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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

In the Matter of the Complaint	)	
WWC License LLC against	)	
Golden West Telecommunications Cooperative, Inc.	)	DOCKET NO. CT05 - 001
Vivian Telephone Company;	)	
Sioux Valley Telephone Company;	)	
Union Telephone Company;	)	<b>MEMORANDUM IN SUPPORT</b>
Armour Independent Telephone Company;	)	<b>OF MOTION FOR PARTIAL</b>
Bridgewater-Canistota Independent Telephone Company; and	)	<b>SUMMARY JUDGMENT</b>
Kadoka Telephone Company	)	

WWC License LLC, of 3650 131<sup>st</sup> Avenue, SE, Suite 400, Bellevue, Washington 98006 (hereinafter "WWC"), by and through its attorney, Talbot J. Wiczorek of Gunderson, Palmer, Goodsell & Nelson, LLP, hereby submits this Memorandum in Support of its Motion for Partial Summary Judgment.

WWC requests the Commission grant its Motion for Partial Summary Judgment with respect to three issues: (1) the Commission's jurisdiction over the matters presently before it; (2) immediate payment of undisputed overage charges; and (3) the applicability of interest to the overage charges. Summary judgment is proper because there is no genuine issue of material fact regarding these issues, and therefore WWC is entitled to judgment as a matter of law. S.D.C.L. § 1-26-18.

**FACTS**

WWC previously entered into interconnection agreements with the following entities: Golden West Telecommunications Cooperative, Inc.; Vivian Telephone Company; Sioux Valley Telephone Company; Union Telephone Company; Armour Independent Telephone Company;

and Bridgewater-Canistota Independent Telephone Company (hereinafter collectively referred to as “Golden West and its affiliated companies”).<sup>1</sup> Those previous Interconnection Agreements terminated on December 31, 2002. On May 13, 2004, the Public Utilities Commission of the State of South Dakota approved a Reciprocal Interconnection, Transport and Termination Agreement (hereinafter “Interconnection Agreement”) between WWC and Golden West. *See* Interconnection Agreements. In addition, the Commission approved similar agreements with identical terms, except rates, between WWC and Golden West’s affiliated companies.

Even though the Commission approved the Interconnection Agreements during 2004, pursuant to the terms of the agreements, the effective date for the rates was January 1, 2003. *Id.* In this regard, the Agreements state,

13.1 Effective Date – The effective date of this agreement is January 1, 2003. The Parties shall implement the agreement immediately, work cooperatively, and take all steps necessary and proper to expeditiously prosecute a joint application before the Commission seeking approval of this agreement pursuant to the provisions of 47 U.S.C. § 252. Each Party shall be responsible for its own costs and expenses incurred in obtaining approval of this Agreement from the Commission.

*See* Agreements, p. 17. While negotiating the Interconnection Agreements, all parties acknowledged that the rates would be less than the rates under the previous existing agreements. However, while the new agreements were to be effective January 1, 2003, WWC agreed in good faith to pay under the old rates until the new rates were determined and approved by the Commission.

Since the Commission’s 2004 approval of the Interconnection Agreements, WWC has sought to be reimbursed for the overpayments it made, in good faith, during the negotiations of the Interconnection Agreements. Golden West and its affiliated companies have acknowledged overpayments in excess of \$535,000. *See* December 1, 2004, correspondence from Dennis Law,

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<sup>1</sup> For the purposes of this brief, Kadoka Telephone Company is not included as an affiliated company.

Regional Manager, and Golden West Telecommunications, attached hereto as Exhibit 1. See Answer ¶ 16. However, they have refused to return such overpayments to WWC. Instead, they have unilaterally decided to credit the funds against future obligations of WWC, while refusing to provide any interest on those funds.

As a result, WWC filed its Complaint against Golden West and its affiliated companies on February 15, 2005. Golden West and its affiliated companies jointly filed their Answer and Counterclaim on March 8, 2005. WWC now files this Motion for Partial Summary Judgment pursuant to S.D.C.L. § 1-26-18.

WWC files this Motion for Partial Summary Judgment to eliminate issues and streamline the issues that need to be heard at the hearing in this matter. The determination of jurisdiction being a threshold determination should be decided prior to a full hearing and, as to amounts that have been agreed to by Golden West and its affiliated companies as being due, these amounts should be ordered to be paid immediately as WWC should not be required to forego these funds simply because Golden West and its affiliated companies simply want use of the funds throughout the litigation.

