STATE OF SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION

In the Matter of the Petitions of 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") for Arbitration Pursuant to the Telecommunications Act of 1996 to Resolve Issues Relating to Interconnection Agreements with WWC License L.L.C. ("Western Wireless").	)	Docket Nos. TC06-036 TC06-037 TC06-038 TC06-039 TC06-040 TC06-041 TC06-042

MEMORANDUM IN SUPPORT OF APPLICATION FOR RECONSIDERATION OF THE JULY 11, 2006 ORDER OF THE PUBLIC UTILITIES COMMISSION GRANTING THE REQUEST OF WWC LICENSE, L.L.C. TO USE THE OFFICE OF HEARING EXAMINERS

The Golden West Companies identified in the caption of these matters, pursuant to A.R.S.D. 20:10:01:30.01, submit this Memorandum in Support of their Application for Reconsideration of the July 11, 2006 decision set forth in the Order Granting Request to Use the Office of Hearing Examiners (the "Order"), which request (the "WWC Request") was made by WWC License, L.L.C. ("WWC") pursuant to SDCL § 1-26-18.3 to utilize the South Dakota Office of Hearing Examiners to conduct the hearing, to make proposed findings of fact and conclusions of law, and to issue a proposed decision in connection with the arbitration of the interconnection agreements at issue in this consolidated proceeding.

ARGUMENT AND ANALYSIS

On June 16, 2006, WWC, pursuant to SDCL § 1-26-18.3, filed the WWC Request with this Commission seeking to have the above-captioned matters directed to the Office of Hearing Examiners. The Golden West Companies filed an opposition to the WWC Request on June 30, 2006, to which WWC submitted its reply in support of its Request on July 7, 2006. Oral

argument was heard by Chairman Sahr, Commissioner Johnson and Staff on July 11, 2006, at which time the Commission voted in favor of granting the WWC Request. On July 14, 2006, the Commission issued the Order which was received via email by the Golden West Companies' legal counsel on the afternoon of July 14, and was received via United States Mail on July 17, 2006.

As an initial matter, the Golden West Companies believe a ruling of first impression such as was made by the Commission in the Order concerning these proceedings which are of considerable significance, and which has clear ramifications for this Commission's authority and procedures applicable to future contested cases before the Commission, should be heard by all of the Commissioners. By this Application, the Golden West Companies seek an opportunity to present argument on this issue to all of the Commissioners.

Based upon the comments made by Commissioners Sahr and Johnson, and by the Staff at the July 11, 2006 Commission meeting, and based upon the wording of the Order, it is clear that the only authority relied upon for granting the WWC Request was the Commission's interpretation of the wording of SDCL § 1-26-18.3 which states:

> In any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17.

The Golden West Companies respectfully submit that reliance solely upon the Commission's interpretation of SDCL § 1-26-18.3 is misplaced, and for the reasons set forth below respectfully request that the Commission reconsider its previous decision and deny the WWC Request.

1. THIS COMMISSION ERRED WHEN IT STRICTLY INTERPRETED AND APPLIED SDCL § 1-26-18.3 TO THESE ARBITRATION PROCEEDINGS.

The entirety of the Commission's analysis underpinning its decision that these arbitration proceedings shall be transferred to the Office of Hearing Examiners is embodied in one sentence of the Order that states: "The Commission finds that SDCL 1-26-18.3, in conjunction with SDCL Chapter 1-26D, gives WWC the right to use the OHE." Order at p. 3. Based upon the comments by Commissioners Sahr and Johnson at the July 11, 2006 meeting of the Commission, the Golden West Companies understand that the Commissioners concluded that based upon the statutory language of SDCL 1-26-18.3 if in "any contested case" a request is made by "any party" for the Commission to use the Office of Hearing Examiners, the Commission has no choice but to grant the request. The foregoing finding and conclusion by the Commission is unduly narrow and fails to take into account a number of issues of statutory construction as well as practical realities applicable not only to the instant proceedings, but to future proceedings before the Commission.

A. SDCL § 1-26-18.3 and SDCL Chapter 1-26D were adopted by the South Dakota Legislature in 1995, prior to the effective date of the Telecommunications Act of 1996 (the "1996 Act") and South Dakota's laws adopted in response thereto.

