLC against Golden West Telecommunications Cooperative, Inc. Vivian Telephone Company; Sioux Valley Telephone Company; Union Telephone Company; Armour Independent Telephone Company; Bridgewater-Canistota Independent Telephone Company; and Kadoka Telephone Company	)	DOCKET NO. CT05 - 001 WWC'S BRIEF IN SUPPORT OF ITS AMENDED COMPLAINT

COMES NOW, WWC License LLC, (hereinafter "WWC"), and hereby submits this Brief in Support of its Amended Complaint dated September 7, 2005, setting forth its claims against Golden West Telecommunications Cooperative, Inc., Vivian Telephone Company, Sioux Valley Telephone Company, Union Telephone Company, Armour Independent Telephone Company, Bridgewater-Canistota Independent Telephone Company and Kadoka Telephone Company (hereinafter jointly referred to as the "Golden West Companies").

This brief will set forth the facts and law supporting the claims asserted in the Amended Complaint. The brief will not address legal issues or claims where the Golden West Companies have the burden of proof, such as defenses against the claims asserted by WWC or counterclaims asserted against WWC. These items will be addressed in WWC's reply and response brief.

Citations to the hearing transcript pages will be made as "HT ____." WWC License, LLC will be referred to as "WWC" and the Defendant telephone companies will be referred to jointly as "Golden West Companies" or be referred to individually if the context of the argument or facts relates only to one company. Intervenor, South Dakota Telecommunications Association will be referred to as "SDTA." The South Dakota Public Utilities Commission will be referred to as "Commission." References to WWC exhibits will be made as "WWC Hearing Ex.___"

while references to exhibits entered into the record by the Golden West Companies will be referred to as "GW Hearing Ex. ____."

BACKGROUND

This litigation arises out of an interconnection agreement that terminated on December 31, 2002, and the Parties' subsequent attempt to renegotiate and arbitrate a replacement agreement. When the Parties' original interconnection agreement was set to terminate, the Parties attempted negotiation, but, when unable to come to terms, an arbitration was filed in front of this Commission. *See* In the Matter of the Petition for Arbitration on Behalf of WWC License L.L.C. with Certain Independent Local Exchange Companies, TC 02-176. That arbitration was resolved by agreement of the Parties. *Id. See* Order Dismissing and Closing Docket dated February 25, 2004. While the Parties settled the arbitration in March of 2003, HT 34, Lns 19-24, the Parties did not reach agreement on the terms of an interconnection agreement that would have retroactive effect to January 1, 2003, until late 2003.

SDTA originally negotiated the terms of the Reciprocal Interconnection, Transport and Termination Agreement (hereinafter "the Interconnection Agreement") on behalf of its members. SDTA's representation in the negotiation included the Golden West Companies that are Parties to this action. HT 25, Lns 2-5, HT 532, Lns 20-23.

Subsequent to SDTA and WWC agreeing to the terms of the Interconnection Agreement, WWC entered into an Interconnection Agreement based on this template with each of the Golden West Companies with the exception of Kadoka Telephone Company (hereinafter "Kadoka.") Regarding Kadoka, the Interconnection Agreement was not entered into as a result of an oversight between the Parties that might have occurred because Golden West Cooperative was in the process of purchasing the Kadoka exchange during 2004. HT 69. Regardless, the Parties

operated as though an Interconnection Agreement had been entered into between Kadoka and WWC. *Id.*

The terms of the Interconnection Agreements were identical for all the companies involved with the exception that each individual ILEC name appeared in the Interconnection Agreement and the appendices attached to the agreement provided companies' specific rates, calculations and calling area information. The appendices varied somewhat from company to company. *See* GW Hearing Ex. 1.

Pursuant to 47 U.S.C. § 252(a), the executed agreements were submitted to this Commission for approval. Pursuant to 47 U.S.C. § 252(e), this Commission subsequently approved, without revision, the Interconnection Agreements as executed on the following dates:

Company	**Signature Date**	**Approved Date**
WWC and Golden West - TC04-043	January 28, 2004	May 13, 2004
WWC and Vivian Telephone Co.- TC04-070	February 18, 2004	June 30, 2004
WWC and Sioux Valley Telephone Co. - TC04-196	April 15, 2004	October 20, 2004
WWC and Union Telephone Co. - TC04-132	June 4, 2004	August 26, 2004
WWC and Armour Independent Telephone Co. – TC04-130	June 4, 2004	August 26, 2004
WWC and Bridgewater-Canistota Telephone Co. – TC04-131	June 4, 2004	August 26, 2004

See WWC Hearing Ex. 3 and GW Hearing Ex. 1.

During the time the Interconnection Agreement terms were being negotiated, Golden West Companies requested that WWC to continue to pay at the expired rates with an understanding that the payments would be "trued up" once the new rates were in place. HT 25, Lns 2-5; HT 33, Ln 22; HT 34, Ln 8. This request was made by SDTA who was acting on behalf of the Golden West Companies and other ILECs. *Id.* WWC only agreed to pay under the old

rates based on the understanding that a true up calculation would be completed and the amounts refunded in a timely manner. SDTA acknowledged WWC was to be repaid. HT 205, Lns 1-16.

After the Interconnection Agreements had been signed by the Parties, WWC's accounting department made several requests for true up. The department requested true up based on the rates effective from January 1, 2003. HT 34, Lns 25 through HT 35, Ln 9. Golden West did not perform a true up at that time. Following the approval of the last Golden West Company, Sioux Valley Telephone Company, Interconnection Agreement by the Commission on October 20, 2004, the Golden West Companies calculated the amount due to WWC and provided a letter setting forth the amount WWC was owed based on a recalculation using the new reciprocal compensation rates and the 3% interMTA factor. *See* WWC Hearing Ex. 4. The letter dated December 1, 2004, came from Dennis Law, Regional Manager of Golden West Telecommunications. *Id.* The amounts the Golden West Companies determined were owed to WWC were as follows:

Company	Credit Amount
Golden West Telecommunications Coop.	$298,380.32
Vivian Telephone Company	$155,490.18
Sioux Valley Telephone Company	$ 49,833.02
Union Telephone Company	$ 14,610.54
Armour Independent Telephone Co.	$ 10,797.83
Bridgewater-Canistota Telephone Co.	$ 5,721.77
Kadoka Telephone Company	$ 2,722.25

The letter declared the Golden West Companies had decided that these amounts would be credited against future invoices and not refunded. *Id.* The total amount that the Golden West Companies acknowledged as of December 1, 2004, being due to WWC was $537,555.91.

Mr. Law's letter makes no claim that the Golden West Companies were entitled to any setoffs against these amount nor does Mr. Law's letter make any claim that the money was being

withheld based on some violation of the Interconnection Agreement by WWC. The letter simply concludes that WWC would be reimbursed through credits for future use. Using the November calculations based on the new Interconnection Agreement, the total terminating charge for Golden West Cooperative was $15,480. *See* GW Exhibit 25. Thus, assuming a usage average of that amount, it would take almost 20 months before the credit would have been paid.

