

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

=====

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

CT05-001

RECEIVED

NOV 21 2006

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

=====

Transcript of Proceedings
November 20, 2006

=====

BEFORE THE PUC COMMISSION

CHAIRMAN DUSTY JOHNSON
VICE-CHAIR GARY HANSON

COMMISSION STAFF

JOHN SMITH
ROLAYNE WIEST
HARLAN BEST

ORIGINAL

APPEARANCES (continued on next page)

TALBOT J. WIECZOREK,
GUNDERSON, PALMER, GOODSSELL & NELSON,
Attorneys at Law, P.O. Box 8045,
Rapid City, South Dakota 57709,
appearing on behalf of WWC License LLC;

DARLA POLLMAN ROGERS,
RITER, ROGERS, WATTIER & BROWN,
Attorneys at Law, P.O. Box 280,
Pierre, South Dakota 57501,
appearing on behalf of Golden West Companies;

Reported by Carla A. Bachand, RMR, CRR

1 APPEARANCES (cont.)

2 RICHARD D. COIT,
3 Executive Director and General Counsel,
4 South Dakota Telecommunications Association,
5 P.O. Box 57, Pierre, South Dakota 57501,
6 appearing on behalf SDTA.

7 Reported by Carla A. Bachand, RMR, CRR

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 MONDAY, NOVEMBER 20, 2006

2 CHAIRMAN JOHNSON: With that, we find ourself at the
3 end of our agenda looking at consumer complaint item one,
4 CT05-001 and that is in the continuing matter of the complaint
5 by WWC against Golden West and affiliated companies. The
6 question before the commission today is how shall the
7 commission rule regarding charges assessed by Golden West
8 against WWC for transiting services? I believe that Western
9 Wireless is the moving party. We do have the briefs of the
10 parties and staff, but Mr. Wieczorek, if you would like to
11 supplement your filings with oral arguments, we would be happy
12 to hear them.

13 MR. WIECZOREK: Thank you, Mr. Commissioner and
14 chairman elect. I'm not going to repeat everything that went
15 into the briefing. I do appreciate the commission sat very
16 patiently through a very long proceeding, most of it which has
17 been settled between the parties, leaving this transiting
18 issue. As the briefs fairly and accurately represent, the
19 transiting issue involves transiting charges by Golden West
20 Cooperative to deliver traffic to one of its affiliates,
21 Vivian. Vivian has an isolated, an isolated wire center in
22 Custer that's geographically separated from the rest of its
23 wire centers and to access that wire center, you have to
24 transit over Golden West.

25 There's been a number of arguments here, a number of

1 issues laid out in the briefs. One thing that I'd like to
2 start with at least is it would appear there is at least some
3 agreement that the transiting shouldn't be charged. As
4 admitted by the Golden West Companies in their own brief, they
5 do not charge transiting for toll traffic, they make a
6 distinction for that, and in this situation, I think it's
7 undisputed that interMTA traffic and toll traffic and at a
8 minimum there would appear to be agreement by Golden West that
9 Golden West should not be charging transiting for that portion
10 of Western Wireless, now Alltel's traffic that's transiting to
11 Custer. For example, if that traffic is three percent, three
12 percent of that traffic should not be charged for transiting,
13 by Golden West's own position.

14 Of course Western Wireless's position is that none of
15 the transiting charges, there should be no transiting charges
16 for any of the minutes of use. Those arguments have been laid
17 out essentially revolving around the fact that it's Western's
18 position that at the time the recip comp rate was taken into
19 consideration, all transiting and transport issues were
20 considered, one. Two, that to allow a company, essentially
21 Golden West owns Vivian, to allow Golden West to charge
22 transiting to deliver to a subsidiary would be inappropriate,
23 as it allows Golden West now or in the future to go out and buy
24 wire centers that are isolated and then get charged -- be able
25 to pick up an extra charge by delivering traffic to a wire

1 center it throws into an affiliate.

2 It also is inappropriate from the standpoint of there
3 was no agreement for this. In fact the previous
4 interconnection agreement provided for transiting, that
5 transiting was dropped. There's been no contract, there's been
6 no agreement to pay transiting since that time. Now, there was
7 an argument asserted by Golden West and adopted by the staff
8 that essentially an estoppel or that we knew we were paying for
9 transiting and thus we can't complain that we didn't have a
10 contract because an implied contract exists. The fact they
11 reply upon is that Western did pay transiting for a number of
12 months after the old interconnection agreement terminated.

13 However, it needs to be remembered, and this issue is
14 not contested at all in this hearing, that SDTA asked Western
15 why they were negotiating and finalizing the new
16 interconnection agreement to pay under the old rates and under
17 the old interconnection agreement. Since the old
18 interconnection agreement provided for transiting, it wasn't
19 unexpected, in fact it was expected that that payment would
20 continue to be made pending resolution of the new
21 interconnection agreement. Thus, to say now that because SDTA
22 asked us to make those payments, those now bind us and
23 establish an implied contract I believe is incorrect. Those
24 payments were made in good faith to -- in good faith on request
25 from SDTA by Western. As soon as it was determined that the

1 charges continued after the resolution of the new
2 interconnection agreement, WWC stopped making those payments,
3 and thus I think relying on the fact that payments were made to
4 establish some implied contract is contradicted by the evidence
5 and how and why those payments were made.

