

STATE OF SOUTH DAKOTA

OFFICE OF HEARING EXAMINERS

In the Matter of the Petitions of Armour)	
Independent Telephone Company,)	OHE FILE PUC 6-06
Bridgewater-Canistota Telephone Company,)	
Golden West Telecommunications)	SDPUC Docket Nos.
Cooperative, Inc., Kadoka Telephone)	
Company, Sioux Valley Telephone Company,)	TC06-036
Union Telephone Company, and Vivian)	TC06-037
Telephone Company (collectively the “Golden)	TC06-038
West Companies”) for Arbitration Pursuant to)	TC06-039
the Telecommunications Act of 1996 to)	TC06-040
Resolve Issues Relating to Interconnection)	TC06-041
Agreements with WWC License L.L.C.)	TC06-042
(“Western Wireless”).)	

MEMORANDUM IN OPPOSITION TO WESTERN WIRELESS MOTION TO DISMISS ENTIRE PROCEEDING

The Golden West Companies identified in the above caption submit this Memorandum in opposition to the Motion to Dismiss the Arbitration Petitions filed by Western Wireless (the “WWC Motion to Dismiss”) in accordance with the schedule established by Hearing Examiner, Hillary Brady, during a conference call with the parties on September 11, 2006. Previously, the Golden West Companies have filed with the South Dakota Public Utility Commission (“Commission”) a Motion to Dismiss certain specific issues raised by Western Wireless (the “Golden West Motion”) in Western Wireless’ Response to the Arbitration Petitions filed with the Commission on May 30, 2006. The Golden West Companies oppose the WWC Motion to Dismiss.

I. Procedural History

On October 21, 2005, Western Wireless notified the Golden West Companies of Western Wireless’ intent to terminate the existing interconnection agreements with the Golden West Companies effective December 31, 2005, and Western Wireless also requested that the

Golden West Companies enter into negotiations with Western Wireless to establish a new interconnection agreement for the transport and termination of telecommunications traffic between the Golden West Companies and Western Wireless. The parties engaged in negotiations until May 3, 2006, when each of the Golden West Companies filed a separate Petition for Arbitration (the "Petitions") before the Commission in accordance with 47 U.S.C. § 252(b) seeking to arbitrate certain unresolved terms and conditions of proposed interconnection agreements between each of the Golden West Companies and Western Wireless.

On May 30, 2006, Western Wireless filed the Response. In the Response, Western Wireless introduced for the first time new "sub-issues" in connection with the issues set forth in the Petitions, raised twelve additional issues not raised in the arbitration petitions filed by the Golden West Companies, and attached a draft interconnection agreement that had never been previously provided to Golden West Companies. Included in these issues were the following and the previously undisclosed interconnection agreement form that had not been part of the negotiation process (the "Non-negotiated Issues"):

- New Sub-issue to Issue 1: Western Wireless' proposal to bill a reciprocal compensation rate based on its own forward-looking rates.
- New Sub-issue to Issue 2: Western Wireless' request that the interconnection agreement provide that Western Wireless be paid compensation for the termination of interMTA traffic originated by customers of the Golden West Companies.
- Issue 6: What is the appropriate term of the Interconnection Agreement?
- Issue 13: Is Alltel entitled to a tandem compensation rate on all calls that pass through its mobile switching center?
- Issue 14: Whether the Petitioners must allow resale of retail services?

- Issue 15: Whether Petitioners should allow Alltel to connect to any selective routers of Petitioner for the purpose of implementation of E911?
- Previously undisclosed Interconnection and Reciprocal Compensation Agreement attached to the Response as Exhibit 1.

In their response to the Golden West Motion, Western Wireless has withdrawn their previous request that the arbitration include the following two Non-negotiated Issues:

- New Sub-issue to Issue 1: Western Wireless's proposal to bill a reciprocal compensation rate based on its own forward-looking rates.
- Issue 14: Whether the Petitioners must allow resale of retail services?

In addition, it has been established that the Golden West Companies neither own nor operate any "selective routers" and thus, Western Wireless' Issue 15 is moot.

Included in its response is the WWC Motion to Dismiss seeking dismissal of the entire arbitration proceeding. As stated above, the Golden West Companies oppose the WWC Motion to Dismiss which is without factual or legal basis as will be demonstrated below.

II. The WWC Motion To Dismiss Should Be Denied

The WWC Motion to Dismiss should be denied because the Motion is based upon an illogical and legally unsupported extension of the standard used to determine whether an issue is an "open issue" within the meaning of 47 U.S.C. §252(b)(1) and is properly included in this proceeding.

A. The law is clear and indisputable that any party to an interconnection negotiation may bring any open issue before a state commission for resolution.

