THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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IN THE MATTER OF THE PETITION
OF KENNEBEC TELEPHONE COMPANY
FOR SUSPENSION OR MODIFICATION
OF 47 U.S.C. SECTION 251(b)(2)
OF THE COMMUNICATIONS ACT OF
1934 AS AMENDED

TC04-025

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Transcript of Tape-recorded Proceedings
March 23, 2004

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BEFORE THE PUBLIC UTILITIES COMMISSION,
ROBERT SAHR, CHAIRMAN
GARY HANSON, VICE CHAIRMAN

ORIGINAL

COMMISSION STAFF
Rolayne Ailts Wiest
John Smith
Karen Cremer
Greg Rislov
Harlan Best
Michele Farris
Keith Senger
Dave Jacobson
Heather Forney
Pam Bonrud

APPEARANCES
David Gerdes
Rich Coit

Reported By Cheri McComsey Wittler, RPR

1 APPEARANCES BY TELEPHONE
Talbot Wieczorek
2 Darla Pollman Rogers
Meredith Moore
3 Mary Sisak
Rod Bowar
4 Dan Davis
Mary Lohnes
5 Suzie Rao

6 =

7 TRANSCRIPT OF TAPE-RECORDED PROCEEDINGS, held
8 in the above-entitled matter, at the South Dakota State
9 Capitol Building, 500 East Capitol Avenue, Pierre,
10 South Dakota, on the 23rd day of March 2004, commencing
11 at 9:30 a.m.
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1 CHAIRMAN SAHR: Next item, No. 4
2 under telecommunications is TC04-025, In the Matter
3 of the Petition of Kennebec Telephone Company For
4 Suspension Modification of 47 U.S.C.
5 Section 251(b)(2) of the Communications Act of 1934
6 as Amended.
7 And the question today is shall the Commission
8 grant intervention to Western Wireless and the
9 South Dakota Telecommunications Association and how
10 shall the Commission proceed?
11 Does Western Wireless or the South Dakota
12 Telecommunications Association care to make any
13 comments on their request for intervention?
14 MR. WIECZOREK: Mr. Chairman, Talbot
15 Wieczorek on behalf of Western Wireless. I would
16 just ask to be allowed to intervene. I think our
17 request for intervention sets forth the grounds.
18 CHAIRMAN SAHR: Thank you very much.
19 Mr. Coit.
20 MR. COIT: Thank you, Mr. Chairman,
21 Commissioner Hanson, and good morning. SDTA is
22 seeking intervention in this process because it is
23 really a case of impression involving the waiver
24 process under 251(f)(2). And we seek intervention
25 based on the interest of Kennebec who's a member

and also based on all of the other rural telephone companies that we represent.

This process as well as the other dockets involving these LNP waiver requests are in a sense all related and have the potential to affect each other. And we are just asking for intervention to support the petition. Thank you.

CHAIRMAN SAHR: Thank you. And is there anyone else appearing either in opposition or in favor of the intervention?

Seeing no one, then I'll go to staff.

MS. CREMER: Staff would recommend granting intervention.

CHAIRMAN SAHR: Ms. Rogers, do you have a position on the interventions?

MS. ROGERS: We don't to the interventions, Commissioner.

CHAIRMAN SAHR: Okay. Well, then I will go ahead and move that we grant the intervention to Western Wireless and the South Dakota Telecommunications Association.

VICE CHAIR HANSON: Second.

CHAIRMAN SAHR: And then the second question is how shall the Commission proceed.

Ms. Cremer.

