

TC97-148

INDEX NO.

TC97-148

**IN THE MATTER OF THE
APPLICATION OF INTELNET
SERVICES OF NORTH AMERICA, INC.
FOR A CERTIFICATE OF AUTHORITY
TO PROVIDE TELECOMMUNICATIONS
SERVICES IN SOUTH DAKOTA**

Public Utilities Commission of the State of South Dakota

DATE	MEMORANDA
8/29 97	Filed and Indexed;
9/4 97	TC Fax Filing;
11/3 97	Order Denying COA;
11/3 97	Notice Class.

III

U S WEST is a common carrier of messages and has a duty, if able, to accept and carry whatever is offered, at a reasonable time and place, of a kind it undertakes or is accustomed to carry pursuant to SDCL 49-2-1 et seq.

IV

Pursuant to its Exchange and Network Services Tariff, Section 2, Page 23, Release 1, effective December 5, 1993, U S WEST has an obligation to make all reasonable efforts to prevent out-of-service conditions. "Out-of-service" is defined as the customer has lost the ability to either originate or receive calls from a premises or location such as a residence, place of business or office locations, or a central office line or a PBX trunk cannot be used to originate or receive calls.

V

U S WEST Communications Group, a parent or similar affiliate of U S WEST, continues to generate increases in earnings, including those generated by local service which grew at a rate of 8.8% for third quarter 1997 (see attached Exhibit A). U S WEST has in the past been able to retain gains it made on the sale of its South Dakota exchanges (Commission docket TC94-122) in the amount of approximately \$43,000,000.00, subject to adjustment for the sales of three exchanges which have not been approved by the Commission and taxation, and has received two rate increases, one in 1995 and another in 1997. U S WEST has apparent access to sufficient capital and should have the financial wherewithal to maintain and operate a functional telecommunications system in South Dakota.

VI

U S WEST has in the recent past had several dockets before the Commission, the details of which are recited herein to provide a historical perspective. U S WEST appears to present a history of laxity in providing service to its South Dakota customers and those seeking to become its South Dakota customers, as demonstrated to-wit:

1. the "land development cases," both those filed as complaints or resolved after a Commission decision, in which U S WEST improperly charged customers for the extension of service to their properties and was not able to accurately advise customers in advance of what the proper charges should be, a list of those cases is attached and incorporated into this Order by reference as Exhibit B.

2. the complaint of Cathy Feickert, docket TC96-174, in which it was found by the Commission that U S WEST failed to timely deliver service and accurately advise the customer of the circumstances of her service request;
3. the quality of service docket, TC97-016, in which the record indicates the following problems with service from U S WEST:
 - a. U S WEST had more outages and more lines affected by those outages in 1996, than in 1995;
 - b. consumer contacts received by the Commission regarding U S WEST went up substantially for 1996, when compared to 1995, if the contacts regarding the issue of Black Hills extended area service were removed from the 1995 numbers;
 - c. sixty-seven (67) complaints were received by the Commission for missed commitments by U S WEST to residential customers in 1996, as compared to 79 in 1995; 30 complaints were received by the Commission for missed commitments by U S WEST to business customers in 1996, as compared to 21 in 1995;
 - d. the Commission received 62 complaints in 1996, regarding service repair reports for residential customers as compared to 26 complaints in 1995; the Commission received 12 complaints for service repair reports for business customers in 1996, as compared to 5 complaints in 1995;
 - e. the Commission's Director of Consumer Affairs, LaNiece Healy testified that response times, turnaround times, and results that she observed in her dealings with U S WEST as Director of Consumer Affairs for the Public Utilities Commission, have not improved over the last couple of years;
 - f. U S WEST failed to adequately maintain its SLC-96 system serving the Junius exchange causing customers to be without telecommunications services on at least 3 occasions; and
 - g. U S WEST did not have sufficient trunking capacity in the Sioux Falls exchanges in the summer and fall of 1996, causing slow dial tone and blocked calls for customers in those exchanges

6. A brief description of the telecommunications services the applicant intends to offer:

Applicant intends to provide intrastate telecommunications service and long distance telecommunications services between points within the entire State of South Dakota. The Company is a non-facilities based reseller of several major long distance carriers. Throughout the past several months, INTELNET has marshalled its technical and operational resources and successfully deployed a number of long distance services. Each product is specially designed to provide the customer with an innovative, high quality, and economical service alternative.

The following service options are available 24 hours a day, 7 days a week:

One-Plus Service utilizes switched access services to connect the customer with the underlying carrier. This arrangement is designed for the residential consumer and small to medium sized business. Customers presubscribe to the service by instructing their local exchange carrier to route all long distance calls to the underlying carrier.

Direct Access Service offers discounted long distance service to businesses whose traffic volume warrants dedicated interconnection with the telecommunications network. The service is provided in conjunction with a local exchange carrier or local access provider.

1-800 Service provides customers with toll-free number for their customers, patrons, and clientele to call the customer at no charge. Customers may elect to interconnect with the network using switched access facilities (presubscription) or dedicated service arrangements. To maximize efficiency, a customer may utilize outbound facilities to receive 1-800 communications.

Travel Service enables customers to utilize the company's service when traveling. Callers simply dial a 1-800 number to access to the network and then enter their billing information and the called telephone number.

Each service arrangement is available on a full time monthly basis and allows call to terminate in intrastate, interstate, and international locations. IntraLATA communications are permitted where authorized by the state regulatory authority. Rates and charges are extremely competitive with other long distance carriers. Under some arrangements, Volume and Term Discounts are also available. From time to time, Promotional Offerings affording even greater rate reductions may be made available to qualified users.

7. A proposed tariff is attached to this application as **Exhibit 4**.

8. A list of states in which applicant is currently certificated and has applications or registrations pending is attached as **Exhibit 5**. Applicant has not been denied registration or certification in any state.

9. Applicant intends to provide nationwide telecommunications services to business, residential and transient customers. Applicant does not provide intrastate services in South Dakota at this time. Applicant intends to begin providing intrastate services in South Dakota upon approval by the South Dakota Public Utilities Commission.

10. Applicant intends to market its services through in house sales personnel and independent agents.

11. Applicant does not plan at this time to construct any facilities in the State of South Dakota.

XII

The Commission, pursuant to SDCL 49-31-7.1(2), may require U S WEST to install facilities necessary for the safety, convenience, and accommodation of the public.

XIII

The Commission, pursuant to SDCL 49-31-7.1(3), is empowered to inquire into the management of the business of all telecommunications companies who are subject to the provisions of SDCL Chapter 49-31. U S WEST is subject to this chapter.

XIV

The Commission, pursuant to SDCL 49-31-7, is empowered to order changes or improvements in telecommunications facilities, exchanges or networks, changes in modes of operating telecommunications facilities, and in conducting a telecommunications company's business.

XV

The Commission is authorized and empowered to suspend or revoke a telecommunications company's authority to operate as a telecommunications company in this state pursuant to SDCL 49-31-3.

NOW THEREFORE, the Commission orders U S WEST and its appropriate corporate officers to appear before it on April 1-3, 1998, beginning at 9:00 a.m., in Room 412, of the State Capitol, 500 East Capitol, Pierre, South Dakota, and demonstrate its financial, managerial, and technical ability, produce corporate and personal records, and show cause why one or more of the following remedies should not be imposed upon U S WEST:

1. revocation of U S WEST's authority to act as a telecommunications company in South Dakota,
2. attach conditions to U S WEST's authority to act as a telecommunications company in South Dakota,
3. that U S WEST be immediately ordered to perform the following tasks or install equipment necessary to accomplish these objectives in its providing service in South Dakota.