6 There is also, as evidence of how this affiliated
7 system should not be rewarded, when Golden West's
8 representative testified about whether transiting is charged
9 between those companies, the testimony was simply that they
10 have some fixed rate for transport between their affiliated
11 companies, thus these affiliated companies have set charges,
12 some type of set charges that they just trade back and forth
13 while they hold up a company like WWC and say, no, no, we are
14 independent for that purpose, but we are not independent for
15 the way we exchange traffic, we are not independent on other
16 filings that have been made in front of this commission, we are
17 independent when we want to be. And I think for those reasons,
18 the commission should find that the transiting is not to be
19 charged, should not be charged, there is no contract for it to
20 be charged and in fact the evidence supports that there was not
21 to be transiting paid.

22 One item I would raise to the court, or the
23 commission, it's involved in a footnote in my reply brief, as
24 to the interMTA rates. Those are part of the settlement. I
25 haven't received or we haven't finalized a per se settlement

1 agreement to provide. If the commission would want when and
2 where those interMTA rates kick in for the purposes of
3 rendering a decision or completing the decision in this case, I
4 would have to supplement the record with that, with an
5 agreement of Golden West Companies. With that, if the
6 commission has questions, I would be more than willing to
7 entertain them now.

8 CHAIRMAN JOHNSON: I think sometimes we take all of
9 the arguments and then questions, but I think let's go ahead
10 and pop in with any questions, if any of the commissioners or
11 advisors have them. I'll just sort of jump in with one, Mr.
12 Wieczorek. In staff's brief, they note concerns, this is on
13 page five, that WWC has not made a sufficient showing that
14 Vivian operates as a mere instrumentality of GWTC. You do note
15 the commonality to the board of directors. Do you have a
16 response to staff's concerns?

17 MR. WIECZOREK: There is commonality in the board of
18 directors. Golden West also testified that essentially Vivian
19 doesn't exist as an end user, they deal with Golden West. They
20 also testified that they don't charge each other transiting per
21 se, they have some kind of interaffiliate agreed on fixed
22 rates. I believe testimony also showed that -- Mr. Law
23 testified that as the purposes of requesting suspension under
24 the 251F for intermodal portability, they file jointly. These
25 things all show that they might operate and they might have --

1 (brief interruption) -- I acknowledge they are separate
2 corporate entities, but they behave, as I said, in a way that
3 those separate corporate entities exist when it benefits them.
4 They don't exist when they find it more prudent or more
5 beneficial to treat their affiliates in a specialized manner.
6 For those reasons, I think what you have here is, for lack of a
7 better visual example, a shell game where they are one thing
8 one day and one the next, and that's the reason from a public
9 policy standpoint this commission shouldn't allow them to
10 charge transiting to an affiliate.

11 CHAIRMAN JOHNSON: Thanks, Mr. Wiczorek. Other
12 questions. If there are no other questions at this time, then
13 we have Mr. Coit at the microphone. Mr. Coit, if you would
14 like to make oral arguments.

15 MR. COIT: This is Richard Coit, executive director
16 and general counsel for SDTA. I will be making the argument
17 today, not only on behalf of SDTA, but also on behalf of Golden
18 West, one of our members. We filed a fairly lengthy portion --
19 I guess a fairly lengthy portion of our brief addresses the
20 transiting issue. I think certainly there were a lot of claims
21 made concerning transiting and whether it was appropriate to
22 charge transiting, so we felt that we had to go into some
23 detail to explain the service and explain why it was being
24 charged.

25 There are some things that I would like to I guess

1 bring to the commission's attention in terms of the facts that
2 surround this transiting service that I think need to be kept
3 in mind as you analyze it. First, I think it needs to be
4 emphasized that despite the fact that the Golden West Co-op was
5 billing Western Wireless or Alltel for transiting service as of
6 January 1st, 2003, the proposed effective date of the
7 interconnection agreement, and continued to bill for this
8 transiting service even after execution and subsequent approval
9 of the interconnection agreement on May 13th, 2004, WWC did not
10 first present any dispute in this case concerning its payment
11 of transiting charges until the filing of its amended complaint
12 on February 16th, 2005. Prior to that time, Golden West had
13 received no notice from Western Wireless that the transiting
14 charges were in dispute.

15 Now, with respect to this transiting service, Golden
16 West has provided it since at least January 1st of 1999. The
17 record establishes that. The testimony also indicates that
18 Golden West Co-op currently bills other wireless carriers for
19 the transit service and receives payment from these other
20 carriers for the service. Even though the testimony indicated
21 that there is no separate formal agreement currently in place
22 between Golden West Co-op and Western Wireless which relates to
23 the transiting service, Golden West has taken steps to notify
24 Western Wireless on a monthly basis of applicable transiting
25 charges. As shown specifically by Golden West's Exhibits 31

1 and 32 introduced at the hearing, the transit charges related
2 to usage of the transport facility are set forth as a separate
3 line item on the monthly CABs invoice.

4 In addition, Mr. Law testified that since sometime
5 during the term of the interconnection agreement between the
6 parties, the prior interconnection agreement between the
7 parties, sometime between 1999 and 2002, Golden West has, with
8 each monthly CABs invoice, provided a separate sheet which
9 briefly describes a transit route and provides a separate
10 calculation of the transit traffic rate element and that
11 element is included on the invoice.

12 During the period of the interconnection agreement
13 that underlies this particular proceeding, and that would be
14 the agreement executed January -- or dated from January 1st,
15 2003 through December 31st of 2005, Western Wireless made in
16 excess of 20 payments to Golden West for transiting services,
17 to be more specific, I think it's 23, almost two years of
18 payments for transiting. In addition, during the period from
19 December 1st, 2004 to December 1st, 2005, Western Wireless
20 received credits on Golden West Co-op billings which were
21 applied to offset monthly transit billings.