## **DISCUSSION**

### **I. Golden West And Its Affiliated Company's Challenge To The Commission's Jurisdiction Is Without Merit Because The Commission Maintains Jurisdiction Of The Present Claims Both Under S.D.C.L. Chapter 49-13 And The Jurisdictional Provision Found In The Interconnection Agreements.**

WWC requests the Commission grant its Motion for Summary Judgment with respect to the jurisdictional issue raised by Golden West and its affiliated companies in their Answer. The Commission maintains jurisdiction over this action pursuant to the authorities set forth in S.D.C.L. Chapter 49-13. It deals specifically with telecommunications and states,

Any person claiming to be damaged by any telecommunications company or motor carrier *may either make complaint to the commission* or may bring suit on his own behalf for the recovery of damages in any court of competent jurisdiction in this state, but no person may pursue both remedies at the same time.

S.D.C.L. § 49-13-1.1 (*emphasis added*). There are no limitations placed upon the Commission's authority to hear complaints. See S.D.C.L. § 49-31-3 (stating, "...The commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies."...)(*emphasis added*). Nor are limitations placed upon the types of damages that may be considered by the commission,

The commission may determine the extent of *any injury or damage* which it finds to have been sustained by any person, telecommunications or motor carrier. If the commission determines that any person is entitled to reparation or to an award of damages, the commission shall make an order directing the telecommunications company or motor carrier to pay to such person the sum of money to which he may be entitled, on or before a named day.

S.D.C.L. § 49-13-14 (*emphasis added*). Hence, the commission may hear any complaint brought before it, regarding any injury or damage, that the Commission is not pre-empted from hearing.

Not only does the Commission have statutory authority to hear WWC's complaint, the Interconnection Agreements specifically place jurisdiction with the Commission. They state,

14.16 Governing Law – For all claims under this Agreement, that are based upon issues within the jurisdiction of the FCC or governed by federal law, the Parties agree that remedies for such claims shall be governed by the FCC and the Act. For all claims under this agreement that are based upon issues within the jurisdiction of the Commission or governed by state law, the Parties agree that the jurisdiction for all such claims shall be with such Commission, and the remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of South Dakota without reference to conflict of law provisions.

See Interconnection Agreements (*emphasis added*). WWC is requesting the Commission clarify the Interconnection Agreements the Commission previously approved. Specifically, WWC is requesting the Commission clarify the proper handling of the overpayments, made in good faith,

during the interim period. South Dakota Codified Law Chapter 49-13, and the Interconnection Agreements, place jurisdictional authority upon the Commission to address such a need for clarification.

Defendants' suggestion that this Commission does not have jurisdiction over the issues before it is without merit. The legal authority Defendants rely upon for their jurisdictional challenge concern gas and electric utilities regulations, not telecommunications regulations. *See In the Matter of Northwestern Public Serv. Co. (Hub City)*, 560 N.W.2d 925, 927 (S.D. 1997)(addressing S.D.C.L. Chapter 49-34A, which deals with gas and electric utilities regulation); *Peoples Natural Gas Co. v. Minn. Public Utilities Commission*, 369 N.W.2d 530, 531 (Minn. 1985)(dealing with Minnesota statutory schemes governing natural gas public utilities). Such statutory schemes are wholly different from the statutory scheme that governs telecommunications services in South Dakota. Moreover, even the authority relied upon by the Defendants states that authority based upon differing statutory schemes is not particularly helpful or instructive. *Peoples*, 369 N.W.2d at 535.

To illustrate, the analysis in *Northwestern Public Serv. Co. (Hub City)*, is inapplicable to the jurisdictional question before this Commission. In *Northwestern Public Serv. Co. (Hub City)*, the issue was whether an entity could terminate its electric service agreement with one supplier and then receive service from another supplier. 560 N.W.2d at 927. The court held, under S.D.C.L. § 49-34A-7, the commission maintains no authority to interpret and enforce the contract between a rural cooperative and its customer. 560 N.W.2d at 930. It based its holding upon the fact that the Commission has no authority over rural cooperatives with regard to rates. *Id.* at 929 (*citing* S.D.C.L. §§ 49-36A-6 to 49-36A-26, inclusive). In addition, it held, under

S.D.C.L. §§ 49-36A-4, the Commission maintained no authority to interpret the contract between the rural cooperative and its customer.