- a. that U S WEST install a system to provide accurate and adequate service ordering, provisioning, and maintenance. The present "system" does not appear to be providing the ability for each of the above units to interface with the other with no loss of data,
- b. service ordering should be able to (1) set the installation date and time, within a four hour window, (2) determine if the facility which is necessary is available for service, (3) determine if excess construction charges will apply, (4) determine the correct billing and advise the prospective customer of same, (5) transmit name and address to directory assistance (if not non-list or non-publish), and (6) do this for a U S WEST customer or a competitive local exchange carrier customer,
- c. when a site visit is necessary, the technician should call if the time cannot be made and, if the work is done as promised, the technician should inform the customer when the installation is complete,
- d. trouble reports should be completed within 24 hours of the problem being resolved. The customer should be informed of what caused the trouble and if the trouble cannot be found, the customer should also be informed of that fact,
- e. the definition of repeat trouble should not be limited to trouble reported within a 30 day period. U S WEST should be able to determine by customer call-in if trouble is recurring. This should also be available by address and by central office,
- f. that U S WEST respond to Commission staff in a timely manner indicating that a complaint has been addressed and its resolution when the Commission staff relays complaints to U S WEST,
- g. that U S WEST improve its planning and provisioning in growth areas,
- h. that U S WEST provision, in a timely manner, adequate and reliable service, and

that U S WEST upgrade obsolete and non-functioning infrastructure.

4. If the Commission issues any order consistent with paragraph 3 above, failure to fulfill that order may result in the Commission recommending to the Attorney General, pursuant to SDCL 49-31-38.2, that U S WEST's authority to operate as a corporation be revoked in South Dakota or that U S WEST or any or all corporate officers or employees violating such order may be fined individually pursuant to SDCL 49-31-38 for each incidence of violation of a Commission order.

The issues at the hearing are whether U S WEST is failing to provide reliable, timely, and adequate service to its customers and, if so, whether one or more of the remedies listed above should be imposed on U S WEST. U S WEST shall file prefiled testimony on or before March 4, 1998. Commission Staff shall file prefiled testimony on or before March 18, 1998. Members of the public may testify without filing prefiled testimony. However, Commission Staff must give U S WEST a list of those members of the public who will testify along with a short description of the subject matter of their testimony to U S WEST ten days prior to the hearing. The hearing is an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to attend and represent themselves or be represented by an attorney. However, such rights and other due process rights shall be forfeited if not exercised at the hearing. If you or your representative fail to appear at the time and place set for the hearing, the Final Decision will be based solely on testimony and evidence provided, if any, during the hearing or a Final Decision may be issued by default pursuant to SDCL 1-26-20.

The Commission, after examining the evidence and hearing testimony presented by the parties, shall make Findings of Fact, Conclusions of Law, and a Final Decision. As a result of the hearing the Commission may order one or more of the remedies as listed above. The Final Decision made by the Commission may be appealed by the parties to the Circuit Court and the South Dakota Supreme Court as provided by law.

It is therefore

ORDERED, that U S WEST and its appropriate corporate officers shall appear before the Commission on April 1-3, 1998, beginning at 9:00 a.m., in Room 412, at the State Capitol, 500 East Capitol, Pierre, South Dakota and demonstrate its financial, managerial and technical ability, produce corporate and personal records, and show cause why one or more of the remedies listed above should not be imposed upon it. U S WEST shall file prefiled testimony on or before March 4, 1998, and Commission Staff shall file prefiled testimony on or before March 18, 1998. Members of the public may testify without filing prefiled testimony. However, Commission Staff must give U S WEST a list of those members of the public who will testify along with a short description of the subject matter of their testimony to U S WEST ten days prior to the hearing.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Public Utilities Commission at 1-800-332-1782 at least 48 hours prior to the hearing if you have special needs so arrangements can be made to accommodate you.

Dated at Pierre, South Dakota, this 20th day of February, 1998.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By Mauree Kalbo

Date 2/20/98

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner

1 THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF SOUTH DAKOTA

3
4
5 IN THE MATTER OF U S WEST)
6 COMMUNICATIONS, INC. AND ITS ABILITY)
7 TO SERVE SOUTH DAKOTA CUSTOMERS) TC97-192
8)
9)
10)

11 HEARD BEFORE THE PUBLIC UTILITIES COMMISSION

12 PROCEEDINGS: February 24, 1998
13 9:00 A.M.
14 Room 430, Capitol Building
15 Pierre, South Dakota

16 PUC COMMISSION: Jim Burg, Chairman
17 Laska Schoenfelder, Commissioner
18 Pam Nelson, Commissioner

19 COMMISSION STAFF
20 PRESENT: Rolayne Ailts Wiest
21 Karen Cremer
22 Camron Hoseck
23 Harlan Best
24 Bob Knadle
25 Gregory A. Rislov
David Jacobson
Steve Wegman
Leni Hook
Shirleen Fugitt

Reported by: Lori J. Grode, RMR

EXHIBIT

17

CERTIFICATE OF INCORPORATION

OF

INTELNET Services of North America, Inc.

* * * * *

1. The name of the corporation is

INTELNET Services of North America, Inc.

2. The address of its registered office in the State of Delaware is Corporation Trust Center, 1209 Orange Street, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

3. The nature of the business or purposes to be conducted or promoted is:

To engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

4. The total number of shares of stock which the corporation shall have authority to issue is One Thousand (1,000); all of such shares shall be without par value.

5. The name and mailing address of each incorporator is as follows:

NAMEMAILING ADDRESS

Dominic A. Dalia

432 Kelley Drive
Berlin, NJ 08009

6. The corporation is to have perpetual existence.

7. In furtherance and not in limitation of the powers conferred by statute, the board of directors is expressly authorized:

1 U S West, do you want to make comments on
2 your request for continuance?

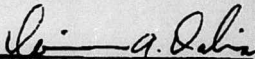
3 MR. WELK: Thank you, Mr. Chairman. This is
4 Tom Welk. Mr. Chairman, is the Court Reporter present
5 at this time?

6 CHAIRMAN BURG: Yes, and she is recording.

7 MR. WELK: Thank you. Mr. Chairman, you have
8 noticed today in TC97-192 a Motion to Continue the
9 Prefiling Dates authorized by the Commission and the
10 hearing date. This motion that you have noticed today
11 was a motion dated February 9th, 1998, filed by the
12 Commission -- or filed by U S West. The motion that
13 was dated February 9th was based upon the request by
14 U S West to depose staff pursuant to U S West's Motion
15 for Discovery dated January 29th. At the time that the
16 February 9th motion was filed, the Commission had yet
17 to rule on U S West's January 29 motion.

18 The Commission has now ruled on U S West's
19 January 29 motion by an Order dated February 20. U S
20 West filed an Amended Motion for Continuance, dated
21 2-19-98, which would have been one day before the
22 Commission issued its order. The motion seeks a
23 continuance on a number of grounds. The Commission has
24 yet to rule on motions dated 2-13, also filed by U S
25 West, which included a Motion to Dismiss Petition, a

THE UNDERSIGNED, being of the incorporator hereinbefore named, for the purpose of forming a corporation pursuant to the General Corporation Law of the State of Delaware, does make this Certificate, hereby declaring and certifying that this is my act and deed and the facts herein stated are true, and accordingly have hereunto set my hand this 28th day of June, 1994.


Dominic A. Dalia
Incorporator

8144
EXHIBIT 2

INTELNET SERVICES OF NORTH AMERICA, INC

CERTIFICATE OF AUTHORITY TO CONDUCT BUSINESS
IN SOUTH DAKOTA

State of South Dakota



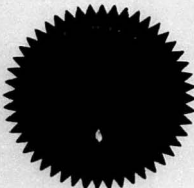
OFFICE OF THE SECRETARY OF STATE

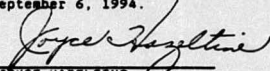
CERTIFICATE OF AUTHORITY

I, JOYCE HAZELTIME, Secretary of State of the State of South Dakota, hereby certify that the Application for a Certificate of Authority of INTELNET SERVICES OF NORTH AMERICA, INC. (DE) to transact business in this state duly signed and verified pursuant to the provisions of the South Dakota Corporation Acts, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I hereby issue this Certificate of Authority and attach hereto a duplicate of the application to transact business in this state under the name of INTELNET SERVICES OF NORTH AMERICA, INC.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota, at Pierre, the Capital, this September 6, 1994.




JOYCE HAZELTIME
Secretary of State

1 for is an orderly process so the Commission can rule on
2 the motions that have been filed to get what documents
3 we ought to be able to look at and rule on our motion.