The Golden West Companies' Memorandum in Support of the Golden West Motion ("Memorandum") sets forth the proper standard for determining whether an issue may be included in an arbitration proceeding. As set forth in 47 U.S.C. § 252(b)(1), a party may petition to "arbitrate any *open* issues." (emphasis added) If an issue regarding an interconnection

agreement was not *raised* during negotiations, then the issue is not an “open issue” and cannot be included in the arbitration proceeding. This clear statutory language is confirmed by *U.S. West Communications v. Minnesota Public Utilities Commission*, 55 F.Supp.2d 698 (D. Minn. 1999) and *Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2003). See Memorandum at 6-9.

B. There is no material issue of fact that the Issues presented in the Petitions were raised by the Golden West Companies during negotiations of the interconnection agreements and remain unresolved between the parties.

The issues raised in the Petitions are properly presented for resolution by the Commission in accordance with its Congressionally-delegated duties under Section 252 because each of these issues was not only raised between the parties after Western Wireless served its request for interconnection upon the Golden West Companies, but further were subject to negotiations between the parties. One need look no further than an exchange of emails between Ron Williams and Dan Davis during the period of March 15 through March 27, 2006, copies of which are attached hereto as Exhibit A, to confirm that the issues set forth in the Petitions were subject to negotiations between the parties, albeit unsuccessful negotiations, and thus, were and are open issues to be resolved by the Commission.

These emails confirm that Dan Davis, the Golden West Companies’ representative in the negotiations, transmitted the proposed interconnection agreement (a copy of which is attached to the Petitions) to Western Wireless on February 23, 2006 and requested a status update from Ron Williams in a March 15 email as to any modifications to be provided by Western Wireless. In an email to Davis dated March 20, Williams set out a list of “significant issues between the parties.” The first two matters addressed, “Scope of Recip Comp Traffic and traffic factors” and “Reciprocal Compensation Rates” encompass Issues 1 and 3 in the Petitions. The fourth matter

mentioned by Williams, “InterMTA Factor, Rate, and Maintenance”, encompasses Issue 2 in the Petitions. Mr. Davis’ Affidavit dated September 13, 2006, which is submitted to the Hearing Examiner with this Memorandum, further confirms that the issues set forth in the Petitions were not only raised in the parties’ negotiations, but further, were the subject of negotiations.

In Western Wireless’ Response to Petitioners’ Motion to Dismiss, Western Wireless apparently is focused upon the *quality and quantity of negotiations* that occurred between the parties relative to the Issues presented in the Petitions. *See*, Response to Petitioners’ Motion to Dismiss at pp. 1-3. Interestingly, Western Wireless cites no law to support its assertions that the Petitions should be dismissed. It attempts to “spin” the case law cited in the Memorandum, but no amount of “spinning” can change the statutory directive of 47 U.S.C. § 252(b)(1).

Effectively, the concept that Western Wireless seems to be trying to invoke is the duty of good faith negotiations. The Federal Communications Commission (“FCC”) addresses this duty in 47 C.F.R. § 51.301. Included among the FCC’s actions or practices that violate the duty to negotiate in good faith are: “Intentionally obstructing or delaying negotiations or resolutions of disputes.” *See*, 47 C.F.R. § 51.301(c)(6). The history of the parties’ negotiations are set forth in the Petitions, paragraphs 7 through 11. Western Wireless does not dispute this chronology of events in its Response. *See*, Response at paras. 6-9. The fact that Western Wireless has not asserted lack of good faith negotiations by the Golden West Companies is not surprising due to Western Wireless’ non-responsiveness in such negotiations.

That Western Wireless would now claim that its failure to fully engage in the negotiation process should be construed as absence of open issues in this arbitration is without basis in law or in fact. To accept such an argument would render the Congressional directive of 47 U.S.C. §

252(b)(1) a nullity and wrongfully deny the Golden West Companies a forum to obtain resolution of the open issues presented in the Petitions.

III. The Golden West Companies Motion to Dismiss Certain Issues Should be Granted

In contrast to Western Wireless' claims in its Motion to Dismiss, the Golden West Companies submit that the issues that are subject to the Golden West Motion and which were never raised by Western Wireless prior to their identification in the Response, must be dismissed from this proceeding based upon the terms of 47 U.S.C. §252(b)(1) and the case law cited in the Memorandum. The Golden West Motion is well taken and should be granted with regard to the specific relief requested.

IV. Conclusion

For the above reasons, Golden West Companies respectfully request that the WWC Motion to Dismiss be denied in all respects and that the Golden West Motion be granted in all respects.

DATED this 14th day of September, 2006.