After receipt of this letter, Ron Williams, on behalf of WWC, contacted and discussed the matter with Mr. Law and then on January 14, 2005, Mr. Williams replied to Mr. Law's December 1st letter, providing recalculations of the amounts due based on the information provided by Golden West. *See* WWC Hearing Ex. 5 and HT 38, Lns 14-25. At the time of sending this letter, WWC did not know that the Golden West Companies had been using exclusively intrastate rates in calculating the amount due under the 3% interMTA factor found under Section 7.2.3 of the Interconnection Agreement. HT 38, Ln 11. In the letter, WWC pointed out that it had "made good faith payments of Golden West invoices that were based on high rates associated with a terminated interconnection agreement while the terms of the new interconnection agreement were resolved. These payments were made by Western Wireless and accepted by the Golden West Companies with the knowledge that any overpayment would be reimbursed upon completion of a new interconnection agreement." WWC Hearing Ex. 5. WWC demanded interest on the money since the "Golden West Companies have had use of substantial amount of Western Wireless's funds for two years and they have not compensated Western Wireless for the use of those funds." WWC Hearing Ex. 5. WWC requested the immediate repayment of $637,698.83, the sum of all balances owed and interest to date on the overpayments known at that time. *Id.*

By the time WWC sent its letter on January 14, 2005, the Golden West Cooperative

agreement had been signed for almost one year. *See* WWC Hearing Ex. 3. Further, the Golden West Companies themselves had known for as long as ten months, based on the signature dates, the applicable rates under the new agreement prior to performing the recalculation of traffic and determining the amount the Golden West Companies owed WWC. HT 34, Lns 19-24. Moreover, the new reciprocal compensation rates had been agreed to since the settlement agreement of March 2003, but had not been implemented by the Golden West Companies. HT 34, Lns 19-24. *Id.*

The Golden West Companies, through Mr. Law, responded by asserting they would not negotiate on paying WWC the money it was due unless WWC acquiesced to other demands of Golden West unrelated to the overpayment. *See* WWC Hearing Ex. 6, Law letter of January 25, 2005. After receipt of this letter and the failure to negotiate a resolution, WWC brought a complaint against the Golden West Companies in front of this Commission seeking a refund. The complaint was based on SDCL Chapter 49-13 and was a complaint against the Golden West Companies for failing to refund overpayments in violation of both statutory law and case law.

Through the process of discovery after the filing of the complaint, it was determined by WWC that the Golden West Companies were using intrastate rates to calculate the amount due for all the minutes of use derived using the 3% interMTA factor under the agreement. In the Interconnection Agreement, the Parties had stipulated to using an agreed upon percent of interMTA use (PIU) factor. WWC Hearing Ex.1, Section 7.2.3. This 3% factor was to be applied against the total amount of minutes delivered by WWC to Golden West Companies. The resulting minutes, in this case the total number of minutes delivered times 3%, was then being taken by the Golden West Companies times the intrastate rate. The use of 100% intrastate rates to calculate the charge for interMTA use, was contrary to the understanding of WWC. HT 65,

Lns 6-12, and in the amended complaint WWC's claim was amended to include a request for overpayment based on the Golden West Companies' use of intrastate as opposed to interstate rates for the derived interMTA minutes.

Regarding the rate to apply to the interMTA 3% agreed upon factor, Ron Williams testified that the Parties had agreed to use the interstate rate as the appropriate rate for the interMTA minutes. HT 65, Lns 6-12. WWC, when calculating the refund amount due for the 3% interMTA matter, used the interstate rate. HT 48, Lns 21-23. Testimony by the Golden West Companies was that Mr. Law unilaterally decided to use the intrastate rate in his calculations. HT 539. *See also* HT 462, Lns 1-40.

Section 2.1 of the Agreement states "InterMTA traffic is subject to telephone companies' interstate or intrastate access charges." The Golden West Companies' witness, Dennis Law testified the Agreement does not specify or define in any way how one would determine whether to charge interstate or intrastate rates when using the 3% interMTA factor. HT 539, Lns 1-4. The Agreement does provide a definition of "interMTA traffic" as "all wireless to wire line calls, which originate in one MTA and terminate in another MTA based on the location of the connecting cell site serving the wireless end user and the location of the end office serving the wire line end user." However, no where in the Agreement does it provide how the minutes derived using the interMTA factor would be split between interstate or intrastate. HT 64, Lns 25 through HT 65, Ln 5. When directly asked whether any provision of the Interconnection Agreement allowed the Golden West Companies to bill the interMTA minutes at exclusively intrastate rates, Mr. Law stated: "There is nothing in the agreement that allows me to do that." HT 519, Lns 1-2. *See* also HT 543, Lns 1-4.

The Amended Complaint also included a claim for refund of transiting costs paid. The

Interconnection Agreement specifically provides the "agreement is not intended to establish any terms, conditions or pricing applicable to the provision of any transiting service." *See* WWC Hearing Ex. 1, p. 1, ¶ 8, last sentence.

Ron Williams testified that during the negotiations of the interconnection agreements, Vivian and Golden West presented their network as a unified network. HT 77, Lns 23 through HT 78, Ln 12. Based on this unified network, reciprocal compensation rates were agreed to and it was the Parties' understanding that such rates entailed all trafficking costs and charges. *Id.*

It is undisputed that Vivian is owned by the Golden West Telecommunications Cooperative. HT 423, Lns 12-13. Mr. Law admitted that as a wholly owned subsidiary, the companies share the same board members but they have different officers amongst these members. HT 558, Lns 23-25. To the end user, Vivian does not even exist. All the end users of Vivian contact Golden West and work through Golden West to resolve all issues. HT 555, Lns 1-15, HT 556, Lns 1-16. Not all carriers are charged transiting over this route. For example, Qwest does not pay Golden West transiting for calls to Vivian. HT 537, Lns 24 through HT 538, Ln 1. When WWC was paying under the old rates as agreed to the Golden West Companies' agent, SDTA, they were paying the old transiting rates found under the pre-existing Interconnection Agreement. HT 77, Lns 13-17. However, as part of the new interconnection agreement, transiting was dropped and Golden West Cooperative did not seek a separate transiting agreement. HT 80, Lns 21-25. This is because the transport rates calculated as part of their reciprocal compensation agreement were seen by the Parties to incorporate all transport including any alleged transiting on the Golden West Companies' integrated network. HT 78, Lns 22 through HT 79, Ln 15. Since there was no transiting agreement and these rates were part of the transport of the integrated network, WWC's Amended Complaint requested a refund of

these amounts paid.

Mr. Williams pointed out that transiting is not paid in the industry to affiliated companies generally because affiliated companies can then "game the system" to increase charges. HT 834, Lns 8-12. An example of this arises out of the fact that Vivian does not pay transiting to Golden West to carry its traffic across the same route when delivering calls to carriers such as WWC. HT 834, Lns 17 through HT 835, Ln 3. Therefore, the network is integrated for the benefit of Vivian but it appears Golden West Cooperative takes the position it is not integrated for the purposes of other carriers.

The transiting need arises out of the requirement by Vivian to deliver all traffic over the Golden West integrated network. Golden West picks up WWC's traffic bound for Vivian's Custer switch at the Qwest meet point on Skyline Drive in Rapid City. The transiting is then charged at a rate per minute per mile that was established in the Interconnection Agreement that expired on December 31, 2002. HT 78, Lns 22 through HT 79, Ln 15. This route goes down through Hot Springs and then up into Custer. The traffic is not switched but is picked up and carried through this route to Vivian's Custer switch. *Id.* HT 77, Lns 5-9. The direct link between Rapid City and Custer was terminated when Vivian acquired the wire center. HT 182, Lns 13-20.