4 And we're working very diligently. I think
5 the record clearly establishes that every filing we
6 have made in this case has been prompt, and that all we
7 ask for is an orderly process by the Commission in
8 order to present our case and to defend the allegations
9 that have been made against us.

10 CHAIRMAN BURG: Mr. Welk, if I understand the
11 reason this is before us today is simply because that
12 request for continuance was filed before the decision,
13 and your only request today is do you wish to ask for
14 the continuance similar to what you filed?

15 MR. WELK: Yes, I do, Mr. Chairman. In fact,
16 that's why we filed the Amended Motion.

17 CHAIRMAN BURG: Very good. Rolayne, do you
18 have any comments on that?

19 MS. WIEST: Well, the only thing that is
20 noticed is the Motion for Continuance. But I would
21 agree that the Commission needs to rule on the other
22 motions as soon as possible.

23 CHAIRMAN BURG: I agree. But the only thing
24 before us today is the --

25 MS. WIEST: Is the original Motion for

1 Continuance. None of the other ones have been noticed.

2 CHAIRMAN BURG: Is it your recommendation we
3 do grant the continuance?

4 MS. WIEST: Well, under the original Motion
5 for Continuance, it was all based on the grounds about
6 the depositions. But I would note that the deadline
7 for U S West's testimony is coming up very fast and
8 that's March 4th.

9 CHAIRMAN BURG: If we grant continuance, do
10 we need to include the dates for continuance in this?

11 MS. WIEST: No, you wouldn't. Well, I
12 believe what U S West has requested is after discovery
13 is complete, 30 days after discovery is complete. Is
14 that right, Mr. Welk?

15 MR. WELK: Yes, General Counsel.

16 MS. WIEST: So the question is today is if
17 you would want to at least suspend the dates for the
18 prefiled testimony and the hearing pending further
19 action on U S West's other motions.

20 CHAIRMAN BURG: Any comments on that
21 suggestion?

22 MR. HOSECK: Mr. Chairman, Camron Hoseck here
23 on behalf of staff. Well, you know, this gets down to
24 a matter of the practicalities and we have deadlines.
25 We have members of the public who have expressed an

EXHIBIT 4

INTELNET SERVICES OF NORTH AMERICA, INC.

PROPOSED TARIFF

SOUTH DAKOTA TELECOMMUNICATIONS TARIFF

This tariff contains the descriptions, regulations, and rates applicable to the furnishing of services and facilities for South Dakota intrastate operator assisted and resale telecommunications services provided by Intelnet Services of North America, Inc. with principal offices at 432 Kelley Drive, West Berlin, New Jersey 08091. This tariff applies for services furnished within the state of South Dakota. This tariff is on file with the South Dakota Public Utilities Commission (SDPUC), and copies may be inspected, during normal business hours, at the Company's principal place of business.

Issued :

Effective:

Issued By: Michael Dalia, President
Intelnet Services of North America, Inc.
432 Kelley Drive
West Berlin, New Jersey 08091

CHECK SHEET

Sheets 1 through 23 inclusive of this tariff are effective as of the date shown at the bottom of the respective sheet(s). Original and revised sheets as named below comprise all changes from the original tariff and are currently in effect as of the date on the bottom of this page.

<u>SHEET</u>	<u>REVISION</u>	<u>SHEET</u>	<u>REVISION</u>
1	Original	13	Original
2	Original	14	Original
3	Original	15	Original
4	Original	16	Original
5	Original	17	Original
6	Original	18	Original
7	Original	19	Original
8	Original	20	Original
9	Original	21	Original
10	Original	22	Original
11	Original	23	Original
12	Original		

Issued :

Effective:

Issued By: Michael Dalia, President
Intelnet Services of North America, Inc.
432 Kelley Drive
West Berlin, New Jersey 08091


1 STATE OF SOUTH DAKOTA)
2 COUNTY OF HUGHES)
3

4 I, Lori J. Grode, RMR, Notary Public, in and
5 for the State of South Dakota, do hereby certify that
6 the above hearing, pages 1 through 11, inclusive, was
7 recorded stenographically by me and reduced to
8 typewriting.

9 I FURTHER CERTIFY that the foregoing
10 transcript of the said hearing is a true and correct
11 transcript of the stenographic notes at the time and
12 place specified hereinbefore.

13 I FURTHER CERTIFY that I am not a relative or
14 employee or attorney or counsel of any of the parties,
15 nor a relative or employee of such attorney or counsel,
16 or financially interested directly or indirectly in
17 this action.

18 IN WITNESS WHEREOF, I have hereunto set my
19 hand and seal of office at Pierre, South Dakota, this
20 25th day of February, 1998.

21
22 
23 Lori J. Grode, RMR
24
25

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.
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Of Counsel
John R. McDowell

J.W. Boyce (1884-1915)
John S. Murphy (1924-1966)

February 19, 1998

William Bullard, Jr., Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

VIA FACSIMILE and
UPS OVERNIGHT

Re: In the Matter of U S West Communications, Inc. and its Ability to Serve South
Dakota Customers (Docket TC97-192)

Dear Mr. Bullard:

Enclosed for filing please find the original and ten copies of the following:

- (1) Motion to Quash; and
- (2) Amended Motion for Continuance.

U S WEST requests that the enclosed motions be heard as soon as possible and that the Commission issue an order.

It is our understanding members of the Commission will be attending meetings in Washington D.C. February 25th through March 4th. U S WEST's deadline to file prefiled testimony is March 4, 1998. U S WEST respectfully requests that the Commission rule on the enclosed motions and issue an order before Commissioners leave.

In addition to the enclosed motions, U S WEST filed several substantive motions on February 13, 1998, which have not yet been heard and is still waiting for a written order on its Motion for Discovery and Expedited Ruling which was filed on January 29, 1998.

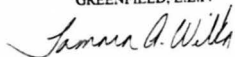
EXHIBIT

18

8145
174

Sincerely yours,

BOYCE, MURPHY, McDOWELL &
GREENFIELD, L.L.P.



Tamara A. Wilka

TJW:vjj

Enclosures

cc: Camron Hoseck
William P. Heaston
Jon Lehnner
Andrew D. Crain
Cindy Pierson

SECTION 1 - TECHNICAL TERMS AND ABBREVIATIONS

Access Line - An arrangement which connects the calling customer's location to an interexchange switching center.

Access code - A sequence of numbers that, when dialed, connect the caller to the provider of services associated with that sequence.

Authorization Code - A numerical code, one or more of which are available to a customer to enable him/her to access the carrier, and which are used by the carrier both to prevent unauthorized access to its facilities and to identify the customer for billing purposes.

Authorized User - A user who is a customer, or a person authorized by a customer that uses the Company's Services. An Authorized User is responsible for compliance with this tariff.

Billed Party - The person or entity responsible for payment for use of the Company's Service(s).

Called Station - The termination point of a call (i.e., the called number).

Calling Station - The origination point of a call (i.e. the calling number).

Central Office - A Local Exchange Carrier switching system where Local Exchange Carrier customer station loops are terminated for purposes of interconnection to each other and to trunks.

Channel - A path for electrical transmission between two or more points, the path having a band width designed to carry voice grade transmission.

Common Carrier - A company or entity providing telecommunications services to the public.

Company - Intelnet Services of North America, Inc.

Credit Card Calls (Calling Card Calls) - A Direct Dialed or Operator Assisted call for which charges are billed not to the originating telephone number, but to a credit card, such as Visa or Master Card, or to a LEC or interexchange carrier calling card, including calling cards issued by the Company.

Issued :

Effective:

Issued By: Michael Dalia, President
Intelnet Services of North America, Inc.
432 Kelley Drive
West Berlin, New Jersey 08091

0145
1178

This inquiry is broad in nature and seeks to probe the technical, financial, and managerial capabilities of U S WEST. Certainly, under the statutes listed above and the specific sections relied upon in its First Request for Information and Documents give the Commission staff sufficient basic authority to look into the affairs in a general nature of this utility.

The First Request for Information and Documents is not deemed to be a deposition or an interrogatory. Further, ARSD 20:10:01:22.01 allows the Commission itself to order the use of certain discovery procedures. There is nothing in the procedures used by staff which imply that the South Dakota Rules of Civil Procedure apply to this situation. Typically in administrative law situations, those rules do not apply until the action reaches the appellate stage, see SDCL 1-26-32.1.