1 MS. CREMER: At this point the most
2 pressing matter is they have requested immediate
3 suspension. And you may want to have Ms. Rogers
4 address when they wanted to do that.
5 I thought too you may ask the parties are they
6 ready for a hearing right now on just the limited
7 question of an immediate suspension, do they
8 need -- I'm not sure what the parties need to do.
9 CHAIRMAN SAHR: Thank you. I think
10 those are all good questions, and I'll look to
11 Ms. Rogers for the position of Kennebec Telephone
12 Company.
13 MS. ROGERS: Thank you, Commissioner
14 Sahr. We would request and we did in our petition,
15 in fact, request immediate suspension of the
16 Section 251(b)(2) requirement pending your
17 consideration on the actual merits of this case.
18 And we've requested this suspension until six
19 months following your Commission -- or your
20 decision on the actual merits of the suspension of
21 the requirements.
22 The reason that we are asking for this
23 immediate suspension is because we are looking at a
24 May 24 deadline to implement the service, and this
25 requires substantial lead time for the company.

1 They're going to have to purchase and order
2 equipment and get it set up and going and they're
3 switches if they are ultimately required to comply
4 with the LNP order. So in the interim we would
5 request that you grant an immediate suspension.
6 You have just granted intervention to two
7 parties. We have already received some data
8 requests from staff, and we would anticipate that
9 there will be more data requests, perhaps, or at
10 least there will probably be some discovery on
11 behalf of one of the interveners.
12 This is going to be -- I would suspect it's
13 going to be a long and detailed hearing on the
14 actual requirements of the company to provide LNP,
15 and because of that, we would ask the Commission to
16 grant us an immediate suspension at this time so
17 that we do not have the May 24 deadline breathing
18 down our throats and leaving us in a position to
19 have to make some expenditures before we know what
20 the final outcome is going to be.
21 In addition, there are still some unresolved
22 issues from the FCC and in the rule-making process
23 and another probably -- probably at least one more
24 decision that will be coming down from the FCC that
25 will provide some guidelines on some of the

1 outstanding issues such as transport. And so we
2 believe that an immediate suspension is definitely
3 necessary in this case, and we believe we've met
4 the statutory burden and also the requirements
5 under the rules for you to grant that.
6 We would respectfully request that at this
7 time.
8 CHAIRMAN SAHR: Thank you. Comments
9 from our new interveners?
10 MR. WIECZOREK: This is Talbot
11 Wieczorek on behalf of Western Wireless. Chairman,
12 I apologize if I'm getting in front of Mr. Coit
13 here, but as -- on behalf of Western Wireless we'd
14 oppose granting that type of relief today.
15 At a minimum we think we should be granted the
16 ability to address the issue. What we'd like to do
17 is make some requests, have them to Kennebec by
18 Monday, have -- under a short response so we can
19 get some clarifications on what the -- the
20 information that they've got in their petition and
21 then have a chance to at least at a minimum submit
22 written argument to the Commission and potentially
23 even to have a short hearing on the matter.
24 I question, frankly, whether just filing the
25 petition and making -- setting forth their

1 allegations of what they contend their situation is
2 meets the standard to get an order for immediate
3 suspension. And we'd like the chance to address
4 that issue specifically.
5 CHAIRMAN SAHR: Thank you.
6 Mr. Coit.
7 MR. COIT: I just -- thank you,
8 Mr. Chairman. Just one brief comment, and that
9 would be we support the request for suspension
10 while this process is pending. And I would just
11 reference the fact that, you know, in the federal
12 statute, and actually in the PUC rules deal with
13 these petitions for suspension or waiver. There's
14 specific mention of the Commission's authority to
15 grant, you know, basically an intermediate stay of
16 the requirements pending the process.
17 Thank you.
18 CHAIRMAN SAHR: Thank you. Staff.
19 Excuse me. Mr. Gerdes.
20 MR. GERDES: Mr. Chairman, members
21 of the Commission, I am Dave Gerdes. I'm a local
22 lawyer, and I represent Midcontinent
23 Communications.
24 Midcontinent has not intervened in this
25 docket. Midcontinent has intervened in the next

