SDTA
Rural roots, global connections

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August 16, 2006

Ms. Patty Van Gerpen, Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
State Capitol Building
Pierre, South Dakota 57501

RE: Dockets TC06-036 thru TC06-042, Application for Reconsideration of Commission Order dated July 14, 2006.

Dear Ms. Van Gerpen:

The South Dakota Telecommunications Association ("SDTA") submits these comments as its response to the "Application for Reconsideration" dated July 28th, 2006, filed by the Golden West Companies in the above referenced proceedings. By Order dated July 14th, 2006 this Commission granted intervention to SDTA and at the same time took action granting a request by WWC License, LLC ("WWC") to assign these cases, for hearing, to the Office of Hearing Examiners ("OHE"). The Application for Reconsideration asks this Commission to reconsider and reverse its decision granting the WWC request to use the OHE. SDTA strongly supports the Application for Reconsideration as filed and, with these comments, presents further argument supporting the position of the Golden West Companies. In SDTA's view, there is sufficient leeway under the current state statutes for this Commission to adopt a different, less literal, interpretation of the provisions of SDCL 1-26-18.3 and further, adopting a different interpretation of the statute should be viewed as favorable from a public policy perspective.

As is pointed out in the "Memorandum in Support of Application for Reconsideration" also filed by the Golden West Companies, this Commission exists, under state statute, as a "separate department" within state government. This "separate" status is consistent with what is generally understood to be the status of "public utility commissions" or "public service commissions." Such entities are generally established as "administrative agencies whose power is derived from the legislature, and whose functions are legislative functions." 64 Am Jur 2d, *Public Utilities*, § 143. "Regulation of public utilities is a legislative, rather than judicial, function." *Id.* at § 15. The function of "rate making," in particular, is "purely legislative in character, whether it is exercised directly by the legislature itself by the enacting of a law fixing rates or by the granting of a charter wherein the rates are regulated or is exercised by some subordinate administrative or

municipal body to whom the power of fixing rates has been delegated." *Id.* at § 68. As the South Dakota Supreme Court has previously held, the "regulation of wages and prices is a legislative function to be exercised by an elected legislative body. The power and authority to do so may be delegated to other government officers or agencies to a limited extent provided understandable standards are adopted to guide the officer or agency in the exercise of that power." House of Seagram, Inc. v. Assam Drug Company, 176 N.W.2d 491, 495 (SD 1970).

The South Dakota legislature has obviously delegated to this Commission the power and authority to establish rates for various utility services and to also regulate in other aspects the services provided by certain utility providers. In making this delegation, the legislature has through various statutes given the Commission specific guidance on certain regulatory matters. The delegation has also been made with the understanding that this Commission is particularly suited to making utility regulation decisions because it is an elected body and because it exists as an agency with certain expertise. *See* Appl. of Jack Rabbit Lines, Inc. 283 N.W.2d. 402, 405 (S.D. 1979).

Many of the regulatory decisions that this Commission is, by statute, authorized to make not only stand to impact the parties that are directly involved, but also will affect other utility carriers, and consumers throughout the State. The Commission's decisions, as a general matter, do affect the public interest. As the South Dakota Supreme Court has noted in addressing this Commission's general statutory authority to supervise and control telecommunications companies, "the underlying basis for this regulation is to protect the public interest. Public service commissions are generally empowered to, and are created with the intention that they should regulate public utilities insofar as the powers and operations of such utilities affect the public interest and welfare." Switched Access Rates for U.S. West, 618 N.W.2d 847, 852 (2000). In regards to rate-making specifically, the legislature has provided significant guidance under the existing statutes recognizing that the rate-making power carries with it the "concomitant responsibility to balance the utility's need for adequate revenue with the public's right to just and reasonable rates." Application of Northwestern Bell Tel. Co., 382 N.W.2d 413, 416 (S.D. 1986). For example, under SDCL § 49-31-1.4, the Commission in cases where it is to apply "price regulation," is required to consider in determining "whether the price is fair and reasonable . . . the price of alternative services, the overall market for the service, the affordability of the prices for the service in the market it is offered, and the impact of the price of the service on the commitment to preserve affordable universal service." As stated in Switched Access Rates for U.S. West, cited above, these statutory provisions amount to a "legislative standard of guidance." 618 N.W. 2d 847 at 851. Similar standards of guidance intended to shape this Commission's decisions are found in other statutes including SDCL §§ 49-31-3, 49-31-3.2, 49-31-3.4,49-31-4, 49-31-4.1, 49-31-4.3, 49-31-7, 49-31-11, 49-31-12.4, 49-31-12.5, 49-31-15, 49-31-18, 49-31-58, 49-31-59, 49-31-71, 49-31-73, 49-31-76, 49-31-78, 49-31-79, 49-31-80, and 49-31-85. With respect to the establishment of reciprocal compensation rates specifically, the types of rates at issue in these proceedings, there are also particular standards that this Commission is obligated to follow. Pursuant to SDCL § 49-31-81, in mediating or arbitrating interconnection issues between carriers, the Commission is directed to follow the provisions of 47 U.S.C.