CONCLUSION

It is interesting to note that U S WEST resists any information being furnished to staff and it states that this is an oppressive inquiry. Bear in mind that in a case now on appeal to the Sixth Judicial Circuit in the switched access case, Civ. 97-462, Hughes County, U S WEST touts the fact that it furnished in excess of 9,000 pages of documents to staff in that case. (Page 9 of Brief.) Oppressiveness was not a subject there. That action, of course, involved increasing revenues for U S WEST.

Staff would respectfully ask the Commission to clarify what staff's role is in this matter so that an orderly proceeding can continue. It is staff's intention to pursue this inquiry which may in the future involve the examination of certain agents, officers, and employees of U S WEST under oath and the examination of U S WEST's records on site.

SECTION 1 - TECHNICAL TERMS AND ABBREVIATIONS (Continued)

Night/Weekend - From 11:00 PM up to but not including 8:00 AM Sunday through Friday, and 8:00 AM Saturday up to but not including 5:00 PM Sunday.

Other Common Carrier - A common carrier, other than the Company, providing South Dakota intrastate communications service(s) to the public.

Premises - A building or buildings on contiguous property (except railroad rights-of-way, etc.) not separated by a public highway.

Subscriber - The property, or property owner, to which the Company provides service.

United States - The forty-eight (48) contiguous states and the District of Columbia, Hawaii, Alaska, Puerto Rico, the U. S. Virgin Islands, as well as the off-shore areas outside the boundaries of the coastal states of the forty-eight contiguous states to the extent that such areas appertain to and are subject to the jurisdiction and control of the United States.

User - The person at the Subscriber's location who actually places the call over the Company's service.

Issued :

Effective:

Issued By: Michael Dalia, President
Intelnet Services of North America, Inc.
432 Kelley Drive
West Berlin, New Jersey 08091

SECTION 2 - RULES AND REGULATIONS

2.1. Application of Tariff

This tariff contains the regulations and rates applicable to the provision of intrastate resale telecommunication services by Intelnet Services of North America, Inc. (hereinafter referred to as the "Company") between domestic points within the state of South Dakota as specified in this tariff. Service is furnished subject to the availability of facilities and subject to transmission, atmospheric and like conditions.

All terms, conditions and limitations of liability contained in this tariff apply to all South Dakota intrastate services including international and domestic services provided by the Company, and including those where charges are established pursuant to contract, unless the contract explicitly provides otherwise.

2.2. Interconnection with Other Common Carriers

The Company reserves the right to interconnect its services with those of any Other Common Carrier, Local Exchange Carrier, or alternate access provider of its election, and to utilize such services concurrently with its own facilities for the provision of Service offered in this tariff.

2.3. Shortage of Facilities

All service is subject to the availability of suitable facilities. The Company reserves the right to limit the length of communications or to discontinue furnishing service when necessary because of the lack of satellite or other transmission medium capacity or due to any causes beyond its control.

2.4. Use of Services

- 2.4.1. Services provided under this tariff may be used only for transmission of communications by customers in a manner consistent with the terms of this tariff and regulations of the FCC and all state and local authorities having jurisdiction over the service.
- 2.4.2. Services provided in this tariff shall not be used for unlawful purposes.

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1 express an opinion on that today.

2 As far as -- finally, as far as the takings issue,
3 the reason -- the things that I've said with respect to
4 the due process issue are equally applicable to a takings
5 issue. Essentially, US West agreed to the -- to the
6 "standard list" situation that they're in by entering into
7 the Stipulation allowing the January 8, 1996 Order to
8 proceed without being appealed and by not exercising its
9 right to unilaterally withdraw from the Stipulation. So
10 under all those circumstances, I don't believe that
11 there's been any taking above and beyond that permitted by
12 regulatory activity that is -- that is permitted to occur
13 short of a compensable taking.

14 So for all those reasons, I'm going to affirm.

15 And for whatever it's worth, which is probably very
16 little, I would state, however, that it seems to me that
17 in fairness and in good faith the Commission does have an
18 obligation at this point to put the parties in a position
19 where they do know what standards and obligations they
20 have to meet to satisfy this agreement. While the Court
21 is not ruling today that there's been a violation of law
22 sufficient to reverse, it would seem to me that this could
23 certainly turn, as US West has pointed out, into a
24 situation where the Commission can't sit back and refuse
25 to identify any kind of standards and subject any

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SECTION 2 - RULES AND REGULATIONS (Continued)

2.5. Liability of the Company (Continued)

- 2.5.5. The Company shall not be liable for any failure of performance due to causes beyond its control, including but not limited to fire, flood, or other catastrophes; Acts of God; atmospheric conditions or other phenomena of nature; federal, state or local governments having jurisdiction over the Company or the Services provided within this tariff; national emergencies; civil disorder, insurrections, riots, wars, strikes, lockouts, work stoppages, or other labor problems or regulations established or actions taken by any court or government agency having jurisdiction over the Company.
- 2.5.6. The Company shall be indemnified and held harmless by the Customer and Authorized User from and against all loss, liability, damage, and expense, including reasonable attorney's fees and court costs, due to claims for libel, slander, or infringement of copyright or trademark in connection with any material transmitted by any person using the Company's Service(s) and any other claim resulting from any act or omission of the Customer or Authorized User relating to the use of the Company's facilities and Service(s).
- 2.5.7. The Company shall not be responsible for the installation, operation or maintenance of any Customer-provided communications equipment.
- 2.5.8. Where Customer-provided equipment is connected to service furnished pursuant to this tariff, the responsibility of the Company shall be limited to the maintenance and operations of such services in the proper manner, subject to this responsibility, the Company shall not be responsible for the through transmission of signals generated by Customer-provided equipment or for the quality of, or defects in, such transmission; or the reception of signals by Customer-provided equipment; or network control signaling where such signaling is performed by Customer-provided network control signaling equipment.
- 2.5.9. Under no circumstances whatsoever shall the Company or its officers, directors, agents, or employees be liable for any indirect, incidental, special, or consequential damages.

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF U S WEST)
COMMUNICATIONS, INC. AND ITS)
ABILITY TO SERVE SOUTH DAKOTA)
CUSTOMERS)

Civ. 98-73

U S WEST COMMUNICATIONS, INC.)

Appellant.)

v.)

AFFIDAVIT OF
COLLEEN SEVOLD

PUBLIC UTILITIES COMMISSION)
OF SOUTH DAKOTA)

Appellee.)

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

I, Colleen Sevold, being duly sworn, state:

1. I am the manager of regulatory affairs for U S WEST Communications, Inc. ("U S WEST") for South Dakota.

2. I state the facts in this affidavit on personal knowledge except as to those matters I state upon information and belief.

3. Shortly after the Staff for the Public Utilities Commission filed its Petition for Order to Show Cause, the Commission placed a request in several South Dakota newspapers asking for public comments regarding U S WEST's service.

SECTION 2 - RULES AND REGULATIONS (Continued)

2.7. Responsibilities of the Customer (Continued)

- 2.7.6. Interconnection between the Customer's equipment and Company-provided service must be made by the Customer by leased channel or dial-up service. Where interconnection between Customer's equipment and Company-provided service is not made by lease of Company facilities, interconnection must be made by the Customer at the Company's operating offices. Any special interface equipment necessary to achieve the compatibility between facilities of the Company and the channels or facilities of others shall be provided at the Customer's expense.
- 2.7.7. If the protective requirements in connection with Customer-provided equipment are not being complied with, the Company may take such immediate action as necessary to protect its facilities and personnel and will promptly notify the Customer of the need for protective action. In the event that the Customer fails to advise the Company within 10 days after such notice is received that corrective action has been taken, the Company may take whatever additional action is deemed necessary, including the suspension of service, to protect its facilities and personnel from harm.
- 2.7.8. The Customer is liable to the Company for replacement and repair of damage to the equipment and facilities of the Company caused by negligence and willful act of the Customer, its Authorized Users, and others, and for improper use of equipment provided by the Customer, its Authorized Users, and others.
- 2.7.9. The Customer is liable for the loss through theft and fire of any of the Company's equipment installed at Customer's premises.