LEGAL ANALYSIS

The Amended Complaint arises out of the complaint procedure found under SDCL Ch. 49-13. An individual or company has the right under that chapter to bring a complaint for any damages a telecommunications company may have caused. S.D.C.L. § 49-13-1.1.

In this matter, the claims in the Amended Complaint are that the Golden West companies have failed to follow the Interconnection Agreement in their billing for services. The

Interconnection Agreement established the billing relationship between WWC and the Golden West Companies and this relationship was approved by and endorsed by the Commission by its Order Approving the Interconnection Agreements between the Parties. Thus, when a party fails to follow an Interconnection Agreement or bill according to an Interconnection Agreement they violate their obligations under 47 U.S.C. §§ 251 and 252 as established by the Interconnection Agreements.

In this matter, all the Golden West Companies have violated the Interconnection Agreement through their failure to refund overpayments when requested by WWC. By failing to refund an overpayment when requested by the paying party, the Golden West Companies have over-billed WWC for traffic delivered for the majority of the term of the Interconnection Agreement that was in place for traffic delivered from January 1, 2003 through December 31, 2005.

As to Golden West cooperative, a violation has also occurred through the billing of transiting. The Interconnection Agreement does not provide for a transiting charge. The Golden West Cooperative and Vivian presented their networks as an integrated network for cost analysis for calculating reciprocal compensation and reaching agreeable Interconnection Agreements. Golden West Cooperative actions of charging for transit results in a charge not approved by the Commission or agreed to by the Parties.

I. THE INTERCONNECTION AGREEMENT CONTROLS THE RELATIONSHIP OF THE PARTIES AND THE EVIDENCE AT HEARING SUPPORTS A FINDING THAT THE RETROACTIVE APPLICATION OF THE RATES TO JANUARY 1, 2003 WAS APPROPRIATE AND THAT THE MINUTES DERIVED USING THE 3% INTERMTA FACTOR WOULD BE BILLED AT INTERSTATE RATES USING THE ACTUAL ROUTE THE TRAFFIC TRAVERSES.

A. The Interconnection Agreements Provided for and Required Retroactive Rate Application to January 1, 2003 and such Retroactive Application was Appropriate.

The Interconnection Agreement is clear on its face. Paragraph 13.1 of every Interconnection Agreement provides that the Agreement will apply to traffic delivered on or after January 1, 2003. Although counsel for the Golden West Companies implied that the Golden West Companies may contest this retroactive date, Dennis Law, the corporate witness for the Golden West Companies clearly testified that Golden West was not making such a request. HT 529, Lns 18-25. Furthermore, any such argument would be without merit.

The Interconnection Agreements between the Parties are voluntary negotiated interconnection agreements whose terms were reached between the Parties and presented to this Commission pursuant to 47 U.S.C. § 252(e). Any voluntarily negotiated Interconnection Agreement must be submitted to the State Commission for approval or rejection. If the Commission rejects any terms within the agreement or rejects the agreement it must do so with written findings as to the agreement's deficiencies. 47 U.S.C. § 252(e)(1). Federal law limits the grounds the Commission can use to reject an interconnection agreement. 47 U.S.C. § 252(e)(2). These grounds are limited to findings that the interconnection agreement discriminates against telecommunications carriers not a party to the agreement, implementation of such an agreement or portion would not be consistent with public interest, convenience, and necessity or the agreement fails to meet the requirements of 47 U.S.C. § 251.

As illustrated in Golden West hearing, Exhibit 2, the Commission made no changes and presented no findings setting forth deficiencies within these Interconnection Agreements. Thus, the Commission approved the retroactive application of the rates established under the Interconnection Agreement. If either of the Parties had objection to the retroactive application that they had agreed to within the body of the agreement, 47 U.S.C. § 252(e)(6) provides an exclusive appeal remedy for review of the Commission's actions. To the extent Golden West's

counsel in the opening statement that Golden West is seeking now to have the Commission revisit its approval of the voluntarily negotiated Interconnection Agreements, such action would be inappropriate as the Commission's action originally approving the Interconnection Agreement would be deemed final as there was no appeal from the Commission's approval of the agreements.

B. With the Exception of What Rate to Charge for the Minutes Derived Using the 3% InterMTA Factor, the Interconnection Agreement Clearly Sets Forth the Reciprocal Compensation Rates.

The appendices to each of the Interconnection Agreements set forth the agreed upon reciprocal compensation rates. A review of the rate and cost analysis submitted by both Parties, WWC Hearing Ex. 21 and GW Hearing Exs. 25 and 52, reveals that the same reciprocal compensation rates and traffic factors were used by both sides when applying the new Interconnection Agreement rates on factors to the traffic delivered. The Parties' disputes on rates revolve around what rate is the appropriate rate to use for the derived InterMTA minutes, how to calculate the reciprocal compensation amount due WWC and, as to Golden West Cooperative, whether any transiting can be changed.

C. The Interstate Rate is the Appropriate Rate to Use when Calculating the Amounts Due for the Minutes Derived when Using the 3% InterMTA Factor.

Mr. Law, the Golden West Company's corporate witness at the hearing, acknowledged that the Interconnection Agreements do not set forth what rate to use when calculating a bill for the minutes derived using the 3% interMTA factor. Mr. Law testified he simply chose the intrastate factor himself without regard to the Agreement. HT 519, Lns 1-2; *See* also HT 461-463.

While the Interconnection Agreement at § 2.1 provides that InterMTA traffic may be subject to interstate or intrastate charges, the Agreement fails to clarify how to allocate or

apportion the minutes derived using the 3% intraMTA factor between those minutes subject to interstate rates and those minutes subject to intrastate rates. Furthermore, no where in the Agreement is one granted the ability to decide what rate to charge.

Since the Agreement does not specify what rate to use or how to allocate these minutes between interstate and intrastate rates, it is appropriate to consider the testimony regarding the intent of the Parties. *See* Haback v. Sampson, 221 N.W.2d 483, 486 (S.D. 1974) (Holding parol evidence admissible when contract ambiguous). *See* also, Quick v. Bahke, Kopp, Ballow McFerlin, Inc., 390 N.W.2d 364, 366 (SD 1986); Jensen v. Pure Plant Food, Int'l, 274 N.W.2d 261, 264 (SD 1979). The only testimony submitted in this hearing by anybody involved in the negotiation and derivation of the terms of the Agreement was the testimony of Ron Williams. Mr. Williams clearly testified that it was his understanding the Parties had agreed to use the interstate rate. HT 65, Lns 6-12. This testimony was never contradicted and the Golden West Companies did not call a witness involved in drafting the Agreement to testify otherwise. Being that the testimony is uncontradicted, and that there is no provision of the contract addressing this issue, Mr. Williams' testimony is the only evidence on this issue. Therefore, the use of interstate rates is the only conclusion supported by the evidence.

D. S.D.C.L. §§ 49-31-109 through 115 are not applicable to this Agreement as the Agreement's Effective Date is January 1, 2003, Predating the Statutes, and, as Applied to CMRS Carrier the Statutes are Pre-empted by Federal Law.

S.D.C.L. §§ 49-31-109 through 115 were passed in the legislative session of 2004. Generally, those statutes address signaling information required when delivering local or nonlocal traffic. The Golden West Companies have alluded to the statutes as somehow being a base for charging

all interMTA calls at 100% intrastate rates. To the extent the Golden West Companies may rely

on these statutes, their reliance is misplaced.