1 docket and will be intervening in quite a number of
2 these dockets, and if the Commission doesn't mind,
3 I think this is going to be a precedent-setting
4 decision the Commission's going to make on this
5 particular one so if I might be heard even though
6 I'm not representing a party intervening.
7 CHAIRMAN SAHR: Please go ahead.
8 Thank you.
9 MR. GERDES: Thank you. On behalf
10 of Midcontinent we would agree with the position
11 taken by Western Wireless. And I don't want to
12 take a lot of time on this because I think that --
13 but I think it is an important decision to make for
14 the Commission.
15 As far as Midcontinent is concerned, we're
16 intervening in many of these dockets because of
17 wireline to wireline portability, not wireline to
18 wireless. But nonetheless, the same issues are
19 involved. And it's a little unclear from reading
20 some of the petitions whether these companies also
21 are seeking suspensions and modifications as it
22 relates to wireline to wireline modifications.
23 I know that in at least one, and I think in
24 more than one, they have specifically mentioned
25 them, whereas in other petitions they have not.

1 And so we're quite fearful that something might
2 slip under the door or something like that on this,
3 and we are, therefore -- we will be intervening in
4 quite a number of them, as I'm sure the Commission
5 knows, have just been reported on the most
6 recent -- the recent sheet giving us
7 telecommunications filings. We would oppose an
8 immediate suspension.
9 Mr. Coit talks about how the rules permit the
10 Commission to do so. The rules may permit the
11 Commission to do so, but I would say it would
12 violate due process, if nothing else, for the
13 Commission not to have even received a brief or
14 received an argument on an issue which can be
15 pretty important.
16 Local number portability is very important to
17 connecting local exchange carriers. In
18 Midcontinent's case we've got a fight going right
19 now up in Webster. We asked for local number
20 portability in January, got stone-walled for three
21 months. They've got a provision in their contract
22 that says they will negotiate in good faith for
23 local number portability. They didn't even talk to
24 us.
25 MS. ROGERS: Mr. --

1 MR. GERDES: And then they filed a
2 petition --
3 MS. ROGERS: Excuse me.
4 MR. GERDES: Under this -- under
5 this -- for suspensions and modifications. If
6 those kinds of things are going to go on, I think
7 that we're entitled to some due process.
8 MS. ROGERS: I object to that
9 particular argument. That's not relevant to this
10 case, and I believe that that's a separate docket
11 in front of the Commission pursuant to Mr. Gerdes's
12 order -- or motion, and I object to his addressing
13 that in this docket. It's not relevant.
14 MR. GERDES: Well, Mr. Chairman,
15 I'll just say I think it is relevant because it
16 shows what can happen if we don't pay attention to
17 what's going on.
18 CHAIRMAN SAHR: Thank you. Any
19 other comments?
20 MR. GERDES: No. Thank you.
21 CHAIRMAN SAHR: Ms. Rogers, I think
22 it's fair to give you a chance to respond, if you'd
23 like to.
24 MS. ROGERS: Thank you,
25 Commissioner. And I apologize for not being there.

1 I think that we should perhaps try to stay focused
2 on the issue before the Commission right now, and I
3 think what we're discussing is whether or not a
4 temporary stay would be appropriate at this time.
5 ARSD Section 20:10:32:39 gives this Commission
6 specific authority to grant a temporary stay of the
7 obligations the carrier seeks to amend or modify
8 while its proceedings are pending. And that allows
9 you as a Commission to engage in as long as it
10 takes to hear all the conflicts and complicated
11 issues that are going to come forward in a hearing
12 in this case.
13 As I said, the fact that we have interveners
14 already and they're already suggesting that they
15 would like to put forth some questions to us,
16 indicates that this is not going to be a short-term
17 process. It's going to be a long and detailed
18 hearing.
19 And I think it's very appropriate in light of
20 the deadline that's hanging over the heads of the
21 company that you grant this immediate -- this
22 temporary stay.
23 I do not believe there's been any violation of
24 due process, and the fact that the parties that
25 have intervened are here today and are responding