2.8. Responsibilities of Authorized Users

- 2.8.1. The Authorized User is responsible for compliance with applicable regulations set forth in this tariff.
- 2.8.2. The Authorized User is responsible for establishing its identity as often as necessary during the course of a call.

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SECTION 2 - RULES AND REGULATIONS (Continued)

2.8. Responsibilities of Authorized Users (Continued)

- 2.8.3. The Authorized User is responsible for identifying the station, party, or person with whom communication is desired and/or made at the called number.
- 2.8.4. The Authorized User is responsible for providing the Company with a valid method of billing for each call. The Company reserves the right to validate the creditworthiness of Users through available Credit Card, Called Number, Third Party telephone number and Room Number verification procedures. Where a requested billing method cannot be validated, the User may be required to provide an acceptable alternate billing method or the Company may refuse to place the call.

2.9. Termination or Interruption of Services

- 2.9.1. Without incurring liability, the Company may by 24 hours advance notice discontinue Service(s) to a Customer or to a particular Customer location, or may withhold the provision of ordered or contracted Service(s) under the following conditions:
- (i) For past due balances or when usage has exceeded the estimated credit limit established by the Company;
 - (ii) For violation of the terms or conditions governing the furnishing of services under this tariff;
 - (iii) For violation of any law, rule, regulation, or policy of any governing authority having jurisdiction over the Company's Service(s); or
 - (iv) By reason of any order or decision of a court having competent jurisdiction, public utility commission, federal regulatory body or other governing authority prohibiting the Company from furnishing its Service(s).

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SECTION 2 - RULES AND REGULATIONS (Continued)

2.9. Termination or Interruption of Services (Continued)

- 2.9.2. Without incurring liability, the Company may temporarily interrupt the provision of Service(s) at any time in order to perform test(s) and inspection(s) to assure compliance with tariff regulations and the proper installation and operation of Customer and the Company's equipment and facilities.
- 2.9.3. In the event that the Company incurs attorneys fees or other costs to recover any sums then due and the Company prevails, the Company shall be entitled to recover its costs of collection, legal costs, court costs, and reasonable attorneys' fees, in addition to whatever other relief the court may award. The Company may assign or sell receivables to Local Exchange Carriers, collection agencies or other parties and said amounts owed to the Company shall then become due and payable to said third party.
- 2.9.4. Service(s) may be discontinued by the Company, without notice to the Customer, by blocking traffic to and from certain countries, cities, NXX's, or by blocking calls using certain Customer Authorization Codes or Calling Card Account Numbers when the Company deems it necessary to take such action to prevent fraud or other unlawful use of its Service(s). The Company may restore Service(s) as soon as it can be provided without undue risk.
- 2.9.5. If, for any reason, Service(s) is interrupted, the Customer will only be charged for the Service(s) that was actually used.

2.10. Payment for Service

- The Customer is responsible for payment of all charges for facilities and Service(s) furnished by the Company, including charges for Service(s) originated or charges accepted at the Customer's service point.
- 2.10.1. Charges for Third Party calls will be included on the Billed Party's local exchange telephone company bill pursuant to billing and collection agreements established by the Company or its intermediary with the applicable telephone company.

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to be providing the ability for each of the above units to interface with the other with no loss of data;

- b. service ordering should be able to (1) set the installation date and time, within a four hour window, (2) determine if the facility which is necessary is available for service, (3) determine if excess construction charges will apply, (4) determine the correct billing and advise the prospective customer of same, (5) transmit name and address to directory assistance (if not non-list or non-publish), and (6) do this for a U S WEST customer or a competitive local exchange carrier customer;
 - c. when a site visit is necessary, the technician should call if the time cannot be made and, if the work is done as promised, the technician should inform the customer when the installation is complete;
 - d. trouble reports should be completed within 24 hours of the problem being resolved. The customer should be informed of what caused the trouble and if the trouble cannot be found, the customer should also be informed of that fact;
 - e. the definition of repeat trouble should not be limited to trouble reported within a 30 day period. U S WEST should be able to determine by customer call-in if trouble is recurring. This should also be available by address and by central office;
 - f. that U S WEST respond to Commission staff in a timely manner indicating that a complaint has been addressed and its resolution when the Commission staff relays complaints to U S WEST;
 - g. that U S WEST improve its planning and provisioning in growth areas;
 - h. that U S WEST provision, in a timely manner, adequate and reliable service; and
 - i. that U S WEST upgrade obsolete and non-functioning infrastructure.
4. If the Commission issues any order consistent with paragraph 2, above, failure to fulfill that order may result in the Commission recommending to the Attorney General, pursuant to SDCL 49-31-38.2, that U S WEST's authority to operate as a corporation be revoked in South Dakota or that U S WEST or any or all corporate officers or employees violating such order may be fined individually pursuant to SDCL 49-31-38 for each incidence of violation of a Commission order.

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Exhibit 4 (Order to Show Cause at 5-7). The order established a March 4, 1998 deadline for U S WEST to file prefiled testimony and set a hearing date of April 1-3, 1998. *Id.* at 7.

On January 29, 1998, U S WEST filed a Motion for Discovery and Expedited Ruling ("Discovery Motion") which sought to have the Commission issue deposition subpoenas to Staff members for depositions scheduled the week of February 9-13, 1998. Exhibit 5. Staff resisted the Discovery Motion, asserting that it was not a party, and that under the Rules of Civil Procedure, discovery is available only to parties. Exhibit 6 (Resistance to Motion for Discovery and Request for an Expedited Ruling and Motion to Quash).

The Commission considered the Discovery Motion on February 3, 1998, but deferred action. At the February 3rd hearing, Staff again conceded that it was not a "party" to the proceeding. Exhibit 7 (Transcript of Feb. 3, 1998 hearing). On February 9, 1998, U S WEST filed a Motion for Continuance which sought to extend the deadline for U S WEST to file prefiled testimony until thirty days after the completion of the requested Staff depositions and to continue the hearing date. Exhibit 8. The next day, the Commission denied U S WEST's request to issue deposition subpoenas to Staff members, allowing only limited discovery. The Commission issued a written order pursuant to its oral ruling on February 20, 1998. Exhibit 9.

On February 13, 1998, U S WEST filed the following motions: Motion to Dismiss, Motion to Preclude Staff from Participating at Hearing and Motion to Amend Order to Show Cause. Exhibits 10, 11 and 12. On the same date, U S WEST received extensive discovery requests from Staff. First Request for Information and Documents. Exhibit 13.

On February 19, 1998, U S WEST filed a Motion to Quash Staff's discovery requests on the

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grounds that the Order to Show Cause is not an investigation or examination. Staff counsel has no authority to act on behalf of the Commission. Staff may not obtain discovery because it is not a party. the discovery sought is unreasonable and the requests fail to comply with the South Dakota Rules of Civil Procedure. Exhibit 14. U S WEST also filed an Amended Motion for Continuance at the same time which sought to extend the deadline for U S WEST to file prefiled testimony until thirty days after the completion of discovery and to continue the hearing. Exhibit 15.

On February 20, 1998, the Commission issued an Amended Order to Show Cause pursuant to Staff's request which corrected a typographical error and set forth a procedure under which members of the public may testify without filing prefiled testimony. Exhibit 16.

On February 24, 1998, the Commission considered U S WEST's Motion for Continuance dated February 9, 1998. The Commission voted to suspend the deadlines previously imposed until the Commission rules on U S WEST's pending motions. Exhibit 17 (Transcript of Feb. 24, 1998 meeting at 10-11). The Commission has yet to schedule a hearing on U S WEST's Motion to Dismiss, Motion to Preclude Staff from Participating at Hearing, Motion to Amend Order to Show Cause and Motion to Quash, although U S WEST has requested expedited hearings. Exhibit 18.