The source of SDCL § 1-26-18.3 and SDCL Chapter 1-26D is SL 1995, ch. 8. No legislative history exists to explain the South Dakota Legislature's intentions as to the breadth of applicability of SDCL § 1-26-18.3, and whether it was intended to be applicable to contested cases before the Commission. However, one fact is clear and unassailable – on the date of adoption of the legislation that was codified as SDCL § 1-26-18.3 and SDCL Chapter 1-26D, the 1996 Act did not exist and thus, the procedures regarding arbitration of disputed terms of interconnection agreements provided in 47 U.S.C. § 252, and Congress' delegation to state

commissions of the duty to conduct such arbitrations, did not exist. Thus, it is absolutely a *non sequitur* for WWC to argue, or for the Commission to reason, that SDCL § 1-26-18.3 was adopted with the legislative intention that it and SDCL Chapter 1-26D contemplated referral of Section 252 arbitration cases to the Office of Hearing Examiners.[1]

B. Legislation enacted by the South Dakota Legislature following passage of the 1996 Act confirms that the Commission was expected to conduct arbitrations of interconnection agreements, not the Office of Hearing Examiners.

What the South Dakota Legislature did do following the passage of the 1996 Act was to authorize the Commission to resolve issues regarding interconnection pursuant to Congress' prescribed procedures. *See generally*, SDCL §§ 49-31-3 and 49-31-81. Specifically, the Legislature directed: "If the parties are unable to voluntarily negotiate an agreement for the interconnection or services requested, either party may petition the commission to mediate or arbitrate any unresolved issues as provided in 47 U.S.C. § 252." Had the Legislature intended for the Commission's arbitration functions under Section 252 to be subject to involuntary transfer to the Office of Hearing Examiners by the unilateral act of one party to an arbitration, it would have reasonably been expected to so state in Section 49-31-81. This it did not do.

"[T]erms of a statute relating to a particular subject will prevail over general terms of another statute." *Meyerink v. Northwestern Pub. Serv. Co.*, 391 N.W.2d 180, 184 (S.D. 1986). In *Meyerink*, SDCL § 5-2-11 required the Governor's approval for conveyance of, or grant of an easement on state owned lands, including railroad right-of-ways. Another statute, SDCL § 1-44-28, specifically governing the South Dakota Division of Railroads, give the Direct of such Division the authority to manage railroad property, including the issuance of easements. The

[1] The Golden West Companies further reiterate the argument set forth in their Brief in Opposition to Request of WWC to Use the Office of Hearing Examiners submitted to the Commission on June 30, 2006, pages 2-5, that SDCL § 1-26-18.3 is preempted by federal law. It is only this Commission, and not the South Dakota Legislature, that may determine whether and to what extent the arbitration authority granted by Congress to the Commission may be delegated to a third party.

Court held that "[s]ince SDCL § 1-44-28 governs a particular subject and was enacted after SDCL § 5-2-11, we find it controls under the facts presented. We therefore conclude the Governor's approval . . . was not required." *Id.* With regard to the instant matter, the Golden West Companies submit that SDCL § 49-31-81, enacted subsequent to SDCL § 1-26-18.3, more particularly addresses the subject of the conduct of arbitrations of interconnection agreements by the Commission, and thus prevails in determining the Legislature's intention that the Commission administer and conduct such arbitrations.

Relying on the foregoing principle of *Meyerink*, in *Faircloth v. Raven Industries, Inc.*, 620 N.W.2d 198 (S.D. 2000), a case involving a dispute as to the application of the proper statute of limitation to a workers' compensation claim, the Court observed:

> In arguing for application of the three-year statute of limitations, Faircloth relies heavily on the following language: 'In *any* case in which *any* benefits have been tendered . . . . (Court's emphasis) *Id.* at 11.

The Court continued by reasoning "[t]his general language, however, should only be understood as affecting those cases, which are not within the more specific notice provision of SDCL 62-7-35." *Id.* Based upon the foregoing reasoning, the Commission should not be troubled by the language of § 1-26-18.3 that "in any contested case" "any party" may require the use of the Office of Hearing Examiners for the reason that § 49-31-81 is a more particular statute specifying that arbitrations of interconnection agreements shall be conducted by the Commission.

Further, in response to the passage of the 1996 Act, the South Dakota Legislature adopted SDCL § 49-31-76 which directed the Commission "to adopt rules addressing the competitive provisioning of local exchange service." In response to this directive, the Commission adopted Chapter 20:10:32 of its Administrative Rules entitled "Local Exchange Service Competition."