Notably, S.D.C.L. Chapter 47-34A, which was considered in Northwestern Public Serv. Co. (Hub City), does not apply to telecommunications regulations. South Dakota Codified Law § 49-34A-7 is not in issue in this case. Because the statutory schemes are completely different, the analysis set forth in Northwestern Public Serv. Co. (Hub City), is not applicable to the jurisdictional question presently before the Commission.

Likewise, the opinion rendered in Peoples v. Minnesota Public Utilities Commission, is similarly inapplicable. 369 N.W.2d 530 (Minn. 1985). The issue in Peoples was whether the Minnesota legislature had conferred a refund power upon the Minnesota PUC. Id. at 534. It concluded the Minnesota legislature had not expressly conferred refund powers upon the Minnesota PUC. Id. It further held that under the Minnesota statutory scheme, there was no reason to find an implied refund authority as the Minnesota PUC had other methods to enforce its orders. Id. at 535.

However, the statutory scheme Minnesota has developed for its natural gas utilities is without question different from the regulatory scheme in place for South Dakota's telecommunications companies. While Minnesota does not provide for refund powers, South Dakota expressly provides such powers. S.D.C.L. § 49-31-5(4) (granting authority to the Commission to award refunds). Notably, the Peoples court concluded that opinions from other states were not instructive as they relied upon differing statutory schemes. Id. at 535. Due to the vast difference between the South Dakota and Minnesota statutory schemes, under the express language found in the Peoples opinion, its analysis is not instructive with respect to the jurisdictional issues presently before the Commission. 369 N.W.2d at 535.

Once the Commission approved the Telecommunications Agreements, any claims arising therefrom fell within the purview of the Commission. *See* Interconnection Agreements. Furthermore, notwithstanding the jurisdictional provision in the Interconnection Agreements, S.D.C.L. Chapter 49-13 expressly grants authority upon the Commission to hear any complaint. Therefore, the Commission maintains jurisdiction over WWC's claim for clarification of the Interconnection Agreements. Because there exists no question of material fact regarding the issue of jurisdiction, WWC is entitled to summary judgment as a matter of law.

**II. WWC Is Entitled To (1) Summary Judgment With Respect To The Undisputed Overpayment Amount Because There Exists No Question Of Material Fact; And (2) Immediate Payment Of Such Amount.**

WWC request the Commission exercise its authority to order immediate payment of damages with respect to the undisputed amount of over payments. As quoted in its entirety above, the Commission maintains authority to, "...make an order directing the telecommunications company ... to pay to such person the sum of money to which he may be entitled, on or before a named day." S.D.C.L. § 49-13-14. WWC merely requests the Commission exercise this power.

Such action is proper because Golden West and its affiliated companies acknowledge WWC is entitled to overpayments in excess of \$535,000. *See* Exhibit 1. While WWC believes the actual amount to be higher than that acknowledged by Golden West and its affiliated companies, it requests the Commission grant WWC Motion for Summary Judgment and order immediate reimbursement of the undisputed amount. Summary Judgment is proper because there is no question of material fact with respect to the undisputed amount. As a result, WWC is entitled to a judgment as a matter of law. S.D.C.L. § 1-26-18. In addition, the Commission has

express authority to award immediate payment. S.D.C.L. § 49-13-14. WWC requests the Commission take such action.

**III. WWC Is Entitled To Summary Judgment With Respect To The Application Of Interest To The Overpayment Amount Because Under South Dakota Law Prejudgment Interest Is Mandatory.**

The South Dakota Supreme Court has recently held that prejudgment interest is mandatory. Loen vs. Anderson, 2005 S.D. 9, ¶ 23 (*citing* Alvine vs. Mercedes Benz of North America, 2001 S.D. 3, ¶ 29, 620 N.W.2d 608, 614). In South Dakota,

Any person who is entitled to recover damages . . . is entitled to recover interest thereon from the day that the loss or damage occurred. . . . If there was a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision . . . . If necessary, special interrogatories shall be submitted to the jury. Prejudgment interest on damages arriving from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be the category B rate specified in § 54-3-16. The Court shall compute and award the interest provided in this section and shall include such interest in the judgment in the manner as it taxes costs.

Id. (*citing* S.D.C.L. § 21-1-13.1) (*emphasis in original*). “When instructing the jury as to prejudgment interest, they must be told that the interest is mandatory when damages are recoverable and not within their discretion.” Loen, 2005 S.D. 9, at ¶ 25, Alvine, 2001 S.D. 3, at ¶ 29.

