

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT
FILED BY WWC LICENSE, LLC AGAINST
GOLDEN WEST TELECOMMUNICATIONS
COOPERATIVE, INC., VIVIAN TELEPHONE
COMPANY, SIOUX VALLEY TELEPHONE
COMPANY, BRIDGEWATER-CANISTOTA
INDEPENDENT TELEPHONE COMPANY,
KADOKA TELEPHONE COMPANY REGARDING
INTERCARRIER BILLINGS

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Transcript of Proceedings
January 17, 2006

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CT05-001

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION,
BOB SAHR, CHAIRMAN
DUSTY JOHNSON, VICE CHAIRMAN
GARY HANSON, COMMISSIONER

COMMISSION STAFF
Rolayne Ailts Wiest
John Smith
Karen Cremer
Sara Greff
Greg Rislov
Harlan Best
Keith Senger
Dave Jacobson
Bob Knadle
Steve Wegman
Tina Douglas
Heather Forney
Patricia Van Gerpen

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

APPEARANCES

Talbot Wieczorek
Darla Pollman Rogers
Richard Coit

Reported By Cheri McComsey Wittler, RPR, CRR

PRECISION REPORTING
L I M I T E D

1 THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF SOUTH DAKOTA
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4 IN THE MATTER OF THE COMPLAINT
5 FILED BY WWC LICENSE, LLC AGAINST
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7 COOPERATIVE, INC., VIVIAN TELEPHONE
8 COMPANY, SIOUX VALLEY TELEPHONE
9 COMPANY, BRIDGEWATER-CANISTOTA
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37 APPEARANCES
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39 Talbot Wieczorek
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1 APPEARANCES BY TELEPHONE 2
2 David LaFuria
3 Lynn Ratnavale
4 Marlene Bennett
5 Jim Adkins
6 Colleen Sevold
7 Doug Eidhal
8
9 =====
10
11 TRANSCRIPT OF PROCEEDINGS, held in the
12 above-entitled matter, at the South Dakota State
13 Capitol, Room 468, 500 East Capitol Avenue, Pierre,
14 South Dakota, on the 17th day of January 2006,
15 commencing at 1:30 p.m.
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1 CHAIRMAN SAHR: CT05-001, In the
2 Matter of the Complaint Filed by WWC License, LLC
3 Against Golden West Telecommunications Cooperative
4 Inc., Vivian Telephone Company, Sioux Valley
5 Telephone Company, Armour Independent Telephone
6 Company, Bridgewater-Canistota Independent
7 Telephone Company, Kadoka Telephone Company
8 Regarding Intercarrier Billings.
9 And the questions today are shall the
10 Commission grant the Motion for Partial Summary
11 Judgment, and shall the Commission grant the
12 Motion in Limine, and shall the Commission grant
13 the Motion to Compel Production of Discovery
14 Responses?
15 And I should note -- hopefully it won't be an
16 issue, but we do have our Appropriations hearing at
17 4 o'clock, and if we do run into a time crunch, we
18 would have to adjourn and come back afterwards. So
19 everyone can make note of that, and hopefully that
20 is not going to be the case. But just in case, you
21 are forewarned.
22 With that, Mr. Wieczorek.
23 MR. WIECZOREK: I will keep my
24 comments to the allotted 40 minutes.
25 CHAIRMAN SAHR: You did the math too

1 fast. 4
2 MR. WIECZOREK: If it meets with the
3 Commission's approval, since we made the Motion for
4 Summary Judgment, I'll deal with that. I'll
5 reserve my comments concerning the Motion in Limine
6 as a response to the argument that will be made by
7 Respondents and Intervener.
8 Just for the Commission's information, the
9 Motion to Compel has been resolved. We received
10 some additional spreadsheets last Thursday, I
11 believe, and then we reached an agreement that
12 any -- there was going to be some supplemental
13 spreadsheets distributed that any supplemental
14 spreadsheets distributed will be distributed either
15 unprotected or with a password so people can look
16 at them, analyze them, and go into the
17 documentation. And I believe that correctly states
18 the conclusion on that.
19 Then I'll begin with the Motion for Summary
20 Judgment. I am not going to repeat everything
21 that's contained in the Brief. I might cover some
22 of it a little bit, but I'm going to try to keep my
23 responses mostly to replying to the Brief that was
24 submitted in opposition.
25 I think the first thing that the Commission

1 needs to understand is what procedural capacity
 2 this Commission currently sits on these claims.
 3 In the Reply Brief there was citations and
 4 discussion and argument regarding
 5 47 U.S.C. Section 252 citing to an arbitration
 6 decision that this Commission decided back in '96.
 7 I think it's important that the Commission
 8 understand that that is not the capacity that
 9 you're sitting in today. There is -- Alltel does
 10 not -- Alltel, WWC, does not contest an arbitration
 11 pursuant to 47 U.S.C. 252(b), that this Commission
 12 can actually determine terms of a relationship
 13 between telecommunications carriers.
 14 However, what you are faced with today is an
 15 Interconnection Agreement that was a voluntary
 16 agreement under the statute 47 U.S.C. 252(a) that
 17 this Commission then approved pursuant to
 18 Section e(2) of that same statute. Under
 19 Section e(2) of that statute you approved it
 20 without reservation. There are limited reasons or
 21 things -- reasons you can deny a voluntary
 22 agreement, negotiated agreement.
 23 There was no denial. There was no send the
 24 parties back to clear up an issue at that point,
 25 which is the power of the Commission at that point.

1 Given that you have an existing
 2 Interconnection Agreement, which essentially
 3 becomes and has been positioned in this action as
 4 essentially a contractual agreement between the
 5 parties.
 6 This is an action that's been asserted under
 7 your Complaint procedures, which has dual
 8 jurisdiction with the Circuit Courts. The
 9 Counterclaim was asserted in the same format. So
 10 you are essentially faced in making your standard
 11 review just like a court would. And so that is why
 12 I think that argument under 47 U.S.C. 252 is
 13 inappropriate in this context because procedurally
 14 you are not in that context.
 15 Now so where does that put this Commission?
 16 That, Commission, puts them -- that, Commission,
 17 puts you in a position to enforce the law and make
 18 a determination of the contractual rights that the
 19 parties agreed to.
 20 So at this point one of the things that was
 21 raised by the opposing Brief is that if there is no
 22 remedy, then if there is a summary judgment where
 23 you cannot resolve the agreement to agreed term.
 24 The agreement to agree term is repeated in both
 25 Briefs. Essentially you have language that says

1 that the parties have agreed to a 3 percent, that
 2 they're going to modify that 3 percent if they can
 3 reach a mutually agreed upon traffic study.
 4 Obviously, at this point we have not been able
 5 to reach a mutually agreed upon traffic study. Now
 6 the question becomes under the law whether that's
 7 an enforceable agreement to force us -- or that
 8 this Commission can essentially step in and
 9 determine what should be the mutually agreed upon
 10 traffic study.
 11 And in the Response Brief the Respondents and
 12 SDTA cite to a lot of other jurisdictions but
 13 frankly this Commission has to come back to what
 14 this court has said. Our Supreme Court has looked
 15 at this issue in at least two cases that are very
 16 direct. And probably the most in-depth review of
 17 this situation and agreement to agree was Deadwood
 18 Lodge - Albert case which we cite. In the Deadwood
 19 Lodge - Albert case the agreement provided for a
 20 grant -- the parties would later consider and
 21 determine the rent, and this was the quote from the
 22 contract that the Supreme Court was interpreting.
 23 "Rental consideration which the parties agreed to
 24 negotiate a mutually acceptable monthly rent."
 25 Here we have the exact same thing. We have a

1 traffic study, which I think common sense reveals
 2 is much more in depth and much harder to figure out
 3 a lot of other factors, figuring out what the
 4 commercial reasonable rent is on a piece of
 5 property. Now the opposition has argued that that
 6 general law has changed somewhat over the last
 7 20 years. However, the South Dakota Supreme Court
 8 again in 2002 cited the same basic theory, endorsed
 9 the Deadwood Lodge - Alberts conclusion that, you
 10 know, in buying property if you did not
 11 agree to the price, the court is not going to come
 12 up with the price for you.
 13 So essentially this Motion for Summary
 14 Judgment is, look, we have a 3 percent inter MTA.
 15 It is actually the rate that was supposed to be in
 16 place at a minimum until the three months after the
 17 approval of the agreements. Now we have not been
 18 able to come up with the traffic study. There was
 19 no action filed actually until the Counterclaim was
 20 filed in response to this Complaint. The
 21 traffic -- mutually agreed upon traffic study has
 22 not been able to be resolved because you can have a
 23 good-faith disagreement about what the traffic
 24 study should show.
 25 That's the second part of the argument because

1 of the good-faith requirement forces us into
 2 negotiations and forces us into this agreement, and
 3 that's just absolutely not so. You can in good
 4 faith try to negotiate an agreement but reach a
 5 conclusion that you cannot come up with an
 6 agreement.

7 For example, if I wanted my friend's vehicle
 8 after he was done with it -- let's say every two
 9 years he buys a new vehicle and gets rid of his old
 10 one. I can certainly reach an agreement with him
 11 that in good faith we'll set the price when you go
 12 to sell that vehicle, but we don't set the price.
 13 When that friend goes to sell it he says, well,
 14 here, you can buy my vehicle, but I want retail
 15 book because that's what a dealer would get. I
 16 say, well, I want wholesale book because that's
 17 what the dealer would give you.

18 Clearly both of those positions are good-faith
 19 positions, but a term was never agreed upon or a
 20 price. And in that case the price was never agreed
 21 upon. And so a court would not step in and force a
 22 price on either party. The court would say under
 23 this agree to agree is unenforceable, and that's
 24 why these are unenforceable.

25 In a context of inter MTA the argument might

1 be, well, we have a tower right on the line of an
 2 MTA. So in the town right next to it that's on one
 3 MTA the R-LEC might argue, well, that's an inter
 4 MTA call. And we say, well, it straddles the line
 5 so we don't think that should be considered. That
 6 should be thrown out. Those are both reasonable
 7 positions. And if you can't come to an agreement
 8 because of that issue on a traffic study, it's
 9 because you agree to agree that your mutually
 10 agreed upon traffic study -- your inability with
 11 faith to come to that agreement results in no
 12 traffic study.

13 Now one of the horror stories they plot out in
 14 their Brief is that, well, then we don't have a
 15 remedy, there's nothing there. The Interconnection
 16 Agreement is only valid through last December.
 17 They certainly have the ability to cancel an
 18 Interconnection Agreement under the terms of the
 19 agreement itself and renegotiate those terms. And
 20 if we cannot renegotiate those terms and can't
 21 resolve them, we come to arbitration and complete
 22 arbitration with this Commission, and the
 23 Commission could then set that term if we could not
 24 come to an agreement.