The statutes became effective on July 1, 2004. Every Interconnection Agreement was signed by both Parties prior to the effective date of the statutes. WWC Hearing Ex. 3 and GW Hearing Ex. 1.[1]

Additionally, these statutes are invalid when applying them to a CMRS carrier. CMRS carriers are controlled by federal law and signaling information and traffic issues are controlled by federal law.

1. Because S.D.C.L. §§ 49-31-109 through 49-31-115 did not Become Effective Until After the Interconnection Agreements were Signed by the Parties, They Do not Apply to These Agreements.

Every one of these Interconnection Agreements were voluntarily entered into by the Parties and executed by the Parties prior to July 1, 2004. The Interconnection Agreements are retroactive to January 1, 2003. The Parties agreed to the terms under the existing law at the time the terms were executed. S.D.C.L. §§ 49-31-109 through 49-31-115 were passed during the 2004 legislative session and, as this Commission has duly taken judicial notice of, did not become law until July 1, 2004.

The South Dakota Supreme Court has noted that when Parties enter into a contract a change in the law cannot be read retroactively to override the terms the contract. Matter of Estate of Gab, 364 N.W.2d 924, 926 (S.D. 1985). In Gab, the deceased had entered into a postnuptial agreement with his wife. Subsequently, the statutory law in South Dakota changed to grant spouses the right to an elective share against the spouse's estate even if a pre or post nuptial

[1] As acknowledged at the time of the hearing, no final Interconnection Agreement was ever signed between Kadoka and WWC. However, the Parties operated as if an identical Interconnection Agreement was signed and a 2.9 cent per minute reciprocal compensation rate was used. It is WWC's position that should Kadoka be treated as not having an agreement Kadoka and WWC would be in a bill and keep relationship since January 1, 2003 entitling WWC to an entire refund plus interest of all payments made to Kadoka.

agreement existed. *Id.* at 925. The South Dakota Supreme Court determined that a subsequent change to law could not change the contractual obligations of a party when the law was passed after the contract was entered into by the Parties. The Supreme Court relied on S.D. Const., Art. VI, § 12 which prevents a new law from impairing the obligations of contracts between Parties. Having entered into the agreements prior to July 1, 2004, the Golden West Companies and WWC are bound to the law that existed at that time.

2. Even if 49-31-101 et. seq. could be Retroactively Applied to these Agreements, They are Preempted Under Federal Law in the Case of CMRS Carriers.

The statutes passed by the legislature in 2004 attempt to grant LECs the ability to determine the signaling information a CMRS carrier must deliver to them or to simply choose to charge all calls at intrastate rates. The statutes attempt to impose a standard on CMRS carriers and control the relationship between CMRS carriers and other telecommunications companies. This legal relationship falls within the control of federal law based on federal statutes, FCC rules and decisions and the State of South Dakota statutory effort to grant LECs special rights within this relationship fails under the preemption doctrine.

The South Dakota Supreme Court has articulated the preemption doctrine as follows:

> Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid. The ways in which federal law may pre-empt state law are well established and in the first instances turn on congressional intent.

Dakota Systems, Inc. v. Viken, 2005 SD 27, ¶ 25, 694 N.W.2d 23, 33 (*quoting* Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604-05, 111 S.Ct. 2476, 2481-82 (1991)). In analyzing congressional intent, the Eighth Circuit has set forth three distinct circumstances under which preemption may be found,

(1) ...when Congress expressly forbids state regulation (express preemption);
(2) when it creates a scheme of federal regulation so pervasive that the only reasonable inference is that it meant to displace the states (field preemption); and
(3) when a law enacted by it directly conflicts with state law (conflict preemption).

Wuebker v. Wilbur-Ellis Co., 418 F.3d 883, 886 (8th Cir. 2005)(*citing* English v. General Elec. Co., 496 U.S. 72, 78-79 (1990)). Under the 1996 Telecommunications Act, as codified at 47 U.S.C. 252, Parties are directed to negotiate rates and terms related to the exchange of traffic between each Parties' network. In the cases where Parties are unable to reach a resolution, State Commissions are authorized to arbitrate a final resolution based on the federal act and FCC rules. *See* 47 U.S.C. § 252(b). Within these relationships, the FCC since 1996 has contemplated that wireless carriers may need to deliver both inter and intraMTA traffic to local exchange carriers. *See* In the Matter of the Implementation of Local Competition Provisions of the Telecommunications Act of 1996, Docket No. 96-98, 11 FCCR 15499, FCC 96-325, First Report and Order (1996) at ¶ 1044 (hereinafter "First Report and Order"). The FCC clearly directed resolution of the issue of rating that traffic to occur within the federal legislative frame-work of 47 U.S.C. §§ 251 and 252. The South Dakota Legislature now has disagreed with the FCC's determination and has deemed negotiations and arbitration under 47 U.S.C. §§ 251 and 252 insufficient to resolve these issues.

The South Dakota Legislature has now mandated in state statutes that signaling information must accompany all calls and empowered LECs to choose its highest billing rate for traffic delivered by CMRS carriers. The state statutes grant local exchange carriers the ability to charge at intrastate rates intraMTA traffic. *See* SDCL § 49-31-110. However, such a result is clearly preempted as the FCC has recognized that intraMTA calls for CMRS carriers are considered local and subject only to access rates and not toll rates. First Report and Order ¶

1036; *see also*, 47 C.F.R. § 51.701. To the extent that the statues are read to allow all interMTA calls to be rated as intrastate calls, the statutes have the same infirmity.

The evidence clearly shows that there is not an accurate way to provide this information as there is neither standard signaling information nor "commonly accepted industry standard" within the industry for CMRS carriers to provide MTA or originating points of calls. The FCC under the First Report and Order recognized this fact and required how to charge for traffic be resolved through negotiations of interconnection agreements or through arbitration by the Parties. First Report and Order ¶ 1044.

State commissions' powers are limited in performing an arbitration and clearly a state commission under 47 U.S.C. 252 cannot mandate requirements such as signaling information or other standards that are not specifically enumerated as within the commission's power. The federal law controls those relationships and the South Dakota Legislature cannot "back door" in any obligations on CMRS carriers that conflict with federal law and federal established procedure. As such, the South Dakota statutes, to the extent they apply to CMRS carriers, are unconstitutional in that they conflict with federal law and state regulation has been displaced through federal statute, FCC rulemaking and decisions.

E. When Calculating the Interstate Rate Due, the Appropriate Method to Use is the Actual Route of the Traffic and not a "Phantom Route" that the Golden West Companies Propose.

When calculating the interstate rate applicable to the interMTA traffic, WWC used the tariffs and the actual route traversed by WWC call traffic to the Golden West Companies. HT 54 - 57. In some situations, even WWC's calculations are slightly overstated because in areas where there is some direct interconnections that are primarily used to pick up traffic those direct interconnects are occasionally used to deliver traffic to the Golden West Company. In these

situations, Williams assumed all traffic being delivered through the Qwest meet point resulting in an overstatement for that traffic that may be delivered over the direct interconnect. HT 58, Lns 7-12.