Included in such Chapter are A.R.S.D. 20:10:32:29 through 20:10:32:36 which address in considerable detail arbitration of open issues relating to interconnection agreements. However, nowhere in such Rules is any mention made of SDCL § 1-26-18.3 or delegation of the Commission's duties under 47 U.S.C. § 252 to the Office of Hearing Examiners. This is, of course, consistent with the absence of any such mention in the enactments by the South Dakota Legislature in response to the passage of the 1996 Act.

The passage of laws by the South Dakota Legislature in response to the 1996 Act, as compared to the pre-existence of SDCL § 1-26-18.3, which neither the Legislature, this Commission nor any South Dakota court has ever indicated as properly applicable to the discharge of the Commission's duties under Section 252 of the 1996 Act, confirms that the Commission's grant of the WWC Request in the Order is misplaced. Such action simply represents an unduly and improperly expansive reading of SDCL § 1-26-18.3 out of the context of subsequent, more particular legislative enactments relative to arbitration of open issues in interconnection agreements. As such, the Commission should reconsider its decision in the Order and deny the WWC Request.

2. Practical and Policy Considerations Require that this Commission, Rather than the Office of Hearing Examiners, Conduct the Hearings of these Arbitration Proceedings and Issue Findings and Conclusions of Law.

A. The Commission's ruling in the Order establishes a precedent that would allow any contested case before the Commission to be referred to the Office of Hearing Examiners.

WWC argues that SDCL § 1-26-18.3 gives an absolute and unassailable right to any party involved in a contested case before the Commission to demand that the matter be referred to the Office of Hearing Examiners. Acceptance of such an interpretation of SDCL § 1-26-18.3 by this Commission impermissibly broadens the context in which this statutory provision can be

invoked. As defined by statute, a contested case is "a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." SDCL § 1-26-1 (2). Under this definition, SDCL § 1-26-18.3 would apply to this Commission's complaint dockets, rate-making proceedings, rule making proceedings, new and revised tariff filings, declaratory rulings and determinations of whether to grant certificates of authority. See SDCL §§ 49-1-11, 49-31-4.1, 49-31-3, 49-31-12, 49-31-12.4 and 49-31-12.5 (enumerating those areas in which the Commission can exercise its discretion); see also SDCL §§ 49-1-2, 49-13-1.1, 49-13-4, 49-13-9 and 49-31-81 (providing that both individuals and other entities may apply to the *commission* for relief and/or the handling of appropriate matters) (emphasis added). Moreover, a contested case would include virtually any case in which a petition to intervene is authorized, as any interested individual or entity having a pecuniary interest is accorded the rights of a party. See A.R.S.D. 20:10:01:15.02.

The potential for abuse of SDCL § 1-26-18.3 is significant, not only in the context of telecommunications dockets, but also in gas, electric and grain dockets, and all matters concerning those utilities over which this Commission has jurisdiction. As such, in order for the Commission to continue to be able to manage its pending dockets and properly inform itself of all facts and issues presented in such dockets through the direct conduct of hearings (thus preserving the opportunity for the Commissioners and its Staff to question and observe witnesses), the Commission should not construe SDCL § 1-26-18.3 in a manner that would allow any party, by unilateral action, to eliminate the Commission's direct involvement in developing the record in a contested case and would instead relegate it to merely a reviewing body of transcripts and proposed decisions rendered by the Office of Hearing Examiners.

Such a review process is insufficient to fully carry out the Commission's regulatory duties and responsibilities. In the instance of the pending proceedings, if these consolidated cases are heard by the Office of Hearing Examiners, this 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 exhibits presented.

B. Only the Commission and its Staff possess the requisite expertise to properly hear and process these arbitration proceedings.

It is the Commission, and its Staff, in sharp contrast to the Office of Hearing Examiners, that possess the knowledge and expertise required to fully analyze the highly specialized and technical issues which will be addressed in these arbitration proceedings. The Office of Hearing Examiners has neither the resources, nor the necessary staff to handle these proceedings. The fact that the Commission retains jurisdiction to accept, reject or modify the findings, conclusions and decision of the Office of Hearing Examiners does not address or remedy the predictable shortcomings concerning creation of the record due to the absence of expertise in the Office of Hearing Examiners relative to the matters presented in these proceedings.