§ 252. That section contains specific provisions describing what must be considered in determining whether proposed reciprocal compensation rates are "just and reasonable."

All of these various standards are intended to guide this Commission in its decision-making with the ultimate aim of protecting the public interest. *See* Switched Access Rates for U.S. West 618 N.W.2d 847. SDTA believes that a fair and effective application of these legislatively established standards requires this Commission, not the OHE, to engage itself directly in the evidentiary hearing process in order to bring the specialized expertise of the Commission and its Staff to bear upon the process of creating a complete evidentiary record upon which the final disposition of the matter will be based. Direct involvement of the Commission in the actual investigatory hearing process is required if this Commission is to have a complete evidentiary record that will facilitate rendering of an informed decision.

As pointed out in the Golden West Companies "Memorandum in Support of Application for Reconsideration," if the interpretation of SDCL 1-26-18.3 argued by WWC is accepted, the Commission is relegated to reviewing transcripts and proposed decisions rendered by the Office of Hearing Examiners. The "Commission will relinquish its ability to hear extensive testimony, interrogate witnesses and review the exhibits in the context of such testimony. This Commission's review of the transcript of such proceedings and any proposed order will be a cold one, depriving it of its ability to ask questions it may and likely will have pertaining to the testimony or the exhibits presented." (Memorandum, p. 8).

SDTA does not believe that the South Dakota legislature intended the provisions of SDCL 1-26-18.3 to have this affect. This Commission is given authority under numerous generally enabling statutes to engage in the regulation of certain public utilities and public utility services. This authority has been extended by the legislature to this Commission with the understanding that the Commission has special expertise in matters involving utility regulation. Similarly, Congress delegated the authority to arbitrate interconnection disputes between telecommunications carriers to this state commission based upon the existence of such special expertise. *See,* 47 U.S.C. § 252(b). SDTA believes that such authority has also been extended with the understanding that this Commission is an elected body and that, as such, Commissioners, unlike executive appointees, have a heightened responsibility to ensure protection of the public interest.

Under SDCL § 49-1-9, this Commission "may in all cases conduct its proceedings, when not otherwise particularly prescribed by law, in such manner and places as will best conduce the proper dispatch of business and to the ends of justice." SDTA shares the view of the Golden West Companies that the provisions of SDCL § 1-26-18.3 do not amount to a "particular" prescription dictating that the Commission must assign its cases, upon the request of any party, to the OHE. Moreover, in addressing the issue at hand regarding the provisions of SDCL 1-26-18.3, it is important that the Commission not minimize the importance of the application of its regulatory experience and expertise to the actual hearing process. The pending arbitration proceedings, like other cases previously presented to this Commission, require a resolution of certain rate development

issues and also a number of complex interconnection related issues that are simply beyond the scope of knowledge of hearing officers or administrative law judges that are not regularly and routinely engaged in this area of law. It would seem obvious that these are not the type of issues that can be fairly addressed by an individual or individuals that have no experience in utility regulation matters. This seems especially true given the arbitration timelines established under the federal law that currently require resolution of any unresolved issues not later than December 31, 2006. Under these circumstances, it is clear that a "proper dispatch of business" and the "ends of justice" require this Commission to conduct the arbitration hearings that are required to address unresolved issues. See SDCL § 49-1-9.

Contrary to what is portrayed by WWC, there is more than one permissible legal interpretation of SDCL § 1-26-18.3. WWC and the Commission Staff have taken the position that the language contained in the first sentence of SDCL § 1-26-18.3 applies to all contested cases coming before the Commission. SDTA disagrees with this interpretation. As argued in our earlier comments to the Commission dated July 2, 2006, the provisions of SDCL § 1-26-18.3 must not be read in a vacuum. Other state statutory provisions, specifically those found in SDCL §§ 1-26-D-4 and 1-26D-11, suggest that the provisions of SDCL § 1-26-18.3, allowing for the request of a "hearing examiner," only apply to contested cases that arise under Titles 10 and 58 of the State Code (Taxation and Insurance), or only to those situations where an agency "not covered by this chapter" [Chapter 1-26D] has "contracted with the Office of Hearing Examiners" to conduct hearings of its contested cases.

Under established rules of statutory construction, "[t]he purpose of a statute is to be gathered from the whole act, and where a word or term is susceptible to two constructions, a meaning should be ascribed which carries out the purpose of the act." Western Surety. Co. v. Mydland, 179 N.W.2d 3, 4 (S.D. 1970). For purposes of statutory construction, the South Dakota Supreme Court gives "words their plain meaning and effect, and reads statutes as a whole, as well as enactments relating to the same subject. Sanford v. Sanford, 694 N.W.2d 283, 287 (S.D. 2005). Further, courts must, where possible, interpret statutes in a manner which permits them to be construed together and harmonized, giving effect to all of their provisions. *See* State v. Young, 630 N.W.2d. 85 (S.D. 2001).