Respectfully submitted,

Armour Independent Telephone Company, Bridgewater-
Canistota Telephone Company, Golden West
Telecommunications Cooperative, Inc., Kadoka
Telephone Company, Sioux Valley Telephone Company,
Union Telephone Company, and Vivian Telephone
Company (collectively the "Golden West Companies")

By: Meredith A. Moore

Ryan J. Taylor *By PMS*
Meredith A. Moore
Cutler & Donohoe, LLP
100 N. Phillips Ave, Suite 901
Sioux Falls, SD 57104
Telephone (605) 335-4950
Facsimile (605) 335-4961

and

Paul M. Schudel, NE Bar #13723
James A. Overcash, NE Bar #18627
WOODS & AITKEN LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
Telephone (402) 437-8500
Facsimile (402) 437-8558
Their Attorneys

CERTIFICATE OF SERVICE

On this 14th day of September, 2006, a true and correct copy of the foregoing **Memorandum in Opposition to WWC Motion to Dismiss Entire Proceeding** was transmitted to by email Talbot Wiczorek, of Gunderson, Palmer, Goodsell & Nelson, LLP, 440 Rushmore Road, Rapid City, SD 57701 and to Stephen B. Rowell, Mailstop 1269 B5-F11-C, One Allied Drive, Little Rock, AR 72202, legal counsel for WWC License L.L.C. by email.

Meredith A. Moore
Meredith A. Moore *By PMS*

Dan Davis

Exhibit

A

From: Dan Davis
Sent: Monday, March 27, 2006 9:47 AM
To: 'Ron.Williams@alltel.com'
Subject: RE: Golden West Western Wireless ICA

Ron,

It appears that there is some distance between our positions on the issues. It is my understanding that it is your position that all of the issues that you have identified in your recent emails to me must be agreed upon prior to arbitration, as opposed to narrowing the scope of issues by addressing each issue individually and then trying to come to an agreement on an issue by issue basis.

I did want to make you aware that we are running FLEC based cost studies in order to develop FLEC based rates for each Golden West Company to establish transport and termination rates. I will forward those rates to you as soon as they are finalized.

Dan

From: Ron.Williams@alltel.com [mailto:Ron.Williams@alltel.com]
Sent: Wednesday, March 22, 2006 6:10 PM
To: Dan Davis
Subject: RE: Golden West Western Wireless ICA

Dan, see my comments below:

-----Original Message-----

From: Dan Davis [mailto:ddavis@telec-consulting.com]
Sent: Wednesday, March 22, 2006 10:30 AM
To: Williams, Ron
Subject: RE: Golden West Western Wireless ICA

Ron,

I may have a better indication on whether we can make progress on the issues you identified if I could quantify how far apart we are on each issue. Addressing the issues identified by you in the order presented in your March 20 email to me, with respect to the traffic factor, do you have a factor in mind to counter the Golden West factors set out in Appendix A to the interconnection agreement so that I can ascertain the relative distance between our positions? As an alternative, if we both agree to measure and bill terminating traffic, this may resolve this issue.

[Williams, Ron] I think we're looking at something closer to 65/35 balance of traffic especially when you consider the impacts of the Atlas 10th circuit decision and the Great Plains federal court decision (still pending appeal decision)

On the issue of direct interconnection, do you have proposed contract language that would allow us to evaluate the effect of your request for "efficient direct interconnection"?

[Williams, Ron] What I would like to do with direct interconnect is identify those points where it is logical for the parties to exchange traffic. With that, we can write contract language that basically says the parties agree to exchange all traffic between their networks using direct connects as the primary route(s). As per my previous email, GW probably has a better sense of what is workable for them. It seems that Wall is

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one logical point and Dell Rapids is another.

For calculating the InterMTA factor, the draft interconnection agreement currently proposes using the results ascertained from the pending docket before the SDPUC on this issue between Golden West and WWC (Alltel). Is your thought to use such finding, but just to freeze the factor on an on-going basis for the term of the agreement along with using a weighted average of interstate and intrastate access rates or specific percentage factors applied to the intrastate and interstate InterMTA MOU?

[Williams, Ron] We would like to establish a mutually agreed interMTA factor and a rate that would be applicable for the term of the agreement (e.g., 10% factor \$.03 rate).

I would like to avoid arbitration or at least narrow the scope of the open issues if possible. If you could respond to the questions I have posed above, or draft some proposed contract language on the issues you presented in your email, we can proceed in quantifying the gaps in positions so that we can determine the likelihood of avoiding arbitration. As the closing of the arbitration window is fast approaching, I would appreciate your response as soon as possible.