25 Other arguments on the good faith, there's

1 been -- there's some reference to some cases, but
 2 if you look beyond their cases, some of the cases
 3 they cite are like UCC case where, of course, in a
 4 UCC case is a whole different set of laws that
 5 applies. For example, UCC steps in the law --
 6 state law substitutes terms where you've left terms
 7 open. So if you agree to spot price you don't have
 8 an agreement to agree. You have an agreement to
 9 spot price on a commodities market. That does not
 10 make it an agreement to agree. The UCC says, well,
 11 that price is filled in because everybody knows
 12 what the spot price is. So those cases are totally
 13 inapplicable. I can't even talk today. Excuse me.
 14 They don't apply in this situation. And in all the
 15 jurisdictions cited I think this Commission has to
 16 come back to what the South Dakota Supreme Court
 17 has said. The language in the Interconnection
 18 Agreement mirrors the language our Supreme Court
 19 has said constitutes an agreement to agree.

20 And in that factual scenario, the Supreme
 21 Court and Deadwood Lodge vs. Albert, there's a much
 22 easier thing for a court to determine than a court
 23 or Commission to determine regarding traffic
 24 studies.

25 That's all I would have for comments.

1 CHAIRMAN SAHR: Thank you. Do you
 2 want to hold questions?

3 VICE CHAIRMAN JOHNSON: Your
 4 pleasure.

5 CHAIRMAN SAHR: If you have
 6 questions.

7 VICE CHAIRMAN JOHNSON:
 8 Mr. Wieczorek, there are a number of different
 9 cases cited by you and the other parties, and I'm
 10 trying to distinguish between them all, you know,
 11 and figure out which are most applicable in our
 12 situation here. You talk about the UCC cases and
 13 the spot market.

14 MR. WIECZOREK: Uh-huh.

15 VICE CHAIRMAN JOHNSON: And I follow
 16 that point. In the Deadwood Lodge case the
 17 agreement never dictated a benchmark or a framework
 18 or a foundation for determining what that rent was.
 19 You used the phrase commercial reasonable rent, but
 20 that wasn't contained anywhere in that agreement.

21 MR. WIECZOREK: Right.

22 VICE CHAIRMAN JOHNSON: Does it make
 23 a difference in this situation that the foundation
 24 or benchmark or method for setting, you know, the
 25 price essentially was putting the agreement between

1 the parties?
 2 MR. WIECZOREK: The problem that
 3 you -- there might be some overlap, and there
 4 actually is when you look at these. But there
 5 isn't a price. 3 percent is a position that I
 6 think is valid at a minimum until three months
 7 past. So then you get into the argument after
 8 three months should this Commission essentially set
 9 a new inter MTA rate and every six months after
 10 should the Commission then set a new inter MTA
 11 rate?

12 The problem that you get is not so much the
 13 fact that you say there's going to be an inter MTA
 14 rate. The problem you get is when they say you
 15 have to agree to a mutually agreed upon study to
 16 come up with it.

17 Well, as I gave in my examples, you may not
 18 agree and both be in good faith because you just
 19 come at this argument in different ways. So I
 20 think the fact that you talk about inter MTA -- I
 21 apologize. I like to use factor as opposed to rate
 22 when I talk to MTA because it's really a factor.
 23 It's not an actual price rate. Because there's a
 24 whole nother issue, and that's the matter of the
 25 Motion in Limine as to whether we talk about

1 different rates that we use to apply the inter MTA.
 2 So that is actually one step removed. You
 3 have to complete the study and agree to a study,
 4 complete the study, readjust the rate -- or
 5 readjust the factor and then implement the rates.

6 So I'm not sure that answers your question,
 7 but I see it as being unenforceable because of the
 8 issue of a mutually agreed upon study, that you
 9 can't reach that -- that this Commission cannot
 10 decide that for the parties.

11 VICE CHAIRMAN JOHNSON: Well,
 12 Mr. Wiczorek, here's what I'm trying to get, and
 13 please feel free to tell me if you think I'm
 14 looking at a wrong piece of legal argument here.
 15 But, you know, on page 6 of your initial Brief in
 16 the paragraph you pulled out -- you said -- or
 17 rather you quoted, "Yet if an essential element is
 18 reserved for the future agreement of both parties,
 19 the promise can give rise to no legal obligation
 20 until such future agreement."

21 I guess I'm trying to determine if an
 22 essential element is missing out of the agreement.
 23 And I'm trying to determine whether or not, you
 24 know, saying this is going to be the method by
 25 which you'll come -- you'll determine that factor,

1 whether or not an essential element is missing.
 2 MR. WIECZOREK: Well, there is no
 3 method established. I mean, if we would have come
 4 to an agreement saying this is a cost study we're
 5 going to do but we're not done with it yet -- this
 6 is how we're going to do it, these are the steps
 7 we're going to go through, this is the data we're
 8 going to collect, this is the things we're going to
 9 disregard, these are the things we're going to
 10 consider, and we just need to complete it, I think
 11 you would have an enforceable agreement. Because
 12 then you would know every factor to take into
 13 consideration in your cost study.

14 When you just say we're going to try to get to
 15 a mutually agreed upon cost study that might
 16 include 60, 70 factors, that's where you do not
 17 have an enforceable agreement between -- the
 18 essential difference is I kind of go back to
 19 that -- you'll see a lease agreement that might
 20 say, we'll enter into a price in the future which
 21 is \$100 plus CPI three years from now.

22 Obviously that's an enforceable agreement
 23 because you tied it to the market. The court can
 24 come in and say, well, it's just a math procedure,
 25 I can enforce that agreement. But going back to

1 the Deadwood Lodge analysis, you can just say,
 2 well, we'll come up with a price later. The
 3 court's like, well, how do you come up with that
 4 price? There might be a number of factors that go
 5 into consideration there, and there's nothing for
 6 me to tie it to.

7 The same thing I think comes with the cost
 8 study. If you say this is exactly how we're going
 9 to do this analysis, this traffic study, you can
 10 enforce that, but when you say we're going to
 11 mutually agree to a traffic study to come up with
 12 the new inter MTA rate it leaves the Commission
 13 going should I consider that tower that's on the
 14 border? How will I deal with, you know, this -- if
 15 they can't eliminate the traffic for this IXC
 16 carrier, how do I deal with ported numbers? How do
 17 I deal with N-1 numbers?

18 I mean, those are all issues that the parties
 19 could not agree upon, that the Commission is going
 20 to have to get -- if you do what the Respondents
 21 want, you're going to have to come up with all of
 22 those issues and say that's how it should have been
 23 done.

24 VICE CHAIRMAN JOHNSON: Well, I'm
 25 trying to get a feel for what the current framework

17

1 in this state says, what is the precedent, what is
 2 the case law out there? What would the courts say,
 3 you know, if you and I had an agreement to sell
 4 agricultural property four years from now based on
 5 what the average per acre price was?
 6 Do you have any insight for me as to whether
 7 or not that would be an enforceable agreement?
 8 MR. WIECZOREK: The average -- if
 9 you said "the average of" and gave a definition of
 10 what you were averaging, I think it would be
 11 enforceable. But if you just say "the average,"
 12 does the average include the county, does the
 13 average include the township, does the average
 14 include the state, does the average include like
 15 real estate, does the average include all
 16 ag-designated real estate, does the average include
 17 land on the border of Sioux Falls that's ag real
 18 estate but obviously is development real estate at
 19 the same time?
 20 I would say the court would simply say that's
 21 totally unenforceable, unless you give a
 22 designation of what you mean when you say you're
 23 going to take the average. You'd have to define
 24 what your average is.
 25 VICE CHAIRMAN JOHNSON: Okay. Than

18

1 you. And I apologize for the hypothetical. I'm
 2 trying to get, as I said, a better understanding of
 3 what the legal framework is like.
 4 MR. WIECZOREK: I fully appreciate
 5 that. It's -- it says -- one of my partners says
 6 it gets a little esoteric in law occasionally so --
 7 VICE CHAIRMAN JOHNSON: Thank you,
 8 sir.
 9 MR. SMITH: Thank you.
 10 Mr. Wieczorek, just following up on Commissioner
 11 Johnson's question, could I draw your attention to
 12 the language itself in Section 7.23.
 13 MR. WIECZOREK: 7.23?
 14 MR. SMITH: And I think we all know
 15 the sentence we're talking about. It would be the
 16 last sentence of the second paragraph. And
 17 Commissioner Johnson's question, if I remember it
 18 correctly, assumed the existence of a method in the
 19 agreement.
 20 When I look at that sentence, the last
 21 sentence in paragraph 2, it states there that the
 22 good-faith covenant is stated as a covenant to
 23 arrive at a method. And does that mean -- is that
 24 true?
 25 MR. WIECZOREK: Well, I think if you

19

1 read that sentence where it says the parties
 2 essentially will use good faith and one of the
 3 other factors that they relied upon in the Brief,
 4 the Golden West Companies there, is reasonable.
 5 I think it gets you right back into the
 6 analogy that I gave with the car. In good faith I
 7 think wholesale as the buyer might be correct, and
 8 it's a reasonable position to take. That's all the
 9 dealer's going to give you. And if you try to sell
 10 it on the open market, you have advertising costs,
 11 you might never find anybody to buy it from you.
 12 People tend not to like to buy cars -- used cars
 13 from individuals just through paper. It tends to
 14 drive the price down.
 15 But if I go to the dealer, he's retail price,
 16 the other side, the guy selling it, he's totally
 17 reasonable in making a good-faith determination
 18 that he believes the same price I'd have to go to
 19 get it from the dealer is the correct price. So I
 20 think by throwing good faith and reasonable in
 21 here -- the cases, in fact, talk -- some of them
 22 talk about -- the ones we cited in our brief talks
 23 about how good faith actually makes it -- what's
 24 good faith?
 25 I have to enter the mind of a businessman to

20

1 determine whether he made a reasonable business
 2 decision in taking this position on how the traffic
 3 study should go.
 4 Those don't clear up this matter at all.
 5 MR. SMITH: Well, and because the
 6 phrase -- the clause reads "proceed toward the
 7 development of a method of a traffic study"; right?
 8 That's the language?
 9 MR. WIECZOREK: Right.
 10 MR. SMITH: So does that presume
 11 that there is no method currently stated in the
 12 document?
 13 MR. WIECZOREK: I believe it does.
 14 And because it -- if they had a method, you would
 15 see it in this agreement.
 16 MR. SMITH: I believe the section
 17 was 5.4 that Golden West pointed to.
 18 MR. WIECZOREK: It may have been
 19 5.12. They talk about local traffic or termination
 20 of inter MTA traffic. 5.4 talks about measuring
 21 traffic, that's correct.
 22 MR. SMITH: So I'm assuming that
 23 reference that Ms. Rogers made in her -- or that
 24 Golden West and SDTA made in their filing was to --
 25 was to that section as providing a sufficient

1 "method", but I guess my question is by the -- by
2 phrasing the arriving at a method as the actual
3 task, if you will, for the parties in 7.2.3, would
4 it be the position of Western Wireless that that --
5 neither 5.4 nor any other provision of this
6 agreement, in fact, provides a method for adjusting
7 the inter MTA factor?