On February 26, 1998, U S WEST filed a Notice of Appeal with this Court which appeals the Order to Show Cause dated January 28, 1998, the Amended Order to Show Cause dated February 20, 1998 and the Order Concerning Motion to Amend and Motion for Discovery, also dated February 20, 1998. The orders constitute final decisions and are appealable pursuant to Chapter 1-26.¹

¹ Alternatively, even if the Court were to construe the decisions as procedural or intermediate agency actions, they would still be immediately reviewable because review of the Commission's ultimate decision on the merits would not provide an adequate remedy. SDCL 1-26-30; South Dakota Bd. of Regents v. Heege, 428 N.W. 2d 535, 539 (S.D. 1988).

SECTION 3 - DESCRIPTION OF SERVICES

3.1. Service Offerings.

The information in this section pertains to all classes of long distance message telecommunications services offered pursuant to this tariff unless otherwise noted. South Dakota intrastate long distance service is offered on a per call basis to Customers originating calls from locations within the state of South Dakota. Such service is available twenty-four (24) hours per day seven (7) days per week.

3.1.1. One Plus Service

One Plus Service is a one-way multi-point service designed for small to medium size Customers for placing long distance telephone calls. Access to the network is available through presubscription (or 1+ access) and dial-up arrangements. Service is provided for a minimum Service Period of one month.

3.1.2. Dedicated One Plus Service

Dedicated One Plus Service is a dedicated service arrangement designed to accommodate the needs of medium to large size businesses. Under this arrangement, Customers access the Company's network via dedicated access facilities between the Customer's premises and the Company point of presence. Charges for interconnection facilities are equivalent to those assessed by the local access provider and payment for such charges shall be the responsibility of the Customer.

3.1.3. Travel Service

Travel Service enables a Customer or Authorized User to bill a long distance telephone call to an authorized calling card account with the Company. Travel Service calls are initiated by dialing an access code and an authorization code.

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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 . . . of the agency's decision. The court, may, within ten days of receiving an application for a stay of the agency's decision in its discretion, order a further stay, pending final decision of the court. The court, as a condition of granting a stay, may require the appellant to furnish a bond or other such security or order supervision as the court may direct to indemnify or protect the state or agency or any person from loss, damage or costs which may occur during the stay.

(emphasis added). This statute clearly authorizes the Court to stay the Amended Order to Show Cause and the Order Concerning Motion to Amend and Motion for Discovery.

B. INHERENT POWER

The Court has jurisdiction over this matter. SDCL 49-1-19, 1-26-30 and 1-26-30.2. In addition to express power, courts also have inherent powers which exist apart from any constitutional or statutory authority. 20 Am Jur 2d Courts § 43 (1995). See also Timmerman v. Timmerman, 81 N.W.2d 135 (Neb. 1957) (courts of general jurisdiction have the inherent power to do all things necessary for proper administration of justice and equity within the scope of their jurisdiction). The power to stay further agency proceedings clearly falls within the scope of the Court's inherent powers.

III. THE STAY FACTORS WEIGH IN FAVOR OF GRANTING A STAY

In considering an application for a stay, courts weigh four factors: (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, 241-42 (8th Cir. 1970) (quoting Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 925 (D.C. Cir. 1958), cert. denied, 402 U.S. 999 (1971)). These factors are to be balanced, not prerequisites to be met. 2 Am Jur 2d Administrative Law § 605 (1994).

SECTION 3 - DESCRIPTION OF SERVICES**3.4 Incomplete Calls**

There shall be no charge for incomplete calls.

3.5 Calculation of Distance

In the event the company provides mileage sensitive products, then usage charges are based on the airline distance between rate centers associated with the originating and terminating points of the call.

The airline mileage between rate centers is determined by applying the formula below to the vertical and horizontal coordinates associated with the rate centers involved. The Company uses the rate centers and associated vertical and horizontal coordinates that are produced by Bell Communications Research in their NPA-NXX V & H Coordinates Tape and Bell's NECA Tariff No. 4.

FORMULA:
$$\sqrt{\frac{(\#1-HZ)^2 + (\#1-VZ)^2}{10}}$$

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There is no legal basis for the OTSC. SDCL 49-31-3 allows for revocation or suspension of a telecommunications company's authority to provide telecommunications service in South Dakota only for willful misconduct or "other good cause." Here, there is no allegation that U S WEST has violated a Commission order. This statute also requires the Commission to make rules to implement its revocation and suspension authority. *Id.* ". . . The Commission shall, by rules promulgated pursuant to chapter 1-26, prescribe the necessary procedures to implement this section. . . ." The Commission has **not** made such rules, nor has it defined the term "other good cause." ARSD 20:10:01:45 is a procedural rule implementing SDCL 49-1-11, not 49-31-3. Additionally, there is nothing in SDCL 49-31-3 which would allow the Commission to place conditions on a certificate. The Commission can grant the certificate, deny the certificate, and suspend or revoke the certificate. The Legislature has provided for nothing more. The Commission has no more authority than what the Legislature provides. *Id.*

Thus, the Commission does not have authority to hold a hearing to impose conditions on U S WEST's certificate of authority.

2) The OTSC Improperly Places the Burden of Proof on U S WEST

In administrative hearings, the moving party has the burden of going forward as well as the burden of persuasion. Gourley v. Bd. of Trustees of South Dakota Retirement Systems, 289 N.W.2d 251, 253 (S.D. 1980). Here, Staff petitioned the Commission to issue an order to show cause. Exhibit 1. However, the Order to Show Cause ("OTSC") places the burden on **U S WEST**. The OTSC improperly shifts the burden of proof and the burden of persuasion to U S WEST.

In order to provide telecommunications services in South Dakota, telecommunications

companies are required to obtain a certificate of authority. SDCL 49-31-3. The certificate is a license. See SDCL 1-26-1(4) (defining a license as "the whole or part of any agency . . . certificate . . . required by law").³ Pursuant to the OTSC, U S WEST is required to show cause why, among other things, its authority to act as a telecommunications company in South Dakota should not be revoked. Order at page 5. Thus, this docket is a license revocation proceeding. As such, the burden or proof properly rests with the agency.

The South Dakota Supreme Court has previously held that in matters concerning the revocation of a professional license, the appropriate standard of proof to be utilized by an agency is clear and convincing evidence. In re Zar, 434 N.W.2d 598, 602 (S.D. 1989). The Court found that this higher standard applied because of the importance of the interest involved, i.e., a professional's career. Id. No less an interest is at stake in this case in that U S WEST's investments in South Dakota are in the hundreds of millions of dollars and affect the lives of hundreds of South Dakota employees who are employed by U S WEST and their families. Affidavit of Colleen Sebold ¶ 8. If the Commission revokes U S WEST's certification, it would be unable to provide telecommunications services in South Dakota to over 200,000 customers. Id. ¶ 8.

3) The Commission's discovery order deprives U S WEST of the ability to conduct discovery

U S WEST is clearly a party to this contested case proceeding. Under the South Dakota Administrative Procedure Act, parties have a full panoply of rights. SDCL 1-26-18 provides:

Opportunity shall be afforded all parties to respond and present evidence on issues of fact and

³ Without a certificate, U S WEST cannot engage in business in this state. Thus, U S WEST has a property interest in its certificate.

arguments on issues of law or policy. A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross-examine witnesses, may present evidence in support of his interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence on his behalf.

(emphasis added).

SDCL 1-26-19.1 provides, in relevant part:

Each agency and the officers thereof charged with the duty to administer the laws of this state and rules of the agency shall have power to administer oaths as provided by chapter 18-3 and to subpoena witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matters in contested cases and likewise issue subpoenas for such purposes for persons interested therein as provided by § 15-6-45.

(emphasis added). ARSD 20:10:01:17 implements 1-26-19.1. It provides:

Subpoenas requiring the attendance of witnesses and the production of records, books, papers, tariffs, agreements, contracts, and documents may be issued by any commissioner or the executive secretary on the written request of any party in any proceeding before the commission.

ARSD 20:10:01:17 (emphasis added). Thus, parties must petition the Commission to issue subpoenas.

SDCL 1-26-19.2 provides:

Each agency and the officers thereof charged with the duty to administer the laws and rules of the agency shall have power to cause the deposition of witnesses residing within or without the state or absent therefrom to be taken or other discovery procedure to be conducted upon notice to the interested person, if any, in like manner that depositions of witnesses are taken or other discovery procedure is to be conducted in civil actions pending in circuit court in any matter concerning contested cases.