22 The total amount of these payments and credits
23 attributable to the transiting service utilized by Western
24 Wireless by the Golden West Companies is calculated at
25 approximately \$183,840. The transit charges on a monthly basis

1 approximate \$6,000. WWC, Western Wireless, continues to
2 receive the transiting service and Golden West continues to
3 bill for the same. At this time, however, all such charges are
4 being disputed by Western Wireless and no payments are being
5 made for the service.

6 It's also significant, and I spent some time in my
7 brief pointing this out, that Western Wireless is not a carrier
8 slash customer that is left with no options in transporting its
9 originated wireless traffic to the Custer exchange. The
10 evidence presented indicates that currently Western Wireless
11 has a direct connect facility or direct connect facilities into
12 the Custer exchange. For some reason, however, it has made the
13 decision to limit the use of these direct connect facilities to
14 only wireline originated traffic, wireline originated calls
15 that would be destined to Western Wireless's wireless
16 customers. Given these established direct connect facilities
17 into the Custer exchange, Western Wireless already has the
18 ability to change the routing of its originated traffic into
19 the Custer exchange as a means of avoiding the transit charges
20 that are assessed by Golden West Co-op. However, at this point
21 it has not exercised this option.

22 In looking at the claims that are made just in general
23 from the perspective of SDTA and Western Wireless, it appears
24 to us that it's quite apparent that Western Wireless does not
25 like either the expense associated with transiting its traffic

1 over the Golden West Co-op network facilities or the expense
2 that would be incurred in using the established direct connect
3 facilities to terminate its wireless traffic into the Custer
4 exchange. What WWC in effect wants this commission to do is
5 simply excuse it from any expense associated with the necessary
6 transport.

7 As noted, WWC has transport options, but it has made
8 an affirmative decision to use the common transit facilities of
9 Golden West Co-op for termination into the Custer exchange.
10 Mr. Williams, during cross-examination, was asked specifically
11 whether Western Wireless desired or wished the transiting route
12 to continue and for its traffic to go over that route. His
13 response was as follows. Quote, well, the reason it goes over
14 that line now is because this path is an economical path to
15 deliver the traffic. We have other options on how we deliver
16 the traffic, but under the terms of the agreement, this is the
17 option we have chosen, unquote. Under these circumstances
18 where other transport options are available, Western Wireless
19 has affirmatively chosen to use the Golden West Co-op route.
20 There is, in our view, absolutely no justification for excusing
21 Western Wireless from any of the transit payments.

22 With respect to some of the arguments that were
23 presented, there is this claim that the new reciprocal
24 compensation rate in the contracts actually included the
25 transit cost or transit rate, so basically Western Wireless's

1 argument is that it was the intention of the parties that the
2 transit rate not carry over. Now, if you look at the specific
3 language in the contract, it does not support the claims that
4 Western Wireless is making with respect to the recip comp rate
5 including transit cost or transit rates. The language
6 specifically says, this agreement is not intended to establish
7 any terms, conditions or pricing applicable to the provisioning
8 of any transit service.

9 Now, this language in itself certainly does not
10 indicate that the transit service being provided by Golden West
11 would be consumed within the reciprocal transport and
12 termination services elsewhere covered in the interconnection
13 agreements. In fact it would seem to suggest the opposite. A
14 claim is made in the reply brief of Western Wireless that is
15 certainly from our perspective new. There is this claim now
16 that they were instructed by SDTA to continue to pay the rates
17 that were paid under the old agreement and now are implying
18 that that extended to the transit rate. Now, I did not go
19 through and examine the entire transcript, but I do not recall
20 that Ron Williams ever gave that sort of an indication during
21 the hearing, so I don't believe there's any factual support in
22 the record from Western Wireless's witnesses to support this
23 new claim. It's also certainly not supported by either the
24 testimony of Larry Thompson or Mr. Law.

25 If you look at that language that says that transit

1 wasn't addressed, why would there be -- why would SDTA or
2 Golden West be saying in view of that, in view of that language
3 that clearly only applies to -- indicating that the agreement
4 only applies to recip comp, that somehow transit rates were
5 affected by this true-up? The true-up extended only to recip
6 comp. The agreement only addressed recip comp. It's, we
7 believe, somewhat inventive, novel to try to now say that the
8 true-up and the agreement between the parties to continue to
9 pay rates and then true-up later applied to the transiting at
10 all.

11 Now, if you go to why SDTA and Golden West included
12 this language in the contract that says that transiting is not
13 addressed, as I had indicated in our brief, the reason for that
14 is that transiting is viewed as a different service for
15 regulatory purposes than reciprocal transport and termination.
16 I cited in my brief the FCC's intercarrier comp NPRM, which
17 very clearly indicates that the FCC has not yet issued any
18 determination as to the scope of its legal authority over
19 transit service and whether it should impose any regulations
20 concerning transit service. So back in January of 2003 and
21 subsequent to that, it was pretty clear to the Golden West
22 Companies and SDTA that transit services were different
23 services, they were unregulated services, and that's the reason
24 they are not addressed in that subsequent contract that was
25 executed or the one dated January 1st, 2003.