8 MR. WIECZOREK: It does not for the
9 sole reason that the agreement doesn't contain
10 enough information for you to do a traffic study.
11 There's still a number of presumptions that would
12 have to be made.

13 And those issues -- like I said, it's not even
14 a value of a car type of deal where you can say
15 we're going to do book value at retail. I mean,
16 you can come up with that. It just doesn't exist
17 in a traffic study that you can have even one
18 factor and say we have an agreed upon traffic
19 factor. Those might be a base to start with, but
20 actually, as you've pointed out, the tort language
21 clearly sends a signal that's something they still
22 need to work towards to consolidate and come up
23 with in good faith what they reasonably and each in
24 their own business opinion believe should be it.

25 And, like I said, that language does not

1 presumptions have to be made by a court that
2 there's not an enforceable contract. Even if we
3 were talking about something as specific as book
4 value, you know, for retail, certainly there are
5 presumptions that would have to be made at that
6 point too to determine exactly what that means. Is
7 the car in mint condition, is it average, you know,
8 what kind of stereo system does it have?

9 Certainly those presumptions would render the
10 agreement unenforceable?

11 MR. WIECZOREK: Yeah. But the
12 difference, Commissioner, I think you would see in
13 that situation based on the hypothetical I have
14 given is you could go get the mileage off the car.
15 That's easily factually determined. You could
16 check to see if it has the stereo in or if it's got
17 the add on for the stereos if it's got the mag
18 wheels, there's a line to add on.

19 So you know it's going to be retail at those
20 prices. Because if you look at -- used cars, but
21 if you look at the differences even on the retail
22 versus wholesale price, those are different values
23 every time you go along. But those are something
24 simply you can say show me the dealer's list what
25 was on the vehicle and what's your mileage to date.

1 guarantee any kind of agreement.

2 MR. SMITH: Just one last -- this is
3 kind of maybe the horror story question here. If
4 the clause is not enforceable, is it Western
5 Wireless's position then that the 3 percent is just
6 meant to be a default number that carries forward,
7 or does this render the whole thing unenforceable?
8 And if it does that, then where are we?

9 MR. WIECZOREK: First of all, the
10 3 percent had been essentially used -- the
11 3 percent was in place when the agreement passed
12 and, as you know from the original filing here, it
13 was retroactively applied and it's separate and
14 apart from an issue as to what rate is supposed to
15 be applied to that.

16 The 3 percent as I read is in place because if
17 you don't replace it, you don't replace it.

18 MR. SMITH: Thank you.

19 CHAIRMAN SAHR: Commissioner
20 Johnson, did you have another question?

21 VICE CHAIRMAN JOHNSON: I have a
22 follow up, but I can wait until you're done.

23 CHAIRMAN SAHR: Go ahead.

24 VICE CHAIRMAN JOHNSON:

25 Mr. Wieczorek, you talked about a number of

1 Those are I think easily enforced in that
2 situation or can enforce in that situation. You
3 might have to take some testimony regarding the
4 actual facts of the car. But you've never had a
5 meeting of the -- the difference is in the pricing
6 you've never had a meeting of the minds, and that's
7 why the courts don't enforce it. I was always
8 thinking retail. You were always thinking
9 wholesale.

10 I mean, it would be -- the courts would
11 determine to be inappropriate for me if you're the
12 one selling the car to get it at wholesale because
13 you never agreed to wholesale even if we factor in
14 all the things, and it would be inappropriate to
15 force me to buy it at retail if I never agreed to
16 retail.

17 VICE CHAIRMAN JOHNSON: Well, I've
18 hijacked your example somewhat. My apologies.
19 But again, throwing out the wholesale retail, I
20 mean, even presuming the parties had agreed on
21 retail, the condition of the car requires some
22 judgment call? I mean, that's subjective; right?
23 I think it's in good condition, you think it's in
24 average.

25 MR. WIECZOREK: Well, the -- well,

25

1 there might be some need for some testimony as to
 2 the car. I mean, if that happens -- the difference
 3 being when -- if we have a meeting of minds it's
 4 going to be retail, we might argue over what
 5 actually should be considered, but the wholesale
 6 retail is you can't force one price down the other.
 7 The court can make a determination if you -- it's
 8 like the -- it's like the lease case. If we say
 9 it's based on CPI plus but I get a credit if I do a
 10 certain fix-up and you come in as the landowner
 11 say, no, you didn't do that fix-up to snuff, that
 12 might be an issue for the court.
 13 But the court's not going to throw out the
 14 whole agreement because you can bring in a witness
 15 and say, yeah, the carpentry didn't meet what was
 16 necessary for standard so I can go home and fix it
 17 up. Those are minor issues the court can get to.
 18 But there you've done more than agree to agree.
 19 It's more of a damages calculation or pricing
 20 calculation as opposed to these guys haven't
 21 reached an agreement as to what even the base for
 22 the price should be. We're not going to come up
 23 with what the base price should be.
 24 VICE CHAIRMAN JOHNSON: Thank you
 25 for your patience, Mr. Chairman. Thank you for

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1 allowing me to wallow around in the hypothetical.
 2 MR. WIECZOREK: I have a car for
 3 sale too.
 4 CHAIRMAN SAHR: Thank you very much.
 5 Do you have anything else, Mr. Wieczorek?
 6 MR. WIECZOREK: Not at this moment.
 7 CHAIRMAN SAHR: Thank you. On the
 8 second Motion then because you're the responding
 9 party, then we'll take your oral argument at that
 10 point in time?
 11 MR. WIECZOREK: Yes. I've avoided
 12 commenting on that. And I believe I've been
 13 successful.
 14 CHAIRMAN SAHR: Thank you.
 15 Ms. Rogers. Good afternoon.
 16 MS. POLLMAN ROGERS: Good afternoon.
 17 Thank you for the opportunity to present argument
 18 on the Motion for Partial Summary Judgment. My
 19 name is Darla Pollman Rogers, and I represent the
 20 Golden West Companies in this proceeding.
 21 The Golden West Companies resist the WWC's
 22 Motion for Partial Summary Judgment, and if it's
 23 agreeable to the Commission and also to counsel for
 24 Western Wireless or Alltel, I will refer to them as
 25 WWC, and we can take notice that this is Alltel.

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1 I think it's important to just back up and
 2 look at a little bit of the history of how we got
 3 to the point that we're at here today. This
 4 Complaint was actually initiated by WWC, and the
 5 purpose of the Complaint, of their Complaint, was
 6 to question Golden West's decision to credit past
 7 due reciprocal compensation payments on the new
 8 agreement that was retroactive until January 1 of
 9 2005. And instead WWC's position is that that
 10 should have just been paid out right in cash. And
 11 so they brought the action under a Complaint
 12 proceeding in front of this Commission.
 13 Now that issue for the most part has -- as far
 14 as the actual crediting or payment of those past
 15 due accounts has basically been resolved or paid.
 16 There are certainly other issues that WWC points to
 17 in their Complaint, but that particular portion of
 18 it has been resolved. So that leaves the issue of
 19 the Counterclaim.
 20 When WWC brought its Complaint against
 21 Golden West Companies we filed a Counterclaim
 22 against them, and that's the highly contested issue
 23 of the inter MTA factor. WWC is now claiming weeks
 24 before the trial that 7.2.3 should be found
 25 unenforceable as a matter of law because it is an

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1 agreement to agree.
 2 Golden West disagrees with that assertion for
 3 several reasons. First of all -- and I would
 4 remind you, as I know you are aware, but on a
 5 summary judgment Motion the facts must be viewed in
 6 the light most favorable to the nonmoving party or
 7 in this case the Golden West Companies. And,
 8 furthermore, case law establishes that whether a
 9 provision is, in fact, an agreement to agree is a
 10 question of fact for the fact finder. So it is not
 11 an appropriate action for summary judgment.
 12 At that point the game should be over, but let
 13 me go on and comment on a few other reasons why we
 14 believe that this Motion should not be granted.
 15 Golden West bases its assertion on its belief
 16 that 7.2.3 is an agreement to agree, and we
 17 disagree. We do not believe that section of the
 18 Interconnection Agreement is an agreement to agree.
 19 And this is why: We base that on several things.
 20 But what the case law says, and we've cited it in
 21 our Briefs, whether an agreement to agree exists
 22 depends upon the parties' intentions and whether or
 23 not you as the governing body or the Commission
 24 that's going to rule in this case can discern those
 25 intentions from what is actually written within the

1 agreement.
 2 And we would submit to you that in this case,
 3 yes, you can discern what the parties intended by
 4 reading language in 7.2.3 of the agreement.
 5 Intention of the parties clearly was that the
 6 3 percent was an initial factor, not one that was
 7 supposed to last throughout the term of the
 8 agreement.
 9 The very language says this is the initial
 10 factor and it is to be adjusted throughout the term
 11 of the agreement. And that adjustment then is
 12 supposed to be based upon a traffic study of the
 13 actual traffic that is exchanged between the
 14 parties.
 15 Now you don't know necessarily what that
 16 traffic is when you enter into these types of
 17 agreements so, therefore, it is very common to have
 18 provisions exactly such as this one, 7.2.3, in
 19 interconnection agreements. Because the goal is to
 20 arrive at an inter MTA factor that is accurately
 21 reflecting the actual traffic that is exchanged
 22 between the parties.
 23 So, yes, there are parameters within the
 24 language in the agreement, and they are sufficient
 25 for this agreement to be enforceable. There is

1 also Section 5.4 as was mentioned by Mr. Smith that
 2 gives some insight on how you measure this traffic.
 3 But before I look at that a little more
 4 specifically, I'd like to point out that, as I
 5 said, it's very common in the telecommunications
 6 industry for these types of clauses to exist in
 7 interconnection agreements.
 8 For example, these are just interconnection
 9 agreements that we pulled off of the Internet.
 10 They're on file. They're of public record. This
 11 happens to be one of CenturyTel of Northwest
 12 Arkansas. And what it provides is that reports
 13 regarding the percentages of intra MTA or inter MTA
 14 traffic and the intrastate or interstate
 15 jurisdiction of the inter MTA traffic shall be
 16 based on a reasonable traffic study conducted by
 17 the CMRS providers and available to the companies
 18 and it will be conducted no less frequently than
 19 once each quarter to ensure that the provider --
 20 that the CMRS provider is using an accurate
 21 inter/intra MTA percentage.
 22 In an agreement between Hills County Telephone
 23 Cooperative and Sprint the parties developed an
 24 initial factor for the inter MTA traffic, and then
 25 that inter MTA traffic factor shall be revised by