Rather than using the actual route the traffic traverses, the Golden West Companies used a fictitious or phantom route by assuming that all traffic went through the SDN tandem in Sioux Falls. HT 58, Lns 17 through HT 59, Ln 10. Using this fictitious route, the Golden West Companies increased the interstate rates substantially, especially for Golden West Cooperative and Vivian. HT 50, Lns 16-25; WWC Hearing Ex. 9, P 3. This results because the fictitious route used by the Golden West Companies increases the miles the traffic travels by hundreds of miles. *Id.*

For example, by using the fictitious route the mileage Golden West comes up with for traffic delivered to the Pine Ridge switch is 296 miles. *See* GW Hearing Ex. 16. WWC has a direct interconnect with that switch so mileage is actually zero. For switches where WWC does not have a direct interconnect, WWC uses the Qwest tandem and Qwest carries the traffic to its meet point with the Golden West Companies. WWC Hearing Ex. 9. In a great number of the cases, this mileage is significantly less than the fictitious route mileage used by Golden West Companies in their calculations. *See* WWC Hearing Ex. 9. Again, the exaggerated miles is especially egregious and severe when looking at Vivian and Golden West Cooperative.

During the hearing, Golden West asserted that it could determine the rate for terminating interstate traffic based upon the use of this fictitious route under the guise of the authority stated in the case of In re the Application of SDCEA, Inc., 5 F.C.C.R. 6978 (1990). Relying upon In re SDCEA, Golden West asserted that all terminating interstate traffic has to be rated as if it was delivered over South Dakota Network, Inc. ("SDN"), which includes a transport charge from the

tandem switch in Sioux Falls even though WWC's traffic is not delivered by this route.

Golden West's reliance upon In re SDCEA is entirely misplaced. The relationship of the Parties and the terms of their contractual relationship are not dictated by an FCC decision that predates the Telecommunications Act of 1996 and only applies to an interexchange carrier ("IXC). Rather, the relationship between the Parties is governed by a contract required by federal law, and accepted and approved by the Commission. In the event the Commission determines In re SDCEA does have any bearing upon the outcome of this situation, however, it must consider and apply US West Communications, Inc. v. PUC, 505 N.W.2d 115 (S.D. 1993).

In this previous case, SDCEA sought "authority to lease and operate transmission and switching facilities for the purpose of providing centralized equal access services to bring the benefits of equal access for interstate and intrastate competitive services to the subscribers of twelve independent local exchange telephone companies[.]" *Id.* SDCEA was wholly owned by SDN. *Id.* Northwestern Bell Telephone Company (NWB) disputed portions of the application, arguing that it had the right to terminate IXC traffic over any available facility and should not be required to use SDN's network. *Id.* at 6980.

Relying on a prior decision, In re the Application of Iowa Network Access Division, 3 F.C.C.R. 1468, the FCC rejected the arguments. *Id.* at 6981. The FCC's decision, however, does not apply outside the context of a relationship between a LEC and an IXC. The case has no bearing upon the relationship of LEC's and a CMRS carrier such as WWC.

WWC is not an IXC. Although an IXC and a CMRS are both telecommunication carriers, *see* 47 C.F.R. § 51.5, they are clearly not identical. IXC's deliver "interexchange traffic," a term of art that "correlates to what consumers would traditionally consider to be 'long-distance' telephone service for which 'toll charges' are incurred[.]" Iowa Network Services, Inc.

v. Quest Corp., 385 F.Supp.2d 850, 860 (S.D. Ia. 2005). This definition is consistent with the terms of the Interconnection Agreements ("IXC means a telecommunications carrier that provides toll telephone service...") and with federal regulations that define an IXC as "a telephone company that provides telephone toll service." 47 C.F.R. § 64.4001. A CMRS provider is entirely distinguishable. Section 64.1001 recognizes this fact, indicating that "[a]n interexchange carrier does not include commercial mobile radio service providers as defined by federal law." *Id.* Simply because a CMRS provider may deliver some traffic that is toll traffic does not make it an IXC and is not sufficient to apply the outdated rationale of In re SDCEA to the facts of this current matter.

A decision applicable to an IXC with limited facilities in South Dakota cannot be automatically extended to include a CMRS such as WWC. In the case involving the IXC, the FCC placed a significant amount of emphasis upon the fact that the mandatory use of the central switch did not differ significantly from the normal access of the IXC to the LEC's network. The same cannot be said under this present situation. WWC has its own established network capable of delivering traffic to switches much closer to the traffic's end destination than Sioux Falls. The normal access of WWC to Golden West's network was not through a limited number of switches, but rather though an entire network of established facilities. WWC has its own switches in both Sioux Falls and Rapid City, intermachine trunking between those switches and additionally has built out its network to allow direct interconnection with some of the Golden West Companies.

Finally, In re SDCEA predated the Telecommunications Act of 1996, the federal law that now controls the relationship of the Parties. Pursuant to 47 U.S.C. § 252, the Parties to this dispute were required, voluntarily or involuntarily, to enter into a contractual relationship with

respect to the applicable rates, compensation, and terms regarding the transmission of telecommunication traffic. The Parties voluntarily entered the Interconnection Agreements and the terms of the contract control the relationship of the Parties. There is no support within the contract for Golden West's argument. The SDN network is not referenced; there is no language requiring that WWC utilize SDN; and no requirement that the Parties determine the interstate rate through the use of the fictitious route suggested by Golden West. To the contrary, provisions in the Agreement suggest the opposite.

Section 4.3 of the Agreement specifically allows WWC to deliver traffic to its destination via any third party provider through an indirect connection. Moreover, throughout the term of the Agreement WWC connected to the Golden West network at various locations in South Dakota. The Interconnection Agreements contemplated direct connections at different locations for the transfer of traffic and this is exactly what occurred. Any argument that the terminating interstate access rate must be based upon a fictitious route, when the use of the SDN network is not required, the contract allowed for the use of alternative connections, and the Parties utilized these alternative routes as a means of delivering traffic to the destination, is simply untenable.

In short, the FCC authority that predates the Telecommunications Act of 1996, applies only to an IXC carrier and is trumped by the Interconnection Agreements. This previous decision does not support Golden West's assertion that the terminating interstate access rate should be based upon a fictitious route. In re SDCEA is distinguishable and, considering the terms of the Interconnection Agreements and the facts and circumstances of this matter, cannot be utilized to support Golden West's argument.

To the extent that In re SDCEA is of any consequence in this matter, the Commission's decision concerning the appropriate terminating interstate access rate must be guided by the

Supreme Court's US West decision. In one administrative proceeding addressed by US West, the Commission ordered, among other things, that "all interexchange carriers shall connect at SDN's tandem switch at or near Sioux Falls to gain access to the SDN member exchanges[.]" April 12, 1991 Amended Order Granting Construction Permit and Approving Tariff F-3860. SDN and SDCEA were essentially provided a monopoly over all switched access service. US West, 505 N.W.2d at 125. On appeal, the Supreme Court recognized that the Commission order would prohibit US West Communication ("USWC") from carrying long distance traffic over its own facilities and would be required to deliver all long-distance traffic to the SDN switch in Sioux Falls. *Id.* at 119. USWC challenged the constitutionality of the Commission order that mandated SDN's monopoly over terminating switched access telecommunications traffic. *Id.* at 125.

The Court ultimately determined that the Commission could compel access at the Sioux Falls tandem switch facility. Id. at 127. However, the Court also held that such an act entitled the company to compensation for inverse condemnation. *Id.* at 127-128. The Court recognized that "the PUC's order mandating USWC to turn over its telecommunication traffic at the SDN tandem in Sioux Falls unconstitutionally deprives them of their property by not allowing the haul to be completed over USWC's own facilities." *Id.* at 127. Similar logic must apply to this matter.