(emphasis added). ARSD 20:10:01:22.01 implements 1-26-19.2. It provides:

The commission at its discretion, either upon its own motion or for other good cause shown by a party to a proceeding, may issue an order to take a deposition, interrogatory, or other discovery proceeding. The taking and use of such deposition, interrogatory, or discovery shall be in the same manner as in the circuit courts of this state.

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The standard for discovery is set out in SDCL 15-6-26(b). It provides, in relevant part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Thus, evidence which is "reasonably calculated to lead to the discovery of admissible evidence" is discoverable. The scope of pretrial discovery is broadly construed. Kaarup v. St. Paul Fire & Marine Ins., 436 N.W.2d 17, 19 (1989). "A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Id.* (citing 8 C. Wright and A. Miller Federal Practice and Procedure § 2001 (1970)). "All relevant matters are discoverable unless privileged." *Id.* at 20.

(a) U S WEST's Discovery Request

The Petition for Order to Show Cause was brought by Staff. In order to prepare its prefired testimony, U S WEST sought to depose the following Staff members: Bob Knadle, Harlan Best, Gregory A. Rislov, Steven M. Wegman, Leni Healy and Tammi Stangohr, all of whom have information relating to U S WEST's service quality, and William Bullard in his capacity as chief administrative officer of the Commission.⁴ In addition, U S WEST sought the production of the following documents:

- (1) Documents prepared by Staff regarding the Petition for Order to Show Cause ("the Petition");
- (2) Documents prepared or received by Staff relative to U S WEST's service quality that

⁴ SDCL 49-1-8.2.

EXHIBIT 6

INTELNET SERVICES OF NORTH AMERICA, INC.

BIOGRAPHIES/QUALIFICATIONS
OF SENIOR MANAGEMENT

In so ruling, the Commission has precluded U S WEST from gaining access to information which may be exculpatory. U S WEST is seeking relevant documents and testimony to matters alleged in the Petition that are in the possession and control of Staff. Moreover, to the extent U S WEST sought copies of documents relative to consumer complaints, these documents are public records and, as such, are discoverable. See SDCL 49-13-1 and 1-27-1. This ruling essentially precludes U S WEST from any discovery prior to the filing of Staff's prefiled testimony, while at the same time requiring U S WEST to carry the burden of proof and file its prefiled testimony first. Then at the time of the filing of Staff's prefiled testimony, U S WEST's discovery is limited to only what evidence Staff files. U S WEST, by the Commission's order, is deprived of any meaningful opportunity to discover information that Staff has in its possession or in the oral testimony of Staff except as dictated by Staff, even of public records.

(c) The Absence of Standards

The issues at the hearing required by the OTSC are "whether U S WEST is failing to provide reliable, timely and adequate service" and, if so, whether one or more of a number of remedies should be imposed. Exhibit 16 at 7. SDCL 49-31-3 requires the Commission to adopt rules implement its revocation and suspension authority. Notwithstanding this legislative mandate, the Commission has failed to adopt such rules. It has similarly failed to adopt rules that provide specific standards for providing telephone service. Nor are there any statutes which provide such standards.

The Commission's failure to adopt service quality standards deprives U S WEST of due process. "[T]raditional concepts of due process require that fair notice of rules and standards be given to the parties prior to an adjudication hearing." Application of Northwestern Bell Tel. Co., 326

N.W.2d 100, 104 (S.D. 1982). Consistent with this principle, SDCL chapter 1-26 requires notice and hearing before the adoption of rules that "implement, interpret, prescribe law, policy, procedure, or practice requirements of an administrative agency." Id.

Applying this principle, the South Dakota Supreme Court in Application of Northwestern Bell held that the Commission did not have authority to apply a financial emergency standard for granting interim rate relief since the Commission had not previously adopted a rule defining such a standard. In so ruling, the Court recognized that administrative agencies must have power to deal with unforeseen, specialized and varying problems which may arise on a case-to-case basis but found that the need for rules and standards governing the granting of interim rate relief was foreseeable, and the problem of establishing a rule defining financial emergency was not so specialized or varied in nature as to be impossible to contain within the boundaries of a general rule. Id.

In this case, the Commission knew that many of the states in which U S WEST does business have adopted quality of service standards. In Docket 97-016 Robert Knadle in Exhibit 13 provides a detailed review of the quality of service standards of the states in which U S WEST does business. See Exhibit 10 (attachment A).

Moreover, this Court recently recognized the Commission's failure to adopt quality of service standards as being problematic:

While the Court is not ruling today that there's been a violation of law sufficient to reverse, it would seem to me that this could certainly turn, as U S WEST has pointed out, into a situation where the Commission can't sit back and refuse to identify any kind of standards and subject any telecommunications company to the standardless review and wait until they present their evidence to deny their request changing and shifting as the sands may blow.

Exhibit 20 (Transcript of Oral Argument at 55-56, U S WEST Communications, Inc. v. Public

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Due process requires at a minimum that U S WEST be notified of any standards against which its performance is to be judged and be given an opportunity to meet such standards. The Commission's action and Amended Order to Show Cause fails to comply with this requirement.

(d) Staff's inconsistencies

During the past two years, Staff has closely monitored U S WEST's operations and has conducted a number of site inspections. In docket TC97-016, Staff found that applying the rejected service quality standards (which had been agreed to by Staff and U S WEST), U S WEST was entitled to increase its basic residential service rates by approximately \$1.30.⁵ In docket TC96-107, Staff conducted the most rigorous examination ever in a switched access docket. The examination consisted of two site visits and meetings with more than a dozen U S WEST employees. At the conclusion of the examination, Staff recommended a switched access rate which was substantially

⁵ The Commission disagreed and denied any increase beyond implementation of the second phase of the touch tone fold in. U S WEST appealed the Commission's decision in docket TC97-016. This Court affirmed. U S WEST Communications, Inc. v. Public Utilities Comm'n, Civ. No. 97-349, Order Affirming Findings of Fact and Conclusions of Law and Order Denying Tariff Revisions of the South Dakota Public Utilities Commission (Feb. 6, 1998).

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similar to the rate proposed by U S WEST.⁶ At no time during this period did Staff suggest that an OTSC was warranted. Exhibit 3 at 5.

Ironically, after petitioning the Commission in this docket, Staff counsel emphatically denied that Staff was "a party to this action." Exhibit 7 at 19, 23. Counsel's admission constitutes a judicial admission and is binding on Staff. In re Estate of Tallman, 562 N.W.2d 893, 896 (S.D. 1997). Because Staff has admitted it is not a party, Staff cannot now avail itself of the right to cross examine, present evidence and conduct discovery. SDCL 1-26-18. Staff has nevertheless served numerous discovery requests on U S WEST. Staff cannot have it both ways. ARSD 20:10:01:22.01 provides that discovery is to be done "in the same manner as in the circuit courts of this state." Pursuant to the South Dakota Rules of Civil Procedure, discovery is only available to parties. SDCL 15-6-26(a) and 1-26-18 and ARSD 20:10:01:17 and 20:10:01:22.01.

- (e) U S WEST is entitled to discover whether there is actual bias or an unacceptable risk of actual bias

U S WEST is entitled to a hearing before a fair and impartial decision maker as a matter of due process of law. Northwestern Bell Tel. Co. v. Stofferahn, 461 N.W.2d 129, 132-33 (S.D. 1990). "The test for disqualification in adjudicatory proceedings is whether an agency adjudicator has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Id. at 133 (citing Cinderella Career and Finishing Schools, Inc. v. Federal Trade Comm'n, 425 F.2d 583 (D.C. Cir. 1970)). The standard to be applied is whether the record establishes either actual bias or

⁶ The Commission adopted Staff's proposed rate but phased it in over a period of time without compensating U S WEST for lost revenue or the time value of money. U S WEST has appealed the Commission's decision which is presently pending before this Court. U S WEST Communications, Inc. v. Public Utilities Commission of South Dakota, Civ. No. 97-462.

Intelnet Services of North America, Inc.