1 mutual agreement of the parties. The parties agree
 2 to review the percentage on a periodic basis and if
 3 warranted by the actual usage, revise the
 4 percentage appropriately.
 5 And, finally, in the Ameritech Michigan
 6 Interconnection Agreement there too exactly as in
 7 this case the parties agreed on an initial
 8 inter MTA factor. Then either party could submit
 9 traffic or studies with regard to that traffic that
 10 was to be determined in good faith, and the parties
 11 shall use such inter MTA traffic information to
 12 negotiate in good faith a mutually acceptable
 13 percentage of carrier to Ameritech traffic
 14 delivered by carrier to the Ameritech that is
 15 deemed inter MTA traffic.
 16 These are exactly the same types of provisions
 17 that now West -- WWC is asking you to throw out as
 18 unenforceable, and I would submit to you that it is
 19 not the same as setting prices for a lease or
 20 setting prices for a contract for deed. This is
 21 industry standard.
 22 Furthermore, with regard to traffic studies
 23 themselves, that is also very common in the
 24 industry, but one of the big issues in coming --
 25 arriving at a traffic study is the location of the

1 cell tower site. And that is defined for you
 2 within the agreement. So you do have sufficient
 3 parameters within the agreement to ascertain the
 4 intention of the parties with regard to the inter
 5 MTA factor and to enforce that provision.
 6 I would also like to comment, if I could, on
 7 the authority of the Commission. I disagree with
 8 Mr. Wieczorek's attempt to limit your authority.
 9 One of the other big distinctions between the case
 10 that you have here and the provisions that I have
 11 read to you is we are in front of the Commission,
 12 and as a Commission it is certainly your -- you
 13 have every authority that you need to set inter MTA
 14 factors, to order traffic studies, to determine
 15 what the appropriate rates are. That's part of
 16 your duty and job as defined statutorily and by
 17 other cases.
 18 One of the reasons that the courts have been
 19 reluctant in some instances to enforce what they
 20 call an agreement to agree, like, for example, in
 21 the Deadwood case where there aren't any parameters
 22 is they say just generally it's not the function of
 23 the courts to determine a lease rate. It doesn't
 24 matter whether traffic studies are complicated or
 25 not. It is within your authority to do that.

1 That's what you do. That's what commissions all
2 across the country do. And so you clearly have the
3 authority to enforce this provision of the
4 contract.

5 I also need to mention briefly the issue of
6 bad faith. In at least one of the cases cited by
7 WWC there was actually a factual finding that the
8 parties negotiated in good faith. Now there hasn't
9 been that finding here. And, in fact, one of the
10 allegations that Golden West has made is that WWC
11 has not acted in good faith. And that's a factual
12 argument. That's a factual determination. We need
13 to be able to come forward and show that.

14 And so we believe that if you look at the
15 actions of the parties, there is an absence of
16 good-faith effort to negotiate and we believe that
17 we can show that or demonstrate that at a hearing
18 and we believe that this provision should be left
19 in the agreement and we should be allowed to show
20 the actions that -- of WWC have not been exercised
21 in good faith.

22 Just on its face, the parties were involved in
23 a negotiation process to try to arrive at this
24 agreement, and it fell apart. They were headed for
25 arbitration, and then on the eve of the trial -- or

1 the hearing on the arbitration a settlement was
2 hammered out and this agreement resolved it from
3 that.

4 In the course of reaching this -- what ended
5 up being this agreement Western Wireless agreed to
6 Section 7.2.3 of the agreement. They agreed to it.
7 And now they're turning around and saying, well,
8 no, that agreement is unenforceable as a matter of
9 law unless they're trying to duck out of their
10 responsibilities under the agreement.

11 And the reason for that is clear, and in fact
12 it came up today in Mr. Wieczorek's comments. The
13 3 percent -- the initial 3 percent is a very,
14 very -- in our opinion very, very low inter MTA
15 factor. They want that 3 percent to remain.
16 That's the whole reason we're here.

17 I also disagree with Mr. Wieczorek's comments
18 concerning if the parties can't agree then
19 basically we're stuck with that 3 percent for the
20 rest of the agreement. I don't think the 3 percent
21 part is something that they can hold onto and
22 choose to abide by and then throw out the rest of
23 the agreement. 7.2.3 and the 3 percent of it in
24 the whole negotiations part of it is very
25 integrally crafted. And the 3 percent is not

1 severable.

2 So worst case scenario you find the
3 agreement -- or 7.2.3 unenforceable, there is no
4 agreement concerning inter MTA traffic. I would
5 submit that either under another section of the
6 agreement we can come back to this Commission and
7 ask you to set that or we can bill them what we
8 want and we'll be back in litigation on the issue
9 at some point anyway.

10 If you follow WWC's argument to its logical
11 conclusion, then what is Golden West's remedy? If
12 the parties cannot agree, which he's claiming they
13 cannot -- and incidentally I believe the parties
14 have agreed on a methodology at this point, but if
15 they can't, then according to Mr. Wieczorek's
16 arguments, we're stuck with the 3 percent and that
17 flies right in the face of the clear and manifest
18 intent of the parties that you can discern from
19 Section 7.2.3.

20 So for those reasons we would ask you to deny
21 the Motion for Summary Judgment. We do not believe
22 that it's an agreement to agree. We believe you
23 can ascertain and determine the intentions of the
24 parties and you can enforce that agreement. We
25 believe you have the authority to do so and this is

1 an appropriate jurisdiction with which to do so and
2 we believe that it is an appropriate -- it is
3 appropriate for you to deny the Motion for Partial
4 Summary Judgment.

5 Thank you.

6 CHAIRMAN SAHR: Thank you very much.
7 Any questions from the Commissioners at this point
8 in time?

9 Commissioner Johnson.

10 VICE CHAIRMAN JOHNSON: I do have
11 one. You mentioned in your comments as well as in
12 your Brief the authority of the Commission. And
13 you talk about how the Commission has the authority
14 to arbitrate and settle disputes arising from
15 Interconnection Agreements.

16 I presume that -- that authority comes from
17 Section 252. And I always assumed that that was a
18 forward-looking power of the Commission and not a
19 backward-looking authority. Am I incorrect in that
20 assumption?

21 MS. POLLMAN ROGERS: I believe that
22 you have the authority to resolve all I think it's
23 called open issues. But in addition to that
24 authority there is a provision within this
25 agreement that says that disputes that arise over

1 the terms and conditions of this agreement will be
 2 brought back here to this Commission. So I believe
 3 that that also gives you the authority to resolve
 4 this issue.
 5 VICE CHAIRMAN JOHNSON: Yes. That's
 6 right. Thanks for jogging my memory. Appreciate
 7 it.
 8 CHAIRMAN SAHR: Mr. Smith.
 9 MR. SMITH: Thank you. Is there a
 10 legal requirement that you have an Interconnection
 11 Agreement at all with Western -- with WWC? Does it
 12 legally require that you have an Interconnection
 13 Agreement with WWC? Do you have to?
 14 MS. POLLMAN ROGERS: I believe that
 15 we are required to have an Interconnection
 16 Agreement under the Federal Act. If they --
 17 MR. SMITH: If they request one.
 18 MS. POLLMAN ROGERS: If they request
 19 one.
 20 MR. SMITH: And then you proceed
 21 down the road of trying to negotiate one, and if
 22 you can't negotiate it, you come here under 252?
 23 MS. POLLMAN ROGERS: Right. If they
 24 don't request one, I don't know that we have an
 25 obligation, but I think once they request one we go

1 down that path, yes.
 2 MR. SMITH: Well, you didn't have an
 3 agreement, right, until sometime in 2004 when you
 4 signed an agreement that then related back to 2003?
 5 MS. POLLMAN ROGERS: There was also
 6 a prior -- we had an Interconnection Agreement.
 7 MR. SMITH: Did you have an
 8 Interconnection Agreement before that?
 9 MS. POLLMAN ROGERS: With WWC prior
 10 to that time that agreement had expired.
 11 MR. COIT: Yes. Yes.
 12 MS. POLLMAN ROGERS: So that started
 13 the negotiations in the new agreement.
 14 MR. SMITH: Sections -- one of the
 15 problems here is we look at Section 7.2.3. It
 16 explicitly uses the words "based upon a mutually
 17 agreed," you know, which does seem to -- I mean,
 18 how can we read that as saying anything other than
 19 the parties have to mutually agree to it?
 20 MS. POLLMAN ROGERS: And I think
 21 that's where the second paragraph also -- or second
 22 sentence also comes into effect, which requires the
 23 parties could exercise good faith in arriving at
 24 that mutually agreeable traffic study.
 25 MR. SMITH: If there are no

1 Interconnection Agreements in place, how would this
 2 whole thing work in terms of doing this, in terms
 3 of your billings for this traffic and -- or would
 4 it not be possible for Western Wireless to
 5 terminate calls to you, period, in the absence of
 6 an Interconnection Agreement?
 7 MS. POLLMAN ROGERS: If we did
 8 not -- I'm not sure I know the answer to that. If
 9 there was no Interconnection Agreement between the
 10 parties, the question becomes would there be any
 11 other rules or framework out there by which the
 12 parties would operate. I mean, the whole purpose
 13 of this agreement is to define the terms and
 14 conditions by which traffic is exchanged between
 15 the CMRS provider and the local exchange company.
 16 So if this weren't in place, I don't know that
 17 there would be anything to prevent us from charging
 18 our traffic pursuant to our tariffs if we didn't
 19 have any definition of what was local and what was
 20 inter MTA.
 21 MR. SMITH: So if this provision --
 22 if 7.2.3 is void, period, because it's -- then does
 23 that default us back to that status of a no
 24 agreement state, at least with respect to this
 25 particular term?

