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October 26, 2006

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Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
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Pierre SD 57501-5070

RE: IN THE MATTER OF THE COMPLAINT FILED BY WWC LICENSE LLC AGAINST GOLDEN WEST TELECOM, et al.
SDPUC Docket File Number CT 05-001
GPGN File No. 5925.050089

Dear Ms. Van Gerpen:

Enclosed for filing please find WWC's Reply Brief in the above-entitled matter. The original will be sent via U.S. Mail today.

By copy of this letter and attached Reply Brief, same is being forwarded to all counsel of record.

Sincerely,

Talbot J. Wieczorek

TJW:klw
Enclosure
c: Darla Rogers
Rich Coit
Clients

BEFORE 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	)	DOCKET NO. CT05 - 001 WWC'S REPLY BRIEF REGARDING TRANSITING ISSUE

COMES NOW, WWC License LLC, (hereinafter "WWC"), and hereby submits this Reply Brief addressing the transiting issue. All other issues have been settled by the Parties. Thus, this Reply Brief is restricted to the Amended Complaint's request for a refund of payments made for transiting. The transiting argument appears in WWC's original brief at pages 24 through 28, Golden West Companies' Response Brief at pages 47 through 67, and Staff's Brief on Transiting.

FACTUAL STATEMENT

While the facts revolving around the transiting issue were previously stated in WWC's original brief, see generally WWC Brief in Support of Amended Complaint, pages 8-9, those facts are restated in part within this brief given that WWC's original brief contained a factual summary on all issues and the transiting aspects were integrated within that factual statement.

The transiting issue surrounds the delivery of traffic to one Vivian exchange. That exchange is Custer. The traffic is picked up by the Golden West Cooperative at the Qwest meet point on Skyline Drive in Rapid City and carried down through Hot Springs and back up to Custer. Golden West Cooperative asserts it is entitled to charge transiting charges for carrying this traffic. WWC's position is (1) that transiting was considered in negotiating the reciprocal

compensation amounts, (2) that the new interconnection agreements, contrary to the previous interconnection agreement, did not provide for separate transiting rates, and (3) no agreement exists for the billing of transiting.

Vivian directs delivery of all traffic destined to it to travel the Golden West integrated network. Golden West picks up WWC's traffic bound for Vivian's Custer switch at the Qwest meet point on Skyline Drive in Rapid City. The transiting is then charged at a per minute per mile rate that was established in the interconnection agreement that expired on December 31, 2002, but not continued as part of the new agreement. HT 78, Lns 22 through HT 79, Ln 15. This route goes down through Hot Springs and then up into Custer.

Vivian is owned by the Golden West Telecommunications Cooperative. HT 423, Lns 12-13. As a wholly owned subsidiary, the companies share the same board members. HT 558, Lns 23-25. To the customers, Vivian does not even exist. The Custer switch end users contact Golden West and work through Golden West to resolve all issues. HT 555, Lns 1-15, HT 556, Lns 1-16. In such a situation transiting is not paid in the industry to affiliated companies generally because affiliated companies can then "game the system" to increase charges. HT 834, Lns 8-12. HT 834, Lns 17 through HT 835, Ln 3.

The interconnection agreement that is the subject of this case specifically provides the "agreement is not intended to establish any terms, conditions or pricing applicable to the provision of any transiting service." *See* WWC Hearing Ex. 1, p. 1, ¶ 8, last sentence. Ron Williams testified that during the negotiations of the interconnection agreements, Vivian and Golden West presented their network as a unified network. HT 77, Lns 23 through HT 78, Ln 12.

As part of the new interconnection agreement, a charge for transiting was dropped and

Golden West Cooperative did not seek a separate transiting agreement. HT 80, Lns 21-25. This did not surprise WWC because the transport rates calculated as part of their reciprocal compensation agreement were seen by the Parties to incorporate all transport including any alleged transiting on the Golden West Companies' integrated network. HT 78, Lns 22 through HT 79, Ln 15.

The record does reflect that WWC paid transiting before the new interconnection agreement was finalized and for some months thereafter. However, WWC made most of these payments based upon the request of SDTA that WWC continue to pay all rates and costs under the previous interconnection agreement while the parties were finalizing the new interconnect agreement. HT 77, Lns 13-17. Since the interconnection agreements that terminated on December 31, 2002 had a specific transiting charge contained within those agreements, WWC's good faith agreement to pay under the old rates included paying transiting under the old agreement pending final negotiations, signature and approval of the new interconnection agreement. The new interconnection agreement was then retroactively applied to all traffic delivered since January 1, 2003. When this litigation began regarding the true-up, it was discovered that Golden West had continued to bill transiting and had not trued-up the transiting charges. Thus, this issue was added as part of this proceeding.