Based upon the above authorities, WWC is entitled to a mandatory application of prejudgment interest. To date, Golden West and its affiliated companies have denied the application of prejudgment interest in calculating the overpayments. However, because prejudgment interest is mandatory in the state of South Dakota, there exists no question of material fact regarding its application. As such, WWC is entitled to judgment as a matter of law regarding the appropriateness of the applicability of prejudgment interest. S.D.C.L. 1-26-18.



Because some discovery needs to be completed to exactly determine when the amounts due became due, at this point WWC is not requesting that the actual interest be calculated. Simply, WWC is asking that the Commission set forth that on the overpayments, interest will be due from the date of overpayment. This will narrow the issues for hearing and expedite the hearing process.

### **CONCLUSION**

WWC respectfully requests the Commission grant its Motion for a Partial Summary Judgment. Motion for Partial Summary Judgment in three areas:

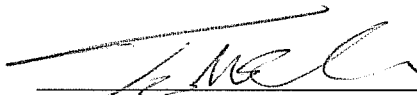
1. Summary Judgment is appropriate with respect to the Commission's jurisdiction over the issues presently before it. Both S.D.C.L. Chapter 49-13 as well as the express jurisdictional statement in the Interconnection Agreements grant jurisdictional authority to the Commission. As a result, there exists no question of material fact regarding the Commission's jurisdiction, and Summary Judgment is appropriate as a matter of law.

2. WWC requests the Commission grant Summary Judgment with respect to the undisputed, overpayment amount. Because such amount is undisputed, there exists no question of material fact. Furthermore, with respect to the undisputed amount of overpayments, the Commission is entitled to order immediate payments. WWC respectfully requests that the Commission order such payments.

3. Finally, WWC is likewise entitled to Summary Judgment with respect to the applicability of prejudgment interest. Prejudgment interest is mandatory in the State of South Dakota. Therefore, Summary Judgment is appropriate with respect to the applicability of prejudgment interest to the damages suffered by WWC.

Dated this 5 day of April, 2005.

GUNDERSON, PALMER, GOODSSELL  
& NELSON, LLP



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Bridgewater-Canistota Independent Telephone	)	
Company; and	)	
Kadoka Telephone Company	)	

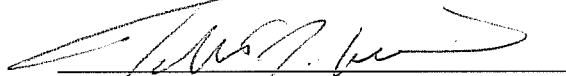
**CERTIFICATE OF SERVICE**

I hereby certify that on the 5 day of April, 2005, a true and correct copy of WWC License, LLC's MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT was sent by first-class, U.S. Mail, postage paid to:

Darla Pollman Rogers  
PO Box 280  
Pierre, SD 57501

Rolayne Wiest  
SD PUC  
500 E Capitol Ave  
Pierre SD 57501-0057

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Dell Rapids, SD 57022



# SIoux VALLEY

TELEPHONE COMPANY

(605) 428-5421  
1 (800) 952-3566  
Fax (605) 428-3132

December 1, 2004

Ron Williams  
Western Wireless Corporation  
3650 131<sup>st</sup> Avenue, SE  
Bellevue, WA 98006

**VIA UPS OVERNIGHT DELIVERY 1Z 571 305 13 4681 3133**

Dear Mr. Williams,

On behalf of all Golden West Telecommunications companies operating in South Dakota, I am writing to inform you that we have completed calculations of the credits due Western Wireless based on the current "Reciprocal Interconnection, Transport and Termination Agreement" executed between each company and Western Wireless.

The credit amounts cover telecommunications traffic exchanged during the period of January 1, 2003 through May 22, 2004 (February 2003 through June 2004 billing cycles) for the following companies:

<u>Company</u>	<u>Credit Amount</u>
Golden West Telecommunications Coop.	\$298,380.32
Vivian Telephone Company	\$155,490.18
Sioux Valley Telephone Company	\$ 49,833.02
Union Telephone Company	\$ 14,610.54
Armour Independent Telephone Co.	\$ 10,797.83
Bridgewater-Canistota Telephone Co.	\$ 5,721.77
Kadoka Telephone Company	\$ 2,722.25

The credit amount of each company will be reflected on the invoices issued by each respective company to Western Wireless on a monthly basis until the total amount is fully credited. This will be applied beginning with the December 2004 invoice(s).

If you have any questions, please contact me at (605) 428-5421.

Sincerely,

Dennis Law  
Regional Manager  
Golden West Telecommunications

Cc: Darla Rogers  
George Strandell  
Ben Dickens