1 MS. POLLMAN ROGERS: To inter MTA
 2 traffic? Yes. And I guess I believe that we could
 3 do our own study and probably bill them any amount
 4 that we wanted to.
 5 There is another section in the agreement that
 6 says that if one part is not enforceable, the rest
 7 of the agreement goes forward. And also there's
 8 another one. I think that the parties can come
 9 back to the Commission and ask for some type of
 10 remedy under this agreement, which is probably
 11 where we would be.
 12 MR. SMITH: Okay. Thank you.
 13 CHAIRMAN SAHR: Mr. Smith asked the
 14 question I was going to ask, but I am really
 15 grappling with the phrase "based on a mutually
 16 agreed to traffic study analysis" in trying to
 17 figure out how that is not an agreement to agree.
 18 And, I mean, you already gave a response to that.
 19 But that is -- really in that provision that's the
 20 language that's particularly difficult for me to
 21 see as anything else other than an agreement to
 22 agree.
 23 I guess I'll give you one last shot on that
 24 one.
 25 MS. POLLMAN ROGERS: The reason that

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1 I don't believe that that is an agreement to agree
 2 is because, again, we're talking about setting the
 3 parameters of arriving at an appropriate inter MTA
 4 factor.
 5 Okay. Like the examples that I used from the
 6 other agreements, this is a very, very common way
 7 to arrive at it. It does set the parameters
 8 because you don't know at the time you enter into
 9 the agreement what that actual traffic is going to
 10 be. And so you need to then have some type of a
 11 traffic study to determine what that traffic is.
 12 I don't want to get bogged down in analogies,
 13 but it would be more like if you and I agree that
 14 I'm going to pay X amount per square foot to lease
 15 a kitchen but we don't know in advance how big the
 16 kitchen is, okay, so then we have to agree on how
 17 we're going to measure that kitchen in order to
 18 determine what the actual price is. I don't
 19 believe that's an agreement to agree. There is
 20 enough parameters there to determine where we need
 21 to end up, which is what is an appropriate inter
 22 MTA factor in this case.
 23 CHAIRMAN SAHR: The -- you know,
 24 looking at that based on mutually agreed to traffic
 25 study analysis, I mean -- and I appreciate your

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1 position where you're coming from. I do think that
 2 analogy is -- and you're doing it on the fly so
 3 it's a lot easier kind of pick it apart. Isn't
 4 quite apt. What seems to me to be lacking is if
 5 they aren't able to come to a mutually agreed upon
 6 traffic study analysis, then X Y and Z but right
 7 now isn't it left pretty wide open, other than, you
 8 know, there's that good-faith provision. But to me
 9 it's -- the agreement seems to be missing kind of
 10 that backstop which oftentimes you do see in
 11 business type agreements where if something's left
 12 open, the parties can discuss that, but then
 13 there's normally some type of backstop process
 14 where then you fall into some sort of default
 15 position.
 16 To me this seems pretty open-ended where, I
 17 mean, if you look at that, that's what kind of
 18 screams out in my mind is, well, what happens if
 19 you guys can't agree other than good faith. And I
 20 don't know if that really gets us any further
 21 beyond the agreement to agree issue.
 22 MS. POLLMAN ROGERS: What happens if
 23 we cannot agree is exactly where we are today. We
 24 are here asking you as the Commission to establish
 25 or set or determine an acceptable traffic

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1 methodology, which the agreement authorizes us to
 2 do.
 3 CHAIRMAN SAHR: Well, that to me,
 4 though, means we're basically writing a contract
 5 provision for you. I mean, that's not what the
 6 agreement says. It doesn't say -- to me it says
 7 it's mutually agreed and if you can't come up with
 8 a mutual agreement, then I don't know where you're
 9 at. I don't think the Commission can necessarily
 10 assert that again on its own volition.
 11 MS. POLLMAN ROGERS: Just a minute.
 12 If I could have a minute.
 13 CHAIRMAN SAHR: Certainly.
 14 MS. POLLMAN ROGERS: I'm looking for
 15 my Brief.
 16 CHAIRMAN SAHR: I have it
 17 electronically if --
 18 MS. POLLMAN ROGERS: I have it. I
 19 just have too many other papers.
 20 CHAIRMAN SAHR: That's the advantage
 21 of having laptops.
 22 MS. POLLMAN ROGERS: Maybe I didn't
 23 end up citing this, but I think it's in Section 11,
 24 one of the subsequent sections in the agreement is
 25 where it discusses bringing disputes before the

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1 Commission, and that's part of this agreement as
 2 well. So I believe the remedy is to come back to
 3 you and ask you to adjust the inter MTA factor
 4 appropriately or establish a methodology to do so.
 5 And you do have the authority to do that.
 6 CHAIRMAN SAHR: Does it talk about
 7 that specifically with the inter MTA, or is it just
 8 kind of a catch-all provision?
 9 MS. POLLMAN ROGERS: I believe it's
 10 the agreement as a whole. It would be any
 11 provision within the agreement.
 12 CHAIRMAN SAHR: And I think the cite
 13 is right to Section 11. I do think, though, the
 14 provision based on mutually agreed to traffic study
 15 analysis, I do think that at least in my mind seems
 16 to be an agreement to agree.
 17 Now, I mean, there may be some other language
 18 in there that you can point to and say here's what
 19 we think should kick in. But in reading the
 20 provision itself, I mean, Mr. Smith read it
 21 already, but the mutually agreed to part I'm just
 22 really grappling with seeing that as anything
 23 beyond the agreement to agree.
 24 MS. POLLMAN ROGERS: And,
 25 Commissioner, I would point out that while I don't

1 agree necessarily with your conclusion that that's
 2 an agreement to agree, at most I think it would be
 3 characterized possibly as an agreement to
 4 negotiate. And there is a distinction there too.
 5 But even if for the purposes of argument we
 6 say it is an agreement to negotiate, which is
 7 certainly enforceable or even if we say it is an
 8 agreement to agree, agreements to agree can also be
 9 enforceable under these cases, especially in
 10 instances like this where you have the ability, the
 11 wherewithal, and the authority to resolve this
 12 dispute.
 13 So even in those cases -- you know, and,
 14 again, I don't agree with you that it is an
 15 agreement to agree. Agreements to negotiate,
 16 unlike agreements to agree, clearly are
 17 enforceable.
 18 CHAIRMAN SAHR: Well, help me out on
 19 this. Maybe you know off the top of your head.
 20 Mr. Wiczorek was talking about how a number, if
 21 not all, of these cases involve UCC type cases? Is
 22 that based on UCC ones, or is it based on non-UCC
 23 as well?
 24 MS. POLLMAN ROGERS: I believe it's
 25 also based on non-UCC. I think that also we

1 pointed out in our Brief that even Williston on
 2 contracts, the language cited by WWC has changed
 3 since then. The new treatise says, yes, there are
 4 instances when agreements to agree -- agreements to
 5 agree are enforceable, but for sure agreements to
 6 negotiate are. And the key is whether or not you
 7 can ascertain the intention of the parties and we
 8 believe that you clearly can here in these cases.
 9 CHAIRMAN SAHR: Thank you.
 10 Mr. Coit.
 11 MR. COIT: Thank you, Mr. Chairman,
 12 Commissioners, and staff. I don't have too much
 13 here, but I would like to make a few comments.
 14 First, just we as SDTA would like to concur in
 15 the comments of Ms. Rogers. As an individual -- as
 16 one of the individuals who participated in the
 17 negotiations that led up to the agreement, I look
 18 at this argument surrounding this agreed to agree,
 19 and in a lot of respects it kind of offends me.
 20 We have agreed to a lot of different
 21 provisions in this contract, and I find it
 22 particularly offensive that they would single out
 23 one section that talks about coming up with a
 24 traffic study analysis, which I agree with
 25 Ms. Rogers. Arriving at traffic studies in this

1 industry is certainly nothing unusual. Reference
 2 to traffic studies and agreements is nothing
 3 unusual. It happens all of the time. PIU factors
 4 and agreements are nothing unusual.
 5 But, you know, if you look at what they're
 6 trying to do here, and Ms. Rogers made reference to
 7 this, they want to keep a part of Section 7.2, and
 8 they want to throw out the rest. They want to keep
 9 the 3 percent, but they want to throw out the
 10 provisions that obligated them to engage in good
 11 faith and come up with a traffic study that is
 12 supposed to come up with a reasonable measurement
 13 of terminated inter MTA traffic.
 14 Again, as someone who participated in the
 15 negotiations, the 3 percent factor was specifically
 16 agreed to in part because of the fact that they had
 17 agreed to continue on and look towards agreeing to
 18 a traffic study that could identify a reasonable
 19 measurement of the traffic.
 20 So it's all part and parcel of the same thing.
 21 They're trying to split -- take the provision
 22 that's most favorable and kick out the rest. We
 23 have a big problem with that.
 24 And looking at just, you know, traffic studies
 25 in general, I'd say there were probably two big

1 issues when you're dealing with a traffic study and
 2 you're looking at wireless traffic. One is what
 3 sort of a sampling period are you going to use.
 4 And that's a common issue when you're dealing with
 5 any traffic study; are you going to measure every
 6 minute, or are you going to come up with a period
 7 of time over which you're going to measure the
 8 traffic and then you're going to utilize that on
 9 some sort of going-forward basis to, you know, come
 10 up with a different percentage or utilize a
 11 different percentage?
 12 The other big one and I think that is very
 13 clearly addressed in this contract -- and Western
 14 Wireless doesn't want to admit they're addressed in
 15 the contract because they're arguing about it, and
 16 they've been arguing about it ever since they filed
 17 this -- and that is what the point of origination
 18 of those wireless calls? And they're claiming that
 19 that's really not addressed. You know, we can't
 20 determine -- we can't really determine where those
 21 calls are coming from and all of that.
 22 Well, it's addressed in the agreement. It's
 23 addressed in 5.4. So really when you start talking
 24 about a traffic study and coming up with a
 25 reasonable measurement of traffic really all you're

1 talking about is looking at actual traffic data, of
2 course. We're not going to look at something that
3 is not reflective or not actual traffic.

4 So we're going to look at actual traffic over
5 a particular period of time, and then we're going
6 to try to determine based on records of that
7 traffic where the calls originated and where they
8 terminate. That's it. That's how you do a traffic
9 study. I'd say the biggest issue here -- because
10 we addressed the point of origination as being the
11 cell site, the biggest issue is time frame. That's
12 it.

13 We could never come to any agreement on time
14 frame. You know why? Because we couldn't get any
15 data. We couldn't get any originating traffic data
16 to determine what sort of traffic was actually
17 being terminated.

18 That's been a fight ever since this thing was
19 signed, and it continues to be a fight. But as far
20 as doing a traffic study, it's nothing mysterious.
21 They're making it sound like it's like -- it's
22 analogous to, you know, picking some value, whether
23 it's a wholesale value or a retail value on a car.
24 I disagree. I don't think that's an appropriate
25 analogy at all. Because what you're looking at is

1 actual traffic data, and you're looking at
2 information surrounding that data.

3 And the two biggest issues once you have
4 identified the traffic, which we've obviously had
5 problems doing, and the reason we had problems
6 doing it is because we can't get records. The two
7 biggest issues are point of origination and time
8 frame.

9 And I think, you know, like I said, I don't
10 believe for a minute it's something mysterious so
11 for them to say that somehow we don't have a
12 meeting of the minds looking at this language in
13 7.2.3, I strongly disagree with that. Is it
14 written perfectly? No. It's probably not written
15 perfectly. But I think you have to read the entire
16 section, and I think you have to look at that and
17 say did the parties come to some agreement for
18 something to happen, something substantive?

19 I think we did. I think we came to an
20 agreement that something was going to happen. And
21 it's pretty clear what was supposed to happen, but
22 it didn't happen.

23 And that 3 percent factor, I agree with
24 Ms. Rogers. I mean, from our perspective that is
25 incredibly low. We wouldn't have agreed to that

1 3 percent if we'd have known we were going to get
2 absolutely no cooperation in the provisioning of
3 traffic records. So we could never even get to the
4 point of actually looking at a traffic study method
5 because we never had any records that would even
6 get us to that point.