LEGAL ANALYSIS

I. The Golden West Cooperative Is Not Entitled To Charge for Transiting Because The Parties Entered Into A New Interconnection Agreement That Did Not Carry Over A Transiting Charge, And The Subject Traffic Is Exchanged Between Affiliated Companies Which Thereby Renders Transiting Charges Unapplicable.

While the section of the Golden West Companies' brief dealing with transiting runs 20 pages, it is only the last few pages that provide the Commission any legal authority to support the arguments raised. *See* Golden West Companies' brief pages 64 through 66. Ultimately, the

Golden West Cooperative's analysis rests on a theory of implied contract. However, the theory of implied contract only succeeds in the limited circumstances in which someone knowingly and voluntarily accepts services and acquiesces or acknowledges the benefit of the transaction. *See* generally Mahan v. Mahan, 121 N.W.2d 367, 369 (S.D. 1966), *See* also Setliff v. Akins, 616 N.W.2d 878, 885 (S.D. 2000). While Staff's brief endorses this implied contract theory as a legal theory under which WWC should pay transiting, the analysis by both Golden West Cooperative and Staff are fatally flawed. *See* Staff's brief at page 6.

Both Golden West Cooperative's analysis and the Staff's analysis ignore the history of the interconnection agreements between the parties. The unrefuted evidence is that transiting was a line item charge in the interconnection agreements that terminated effective December 31, 2002. WWC Exhibit 2. In the interconnection agreement that became effective retroactively to January 1, 2003, there was no provision for transiting charges. Rather, the agreement specifically said that no charge for transiting was established under the interconnection agreement. *See* WWC Exhibit 1, Page 1, ¶ 8. This is because the transport obligations of the affiliated network of the Golden West Companies was considered in negotiating the reciprocal compensation rates.

The history also obviates Golden West Cooperative's argument that WWC's payment of the rate acknowledges the benefit of the transaction. To illustrate it is undisputed that SDTA, on behalf of the Golden West Companies, requested WWC pay under the old interconnection agreement pending drafting, execution and approval of the new interconnection agreement. Since transiting was part of the old interconnection agreement, transiting was paid subject to true-up. These payments under the old agreement account for the majority of payments made for transiting. After it was determined that Golden West Cooperative failed to stop billing for

transiting once the new interconnection agreement was approved, payments of transiting were timely terminated.

Essentially, the Golden West Cooperative is asserting that since it failed to include the transiting issue in the interconnection agreement, although it was in the previous interconnection agreement, it should now be allowed to collect as if a contract exists. The Golden West Cooperative is asking this Commission write in to the new interconnection agreement the transiting rate that appeared in the previous agreement.

However, it is not the function of a reviewing body to rewrite a contract. South Dakota State Cement Plant v. Wausau Underwriters Insur. Co., 2000 SD 116, ¶ 24, 616 N.W.2d 397, 407 (*citing* Kroupa v. Kroupa, 1998 SD 4, ¶ 49, 574 N.W.2d 208, 217 (*quoting* Hisgen v. Hisgen, 1996 SD 122, ¶ 17, 554 N.W.2d 494, 499)(Sabers, J., *dissenting*));(*string citation omitted*)). Rather, the reviewing body must, "...examine the contract as a whole and give words their 'plain and ordinary meaning.'" Canyon Lake Park, L.L.C. v. Loftus Dental, P.C., 2005 SD 82, ¶17, 700 N.W.2d 729, 734 (*quoting* Gloe v. Union Ins. Co., 2005 SD 30, ¶ 29, 694 N.W.2d 252, 260). When the plain meaning of a contract is clear, it is not subject to, "...be enlarged or diminished by judicial interpretation." Cain v. Fortis Insur. Co., 2005 SD 39, ¶ 17, 694 N.W.2d 709, 713 (*citing* Am. Family Mut. Ins. Co. v. Elliot, 523 N.W.2d 100, 102 (S.D. 1994)).