Contact for Complaints and Regulatory Matters

**Bea Hagy
432 Kelley Drive
West Berlin, New Jersey 08091
(609) 768-2201
(800) 307-3980**

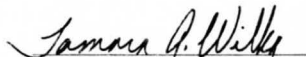
EXHIBIT 8

INTELNET SERVICES OF NORTH AMERICA, INC.

BILLING AND CUSTOMER SERVICE PROCEDURE

0145
2002
Motion for Discovery and all proceedings before the Commission in docket TC97-192 until this Court hears this case on the merits.

Dated this 2nd day of March, 1998.



Thomas J. Welk
Tamara A. Wilka
BOYCE, MURPHY, MCDOWELL &
GREENFIELD, L.L.P.
P.O. Box 5015
Sioux Falls, SD 57117-5015
Telephone: (605) 336-2424

Andrew D. Crain
U S WEST Communications, Inc.
1801 California, Suite 5100
Denver, Colorado 80202
Telephone: (303) 672-2926

Attorneys for U S WEST Communications, Inc.

EXHIBIT 9

INTELNET SERVICES OF NORTH AMERICA, INC.

FINANCIALS

SUBMITTED UNDER SEAL

CONFIDENTIAL

INTELNET SERVICES OF
NORTH AMERICA, INC.
A DELAWARE CORPORATION
432 KELLY DRIVE
WEST BERLIN, NJ 08091

EXPLANATION	AMOUNT

95-208/212

2113

PAY
AMOUNT
OF

THE SUM 250 DOLS 00 CTS

DOLLARS

CHECK
AMOUNT

DATE	TO THE ORDER OF	DESCRIPTION	CHECK NUMBER	CHECK AMOUNT
8/24/77	Debate Public Utilities Commission	Application for cash of account	2113	\$ 250.00

TC97-148

SUMMIT
CORP.

Burda Wagon
Domestic P. Sales

⑈002113⑈ ⑆031202084⑆ 4266-00896 2⑈

South Dakota
Public Utilities Commission
State Capitol 500 E. Capitol
Pierre, SD 57501-5070
Phone: (800) 332-1782
Fax: (605) 773-3809

TELECOMMUNICATIONS SERVICE FILINGS

These are the telecommunications service filings that the Commission has received for the period of:

08/29/97 through 09/04/97

If you need a complete copy of a filing faxed, overnight expressed, or mailed to you, please contact Delaine Kolbo within five days of this filing.

DOCKET NUMBER	TITLE/STAFF/SYNOPSIS	DATE FILED	INTERVENTION DEADLINE
REQUEST FOR CERTIFICATE OF AUTHORITY			
TC97-151	Application by GLD, Group Long Distance, Inc. to amend its Certificate of Authority to operate as a telecommunications company within the state of South Dakota. (Staff: TS/CH) "Applicant is a reseller which intends to offer all local services provided by the incumbent LECs....GLD seeks authority to resell local exchange services throughout the state ... in areas served by any LECs in South Dakota that are not eligible for a small or rural carrier exemption pursuant to Section 251(f)(1) of the Federal Act. GLD does not seek to provide resold services to customer in those small or rural territories at this time....Applicant will file a copy of its proposed tariff ... upon completion of negotiations for interconnection."	08/29/97	09/19/97
TC97-148	Application by Intelnet Services of North America, Inc. for a Certificate of Authority to operate as a telecommunications company within the state of South Dakota. (Staff: TS/CH /KC) Intelnet proposes to provide One-Plus Service, Direct Access Service, 1-800 Service and Travel Service. TS	08/29/97	09/19/97
NONCOMPETITIVE TELECOMMUNICATIONS FILING			
TC97-152	U S WEST Communications filed to modify the pay telephone language pursuant to the Telecommunications Act of 1996, Section 276, Provision of Payphone Services. (Staff: DJ/KC) "This ensures that the tariff accurately reflects the federal deregulation of payphone services and that the products and services offered by U S WEST Communications to Payphone Service Providers are offered under equal terms and conditions....U S WEST Communications requests an effective date of September 29, 1997."	08/29/97	09/19/97

Important Notice: The Commission is compiling a list of internet addresses. If you have an internet address please notify the Commission by E-mailing it to Terry Norum at: terryn@puc.state.sd.us Faxing the address to the Commission at: 605-773-3809

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

IN THE MATTER OF THE APPLICATION OF)
INTELNET SERVICES OF NORTH AMERICA,)
INC. FOR A CERTIFICATE OF AUTHORITY TO)
PROVIDE TELECOMMUNICATIONS)
SERVICES IN SOUTH DAKOTA)

ORDER GRANTING
CERTIFICATE OF
AUTHORITY

TC97-148

On August 29, 1997, the Public Utilities Commission (Commission), in accordance with SDCL 49-31-3 and ARSD 20:10-24:02, received an application for a certificate of authority from Intelnet Services of North America, Inc. (Applicant).

Applicant proposes to offer 1+, 800, travel service, and directory assistance. A proposed tariff was filed by Applicant. The Commission has classified long distance service as fully competitive.

On September 4, 1997, the Commission electronically transmitted notice of the filing and the intervention deadline of September 19, 1997, to interested individuals and entities. No petitions to intervene or comments were filed and at its regularly scheduled October 28, 1997, meeting, the Commission considered Applicant's request for a certificate of authority. Commission Staff recommended granting a certificate of authority, subject to the condition that Applicant not offer a prepaid calling card or require deposits or advance payments without prior approval of the Commission.

The Commission finds that it has jurisdiction over this matter pursuant to Chapter 49-31, specifically 49-31-3 and ARSD 20:10-24:02 and 20:10-24:03. The Commission finds that Applicant has met the legal requirements established for the granting of a certificate of authority. Applicant has, in accordance with SDCL 49-31-3, demonstrated sufficient technical, financial and managerial capabilities to offer telecommunications services in South Dakota. The Commission approves Applicant's application for a certificate of authority, subject to the condition that Applicant not offer a prepaid calling card or require deposits or advance payments without prior approval of the Commission. As the Commission's final decision in this matter, it is therefore

ORDERED, that Applicant's application for a certificate of authority is hereby granted, subject to the condition that Applicant not offer a prepaid calling card or require deposits or advance payments without prior approval of the Commission. It is

FURTHER ORDERED, that Applicant shall file informational copies of tariff changes with the Commission as the changes occur.

Dated at Pierre, South Dakota, this 3rd day of November, 1997.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By

Date

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.
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Of Counsel
John R. McDowell

J.W. Boyce (1884-1915)
John S. Murphy (1924-1966)

March 6, 1998

William Bullard, Executive Director
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

Rolayne Ailts Wiest, General Counsel
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

Camron Hoseck, Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

RECEIVED

MAR 09 1998

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Re: In the Matter of U S West Communications, Inc. and its Ability to Serve South Dakota
Customers (Civ. 98-73) (Docket TC97-192)

Dear Bill, Camron and Rolayne:

Please find enclosed a copy of the Motion to Supplement Record and Notice of hearing Pursuant to
Sixth Circuit Court Rule 95-1. This is intended as service by mail upon you.

Sincerely yours,

BOYCE, MURPHY, McDOWELL &
GREENFIELD, L.L.P.



Tamara A. Wilka

TAW/vjj
Enclosures

cc: Jon Lehner
Andrew D. Crain
Cindy Pierson

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

CERTIFICATE OF AUTHORITY

To Conduct Business As A Telecommunications Company
Within The State Of South Dakota

Authority was Granted October 28, 1997
Docket No. TC97-148

This is to certify that

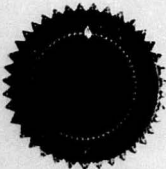
INTELNET SERVICES OF NORTH AMERICA, INC.

is authorized to provide telecommunications services in South Dakota.

This certificate is issued in accordance with SDCL 49-31-3 and ARSD 20:10:24.02, and is subject to all of the conditions and limitations contained in the rules and statutes governing its conduct of offering telecommunications services.

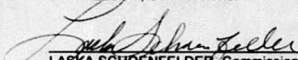
Dated at Pierre, South Dakota, this 3rd day of November, 1997.

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION:**




JAMES A. BURG, Chairman


PAM NELSON, Commissioner


LASKA SCHOENFELDE, Commissioner