1 Now, WWC, as we heard some today, tries to make much
2 of the fact that Vivian Telephone Company and Golden West Co-op
3 are affiliated entities. And during the hearing much was made,
4 there were claims made that they operated an integrated,
5 jointly provided network and there was this effort to try to
6 set this service out as being something different than
7 transiting. We do not agree with that at all. This is very
8 clearly a transit service. If you look at the definitions that
9 are in our state law of what constitutes a transiting carrier
10 and an originating carrier and a terminating carrier, in this
11 case where Golden West provides an intermediate transport
12 facility, it is very clearly a transiting carrier. It does not
13 terminate the traffic. It does not originate the traffic. So
14 under state law and also I would note that under the old
15 agreement that define transiting, very clearly Golden West was
16 a transiting carrier. There is no basis to try to say that
17 this service is somewhat different and it shouldn't be treated
18 like any other transit service.

19 With respect to the affiliated nature of the
20 companies, I think what is really important there is that you
21 are dealing from a legal standpoint with two separate corporate
22 entities. One is a private corporation, Vivian. The other is
23 a cooperative. They are different types of legal entities.
24 They are regulated separately. They each file separate cost
25 studies. They each have their separate universal service study

1 areas. For virtually all regulatory purposes, and I understand
2 that there was a joint filing in the LNP case, but that does
3 not change the fact they are separate companies and they have
4 traditionally been regulated as such.

5 As far as the selective billing, there is this
6 suggestion that there is selective billing of the transiting.
7 I think we addressed that pretty clearly in our brief. There
8 was a reference to Qwest and whether Qwest was paying any
9 transiting charges, and as was indicated during the hearing,
10 the Qwest traffic is toll traffic, it's not local traffic, so
11 it would not be subject to transit, it would be subject to
12 access. With respect to the claim regarding interMTA traffic
13 and whether that should be subject to transiting, we would
14 agree with Western Wireless on that point, that if it is an
15 interMTA minute, it would not be subject to the transit
16 charges.

17 One of the things that I think probably more than
18 anything should be persuasive is if Western Wireless was so
19 concerned about not being assessed transiting and that these
20 companies should be viewed as basically the same company
21 operating an integrated network, why did they voluntarily
22 execute two separate agreements for recip comp, one with Vivian
23 and one with Golden West? That in itself should be persuasive
24 enough evidence that the companies were viewed as separate
25 companies and therefore should be treated as separate companies

1 when it comes to breaking the services down into recip comp
2 versus transiting as well. So they found it acceptable to
3 treat them separately in executing the underlying interconnect
4 agreements, but they don't find it acceptable when you start
5 talking about whether they are obligated to pay any transiting.

6 And lastly with respect to the implied contract
7 theory, and staff indicated agreement with us on this, we do
8 believe under the circumstances, if you look at the totality of
9 the circumstances surrounding execution of the agreements and
10 what happened after the agreements were executed, there is an
11 implied contract here. There is an implied contract not only
12 in fact but an implied contract in law. It is a settled rule
13 of law in South Dakota that where services are rendered by one
14 for another, which services are knowingly and voluntarily
15 accepted without more, the law presumes that such services were
16 given and rendered in the expectation of being paid and will
17 imply a promise to pay what they are reasonably worth.

18 Western Wireless is receiving a transport service. As
19 I indicated earlier, it certainly appears to us that really all
20 they are trying to do here is get out of any responsibility for
21 paying the transport that's necessary to get this traffic into
22 the Custer exchange. And they have received the service, they
23 are receiving a benefit, they made payment on the service for a
24 period of about 23 months. The circumstances, in our view,
25 clearly show that there is an implied contract between the

1 parties, and based on that implied contract, we do not believe
2 they are entitled to any refund. I would answer any questions
3 that you might have.

4 CHAIRMAN JOHNSON: Before we go to any questions by
5 commissioners or advisors, Ms. Rogers, did you plan to make any
6 comments? Okay. Any questions by commissioners or advisors?

7 VICE-CHAIR HANSON: Rich, excuse me, Mr. Coit,
8 approximately halfway through your presentation, you stated,
9 you quoted an individual apparently, an employee of Western
10 Wireless. Would you read that quote and tell me again who the
11 individual was?

12 MR. COIT: It was Ron Williams and let me see here, it
13 is a statement that he made, I believe it was around page 143
14 of the hearing transcript and he was asked specifically whether
15 Western Wireless desired or wished the transiting route to
16 continue and for its traffic to go over that route, and he
17 responded, quote, well, the reason it goes over that line now
18 is because this path is an economical path to deliver the
19 traffic. We have other options on how we deliver that traffic,
20 but under the terms of the agreement, this is the option we
21 have chosen, unquote.

22 VICE-CHAIR HANSON: Thank you. Could you tell me, I
23 know we had some discussion on this previously, can you tell me
24 to what extent the board of directors of the two companies
25 share members?

1 MR. COIT: My recollection of the transcript is that,
2 and if I'm incorrect, please let me know, but my recollection
3 is that the board members are the same but the officers are --
4 that the officers of the two different entities are not, so the
5 board members themselves would be the same, I believe.

6 VICE-CHAIR HANSON: Notwithstanding all of the other
7 arguments whether they should be separate, doesn't that really
8 make the two companies look a lot like they are the same
9 company?