1 to the motion would certainly indicate that due
2 process has not been violated because they have had
3 a chance to give input on it.
4 So I would once again urge the Commission to
5 grant a temporary stay for six months until six
6 months after the final decision on these dockets
7 and this docket in particular.
8 MR. WIECZOREK: Mr. Chairman, this
9 is Talbot Wieczorek. May I make a couple of
10 comments?
11 CHAIRMAN SAHR: Yes, you may. Go
12 ahead.
13 MR. WIECZOREK: First of all, I want
14 to make sure my earlier comment's not misconstrued.
15 What I said is I don't believe that they've met
16 their burden for a temporary stay and that we
17 should be allowed at least to brief that issue.
18 I don't contest that -- there is plenty of
19 statutory authority that this Commission has the
20 ability to grant a temporary stay. The question is
21 whether their mere allegation that they're entitled
22 to it should allow -- should be considered meeting
23 a burden that they should get a stay that lasts six
24 months past your final decision.
25 And for that reason that's why we're asking

1 for some immediate input before the Commission
2 would grant this, that we would have a chance to
3 ask some questions and a chance to address the
4 issue at a minimum in some type of written
5 argument.
6 Second, I'm a little concerned that -- while I
7 understand Mr. Coit's comments that this could be
8 used as some type of template, each of these
9 questions should be specific to each carrier. The
10 facts are going to be different. The facts for one
11 carrier might not carry to another.
12 And one of the concerns I've gotten from these
13 later filings that we've gotten is they grouped
14 some exchanges together, some different -- like
15 Golden West is grouped with two others, and their
16 numbers are submitted grouped. So, you know, I'm
17 concerned that they're grouping together some of
18 these to drive up costs for one local exchange
19 carrier that might not be true for another. And so
20 we need to even break that out.
21 So I'm a little concerned that we're arguing
22 or there's been some argument or impression made by
23 some of the people arguing today that this could
24 carry over and we're not going to do an analysis of
25 each question for temporary suspension.

1 Finally, I'm also a little concerned that they
2 come in and they argue, look, this is going to
3 happen in a hurry, we have this deadline in May.
4 It's not like the deadline has been hidden from
5 them.
6 We made the request for local number
7 portability last November. If this was going to be
8 a problem, they certainly could have come in front
9 of the Commission and made their request for
10 suspension of waiver in December and not be sitting
11 here arguing that we have this hard deadline. So
12 that's one of the reasons the Commission should
13 grant this right now.
14 That's all I have, Mr. Chairman. Thank you.
15 CHAIRMAN SAHR: Thank you.
16 Ms. Rogers, do you want to address the last issue
17 raised by Mr. Wieczorek?
18 MS. ROGERS: Yes, I would. It has
19 taken us quite awhile to compile the data
20 necessary, the facts and the financial information,
21 necessary to support our request. And so we have,
22 in fact, compiled these just as soon as that data
23 has been available.
24 But it has certainly -- I mean, this is not --
25 these are not easy calculations, and it has taken

1 time to put together the information that you have
2 before you.
3 In addition, we are today talking about the
4 request of Kennebec, and I think that that issue is
5 properly before you, and I think that that's
6 something that would be appropriate for you to rule
7 on today.
8 CHAIRMAN SAHR: Thank you. Staff.
9 MS. CREMER: Thank you. This is
10 Karen Cremer with staff. I think I have long since
11 lost sight of the issue of what we were talking
12 about here, but I believe that it was how shall the
13 Commission proceed.
14 I don't think that the Commission can order
15 today an immediate suspension. I'm not sure that
16 that would be an intermediate order that could be
17 appealed up to circuit court or not. Either way,
18 though, I believe that you need findings of fact
19 and conclusions of law.
20 And so at a minimum you will need a hearing, I
21 believe, on the immediate suspension. I'm not sure
22 how much discovery that's actually going to require
23 of all the parties to come forth on that.
24 I agree with Western Wireless in the sense
25 that, you know, these were filed February 12 and