SDTA believes that based on these established rules of statutory construction one can reasonably conclude that the provisions of SDCL § 1-26-18.3 are only applicable to contested cases that arise under Titles 10 and 58 and to contested cases overseen by agencies that are not covered directly by Chapter 1-26D, but which have contracted with the OHE.

It is interesting that the provisions of SDCL § 1-26D-4 which describe the "Powers of Hearing Examiners," only provide that "[h]earing examiners . . . shall hear all contested cases that arise under Titles 10 and 58." (*Emphasis added.*) The subsequent provisions contained in SDCL § 1-26D-11 then state that "[a]ny agency not covered by this chapter may contract with the Office of Hearing Examiners or any other person to conduct

hearings on a case-by-case basis . . .." (*Emphasis added*). If the positions of WWC and Commission Staff regarding the interpretation of SDCL § 1-26-18.3 were to be accepted, there is no consistency with the language of these other statutes. What happens to the option to contract that appears to be granted to agencies that are not covered directly by Chapter 1-26D?

In SDTA's view, the Commission is not bound to accept the legal interpretation argued by WWC. There is another permissible interpretation and this other interpretation is not only more consistent with established rules of statutory construction, it is an interpretation that better serves the public interest by preserving this Commission's ability to utilize its expertise in the actual hearing process.

Accepting this latter interpretation would also eliminate any future need for this Commission to address the other issues that inevitably arise if this Commission adopts the position that any "contested case" under its jurisdiction may be transferred, upon party request, to the OHE. A review of the state statutes indicates that this Commission is authorized to conduct hearings in the following areas:

49-13-1 and 49-13-9 (General Complaint Proceedings);
49-31-3 (Telecommunications Company Inter-exchange Certification Hearings);
49-31-3.2 (Hearings Regarding Waiver or Modification of Rules and Orders for Fully Competitive or Emerging Competitive Services);
49-31-3.3 and 49-31-3.4 (Telecommunications Service Reclassification Hearings);
49-31-4.1 (Hearings on Price Regulation);
49-31-12.4 (Hearing on Non-Competitive Tariffed Service Offerings);
49-31-12.5 (Hearing on Emerging Competitive Service Offerings);
49-31-71 and 49-31-72 (Telecommunications Company Local Exchange Certification Hearings);
49-31-79 (Hearings Regarding Rural Telephone Company Interconnection Exemptions);
49-31-95 (Hearings on Slamming or Cramming);
49-34A-12 and 49-34A-12 (Hearings to Review Changes in Gas and Electric Rates);
49-34A-39 (Investigatory Hearings on Gas or Electric Utility Regulatory Issues);
49-34A-51 (Hearings Related to Determination of Price for Municipal Purchase of Electric Facilities in an Annexed Area);
49-43A-56 (Hearings Regarding Requests of Large Customers to Not Take Service from Assigned Electric Utility);
49-34A-58 (Hearings Regarding Adequacy of Electric Utility Service);
49-34A-59 (Hearings on Violation of Service Area Provisions);
49-34B-5 (Hearings Regarding Gas Pipeline Safety Violations);
49-41B-20 (Final Hearing Regarding Permit for Energy Facilities); and
49-45-7 (Hearing on Application for Grain Dealer License).

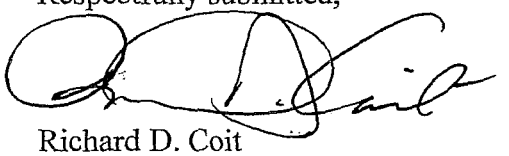
If the Commission adopts the interpretation of SDCL § 1-26-18.3 argued by WWC and Staff, which of the above referenced hearing proceedings can be transferred to the OHE and which cannot? If any "contested case" can be transferred upon request by a party to the OHE, does this mean that all of the above hearings are subject to such a transfer request?

A question also arises as to which parties to a contested case will be permitted to a request a transfer to OHE. The provisions of SDCL § 1-26-18.3 state that "any party to the contested case" may require a transfer to the OHE. (*Emphasis added*). Does this then mean that an "intervening party" may legally request an assignment of a contested case before this Commission to the OHE? Could SDTA have requested an assignment of the arbitration proceeding to the OHE?

For all of the reasons set forth in these comments and in our earlier comments of July 3, SDTA urges the Commission to grant the Application for Reconsideration filed by the Golden West Companies and to reject the interpretation of SDCL § 1-26-18.3 offered by WWC. The Commission should retain its ability to directly conduct these arbitration hearing(s).

Thank you for your consideration of these comments.

Respectfully submitted,



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