10 MR. COIT: Well, I guess to me what is probably -- I
11 understand the instrumentality exception, and I agree with
12 staff, that I don't think that the facts in this case would
13 indicate in any way that Vivian is some sort of an
14 instrumentality of Golden West, and this isn't a direct answer
15 to your question, but I think there is this suggestion that
16 there is some sort of a shell game going on or something that's
17 been done to try to maximize revenue to Golden West. And I
18 addressed this quite lengthy in my brief, but I don't think
19 there is any indication at all that the reason that this
20 transport is set up the way it is is for Golden West to make
21 more money.

22 The fact of the matter is that if you look -- well, I
23 can't get into this because it wasn't in the record, but the
24 networks in South Dakota are pretty extensive. But the other
25 thing that I think to keep in mind here is options. Western

1 Wireless could use the direct connect. They are not forced to
2 use that other connection. They could build, if they felt it
3 was economical for them to build to shorten the route, they
4 could do that. There is nothing stopping them from putting in
5 their own facilities. So I guess I look at the entire thing
6 and this idea that they are somehow gaming the system, I don't
7 think, given the level of competition there is in the industry
8 and the various transport modes that are available, that there
9 is really an ability to do that.

10 MR. SMITH: Mr. Coit -- pardon me, I'm sorry.

11 VICE-CHAIR HANSON: You probably saw that I was trying
12 to figure out whether I wanted to ask the next question or not.
13 You were going to save me from asking it. And I was debating
14 whether to ask it or not. You made an argument that February
15 16th of '05, that at that point a dispute was announced through
16 the filing. Do you really think that estops Western Wireless
17 from making its argument, that that invalidates their position?

18 MR. COIT: No, I think they can make their argument.
19 I think under the implied contract theory, you are supposed to
20 basically look at the totality of the circumstances surrounding
21 execution of the agreement or basically the facts that surround
22 everything upon which you would rely to try to argue that there
23 is an implied contract, and I think the fact that they
24 continued to pay for as long as they continued to pay and the
25 fact that they had paid previously, they make the arguments

1 that it was understood between the parties that they were going
2 to stop paying when the new agreements were executed or
3 approved and we don't agree with that at all. That wasn't our
4 view. That was supported by both the testimony of Larry
5 Thompson and Denny Law, that it was their understanding that
6 the transit charges were going to continue and they indicated
7 that the reason that the transiting wasn't included in the
8 agreement is that it's a different service.

9 VICE-CHAIR HANSON: Thank you.

10 MR. SMITH: Mr. Coit, with respect to the discussion I
11 think originally raised by Western Wireless and then all of you
12 I think, maybe with the exception of staff, discussed the -- I
13 guess the allegation of discrimination, if you want to call it
14 that, or the noncharging of both Qwest and certain other
15 companies because that traffic is toll traffic. And I guess
16 when I look on page 60, the definition of transiting carrier,
17 just on the face of it, that definition doesn't seem to
18 differentiate between whether your function as a transiting
19 carrier is in the toll or in the local context. And maybe is
20 that something you could address maybe and clarify for me? The
21 idea was, well, access charges are paid and I guess my gut
22 feeling is, you can correct me if I'm wrong, but those access
23 charges are paid, are they not, to the terminating carrier and
24 would not Golden West still be in the situation of transiting
25 carrier in that situation? It's on page 60 is where the

1 definition is in your brief. I don't want to ambush you.

2 MR. COIT: I don't have the statutes in front of me.
3 I think generally transiting, if you look at it from the
4 federal regulation side, transiting is generally associated
5 with an exchange of local traffic. There is no transiting
6 that's referenced in any of the access tariffs that I'm aware
7 of. In thinking about the statutes, I'm not sure that -- they
8 probably more generally talk about transiting carriers, so
9 maybe they are not as specific as the federal law and
10 provisions in some of the tariffs. I would say that you are
11 probably correct on generally access is billed by the
12 terminating carrier, but I don't think that's true in all
13 situations. You got different elements, you have different
14 rate elements for access. You have local transport, you have
15 terminating switching and end office switching and you got
16 loop, and if you have got a carrier that's only providing one
17 segment of that, I would think under access tariffs, that's
18 what they would charge. With respect to this facility, and I
19 don't know if this -- well, it wasn't in the record so I
20 probably shouldn't be talking about how things are accounted
21 for on the Golden West side, that wasn't in the record.

22 MR. SMITH: Thank you.

23 MR. COIT: I don't think I really answered your
24 question.

25 MR. SMITH: This issue came up awfully late, although

1 I agree there was testimony in the record that dealt with that,
2 Denny's testimony in the record explaining what the differences
3 are. I'm not sure.

4 MR. COIT: There may be something in there I'm not
5 aware of.

6 MR. SMITH: I'm not supposing that's dispositive
7 anyway in the case. With respect to the claim by -- let me ask
8 you one thing first before I get to that. You talk about the
9 \$183,000 and I think it's on page 20 of your brief, and then
10 you talk about the \$6,000 approximately per month that's been
11 withheld, and again I can go back and dig around and look, but
12 in terms of us looking for exactly what to decide here, you
13 don't have an affirmative claim in the case relative to those
14 unpaid \$6,000 amounts, or do we? So that's a different --

15 MR. COIT: Looking at Darla here, the answer would be
16 no, I guess.

17 MR. SMITH: Depending on how the commission elects to
18 go, that isn't going to factor into the damages award, you
19 know, offsetting credits or whatever might happen in the case?

20 MR. COIT: I think this was just all of the transiting
21 arguments, my understanding, are just based on the Western
22 Wireless claim for a refund. That's my understanding. Is that
23 correct? Darla is shaking her head yes.