7 We've got an agreement with Verizon that has a
8 20 percent factor that's on file with this
9 Commission, 20 percent.

10 And I really do think -- and this was --
11 Ms. Rogers pointed this out. You know, you as a
12 Commission, you have the authority to decide what
13 an appropriate factor is where there is a dispute.
14 I think you've already done that. I think there
15 was a cite in the response to a Qwest case where
16 you established a percentage. I'm not sure if it
17 was an inter MTA percentage or -- I think it was a
18 local traffic percentage. But you can establish a
19 percentage -- percentages.

20 You know, the fact that there's language in a
21 contract that for a period of time doesn't nail
22 down that percentage I don't think means that,
23 well, there's nothing there that you can insert or
24 there's no action that you can take.

25 I guess that's all I have unless you have any

1 questions.

2 One other point is that, you know -- and this
3 gets to the governing law. Okay. It says,
4 Section 14.16, "For all claims under this agreement
5 that are based upon the issues within the
6 jurisdiction of the Commission or governed by state
7 law, the parties agree that the jurisdiction for
8 all such claims shall be with such Commission and
9 remedy for such claims shall be as provided for by
10 such Commission."

11 Thank you. Any questions?

12 CHAIRMAN SAHR: Yes, I do. And I
13 appreciate you giving us kind of the practical
14 approach and I guess kind of nailing down the
15 parameters of how we would look at this going
16 forward if we felt that we had the jurisdiction to
17 do so.

18 I'm going to read this -- you know, this
19 phrase says, "based on a mutually agreed to traffic
20 study analysis." If that said based on a traffic
21 study analysis, I would have a lot easier time
22 doing what you're proposing. I mean, it does say,
23 "based on a mutually agreed to traffic study
24 analysis."

25 You take out "mutually agreed to", I think it

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1 reads a lot differently. And I think you made some
 2 very sound arguments for how you get there. And it
 3 sounds like at least under your take on it it's not
 4 that difficult and it may even be, you know, so to
 5 speak, blown out of proportion.
 6 The problem is that we have to read it with
 7 that language in there, and as far as I know, I
 8 don't have -- when we interpret contracts I don't
 9 know if we can strike those three words.
 10 MR. COIT: Well, what does the
 11 obligation to proceed in good faith mean? I guess
 12 we're -- we obviously have some disagreement even
 13 as to what constitutes good faith. I guess -- I
 14 guess I feel like I have a pretty good idea of what
 15 good faith is. Apparently, there's a disagreement
 16 as to what good faith is.
 17 I think you have to read that sentence with --
 18 you have to read that language looking at the
 19 entire section and what the entire section says.
 20 And this is not -- this is not unusual in
 21 contracts. In this industry this is not unusual.
 22 You could go -- and Darla mentioned just a couple
 23 of them. There are many more that are very similar
 24 to this that are in agreements with wireless
 25 carriers.

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1 So the fact that you've got two words in here
 2 that we're going to just take the entire thing out
 3 it just -- strike this whole section then because
 4 we've got two words, "mutually agreed".
 5 CHAIRMAN SAHR: I mean, that's what
 6 lawyers do is we look at the actual language of the
 7 contracts. I mean, and you may still have a
 8 argument that can survive as to good faith. I
 9 certainly am not disagreeing with your potential to
 10 raise that.
 11 But I'm just grappling with what to do with
 12 those three words, if you will, because I think you
 13 take away those three words. And the argument that
 14 you made on how you go through the analysis I think
 15 probably is pretty sensible at least from my
 16 understanding of where you guys are coming from.
 17 MR. COIT: Well, you strike out the
 18 entire section we're right back with the Commission
 19 and Complaint proceeding arguing about what they
 20 should pay and what they shouldn't pay.
 21 CHAIRMAN SAHR: Mr. Smith.
 22 MR. SMITH: Mr. Coit, I'm just
 23 asking you the same question that I asked Darla
 24 with respect to whether it's mandatory that you
 25 have an Interconnection Agreement with everybody

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1 out there.
 2 I mean, are there situations where you don't
 3 have an Interconnection Agreement, where companies
 4 do not have an Interconnection Agreement with every
 5 company that they terminate traffic for?
 6 MR. COIT: Where companies are
 7 willing to pay the compensation that is billed,
 8 then it's not necessary to have an Interconnection
 9 Agreement. There are some companies that terminate
 10 just small amounts of traffic, and they have
 11 basically just accepted the same billings that go
 12 to the larger carriers, you know, for like local
 13 traffic or for an inter MTA percentage. They
 14 accept the same thing that the LEC is billing a
 15 carrier that they might have a contract with.
 16 MR. SMITH: So if the Commission --
 17 I mean, is one way the Commission might look at
 18 this is that if this provision fails, right, if
 19 this provision fails because we are unable to come
 20 up with a way to predict what the parties might
 21 have done, right, whether they acted in good faith
 22 or not, then, I mean, is it possible that the whole
 23 section fails and we're left in the situation we
 24 would be in with respect to this matter that we
 25 would be in if there were no Interconnection

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1 Agreement at all? Is that where we're at?
 2 MR. COIT: I suspect what will
 3 happen is then there will be another Complaint and
 4 there will be all kinds of discovery trying to
 5 recover traffic data based, you know, upon which
 6 some reasonable billings can be made. Does that
 7 sound --
 8 MR. SMITH: I think what I'm getting
 9 at is the Commission -- I mean, I've been involved
 10 in cases here where this Commission decides who
 11 gets what without an Interconnection Agreement
 12 there. And I'm just wondering if that's where we
 13 wind up if we -- if this clause is totally void.
 14 And I'm not saying -- I'm not assuming that it
 15 is. I guess I'm assuming for the purposes of the
 16 question, but I'm certainly not implying that it
 17 is. But it's one conceivable result the Commission
 18 could get to is if the clause is void, it's void.
 19 MR. COIT: I also think, though, you
 20 know, I guess my argument is that, you know, if
 21 you -- you need to look at the entire contract, and
 22 you need to interpret one sentence of the contract
 23 looking at all of the other provisions in the
 24 contract. And I'd hate to think because you've got
 25 two words in that one sentence that all of the

1 sudden the rest of it doesn't mean anything.
 2 And you've got information in there. You've
 3 got provisions in there that identify the point of
 4 origination in a call. You've got all kinds of
 5 information in that contract that define what local
 6 traffic is, what nonlocal traffic is, what
 7 interstate is, what intrastate is, what it's
 8 subject to. I don't think all of those provisions
 9 can be ignored when you're looking at that
 10 particular provision.
 11 MR. SMITH: Thank you.
 12 CHAIRMAN SAHR: I'm going to go to
 13 staff next, as I'm looking for staff. I'm going to
 14 go to Ms. Wiest.
 15 MS. AILTS WIEST: Thank you. This
 16 is Rolayne Wiest. This is a difficult question,
 17 and I think the parties have done a good job of
 18 bringing up both sides of the argument. But I
 19 think what it comes down to is the language does
 20 anticipate that the parties are going to agree in a
 21 traffic study, and the fact is that the parties
 22 haven't agreed on a traffic study.
 23 And then although other jurisdictions may have
 24 a less restrictive view on these types of clauses,
 25 based on the South Dakota cases cited by WWC it

1 does appear to meet at least South Dakota's
 2 definition of an agreement to agree.
 3 Also I think in order to get intent -- or to
 4 go back and try to reconstruct any of these traffic
 5 studies as was anticipated by the agreement would
 6 be impossible. I mean, I don't think you can go
 7 back and get the traffic study that would have been
 8 valid back in July of 2004, which I think the first
 9 time they should have come up with a traffic study.
 10 I do agree that we have the authority to set
 11 inter MTA factors, but to set them -- that's
 12 pursuant to an arbitration. And as the parties
 13 have already stated, this is not an arbitration.
 14 The arbitration was dismissed, and the parties
 15 entered into an Interconnection Agreement.
 16 Now when the Commission is going to look at an
 17 Interconnection Agreement what they're doing is
 18 they're interpreting or they're enforcing the
 19 Interconnection Agreement, and generally what you
 20 do with an Interconnection Agreement when you're
 21 interpreting or enforcing it is it's pursuant to
 22 state contract law.
 23 And so it appears that when you apply our
 24 state contract law what you have an is an agreement
 25 to agree here. Thank you.

1 CHAIRMAN SAHR: Thank you. Any
 2 questions?
 3 Mr. Smith.
 4 MR. SMITH: Does staff have a
 5 position at all on the issue of whether the whole
 6 clause fails, or is it staff's position that the
 7 3 percent stays in effect through the term of this
 8 contract?
 9 And I guess if the whole clause fails, then
 10 what do we do?
 11 MS. AILTS WIEST: You know, I think
 12 that's an even harder question. But I think if you
 13 look at the case law, I mean, once you strike a
 14 clause the other parts are not necessarily given
 15 the intent -- you know, you're not taking the
 16 agreement as a whole. So if you strike that part,
 17 I think you could go with the 3 percent factor.
 18 CHAIRMAN SAHR: Thank you. Any
 19 questions from Commissioners?
 20 If not, Mr. Wieczorek.
 21 VICE CHAIRMAN JOHNSON: I do have a
 22 question, Mr. Chairman.
 23 Ms. Wiest, does the fact that we've been told
 24 that inter MTA -- you know, that these traffic
 25 studies, that that's a pretty typical part of other

1 contracts, does that affect your advice at all,
 2 your recommendation?
 3 MS. AILTS WIEST: My problem -- and,
 4 you know, I looked at a lot of cases here, and the
 5 part I struggle with is trying to, you know, get
 6 around what the South Dakota Supreme Court has said
 7 on agreements to agree and that's my difficulty
 8 here.
 9 And, you know, traffic studies based on my
 10 experience in this case are not that easy to come
 11 up with. And you can have some general standards
 12 in there, but there's still a lot of decisions that
 13 have to be made with those traffic studies.
 14 VICE CHAIRMAN JOHNSON: Would it be
 15 your opinion that a traffic study would have to be
 16 completed before entering into an Interconnection
 17 Agreement to make it stick?
 18 MS. AILTS WIEST: What I think --
 19 what should have happened is, as Commissioner Sahr
 20 mentioned, there should have been a backstop here.
 21 Once you have an agreement you have language that
 22 says the parties will agree, and there's nothing
 23 that says what happens when the parties don't
 24 agree. That was the problem.
 25 They should have said, yes, they could have

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1 had an agreement -- I mean, they could have agreed
 2 to agree on a traffic study, and in the event they
 3 can't agree, this happens.

4 VICE CHAIRMAN JOHNSON: And the
 5 arbitration clause at the end of the agreement with
 6 regard to the Commission playing that role is not
 7 applicable because?

8 MS. AILTS WIEST: It's not really an
 9 arbitration clause, in my opinion. And based on
 10 other case law where State Commissions have looked
 11 at Interconnection Agreements, what they look at
 12 Interconnection Agreements to are pursuant to our
 13 state contract law, and that's what I was looking
 14 at pursuant to.

15 VICE CHAIRMAN JOHNSON: I heard your
 16 explanation. I'm afraid it hasn't quite sunk in
 17 yet. And I don't have the agreement in front of
 18 me. My apologies.