If the Commission allows the Golden West Companies to utilize a fictitious route in determining the applicable terminating interstate access rate, the principles explained in US West are equally applicable in this matter because, in effect, WWC would be deprived of the use of its own network's capabilities in delivering interMTA traffic to locations near to the destination. HT 831, Lns 20-24. WWC has significant investment in South Dakota through the creation of its

own network and, if the SDN rate applies in this instance, would effectively be unconstitutionally deprived of the use of its network. If the Commission finds In re SDCEA applicable in this instance, WWC is entitled to compensation.

The fact that WWC could still use its facilities to deliver local traffic does not result in a finding that the fictitious interstate rate does not constitute a taking. Like US West, the forcing of WWC to use SDN or SDN rates would constitute a taking of that portion of the network built out that has been allocated to deliver the toll traffic that would have to be routed by default through SDN. HT 831.

During the creation of its network, the Golden West Companies were fully aware of the fact that the switches installed in South Dakota by WWC would be utilized for the benefit of WWC's customers. Golden West never objected to the creation of the WWC's network and never asserted that WWC must use the SDN network. As WWC has established, the Parties contemplated the delivery of traffic from WWC to Golden West's network at various locations in South Dakota, even through third Parties. Golden West cannot now claim, at this juncture and within the context of this litigation, that a rate based upon a bogus, fictitious route not utilized to deliver traffic is applicable. If the Commission disagrees, it must also find that WWC has an inherent property right to transport its terminating interstate traffic to any of its access points in within the state and hold that Plaintiffs or the state must compensate WWC pursuant to US West for the unconstitutional regulatory taking.

Congress enacted the Telecommunications Act of 1996 to alter the "monopolistic structure" of local telephone companies by injecting competition into the local markets. Iowa Utilities Board v. Federal Communications Commission et al, 109 F.3d 418, 421 (8th Cir. 1996). Allowing Golden West to charge a rate based upon a fictitious route would, in effect, be

fostering SDN's monopoly by essentially mandating the use of the SDN tandem switch in Sioux Falls. Such a result is contrary to the spirit of the Telecommunications Act of 1996 and the PUC must refuse Golden West's argument.

Finally, when WWC approached SDN about carrying WWC traffic SDN was not interested in carrying WWC's traffic. HT 152, Lns 17-19. Thus, the Golden West Companies contend WWC must pay interstate rates based on a SDN monopoly, yet SDN has no obligation to carry WWC's traffic.

Costs should be related to the actual usage of facilities and not based on a fabricated route. Because actual routing should be used when calculating the tariff amounts due for calls and there is no legal analysis that supports using a phantom route, WWC's interstate rates for the Golden West Companies should be used when calculating the amount due for the interMTA minutes derived using the 3% factor that appears in the Agreement.

II. GOLDEN WEST COOPERATIVE IS NOT ENTITLED TO CHARGE TRANSITING WHERE THE INTERCONNECTION AGREEMENT DOES NOT PROVIDE FOR CHARGES FOR TRANSITING AND GOLDEN WEST COOPERATIVE WAS TRANSPORTING THE CALLS TO VIVIAN, A WHOLLY OWNED, AFFILIATED COMPANY WITH AN INTEGRATED NETWORK.

After this action was commenced, it was discovered that Golden West Cooperative was continuing to charge transiting of calls over the Golden West Cooperative network to the Vivian Custer Wire Center, a wire center isolated from the remainder of Vivian's wire centers. WWC had been paying under the old rates until the Golden West Companies adjusted their rates after approval of the interconnections by the Commission. When the rates were adjusted, Golden West did not stop charging for transiting. This was discovered during the discovery portion of this proceeding. HT 44, Lns 9-12.

Under the former interconnection agreements, there was a provision for Golden West

Cooperative to charge transiting. WWC Hearing Ex. 2, page Exhibit A of Agreement. That provision and that ability to charge transiting were not carried over to the Interconnection Agreement that covered traffic from January 1, 2003 through December 31, 2005.

This Interconnection Agreement, the one at question in this action, is clear on its face. On the first page, eighth paragraph, last sentence, it sets forth that "this Agreement is not intended to establish any terms, conditions or pricing applicable to the provision of any transiting service." The evidence shows that the Golden West Companies presented themselves during negotiations of this Interconnection Agreement as an integrated network. Reciprocal compensation rates were set with this understanding. HT 77, Lns 23 through HT 78, Ln 12; HT 189, Lns 17-22. Golden West and Vivian have previously presented their costs jointly in regulatory matters. HT 543, Lns 1-4. Within the industry, integrated affiliated networks are treated differently than non-affiliated networks. HT 186, Lns 1-16. This is because allowing affiliated networks to use joint cost to set reciprocal compensation rates but then charge transiting allows these networks to "game the system." HT 834, Lns 8-12.

As noted by the Parties, how the traffic is being transported to Vivian did not change. The Interconnection Agreement changed what charges are allowable. Given the fact that the former interconnection agreements provided for transiting charge and the current Interconnection Agreements do not provide for transiting charges, the logical conclusion is that under this Interconnection Agreement transiting charges are part of the reciprocal compensation rate.

"It is a well settled principal of contract law that a new agreement between the same Parties on the same subject matter supersedes the old agreement." Ottawa Office Integration, Inc., v. FTF Business Systems, Inc., 132 F.Supp.2nd 215, 219 (SD NY 2001) (citing Restatement First of Contracts Section 408). As recognized in the Restatement 2d of Contracts, specifically,

Section 279, when a contract between Parties replaces a pre-existing contract, inconsistent terms or terms not carried over are not part of the new contract. *See* Restatement 2d of Contracts, Section 279(A) ("If the parties intend a new contract to replace all the provisions of the earlier contract, the contract is a substituted contract.") The presumption legally is against inclusion or allowing of provisions that could have been included in a contract but were not. Klemp v. Hergott Group, Inc., 641 N.E.2d 957, 962 (Ill. App. 3, Dist. 1994); *see also* Lee v. Allstate Life Insurance Co., 838 N.E.2d 15 (Ill. App. 2, Dist. 2005). Because the new Interconnection Agreement replaces the old interconnection agreement and controls the relationship of the Parties, the failure to bring over a transiting charge is an acknowledgement of the intent of the Parties not to charge transiting.

The conclusion that transiting was not to be charged under the new agreement is also supported by selective billing of transiting. From the evidence in the record, Golden West does not consistently charge transiting. Golden West Cooperative's witness, Mr. Law, testified that Golden West does not charge Qwest for transiting to the Vivian Exchange. HT 537, Ln 24 through HT 538, Ln 2. Mr. Law testified that this was because that traffic would be viewed as toll traffic. However, the Golden West now claim transiting for all WWC traffic, even for those minutes derived as toll minutes. Mr. Law also testified that transiting it not charged to affiliated companies. HT 834, Lns 17-20. Thus, when Vivian uses the same route to deliver traffic back to WWC, Vivian does not have to pay Golden West Cooperative transiting.

The conclusion that transiting was not to be billed is further supported by the make up of the Golden West Companies, wherein Vivian is treated as simply an arm of Golden West Cooperative as opposed to an independent, free-standing company. Vivian is wholly a subsidiary of Golden West Cooperative. HT 423. As acknowledged by Golden West own

corporate witness, the end users deal exclusively with a company called Golden West. HT 555-556. The board members of the companies are the same, costs are shared as are employees. HT 558, Lns 23-25.