Dan Davis

From: Ron.Williams@alltel.com [mailto:Ron.Williams@alltel.com]
Sent: Monday, March 20, 2006 1:10 PM
To: Dan Davis
Subject: RE: Golden West Western Wireless ICA

CONFIDENTIAL NEGOTIATION DOCUMENT

Dan,

Per our call this morning, I have addressed, below, some of what I believe to be the significant issues between the parties. Please provide me some feedback on whether you think we can make progress in any of these areas and what terms GW can offer for resolution:

Scope of Recip Comp Traffic and Traffic factors: This involves establishing a balance of traffic between the parties based on an intraMTA scope for both mobile-to-land and land-to-mobile traffic. The traffic ratios used in the old agreement were largely based on all mobile-to-land traffic compared to only land-to-mobile in an EAS area. We would expect recognition of the expanded calling scope to result in a more balanced traffic factor in any new agreement.

Reciprocal Compensation Rates: We would like to see the rates unified across all the GW companies.

Efficient Direct Interconnection: It appears that the GW companies have taken steps to integrate much of their network functionality such that there are fewer 'aggregation points' within their combined networks. Given the amount of traffic exchanged between Alltel and the GW companies, it would appear that the establishment of efficient direct interconnection points would be of benefit to both companies. We would like to see what GW could come up with as a minimal number of direct connects where the parties could exchange most of their traffic (e.g., we discussed the possibility of Sioux Valley's Dell Rapids switch as a hub to exchange traffic for all of Sioux Valley, Armour, Bridgewater, and Union.

InterMTA Factor, Rate, and Maintenance: This is obviously a big issue between the companies under terms of the old agreement. For a new agreement, we are willing to negotiate both factors and applicable rate for interMTA traffic. However, we are not willing to adopt a factor that will be subject to studies and adjustment through the term of the agreement. In other words, we would like to reach agreement on an interMTA factor that would be fixed through the term of the agreement.

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Type 1 Number Migration and N-1 routing: This continues to be a big issue for our customer base. We need to have control of these numbers. GW also needs to begin abiding by its N-1 routing obligations (they continue to send us 1000's of calls that are destined for numbers that have been ported to other carriers).

Dispute Resolution: The agreement will need to contain a dispute resolution section.

Understand that the above list is not a complete list of all issues that may arise in the context of an arbitration between GW and Alltel. It is, however, a list of material subject matter that should be the focus of our negotiations. If we cannot achieve accommodations on these matters, it is unlikely we can avoid arbitration.

Ron Williams
Alltel Communications, Inc.
425-586-8360

-----Original Message-----

From: Dan Davis [mailto:ddavis@telec-consulting.com]
Sent: Monday, March 20, 2006 7:53 AM
To: Williams, Ron
Subject: RE: Golden West Western Wireless ICA

Ron,

I would suggest that we develop a list of potential issues of disagreement so that we can assess how far apart we are and what the likelihood is in reaching any compromises on those issues.

Dan

From: Ron.Williams@alltel.com [mailto:Ron.Williams@alltel.com]
Sent: Friday, March 17, 2006 5:16 PM
To: Dan Davis
Subject: RE: Golden West Western Wireless ICA

Dan,

Per my voicemail, I am interested in talking with you about how to most effectively conduct our negotiations regarding a new interconnection agreement between the Golden West companies and Alltel. Mike Wilson has provided me a status on the negotiations and I do have the draft agreement terms you had provided Mike in February. While I am not necessarily opposed to extending the 'arbitration window' for these negotiations, it would only make sense to do that if both parties have a conviction that a compromise may emerge from further discussions.

Please call me at your earliest convenience to discuss.

Ron Williams
Alltel Communications, Inc.
425-586-8360

-----Original Message-----

From: Dan Davis [mailto:ddavis@telec-consulting.com]
Sent: Wednesday, March 15, 2006 2:19 PM
To: Williams, Ron
Subject: Golden West Western Wireless ICA

Ron,

I am contacting you to verify that you and Mike Wilson have discussed the status of

negotiations between the Golden West companies and Western Wireless (Alltel).

On February 23, 2006, I sent to Mike by email a proposed interconnection contract for his review. Based upon my conversation with Mike on March 2nd, he had forwarded a copy of that proposed contract to you for your review. Could you give me a status update on your review of that contract and a date upon which you will send to me any proposed modifications?

Also, based upon the date that Golden West received Mike Wilson's letter of October 21, 2005, requesting negotiations for a new interconnection agreement, I calculate that the arbitration window as established in Section 252 of the Act commenced on March 8, 2006 and continues until April 3, 2006.

Based upon our current status, we propose to stipulate in writing to extend the arbitration window 30 days, in which the Arbitration window will end on May 3, 2006.

Please advise by March 22, 2006 if Western Wireless agrees with the arbitration window extension. If I have not received confirmation by you, we will proceed as needed.

I look forward to hearing from you.

Dan Davis
TELEC Consulting Resources
402-441-4315

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