19 They do mention that where there's an issue of
 20 dispute that the Commission will weigh in, I mean,
 21 essentially Act as arbitrator. They may not use
 22 that word.

23 MS. AILTS WIEST: But I think
 24 there's a big difference between acting as an
 25 arbitrator in a dispute and deciding and

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1 interpreting a contract pursuant to state contract
 2 law. And I think that's your role right here.

3 VICE CHAIRMAN JOHNSON: It just set
 4 in. Thank you.

5 CHAIRMAN SAHR: Mr. Wieczorek.

6 MR. WIECZOREK: I have just a couple
 7 of Brief follow-up comments. And one of the first
 8 is so my silence doesn't be taken as agreement, I
 9 do not agree with Ms. Rogers' contention that the
 10 overpayment has been resolved. I don't agree at
 11 all that that's been resolved.

12 As to the 3 percent I said when I was out here
 13 when Mr. Smith asked -- I think you stated
 14 the 3 percent is what occurs here. I don't agree
 15 with -- if the whole section would go out, which I
 16 don't think is the appropriate remedy -- I think
 17 you only strike that portion that you can't
 18 enforce -- I think you fall back to recip. comp
 19 rate.

20 I mean, I'm not asking for them to throw out
 21 that whole section. So I think that falls under
 22 recip. comp.

23 The section they cite, I agree with staff.
 24 All it basically says is if we have a contract
 25 dispute, you guys have the jurisdiction to decide

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1 that dispute and we've agreed to come back here on
 2 a contract dispute. It doesn't overrule
 3 47 U.S.C. 252 where the Commission if they're going
 4 to modify terms of Interconnection Agreement, has
 5 to do it at the same time that they have the
 6 Interconnection Agreement initially put in front of
 7 them.

8 As to the contract, our Supreme Court's made
 9 clear if a contract is not enforceable as a matter
 10 of law on its face, it's a legal question. And I
 11 think this is a legal question in front of the
 12 Commission.

13 As to the other states cited, you know, I
 14 haven't had a chance to look at those agreements.
 15 It wasn't provided with them, but I didn't hear the
 16 term "mutually acceptable" in those descriptions.
 17 And we're talking about South Dakota Law here, and
 18 those were simply in contracts. We don't even know
 19 in they're states would enforce those contracts as
 20 written. The fact that somebody else wrote it in
 21 into a contract doesn't make it enforceable as a
 22 matter of law.

23 Regarding Mr. Coit's comments, I'm a little --
 24 in a difficult situation with that. Mr. Coit's
 25 comments I think bordered on testimony at times,

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1 talking about the agreement. But one of the things
 2 he says -- I mean, I wrote down verbatim is he
 3 said, Well, when we did this we agreed to continue
 4 on and look towards a traffic study.

5 By his own admission essentially here he's
 6 saying that they never agreed to it. They agreed
 7 to continue on and look towards. And he also said,
 8 The agreement, that was something that was going to
 9 happen.

10 So to the extent I think there's some blurring
 11 lines potentially between testimony. Those facts
 12 he threw out actually support a finding of an
 13 agreement to agree.

14 Now as to this whole good-faith argument, the
 15 good-faith argument seems to surround what we want
 16 to do for a traffic study, if you don't do it,
 17 that's good faith. I mean, that is basically the
 18 feeling I walk away from when I hear these
 19 arguments.

20 And I think on its face this portion of the
 21 agreement that they made a Motion for Summary
 22 Judgment for is unenforceable as a matter of law.
 23 It's unenforceable given what was said here today.
 24 It just simply supports that.
 25 And that's all I have.

1 CHAIRMAN SAHR: Thank you very much.
 2 Next we will take up the question of whether or not
 3 the Commission shall grant the Motion in Limine.
 4 Ms. Rogers I believe is the moving party in
 5 that one.
 6 MS. POLLMAN ROGERS: Find the right
 7 file here. Give me a minute to switch gears.
 8 We brought the Motion in Limine in an attempt
 9 to limit the issues in front of the court. And
 10 initially I would like to just make a clarification
 11 to the actual Motion that we filed in this case.
 12 In the first paragraph we're talking about any
 13 prior agreements and negotiations leading up to
 14 this agreement, and I just wanted to make it clear
 15 that what we're asking this Commission to limit the
 16 evidence to is negotiations that led to the
 17 Settlement Agreement, and then the Settlement
 18 Agreement itself would be excluded or not allowed
 19 to be introduced into evidence and then
 20 negotiations after the Settlement Agreement that
 21 led up to the final agreement.
 22 So we were not talking about, you know, any
 23 other agreements that may have been negotiated
 24 between the parties but just the Settlement
 25 Agreement that was precedent -- or preceder, I

1 guess you'd say, that was entered into prior to the
 2 Interconnection Agreement.
 3 MS. AILTS WIEST: I don't mean --
 4 I'm sorry to interrupt, but just procedurally isn't
 5 the Settlement Agreement filed as confidential? Is
 6 there a problem?
 7 MS. POLLMAN ROGERS: We did
 8 originally file it.
 9 MS. AILTS WIEST: Is it still
 10 confidential?
 11 MR. COIT: I don't know. I guess
 12 that depends on whether they want to treat it as
 13 confidential.
 14 MS. POLLMAN ROGERS: I think that
 15 would be up to WWC.
 16 MS. AILTS WIEST: Because they cited
 17 to it in their Brief, and it wasn't marked as
 18 confidential.
 19 MS. POLLMAN ROGERS: When the
 20 parties executed this I believe it was a
 21 confidential agreement.
 22 MR. COIT: And it does affect all of
 23 the SDTA member companies.
 24 MS. POLLMAN ROGERS: Yes. So I
 25 guess I can't waive confidentiality on behalf of

1 everyone else.
 2 MS. AILTS WIEST: I'm just asking
 3 what you guys can talk about in an open meeting.
 4 MS. POLLMAN ROGERS: I'm not going
 5 to refer to it again.
 6 MS. AILTS WIEST: No. I'm not
 7 trying to limit you. I'm just asking if it's
 8 confidential.
 9 MS. POLLMAN ROGERS: I was just
 10 trying to clarify what we were asking for in this
 11 case.
 12 We believe that under the general rules that
 13 this Motion in Limine should be granted by the
 14 Commission. First of all, SDCL 53-8-5 states that
 15 once there's an execution of a contract in writing,
 16 that supersedes all oral negotiations, prior
 17 drafts, or stipulations which preceded the
 18 execution of the instrument.
 19 And under South Dakota Law, of course, the
 20 Parole Evidence Rule, it states that it is
 21 inadmissible -- parole evidence is inadmissible to
 22 vary, contradict, or add to a contract that has
 23 been reduced to writing and as long as that
 24 contract is clear, definite and complete.
 25 And then in addition to that the agreement

1 itself states that. Section 14.18 of the agreement
 2 says that, If this agreement constitutes the entire
 3 agreement of the parties, it supersedes all prior
 4 discussions, representations, or oral
 5 understandings reached between the parties.
 6 So to overcome those general rules of law and
 7 the specific language of the agreement, WWC must
 8 show ambiguity or that the agreement itself isn't
 9 clear.
 10 Now as I understand WWC's claim here, they're
 11 claiming that the ambiguity is that the agreement
 12 fails to specify the factors to consider in
 13 determining which of the two access rates to
 14 utilize in determining the inter MTA traffic
 15 charges, identification of the party responsible
 16 for choosing the applicable rate, or when/if/how
 17 the rate could or should change, and the party with
 18 the right or responsibility for making such
 19 changes.
 20 I don't consider any of those to be
 21 ambiguities under this agreement. And our response
 22 is we're not making new rules here. If you look at
 23 the agreement itself, it characterizes the traffic.
 24 We're not changing that in this agreement. If you
 25 go to Section 1.0 in the definitions section, it

1 says that there are two types of traffic that are
2 covered by this agreement. There's local traffic,
3 and there's inter MTA traffic. And then those
4 terms are defined.

5 And within the definition of inter MTA
6 traffic, which in a world of -- where we're not
7 talking about CMRS carriers, inter MTA traffic
8 would be toll traffic. It's nonlocal. So the
9 inter MTA traffic is defined within the agreement,
10 and if you read that definition, that definition
11 includes the fact that where -- how you identify
12 the traffic with regard to the cell site.

13 So what is covered then under the agreement is
14 you have wireless calls to a wireline call. All
15 right. So let's just look at a couple of examples
16 of that, just to make sure that we are all on the
17 same page as to what we're talking about.

18 You first ask the threshold question, does the
19 call cross an MTA? Because that's what defines
20 whether or not it's a toll call in the wireless
21 world. In South Dakota, as you're aware, we have
22 three MTAs, okay, so we have -- let's just assume
23 then for the purposes of this case that Denny Law
24 uses his wireless -- Alltel wireless phone in
25 Dell Rapids, and he makes a call to

1 George Strandell, wireline call on his wireline or
2 landline phone in Wall, South Dakota.

3 So that wireless call -- and assuming too that
4 it connects to a tower site in Dell Rapids -- is
5 originated in the Minneapolis MTA and it terminates
6 in the Denver MTA, which is where Wall is located.
7 So it crosses an MTA. That is an inter MTA call.
8 It's nonlocal.

9 So then you go to the next question, and that
10 is, is it interstate or is it intrastate? Well, in
11 this example, obviously it's within the State of
12 South Dakota. That means pursuant to the agreement
13 that your intrastate access rates would apply.

14 Now if in my example Denny takes his same cell
15 phone to Minneapolis and now he makes that call
16 back to George Strandell at his office in Wall,
17 South Dakota, that is also an inter MTA call
18 because it is going from the Minneapolis MTA to the
19 Denver MTA but in this case it's also an interstate
20 call because it's going from Minneapolis to
21 South Dakota.

22 So that tells you then under the terms of this
23 agreement that interstate access charges apply, and
24 that would be the NECA tariff, the appropriate NECA
25 tariff of the companies.

1 Now where is that covered within the
2 agreement? If you look at Section 5.1.1 of the
3 agreement, it tells you that inter MTA -- or that
4 telephone companies' access charges apply to
5 termination of inter MTA traffic. Then if you go
6 to Section 2.1 of the agreement, it says inter MTA
7 traffic is subject to the telco's interstate and
8 intrastate access charges.

9 So there isn't any question with regard to the
10 ambiguities, or there aren't any ambiguities
11 concerning what this agreement says with regard to
12 the traffic. It clearly states what's covered
13 under the agreement, what rates apply.

14 The Commission can clearly determine that
15 within the four corners of the agreement, and that
16 being the case, there isn't any ambiguity and we
17 believe that any prior negotiations leading up to
18 this agreement and the confidential exhibit
19 referred to by Ms. Wiest should not be included as
20 evidence at the hearing that concerns
21 interpretation of this agreement.