The Interconnection Agreements provide that the transport of the calls from where the Parties connect to the end users is part of the transport cost calculated in deriving the reciprocal compensation rate. For all intent and purpose, Golden West Cooperative and Vivian constitute one network and one party.

The South Dakota Supreme Court has recognized a parent corporation can be bound by the agreements of a subsidiary when the subsidiary is used as the instrument of the parent. Glanzer v. St. Joseph Indian School, 438 N.W.2d 204 at 207 (S.D. 1989). The Supreme Court has determined that a parent is restricted by the agreements entered into by a subsidiary where "the parent controls the subsidiary to such a degree as to render the later the mere instrumentality of the former." *Id.* The Supreme Court recognized that a number of factors could lead to this conclusion. Amongst those factors are: a parent entity owning all of the stock of the subsidiary; the parent and the subsidiary having common directors or officers; the joint use of property and other general factors. *Id.* The Supreme Court recognized that all these factors are not necessary to show instrumentality. *Id.*

In this situation a number of these factors are present. When taking these factors into consideration, the Golden West Companies should not be allowed to collect for traffic being delivered to Vivian beyond those amounts that can be collected under the Vivian agreement. Transiting should not be allowed on top of these numbers and the Golden West Cooperative should be bound and subject to the agreement Vivian made for accepting that traffic at these established rates.

Because of this affiliation and close tie, it is inappropriate without an agreement with WWC for Golden West Cooperative to charge transiting for transport of WWC calls to Vivian's Custer Exchange. Had WWC known Golden West Cooperative was going to insist on collecting transiting on top of the rates its wholly-owned subsidiary would collect under the Interconnection Agreement, WWC could have negotiated with Vivian to pay those transiting rates or reduce the reciprocal compensation rate. Failure to treat these affiliated companies with an integrated network as the one entity they are, grants the Golden West Companies the ability to manipulate the market by requiring indirect routes for delivery of traffic to isolated wire centers simply to increase costs of competition and as a profit generating scheme for the company.

III. WWC IS ENTITLED TO REIMBURSEMENT OF ITS OVERPAYMENTS PLUS INTEREST WHERE WWC, PURSUANT TO AGREEMENT OF PARTIES, PAID UNDER THE OLD RATES WITH THE UNDERSTANDING THAT A TRUEUP AND REPAYMENT WOULD RESULT.

As recognized above, WWC paid under the old interconnection agreement's rates with the understanding it would be reimbursed. It cannot be asserted by Golden West Companies that WWC was not entitled to the benefit of this money after the approval of the new Interconnection Agreement by the Commission. Mr. Law, on behalf of the Golden West Companies, recognized in his letter of December 1, 2004 that WWC was entitled to credit for these overpayments.

WWC requested refund of these overpayments plus interest. WWC Hearing Ex. 5. This request was wrongfully denied by the Golden West Companies, WWC Hearing Ex. 6, and WWC is entitled to immediate repayment, plus interest. The amount due WWC is in question. The Parties agree on most of the calculations necessary to determine the amount owed. The use of the inter or intrastate was addressed above. The only remaining differences not previously addressed are the calculations of the reciprocal compensation amount due to WWC, the availability of interest on the overpayments, and whether the amounts due WWC should be

reimbursed or paid back through monthly credits.

A. The Reciprocal Compensation Credit Due WWC Should be Calculated Using the Clear Language of the Interconnection Agreements Found Under Appendix A, Section 4.0.

In support of WWC's claim, Ron Williams prepared an exhibit entered into evidence as WWC Hearing Exhibit 21. This Exhibit provides an analysis by company of the refund amounts due. The calculations are based on the rates of the new Interconnection Agreement giving credits for payment history made by WWC in good faith under the old rates while awaiting Commission approval of the new Interconnection Agreement.

Page two of that Exhibit sets forth an explanation of where the information contained in each column was obtained or how the results were derived using other columns. The spreadsheets take the minutes delivered by WWC and amounts paid by WWC as the beginning numbers. From there, all of the numbers and calculations are derived.

While the new Interconnection Agreement was retroactive to January 1, 2003, since it only applied to traffic delivered on that date and thereafter, the first billing for most companies that the new Interconnection Agreement applied to occurred in February and the traffic had to be prorated for those days that fell under the new Interconnection Agreement versus those days that would have been subject to the rates under the old interconnection agreement. *See*, for example, WWC Hearing Ex. 21 p. 3, Armour Spreadsheet.

The explanation sheet correctly follows the Interconnection Agreement terms. A mistake does appear on the spreadsheets under the calculation of the Reciprocal Compensation minutes Column L. The explanation for Column L defines a calculation where Column G is divided by 1 minus the traffic factor with the resultant of that division being taken times another traffic factor. This formula is taken from the Appendix of the Interconnection Agreement.

Specifically, Section 4.0 of the Appendix A to each Interconnection Agreement, the Reciprocal Compensation Credit Formula, sets forth that to calculate the Reciprocal Compensation Credit one is to "divide the total number of monthly measured minutes of use terminated on telephone company's network by the mobile to land factor." This calculation "will then be multiplied by the land to mobile factor to arrive at the total telephone company minutes of use terminated on CMRS provider's network per month." *See* Appendix Section 4.0 of WWC Hearing Ex. 1 and GW Hearing Ex. 1. That Appendix sets forth an example. The example provides that if "10,000 minutes of mobile originated telecommunication traffic has been delivered to it by the CMRS provider in a given month: In year 1 of the Agreement the Parties will assume 2,658 minutes of land originated calls were delivered by telephone company to CMRS provider for termination ($10,000 divided by .79 multiplied by .21)." *Id.* The Reciprocal Compensation Credit Factor then changed over the term of the years as set forth in the Table under Appendix Section 4.0.

In one part of his testimony, Mr. Williams explained the spreadsheets as netting out InterMTA minutes. HT 47. This is how it appears in the actual spreadsheets but not in the explanation sheet. While Mr. Williams stated this netting affect, in another part of his testimony, under cross-examination, Mr. Williams gave the correct definition for calculating reciprocal compensation credit. HT 143, Ln 13 through HT 144, Ln 6. At this point in his testimony, Mr. Williams gave a correct example of how the reciprocal compensation credit should be calculated, but failed to recognize that within the spreadsheets, the calculation was incorrect.

While the exhibit and testimony conflicts, it is the Commission's obligation to read the contract and only consider the testimony if the contract is not clear on its face. The terms and effect of contract language are questions of law reserved to this Commission. *See* Cotton v.

Manning, 600 N.W.2d 585, 588 (S.D. 1999). Where the express language of a contract addresses an issue, there is no need to take testimony as to the intent or supply implied terms. Farm Credit Serv. Of America v. Dougan, 704 N.W.2d 24, 28 (S.D. 2005). Thus, while the conflict exists in the exhibit and testimony, the clear intent of Section 4.0 shows the explanation as being the correct legal interpretation of the contract.