24 MR. SMITH: That's what I thought. That's my
25 recollection and I regret to say I didn't go back and burrow

1 into all of the original pleadings, of which we have had many
2 sets up till now. Then I guess I noted in Mr. Wieczorek's, and
3 it might be something I might want to address to him, too, in
4 terms of if the commission were to accept the goose and gander
5 theory on the toll traffic and decide that it should afford the
6 same treatment and cut that out, would it be your view, and
7 again I'd like Mr. Wieczorek's opinion on this, too, that we
8 have -- do we have an adequate factual record right now to
9 calculate that, including the timing of those payments, so that
10 we could then, if the commission stays with its earlier rulings
11 on interest, that it would be able to calculate interest
12 attributable to that stuff?

13 MR. COIT: I can't answer that. Darla.

14 MS. ROGERS: I want to make sure that I understand
15 your question and then I might need some coaching from Denny on
16 this, who did a lot of the calculations of everything. But is
17 your question that if the commission determines that, just for
18 example, if the commission should determine that Western
19 Wireless is not entitled to a refund of the transiting except
20 for the toll portion of it, do you have sufficient information
21 in front of you to possibly calculate what that would be?

22 MR. SMITH: That's what I'm asking, including timing.
23 Part of what I'm asking, again I can go back and dig out
24 Denny's spread sheets, his exhibits, and we had Ron Williams'
25 spread sheets and then we had Mr. Wieczorek offering an amended

1 set of spread sheets that dealt with a different issue, but
2 whether those spread sheets and the timing of everything on
3 there, whether you believe we have enough to figure that out or
4 whether the parties believe some kind of supplemental filings
5 are going to be needed in order to figure that out.

6 MR. WIECZOREK: Mr. Smith, maybe I can cut through
7 that, because I do cite it in my footnote. I would envision
8 the commission would need to know the date the interMTA factor
9 changed. Otherwise the commission would have the history of
10 payments, payment dates in the record, but the change in the
11 interMTA factor would need to be provided yet to the
12 commission.

13 MS. ROGERS: I concur. I think that the parties would
14 perhaps have to supplement with some additional information.

15 MR. SMITH: Relative to whatever you have done, which
16 we are not privy to.

17 MS. ROGERS: Again depending on what ruling is
18 reached.

19 MR. SMITH: I'm not going to ask anybody to disclose
20 anything. I'm sure that's probably confidential. I think
21 that's all I have. I don't know, maybe staff wants to talk
22 first. I certainly also wouldn't mind hearing your take on the
23 questions I asked about transiting and toll services, Mr.
24 Wieczorek.

25 CHAIRMAN JOHNSON: Perhaps, Mr. Smith, we can see if

1 there are any other questions for Mr. Coit and then go to
2 staff's oral arguments and we can come back to Mr. Wieczorek
3 for some rebuttal arguments. Any other questions for Mr. Coit?
4 Mr. Coit, in Mr. Wieczorek's brief, he does note that Golden
5 West affiliates don't charge one another for this sort of
6 transiting service. Did you have a response to that?

7 MR. COIT: Well, looking at the testimony in the
8 record, there are some lease arrangements between the companies
9 dependent on who owns what facility where, and Mr. Law had
10 indicated during the hearing that they were fixed rates or
11 fixed capacity payments or whatever, and I can just go to the
12 hearing, and I believe you have different -- you have got
13 obviously interconnected networks between Vivian and Golden
14 West and there's some leasing that goes on. It's a little
15 different situation, I guess, from that standpoint, but Western
16 Wireless is free to lease facilities as well. They are leasing
17 direct connect facilities. I don't know if that's a good
18 enough answer for you, but I don't know if I can go beyond the
19 record either.

20 CHAIRMAN JOHNSON: Yeah, I understand. I have some
21 additional questions that I suspect would go beyond the record
22 as well so I will sit tight for now. Thanks. Any other
23 questions for Mr. Coit? Hearing none, perhaps now would be the
24 time to hear staff's oral arguments.

25 MS. WIEST: Thank you. This is Rolayne Wiest. It's

1 staff's position that under the clear terms of the
2 interconnection agreement, transit was not part of that
3 agreement and it was in fact explicitly excluded from the terms
4 of the agreement, and although Western Wireless cites to cases
5 stating that the commission should not read into contracts
6 provisions that easily could have been included, I would
7 suggest that really Western Wireless's position, they are
8 attempting to read into the agreement that transit was included
9 in the agreement, and I think it was not. The language states
10 that the ICA was not intended to establish any terms,
11 conditions or pricing applicable to transiting.

12 If it were the case that the parties agree that
13 transiting was included as part of the recip comp, so wouldn't
14 the language have stated it that way? For example, wouldn't
15 the ICA have stated that no separate pricing is provided for
16 transit because it's incorporated into the recip comp rate?
17 Instead it says there's no terms, conditions or pricing for
18 transiting. So I think it's clear that transiting is not
19 included in the interconnection agreement.

20 And then I think if the commission would agree with
21 that, then I think the next question you have to look at is
22 whether this is a transit service. Staff believes that the
23 facts developed at the hearing does in fact show that it is a
24 transit service. We don't think that the relationship between
25 Golden West and Vivian changes that fact. We think that those

1 two companies are separate companies and should be treated as
2 such. When you are talking about instrumentality, I think if
3 you really read the Glanzer case, I think it's a fairly high
4 hurdle to show instrumentality. You can look at factors such
5 as common directors and those things, but looking at some of
6 the other factors, it goes way beyond that. It includes
7 whether the subsidiary has grossly inadequate capital, were the
8 formal legal requirements of the subsidiary not observed,
9 whether it has no -- has substantially no business except with
10 the parent corporation. And so in this case we are talking
11 about two separate companies. One is an independent and one is
12 a cooperative. So I don't think that the facts show that
13 Vivian operates as an instrumentality of Golden West.