1 the next one February 25, and then to ask for
2 immediate suspension before intervention deadlines
3 have even run is impractical.
4 So I would recommend that the Commission order
5 the parties to set a -- or that the Commission
6 order a procedural schedule and the parties work on
7 that.
8 CHAIRMAN SAHR: Thank you. And I
9 think there are some questions of notice,
10 especially if we're going to get into this
11 particular issue. And I would look to our General
12 Counsel for some suggestions.
13 I can kind of envision a fairly quick schedule
14 on this issue of the immediate suspension where
15 everyone would have a chance to offer some type of
16 brief or at least some type of filing to put it
17 before the Commission.
18 You know, I know we have an April 6 Commission
19 meeting. I don't know if that's a time frame that
20 would work for people, but I think if we moved
21 relatively quickly on this with the May 24
22 deadline, while I certainly understand the costs
23 and lead time associated with getting LNP up and
24 running for an organization, it's not like this is
25 May 22.

1 So I think in that instance I would look to
2 set up some type of procedural schedule and give
3 staff and the interveners and the petitioner a
4 chance to be able to make their arguments in a more
5 formal setting and, frankly, you know, give the
6 Commissioners and our advisers a chance to actually
7 analyze the issue outside of just some, you know,
8 verbal testimony -- or actually not testimony.
9 Sparring. I don't know.
10 But I guess I would look to Mr. Smith for some
11 suggestions on procedurally how we might be able to
12 go forward.
13 MR. SMITH: Well, you know, I think
14 it probably is going to depend to some extent on
15 how the parties perceive the nature of the question
16 here.
17 You know, Ms. Cremer just raised at least the
18 possibility of a need for a factual hearing and
19 findings and conclusions. I'm not presuming that
20 to be the case. That's her opinion as one advocate
21 here.
22 But I think just on that level the parties or
23 at least if they can't come to an agreement on
24 those issues, at least we need to have some way of
25 deciding that there is a disagreement about that.

1 And I noticed we have a hearing -- or a
2 meeting coming up on April 6, and I guess would it
3 be possible for us to somehow bring this thing into
4 focus or before the Commission for some kind of a
5 decision on April 6?
6 And I think without the parties kind of
7 talking it over and what they might see the issues
8 to be, I don't know whether on April 6 we could
9 actually hear the final question of whether there
10 would be an immediate suspension or whether all we
11 can decide is what we have to do in order to get
12 that done.
13 MS. CREMER: I guess that was going
14 to be my question too. Do you want to narrow what
15 the issue you want to hear on April 6? I mean --
16 MR. SMITH: Well, I think the
17 immediate problem, right, is this immediate
18 suspension?
19 MS. CREMER: That would be the most
20 pressing, yeah.
21 MR. SMITH: And I think just looking
22 at it without -- I didn't know this was coming up
23 today either so it's even took us by surprise, I
24 think. But, you know, just without having dug into
25 it, I mean, one would assume that the whole purpose

1 of an immediate suspension provision is to preserve
2 the status quo prior to the petition pending the
3 outcome of the ultimate question.
4 And, therefore, whether that rises to the
5 burden of -- you know, I don't think we need to --
6 I don't think we need to decide the whole
7 proceeding twice, I guess is what I'm getting at.
8 There has to be some distinction between the
9 level of finding we have to make for that versus
10 what we ultimately decide in the case. Otherwise,
11 we wouldn't call it a suspension. It would be the
12 decision.
13 And so I think that's what I would hope the
14 parties could talk about and schedule something for
15 resolution either at the April 6 meeting, or if
16 it's that urgent that if we have an intermediate
17 issue that has to be decided, the Commission can --
18 we can try to find an ad hoc date in the interim.
19 CHAIRMAN SAHR: Ms. Rogers, since
20 you're bringing this on behalf of your client, I
21 would look to you for some -- you know, at least
22 your opinion as to what the appropriate procedural
23 schedule would be going forward just on the
24 immediate suspension issue.
25 MS. ROGERS: Well, Commissioner