22 CHAIRMAN SAHR: Thank you very much.
23 Mr. Coit.

24 MR. COIT: I don't have anything to
25 add. We concur in Darla's comments.

1 CHAIRMAN SAHR: Thank you.
2 Mr. Wieczorek.

3 MR. WIECZOREK: Thank you,
4 Commission. The Motion in Limine agrees that if
5 there's an ambiguity, you can look at Parole
6 Evidence. I'm not exactly sure how she's modified
7 her Motion. As I understand it, she is taking the
8 position that anything that existed before the
9 Interconnection Agreement was signed constitutes
10 Parole Evidence, if I understand that correctly.

11 We have asserted the Settlement Agreement is
12 relevant to determine what rate to charge for those
13 calls determined that are the inter MTA factor.
14 Now Ms. Rogers gave a rendition of a perfect world.
15 Actually this agreement obviously doesn't propose a
16 perfect world.

17 What she failed to inform the Commission is
18 the Golden West Companies charged every inter MTA
19 call under that 3 percent at their intrastate
20 charges. So that means not only did Denny Law
21 never leave the state and call back to the state
22 but nobody else left the state and called back to
23 any of their territories under interstate.

24 Why is that? Now essentially they took the
25 3 percent and just charged intrastate, the highest

1 rate across the board. They did that because --
2 I'm not sure why they did that. The issue we had
3 when we discovered that was the agreement as we
4 understood it was that the inter MTA 3 percent rate
5 would be charged at interstate rates. We have
6 raised that issue.

7 Now they come to you and they say that this
8 agreement is unambiguous. Well, if it's
9 unambiguous, then I don't see where in the
10 agreement there is an agreement by the parties that
11 Golden West can charge intrastate rates for all
12 inter MTA calls, the 3 percent. That does not
13 exist in the agreement.

14 That raised the fact that we said, hey, the
15 Settlement Agreement says interstate for inter MTA
16 calls. And they argue we can't bring that in. I
17 think that is entirely relevant. It doesn't modify
18 the agreement. It clarifies the agreement.
19 Nowhere in the agreement does it say what they're
20 going to charge. If -- you know, frankly if you
21 don't complete a traffic study, nowhere in the
22 agreement is there an agreement as to what to
23 charge the inter MTA 3 percent rate at.

24 So even if you were to deny my Motion for
25 Summary Judgment, the issue still stands out this

1 agreement is ambiguous as to how you charge the
2 3 percent inter MTA factor calls.

3 Golden West took the position you charge
4 intrastate. Our position is they are supposed to
5 be charged at interstate. And the Settlement
6 Agreement says that specifically, and the actual
7 agreement does not tell you anywhere in it that
8 this is when this 3 percent should be charged or
9 this is the ratio under the 3 percent and how these
10 calls should be charged. Nowhere does that say.
11 So for no other reason the Settlement Agreement is
12 entirely relevant to try to figure out what rate is
13 supposed to be charged against that inter MTA
14 3 percent.

15 The statute cited -- what they call the
16 Parole Evidence Rule cited by Ms. Rogers, 53-8-5,
17 it's acknowledged the ambiguities and exception to
18 that rule by our Supreme Court in McCollam vs.
19 Littau. That's 307 N.E.2d 144.

20 And it's been acknowledged under South Dakota
21 Law that contractual provision is ambiguous and I'm
22 quoting here, The Supreme Court after application
23 of pertinent rules of interpretations of the face
24 of the instrument a genuine uncertainty exists as
25 to which of the two or more meanings is the proper

1 one.

2 Well, Golden West says intrastate for all
3 inter MTA calls at 3 percent. We stay interstate.
4 The agreement on its face does not resolve that,
5 and, therefore, the Settlement Agreement is
6 relevant for that determination.

7 The other interesting aspect of this Motion in
8 Limine arises out of the fact that in both their
9 Answer and their Amended Answer Golden West
10 attaches the Settlement Agreement and uses it as a
11 basis and a foundation for some of their
12 affirmative defenses. So you have Golden West
13 filing this as a part of their Answer and Amended
14 Answer, these Settlement Agreements they are now
15 telling you that we cannot refer to in the hearing
16 as support for their affirmative defenses.

17 So, in other words, it's okay for them to rely
18 on it for their affirmative defenses, but if we use
19 it to point out that we've been overcharged, we're
20 not entitled to.

21 The basis of this Motion -- this Motion needs
22 to be denied simply for the fact that this issue is
23 not resolved in the Settlement Agreement. There is
24 no ratio to be used with that 3 percent factor.
25 And you do not have an agreement as to what rate.

1 You have polar opposites on it. And that term is
2 ambiguous. What rate should have been applied is
3 certainly ambiguous.

4 Also the fact that Golden West is relying on
5 the exact same document for its affirmative
6 defenses I think adds to the fact that this
7 Commission can look at it and we can offer
8 testimony as to what the intent of the parties were
9 and that supports what the intent of the parties
10 was.

11 That's all I have.

12 CHAIRMAN SAHR: Thank you. Any
13 questions from Commissioners? Counsel?

14 Mr. Smith has one.

15 MR. SMITH: I guess I -- you know,
16 to me I look at that Section 2.1, that last
17 sentence. I mean, it looks to me on its face to be
18 clear as heck, you know, but can you explain to
19 me -- I mean, I just -- I don't get it. You know,
20 it says inter MTA traffic is subject to telephone
21 companies' interstate or intrastate access charges.
22 And we know what those are. They're tariff
23 charges.

24 MR. WIECZOREK: Right. And I
25 understand that. And that's why in the Brief I

1 said, you know, you read that, and that seems
 2 fairly clear. The problem that you come into is,
 3 okay, you have a 3 percent inter MTA factor, but
 4 you don't have an agreed upon ratio to use to
 5 charge inter or intrastate.
 6 MR. SMITH: Isn't that just, though,
 7 a questions of fact as to whether or not, you
 8 know -- you know, whether the facts bore out their
 9 bills or not and then we've got the effect, as you
 10 know, of the law is lurking there in the
 11 background, Section 1.11 or whatever it is.
 12 MR. WIECZOREK: The difficulty
 13 arises out of the fact that we don't know what
 14 those ratios were.
 15 MR. SMITH: But they are -- I mean,
 16 the traffic is what it is. It's either an
 17 interstate call or it's an intrastate call.
 18 MR. WIECZOREK: Well, arguably. But
 19 we don't have that data for that traffic. And that
 20 is why our testimony is going to be the agreement
 21 was you don't have the data for the traffic and
 22 that's why you've got to either pick a ratio or
 23 you've got to pick a rate.
 24 Because, you know, this discussion of point of
 25 origin on the cell site, well, CMRS carriers bill

1 differently than landline. They have never
 2 tracked, as a general rule, point of origin of
 3 calls because it's a moving point. So in the data
 4 they deliver you cannot tell -- the general data
 5 they deliver you cannot tell where the point of
 6 origin is.
 7 And so when you have -- you essentially have
 8 an agreement that was a year out and yet you're
 9 retroactively applying it to traffic that's more
 10 than a year old, I don't know how you go back and
 11 recreate more than a year and a half of traffic,
 12 actually come up with what the actual numbers are
 13 because the data was never kept in the first place.
 14 And so that's why when you have inter MTA
 15 3 percent -- I'm calling it WWC too -- WWC is
 16 understanding that it's going to get charged at
 17 interstate rates because nobody knew what those
 18 ratios are, and the data was long gone. So
 19 there's --
 20 MR. SMITH: I mean, it just -- it is
 21 a fact, though, that's not what the agreement says
 22 in black and white.
 23 MR. WIECZOREK: That's why the
 24 agreement becomes ambiguous because there is no way
 25 to actually calculate that -- what rate should have

1 been charged to those 3 percent of the calls if you
 2 want to try both inter and intrastate, and that's
 3 the ambiguity that arises.
 4 And that's why the agreement when you kind of
 5 read it, okay, well, it doesn't look ambiguous, but
 6 when you go to say, well, how did you come up with
 7 the rate.
 8 MR. SMITH: Thank you.
 9 CHAIRMAN SAHR: Staff.
 10 MS. AILTS WIEST: Thank you.
 11 It's Rolayne Wiest. Staff disagrees with
 12 Western -- or WWC. And we do not believe that the
 13 clause in the Settlement Agreement can be used to
 14 interpret the Interconnection Agreement. In WWC's
 15 Brief they state the Parole Evidence is only
 16 admissible for limited purposes and cannot be
 17 admitted to vary the terms of the contract or to
 18 add or detract from the written agreement.
 19 Well, if you accept WWC's position, what
 20 they're essentially doing is writing out the word
 21 "intrastate" from the Interconnection Agreement so
 22 that does, in fact, vary the term of the contract.
 23 If WWC thought that only interstate's were going to
 24 be applied, then they should never have agreed to
 25 putting intrastate in the Interconnection

1 Agreement.
 2 I think with both of these motions comes down
 3 to the same principles. The parties have to live
 4 with what they agreed to in the Interconnection
 5 Agreement.
 6 Thanks.
 7 CHAIRMAN SAHR: Thank you.
 8 Ms. Rogers, do you have rebuttal?
 9 MS. POLLMAN ROGERS: I just had a
 10 couple of Brief comments. Number one, if the
 11 Commission grants this Motion, obviously we are
 12 bound by it too, and so that means that if we, you
 13 know, use this as a basis for claims, some of our
 14 affirmative defenses we would not be able to use
 15 that as well.
 16 And with regard to what Golden West has been
 17 billing or what WWC is alleging, that's really not
 18 the issue here. The issue is, is there ambiguity
 19 in the agreement. We also have a state statute
 20 that would govern the actions of what Western
 21 Wireless has done with regard to billing of
 22 unidentified traffic.
 23 That, again, is not really the issue. The
 24 issue here, is there ambiguity. And I think that
 25 Section 2.1 of the agreement is very, very clear

1 and that's what should control in this case. Inter
 2 MTA traffic is subject to telephone companies'
 3 interstate or intrastate access charges. I don't
 4 see any ambiguity here, and I believe that
 5 Western Wireless should be precluded from bringing
 6 in the Settlement Agreement or prior negotiations.

7 Thank you.

8 CHAIRMAN SAHR: Thank you very much.

9 VICE CHAIRMAN JOHNSON:

10 Mr. Chairman, some of the legal standards I want to
 11 dive into a little bit deeper. Given that, I would
 12 move that we take this under advisement at this
 13 time.

14 CHAIRMAN SAHR: And I will second
 15 that.

16 (The hearing is concluded)

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1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF HUGHES)

4
5 I, CHERI MCCOMSEY WITTLER, a Registered
 6 Professional Reporter and Notary Public in and for the
 7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
 9 shorthand reporter, I took in shorthand the proceedings
 10 had in the above-entitled matter on the 17th day of
 11 January 2006, and that the attached is a true and
 12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 23rd day
 14 of January 2006.

15
16
17 
 18 Cheri McComsey Wittler,
 19 Notary Public and
 Registered Professional Reporter

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25

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