14 Then I think if the commission believes that it is a
15 transit service, the next question is whether Golden West is in
16 fact entitled to payments for its transit service under an
17 implied contract theory. Based on 53-1-3 and South Dakota case
18 law, we believe that Golden West is entitled to compensation
19 for the transiting service. Looking at the conduct of the
20 parties, Golden West provided a service, Western Wireless
21 received the benefits of the service, Golden West billed for
22 that service and Western Wireless paid for that service up
23 until the time Golden West began applying credits.

24 And when you look at Western Wireless's comments about
25 how once they figured out they were paying for transit, they

1 timely terminated, well, you really have to go back through the
2 record and figure this out. They were paying transiting up
3 until, if I had the dates correct, November of 2004. Beginning
4 in December of 2004, what happened is that Golden West started
5 applying its credits, so essentially the credits were applied
6 so there was no charge for transiting because the bill was
7 essentially zero. Then it wasn't until the next year, 2005,
8 probably in the summer or spring of 2005 that Western
9 Wireless's witness in this case discovered that transit was
10 being paid, but I think you have to make a distinction between
11 what Western Wireless's witness in this case discovered and
12 what Western Wireless, the company, knew. Western Wireless,
13 the company, got a bill every month and had clear knowledge
14 that this service was being charged to Western Wireless. And
15 so I don't think they timely terminated any payments in this
16 case. They were paying for the service and they had notice of
17 the service.

18 With respect to the exact amount in dispute, Harlan
19 and I tried to come up with an exact figure, but I don't think
20 we can without knowing what the settlement agreement is. We
21 relied on Golden West's Exhibit 40 and Western Wireless I think
22 Exhibit 7 and in those exhibits, you can come up with the
23 amounts that were charged and I think you can also come up with
24 the amounts of transit that were actually paid by Western
25 Wireless. The problem is that then at the end of the year,

1 Western Wireless inadvertently made a couple of payments in the
2 last two months and if you look back and you try to tie those
3 two amounts, those amounts would be encompassed two months in
4 which transit was billed and so I don't know how they
5 structured their settlement agreement. Did they include those
6 amounts, did they not include those amounts? So I do think you
7 need additional information, either way that you decide the
8 case. Thanks.

9 CHAIRMAN JOHNSON: Any questions for staff? Mr.
10 Smith.

11 MR. SMITH: Does staff have any thoughts on the issue
12 raised by Western Wireless at the end of its brief regarding
13 the deduction of toll related transiting basically on again I
14 call it, for lack -- for ease, the goose and gander theory?

15 MS. WIEST: That they should not be charged for toll
16 traffic?

17 MR. SMITH: Right.

18 MS. WIEST: Right, I think Rich even said that he
19 agreed that they should not be charged. Again, I'm not sure
20 how you come up with a number on that. I guess if the parties
21 agree to use whatever is in the stipulation, that would work.
22 If the parties didn't agree, then I think it's more
23 problematic.

24 MR. SMITH: Thank you.

25 CHAIRMAN JOHNSON: Any other questions for Ms. Wiest

1 or other members of staff? Hearing none, I think it's probably
2 appropriate to give Mr. Wieczorek an opportunity to answer some
3 of the questions that have been put to other parties as well as
4 to offer any rebuttal arguments. Mr. Wieczorek.

5 MR. WIECZOREK: Thank you, Mr. Chairman. As I was
6 listening to Mr. Coit, I kind of came to the conclusion all we
7 are doing is repeating what's in our briefs, so I'd like to
8 spend the time more just directly answering questions rather
9 than repeating what I said in my brief to counter what he said
10 in his argument, which pretty much follows his brief. I know
11 Mr. Smith had a couple questions he wanted to direct to me, but
12 I am going to have to ask him to oblige me and remind me
13 exactly what those questions were he directed to Mr. Coit he
14 also wanted me to address.

15 MR. SMITH: One of them was -- excuse me, my cold is
16 reappearing here all of a sudden -- one of them is just a
17 practical thing. It's been addressed by a couple of other
18 people here and it deals with evidence, I think, and that we
19 are going to need additional information in order to make the
20 calculations that are necessary, assuming, it depends on what
21 the commission decides, you know, but particularly if the
22 commission buys your argument about treating your toll traffic
23 the same as their internal toll traffic and the Qwest toll
24 traffic.

25 MR. WIECZOREK: To address that question first, I

1 think the only thing the commission would need in addition is
2 when the date the interMTA factor changed and the date -- or
3 what the new interMTA factor was. Otherwise you should have
4 all payment history. And the other thing I would add, I guess,
5 is staff raised a question, if there is -- depending on how we
6 treated the payment history on the rest of the settlement, that
7 could impact how to allocate or how to adjust the transiting
8 also. And so I hadn't thought about that, but now that staff
9 brings it up, I think that would probably be relevant, too, as
10 I understand staff's meaning if all payments including
11 transiting were treated as a credit for recip comp, the
12 calculations to recip comp, you would have to do a calculation
13 essentially to create a total who would do what for both the
14 recip comp true-up and the commission's final determination on
15 transiting.