Based on this, the exhibits as entered into the record by WWC contain a formula error under Column L. Correction of this error to comply with the contract results in changing the formula of Column L by replacing Column J in the formulas with Column G. The reciprocal compensation traffic factors used by WWC in its calculations are not disputed by the Parties. *See* WWC Ex. 21 and GW Ex. 25 and 52. Recalculating the amount claimed results in an increase in the amount due WWC as of February 1, 2006 of $964,016.71 as opposed to $953,664.00 as it appears in WWC Hearing Ex. 21.[2]

B. Interstate Rates Must be Used in Billing the Minutes Derived Using the 3% interMTA factor.

As set forth above, there is a dispute as to whether to charge inter or intrastate rate for the minutes derived using the 3% InterMTA factor found under Section 7.2.3. As the analysis set

[2] It shall also be noted that WWC Ex. 21 did not have the final months of minutes of traffic delivered to the Golden West Companies in its calculations. These final months are contained in GW Hearing Ex. 52. Because of lag time in the billing, some of the traffic subject to the agreement was not included in any billing by Golden West until after December 31, 2005. WWC's witness recognized at the hearing that these final minutes should be considered. For Armour one additional month for February of 2006 of 11,000 minutes should be considered; for Bridgewater two months of additional minutes should be considered, 58,922 for January and 14,000 for February; for Golden West the February traffic shall be credited in the amount of 50,630 minutes; for Kadoka, the January traffic was for 34,513 minutes and February for 8,489 minutes; Sioux Valley, the January traffic of 255,069 and February traffic of 64,744 minutes; Union for January traffic of 2,147 minutes and February traffic of 5,496 minutes; and Vivian has a January traffic of 1,621,828 minutes with February 423,116 minutes. Consideration of these minutes with the changes in Column G of WWC Hearing Ex. 21 in result in a total amount due to Alltel of 943,008.92.

forth above explains, interstate rates are the appropriate rate and the use of the actual route as opposed to the fictitious route the appropriate method to calculate the applicable interstate rate. This results in interstate rates as set forth in WWC Hearing Ex. 8 that are in turn applied to traffic in WWC Hearing Ex. 21 at Column I.

C. WWC is Entitled to Interest on the Overpayments Accruing from the Dates of the Payments.

This Commission has already recognized that there is interest due on overcharges. The South Dakota Supreme Court has determined that prejudgment interest is mandatory when a party is entitled to a recovery. *See* Loen v. Anderson, 692 N.W.2d 194, 201 (S.D. 2005). Moreover, the South Dakota Supreme Court has held that "the adoption of S.D.C.L. § 21-1-13.1 in 1990 abrogated the rule that prejudgment interest cannot be obtained if damages remain uncertain until determined by the court." City of Aberdeen v. Rich, 658 N.W.2d 775, 781 (S.D. 2003) (citing Fritzel v. Roy Johnson Construction, 190 SD 59 ¶ 12, 594 N.W.2d 336, 339). As a result, under the present South Dakota law as set forth in S.D.C.L. § 21-1-13.1, "prejudgment interest is allowed from the day the lawsuit damage accrued regardless of whether the damages are certain." *Id.*

Furthermore, it is not required that WWC make a demand before interest accrues. A party only needs to know that it will be liable for some amount owed. *See* South Dakota Building Authority v. Geiger-Berber Assoc., P.C., 414 N.W.2d 15, 19 (S.D. 1987). In this action, a demand is not required because the Golden West Companies knew they owed money back to WWC. *Id.* It is acknowledged in Column X of GW Hearing Ex. 52.

The payment history supplied by WWC has not been contested by Golden West. Golden West's spreadsheets, the original spreadsheet being marked as GW Hearing Ex. 25 and the subsequent one as GW Hearing Ex. 52, do not reflect the payments received on the methodology.

Even so, the Golden West Companies' exhibits note the significant credits due WWC starting in February 2003, in Column X of GW Hearing Ex. 52. The Golden West Companies cannot now say that when they were negotiating these agreements they did not realize the rates would change and WWC was overpaying as everyone knew the new rates as early as March 2003. HT 39, Lns 19-24.

S.D.C.L. § 21-1-13.1 provides that if a rate is set in the contract, the contract rate applies. If there is no rate established and a person is entitled to recover damages, the prejudgment interest rate is set by S.D.C.L. § 54-3-16 using the Category B rate of 10%. Section 7.2.4 provided for a rate of 1.5% per month or the maximum amount allowed by law. In this situation, both sides knew what the new rates and tariffs were and these were uncontested. Thus, the 1.5% rate should apply rather than the 10% statutory rate.

D. The Commission Should Immediately Order that the Golden West Companies Pay the Amounts Owed to WWC.

This action was brought under S.D.C.L. Ch. 49-13. S.D.C.L. § 49-13-14 requires that the Commission direct the party owing the money pay the sum to the person owed by a date certain. The statute does not allow the Commission latitude to set up an elaborate credit system on a going forward basis. Instead, the statute requires the Commission, when it finds amounts due to a complaining party, to have the amounts due paid directly to that party.

WWC Hearing Ex. 21 concluded with an amount due as of the end of February of $953,664.00. As noted in the arguments above, the Interconnection Agreement provides an explicit formula for calculating the reciprocal compensation minutes due WWC. While the explanation on WWC Hearing Ex. 21 is correct the spreadsheets were incorrect in applying this formula. Adjusting for this formula, the formula that is required as a matter of law, increases the total amount due WWC to $964,016.71.

However, it was recognized by WWC at the hearing that not all of the traffic subject to the Interconnection Agreement was included in WWC Hearing Ex. 21. These amounts were noted in GW Hearing Ex. 52, and proper application of these minutes lowers the total due Alltel as of March 1, 2006 to $943,008.92.

CONCLUSION

The Interconnection Agreement clearly provides the reciprocal compensation rate and the formula to use in calculating reciprocal compensation credit due to WWC. The Interconnection Agreement is silent as to what rate would apply to those minutes derived using the 3% interMTA factor and the only evidence on this issue shows that the Parties agreed the interstate rate would apply to those minutes.

As to transiting, transiting is not allowed as the interconnection agreement that expired on December 31, 2002 included a transiting provision while the new Interconnection Agreement calculated transport of the Golden West Companies as an integrated network. Any alleged cost associated with carrying traffic is paid for by the reciprocal compensation amount paid to the Golden West Companies.

WWC paid in good faith under the old rates while waiting for true up. At this point, WWC should be reimbursed the amount it is due for overpayments plus interest. WWC is due $943,008.92 for overpayments plus interest through March 1, 2006. In addition to this amount, WWC is entitled to interest from March 1 until date of payment. Under the law, this amount should be paid immediately by the Golden West Companies as opposed to being delayed or credited.

Dated this 6 day of September, 2006.

GUNDERSON, PALMER, GOODSELL
& NELSON, LLP

Talbot J. Wieczorek
Attorneys for WWC License LLC
440 Mt. Rushmore Road
PO Box 8045
Rapid City SD 57709
Phone:1-605-342-1078
Fax: 1-605-342-0480

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of September, 2006, a true and correct copy of WWC's BRIEF IN SUPPORT OF ITS AMENDED COMPLAINT was sent via facsimile and by first-class, U.S. Mail, postage paid to:

Via Fax: 605-224-7102
Darla Pollman Rogers
PO Box 280
Pierre, SD 57501

Via Fax: (605) 224-1637
Richard Coit
SDTA
PO Box 57
320 E. Capitol Avenue
Pierre SD 57501

Via Fax: 605-773-3809
Rolayne Wiest
SD Public Utilities Commission
500 E Capitol Ave
Pierre SD 57501-0057

Talbot J. Wieczorek