1 Sahr, if the Commission feels that, you know, we
2 need to have a hearing on that issue -- and I agree
3 with Mr. Smith that the whole purpose, of course,
4 and the reason we brought this forth is we do want
5 to try to preserve the status quo for Kennebec
6 Telephone Company until the Commission has reached
7 a final decision.
8 I would hope that we would be able to -- maybe
9 if you want further evidentiary evidence on
10 April 6, we will be ready to provide that. If you
11 want any type of written responses or arguments
12 prior to that time, we will also try to comply with
13 whatever you would impose.
14 But we would really like to see a decision
15 rendered on that date, if at all possible, on the
16 temporary suspension -- or temporary stay request.
17 And, further, Commissioner, if you want
18 counsel for intervening parties to, you know,
19 explore this further, we'd be happy to do that as
20 well.
21 MR. SMITH: Well, Darla, I mean,
22 what I'm thinking is at least -- I know the time is
23 crunched here, but for you guys to take a day or so
24 and see what you can work out in the way of what
25 makes sense in terms of bringing this in an orderly

1 way before the Commission.

2 And then if you need a decision from the

3 Commission as to exactly what that should be, I

4 don't know, are the Commissioners -- would they be

5 available for an ad hoc meeting over the next

6 couple of weeks? We're only talking two weeks from

7 now is April 6.

8 CHAIRMAN SAHR: I don't see that it

9 really should be any problem that I can foresee. I

10 can't speak to anyone else's schedule.

11 MR. SMITH: If you want to sort it

12 out and see if -- because we have no idea here

13 today, you know, what are you talking -- are we

14 talking you want briefs and then responsive briefs

15 and replies?

16 I think just some initial thought as to what

17 you want to do and are there some preliminary

18 factual findings that the Commission needs to make.

19 And if so, we'll have to have a different kind of

20 proceeding than if we're just talking an argument.

21 CHAIRMAN SAHR: I think that is

22 something the parties need to work out. You know,

23 are they just going to fight it out on the legal

24 merits of it, or is it going to become factual?

25 And I think that makes a pretty significant

1 difference in what sort of proceeding -- I mean, if
2 it's just going to be legal arguments, I really
3 don't see why they couldn't talk, come up with a
4 schedule where Ms. Rogers files within X amount of
5 days, the interveners have a chance to file within
6 X amount of days after that.
7 And if we're focusing on your typical level of
8 scrutiny for a stay or suspension or so on and so
9 forth, I think it's pretty straight forward legal
10 analysis.
11 But I also can see if we start getting into
12 some big factual arguments and questions of harm
13 and no harm, this, that, the other thing, then
14 obviously it's going to get more complicated.
15 And I agree with you. The parties are really
16 in the position to work out those issues and bring
17 that to the Commission. And, you know, I can speak
18 for myself, but I think we can be fairly flexible
19 and either take that on April 6 or at a time before
20 or after, as the parties see fit and, you know,
21 just do it like we do any other scheduling for a
22 Commission matter.
23 But I really do think it does need to be
24 something where the parties sit down and at least
25 have a conversation of where they think this is

1 going. And, again, I would caution, as Mr. Smith
2 did as well, you know, let's keep a focus on the
3 immediate suspension and not make it a full-blown
4 hearing over the actual merits of the case.
5 MR. GERDES: Mr. Chairman, just a
6 matter of clarification. Then probably what makes
7 sense is we should have a conference call among the
8 parties and staff, and I'd suggest maybe tomorrow
9 sometime. And I don't want to take up your time
10 for that. I just mention that so people are
11 thinking about it.
12 CHAIRMAN SAHR: And I think that
13 probably is a good way to close this out.
14 I will move that the Commission instruct the
15 parties and staff to forthwith have a conference
16 call to discuss how to proceed on the question of
17 the immediate suspension.
18 VICE CHAIR HANSON: Second.
19 CHAIRMAN SAHR: Thank you.
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STATE OF SOUTH DAKOTA)

:SS CERTIFICATE

COUNTY OF HUGHES)

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I transcribed, to the best of my ability, the cassette tape of the foregoing proceedings.

Dated at Pierre, South Dakota this 5th day of April 2004.

Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter

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