16 MR. SMITH: Thank you. And maybe at the end here, and
17 I'm sure the chairman, he might want to do this, but it
18 probably is something we ought to do, then, to define a
19 procedure that we are going to follow if the parties all
20 believe that we might need some additional information as to
21 how we ought to go about doing that. Not that I want this case
22 to go on any longer, but it might have to.

23 The other question I asked Mr. Coit dealt with just
24 the definition of transiting services and the distinction
25 offered by Golden West regarding the transiting to a

1 terminating carrier of toll traffic versus this traffic and
2 whether there really is any difference, and again I don't know
3 in the end, does it make any difference in this case? Maybe
4 not. But I'd be interested in your thoughts on that.

5 MR. WIECZOREK: As I recall, the definition relied
6 upon by Mr. Coit was the definition from the statutes that were
7 adopted by the legislature in 2004, and I would agree that
8 under the definition that was adopted, became part of the set
9 of statutes July 1st, 2004, it would appear this would fall
10 under the company's definition of transiting traffic if one
11 considers the co-op separate from its subsidiary, Vivian.

12 MR. SMITH: And that would apply -- would that apply
13 equally to access traffic and recip comp traffic?

14 MR. WIECZOREK: Well, the issue with access traffic, I
15 think, Mr. Smith, you are correct in saying that access rates
16 would be paid to the receiving carrier. In the exhibit as we
17 calculated our interstate access, we calculated mileage for the
18 Custer exchange as part of the testimony from the Qwest meet
19 point, so the rate being paid to Vivian under interstate
20 includes the transport of that traffic through Qwest's meet
21 point. So if there is an arrangement to the end terminating
22 carrier for traffic or transport of traffic from that meet
23 point to the terminating carrier, it's a matter of WWC pays the
24 access to the terminating carrier, terminating carrier then
25 kicks back or makes the arrangement for compensation to the

1 carrier that carried from the meet point from which access was
2 calculated. Does that make sense?

3 MR. SMITH: Thank you. I understood what you said.
4 Thanks.

5 CHAIRMAN JOHNSON: Are there any other questions for
6 Mr. Wieczorek? Mr. Smith made a suggestion about procedure
7 going forward. Are we able to do that without presupposing a
8 commission decision?

9 MR. SMITH: Maybe not.

10 CHAIRMAN JOHNSON: It seems even if the commission
11 didn't act today, our next regularly scheduled meeting is next
12 week and so I doubt -- I guess I won't presume anything. I
13 hope that it wouldn't be unduly burdensome if the commission
14 were to make a decision next week and then staff could work
15 with the parties to lay out a procedural schedule from there,
16 if one is needed.

17 MR. SMITH: I agree.

18 MR. WIECZOREK: Mr. Chairman, on behalf of WWC, I
19 would envision the commission could certainly make a decision
20 saying here is our ruling on the issue of transiting, but not
21 give a number, just give here is what we think is allowable and
22 what isn't and put it back on the parties to either calculate
23 it with staff or return to the commission with opposing
24 calculations on what the final result should be.

25 CHAIRMAN JOHNSON: Okay. Any of the other parties

1 have anything they feel they have to add into the record at
2 this point? Seeing nothing, unless Commissioner Hanson has a
3 motion, I would presume we would save this for next week, take
4 this under advisement.

5 VICE-CHAIR HANSON: I'll accept that position at this
6 time and I can appreciate the challenge and the concerns by all
7 of the parties as to where the ruling is going to take place
8 and from the standpoint of should they go through the process
9 of ascertaining costs and things of this nature. I'm wondering
10 whether or not we might take just two minutes to discuss that,
11 you and I.

12 CHAIRMAN JOHNSON: Yet today?

13 VICE-CHAIR HANSON: Yes, just right now.

14 CHAIRMAN JOHNSON: I think --

15 VICE-CHAIR HANSON: Obviously you are 50 percent, so
16 if you are not engaged in making the decision.

17 CHAIRMAN JOHNSON: That's the difficulty with having a
18 two-member commission.

19 VICE-CHAIR HANSON: I'll acquiesce to your position we
20 should make the decision at our next meeting.

21 CHAIRMAN JOHNSON: Thanks. Unless there's anything
22 further, the commission is in --

23 MR. SMITH: Ms. Wiest has another issue.

24 MS. WIEST: I apologize, this is going back to the
25 rule making. I mentioned all the changes we had considered

1 based on what was filed. The change that I failed to mention
2 today, which I did bring up at the hearing, was the fact that
3 we had to change the declaratory ruling rule, and I had to add
4 back in the time frame.

5 CHAIRMAN JOHNSON: That was 60 days.

6 MS. WIEST: That's because LRC wouldn't allow us to
7 say no time frame.

8 CHAIRMAN JOHNSON: No amended motion is required.

9 MS. WIEST: I don't think so.

10 CHAIRMAN JOHNSON: With that, the business of the
11 commission is done for today and we stand adjourned. Thanks.

12 (Whereupon, the proceedings were concluded at 3:15
13 p.m.)

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Carla A. Bachand, RMR, CRR, Freelance Court Reporter for the State of South Dakota, residing in Pierre, South Dakota, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause;

I further certify that the foregoing pages of this transcript represents a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on this the 21st day of November 2006.

Carla A. Bachand

Carla A. Bachand, RMR, CRR
Freelance Court Reporter
Notary Public, State of South Dakota
Residing in Pierre, South Dakota.

My commission expires: June 10, 2012.