It cannot be overstated that this Commission is unique from other administrative agencies given its state and federal mandates. SDCL § 49-1-8.1 evidences the unique nature of this Commission, specifically providing that it is "continued as a separate department" and thus acknowledging its expertise and need to exist outside of the context of other administrative agency norms and rules. This is exactly why SDCL § 49-1-9 provides that 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 to the proper dispatch of business and to the ends of*

justice." (emphasis added). SDCL § 1-26-18.3 is not such a "particular" prescription of South Dakota law. Rather, the statute is a generalized grant of authority to the Office of Hearing Examiners to conduct certain administrative hearings that was enacted prior to the 1996 Act and the specific South Dakota legislation implementing such Act which specifically assigned to this Commission the authority and duty to conduct arbitrations of the terms of interconnection agreements. The proper dispatch of business and ends of justice are best served only by this Commission reserving to itself the conduct of these arbitration proceedings.

C. Even assuming *arguendo* that these arbitration proceedings are transferred to the Office of Hearing Examiners for hearing and issuance of proposed orders, the Commission must hear and render decisions regarding substantive motions that have been filed or will be filed during the pendency of these proceedings.

SDCL 1-26-18.3, by its terms, merely allows the "use" of the Office of Hearing Examiners in connection with contested cases. While the Golden West Companies continue to advance their position that such statute does not apply to these proceedings, even a most liberal interpretation of such statute does not extend any authority to the Office of Hearing Examiners to render rulings on issues that arise in these proceedings that directly impact the scope of the issues or substantive matters to be addressed herein.

The Golden West Companies [will shortly file] a Motion to Dismiss a number of the issues presented in WWC's Response. The Commission's ruling on such Motion will directly impact the scope of the proof to be properly presented in the hearing of these matters. The Office of Hearing Examiners has no authority under SDCL Chapter 1-26D to render *any final decision* on the merits of any case referred to it – only the agency has this power. *See,* SDCL §§ 1-26D-6 and 1-26D-9. Similarly, the Office of Hearing Examiners has no authority to address the substance of the pending Motion Seeking Order Requiring Payment of Interim Compensation

filed by the Golden West Companies on June 16, 2006. Such Motion is based on rules enacted by the FCC in 47 C.F.R. §§ 51.715 and 20.11(f) that are delegated for administration to this Commission. Not only does the Office of Hearing Examiners lack any familiarity with the issues presented in this Motion, moreover, even the furthest stretch of a reading of SDCL § 1-26-18.3 does not provide any authority to address this Motion or other substantive motions in these proceedings.

As a practical matter, if the Commission does not grant this Application for Reconsideration and deny The WWC Request, it would mean that the processing of these arbitration proceedings would be bifurcated between the Office of Hearing Examiners and the Commission. Not only is this unworkable, but more importantly, this result underscores and confirms the arguments previously presented in this Memorandum to the effect that the South Dakota Legislature did not intend for SDCL § 1-26-18.3 to apply to Commission proceedings, and most particularly not to proceedings conducted pursuant to the exercise of the Commission's delegated authority under 47 U.S.C. § 252.

CONCLUSION

Federal and South Dakota law have tasked this Commission with significant regulatory responsibilities in connection with resolution of open issues in interconnection agreements. The Commission's interpretation of SDCL § 1-26-18.3 and the issuance of the Order to transfer these dockets to the Office of Hearing Examiners are improper in light of the basic principles of the Telecommunications Act of 1996 and South Dakota law passed to implement the 1996 Act.

For all of the reasons set forth herein, the Golden West Companies respectfully request that this Commission reconsider its previous decision granting the Request of WWC to transfer

these matters to the Office of Hearing Examiners for all further hearings and proceedings and instead deny the same.

Dated this 28th day of July 2006.

Respectfully submitted,
THE GOLDEN WEST COMPANIES

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CERTIFICATE OF SERVICE

On this 28th day of July, 2006, a true and correct copy of the foregoing was transmitted via email to Talbot Wieczorek, of Gunderson, Palmer, Goodsell & Nelson, LLP, 440 Rushmore Road, Rapid City, SD 57701 at tjw@gpgnlaw.com, Stephen B. Rowell, Mailstop 1269 B5-F11-C, One Allied Drive, Little Rock, AR 72202, legal counsel for WWC License L.L.C. at Stephen.B.Rowell@alltel.com, Rolayne Wiest of the South Dakota Public Utilities Commission at Rolayne.Wiest@state.sd.us and Sara Greff of the South Dakota Public Utilities Commission at Sara.Greff@state.sd.us.

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