As a result, determination of the issue before this Commission requires an analysis of the language contained in the subject interconnection agreement. Canyon Lake, 2005 SD 82, ¶17 (*citing* Gloe, 2005 SD 30, ¶ 29). With respect to the issue of transiting, the interconnection agreement is clear on its face. It explicitly states that it does not establish any terms, conditions, or pricing related thereto. Because the plain meaning of the language is clear, it would be improper for this Commission to now expand the provisions of the interconnection agreement to

include transiting pricing. Cain, 2005 SD 39, ¶ 17 (*citing* Elliot, 523 N.W.2d at 102).

Furthermore, the parties' election to not include transiting pricing in the interconnection agreement when it was present previously is instructive. "It is a well settled principle of contract law that a new agreement between the same parties on the same subject matter supercedes the old agreement." Ottawa Office Integration Inc. v. FTF Business Systems, Inc., 132 F.Supp.2d 215, 219 (D.C.S.D.N.Y. 2001)(*citing* NLRB v. International Union of Operating Eng'rs, 323 F.2d 545 548 (9th Cir. 1963)). To that end, the election to enter into a new contract with terms inconsistent with the prior contract demonstrations an intention to rescind those terms in the prior contract not contained within the new contract. Bishop v. Clark, 54 P.3d 804, 809 (Ala. 2002)(*citing* Restatement of Contracts § 408 (1932); Juneau Educ. Assoc. v. City & Borough of Juneau, 539 P.2d 704, 706 (Ala. 1975)).

The subject interconnection agreement replaced the prior interconnection agreement. Both interconnection agreements governed the same subject matter, which is the pricing related to the exchange of traffic between these two parties. Notably, while the method in which traffic is exchanged has not changed, the pricing that applies has changed. Specifically, the parties explicitly omitted the inclusion of any separate charge for transiting. Under the above authority, the election to not include separate pricing for transiting demonstrates an intention to reject and rescind the transiting charge that were contained in the prior interconnection agreement during the life of the new agreement. Id.

Not only does the subject interconnection agreement demonstrate an intention to rescind transiting pricing, there is no other agreement that resurrects this cost. The parties' silence on this issue is another factor that must be considered by this Commission. It must be considered because, "There is a strong presumption against reading into contracts provisions that easily

could have been included but were not." Fix v. Quantum Industrial Partners LDC, 374 F.3d 549, 553 (7th Cir. 2004)(*citing* In re Marriage of Sweders, 695 N.E.2d 526, 529 (Ill.App. 1998); H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129, 141 (Del.Ch.2003)). The Golden West Companies could have addressed transiting in the new interconnection agreement but chose not to continue the change. As a result, the presumption against allowing the imposition of a transiting rate that is wholly absent from any governing agreements between the respective parties controls. Id.

This presumption is not overcome by any of the evidence in the record. The only argument to potentially overcome such a presumption would be the payment by WWC of transiting charges. However, as it is clear from the record, the majority of those payments were made under the old interconnection agreement pending drafting, executing and approval of the new interconnection agreement that was then retroactively applied. The fact that the Golden West Companies did not appropriately true-up the charges by crediting the transiting amount does not show a willingness or an acquiescence of WWC that establishes an implied contract to pay for transiting services over and above what it was paying for reciprocal compensation.

The presumption against the charge for transiting is also supported by the discriminatory nature of how transiting is charged between the Golden West Companies' affiliates. The affiliates do not charge each other transiting. HT 834, Ln 17 through HT 835, Ln 3. This is true even though Golden West transits traffic through the Vivian-Custer exchange to deliver it to WWC at the point of interconnect that WWC has at the Custer exchange with Vivian. Id. Thus, while the Golden West Companies argue they are separate entities, they do not charge each other as if they are truly separate corporations or separate operating units.

II. Even If The Commission Should Find That The Golden West Companies May Charge Transiting For Local Traffic, The Commission Should Find That The Golden West Companies Cannot Charge Transiting On Any Toll Traffic Delivered To The Custer Exchange.

South Dakota law and Golden West Companies' own admissions demonstrate it is not entitled to charge transiting fees on toll traffic. South Dakota Codified Law § 49-31-11 provides,

> No telecommunication company may offer a rate or charge, demand, collect or receive from any person a greater or lesser compensation for any telecommunication service offered than it charges, demands, collects or receives from any other person for providing a like telecommunications service.

Based on the Golden West Companies' own analysis, the transiting charges should not be applied to that percentage of minutes that constitutes interMTA minutes.[1]

To illustrate, Mr. Law, on behalf of Golden West Cooperative, testified that no transiting is charged to Qwest because Qwest traffic is toll traffic. Based on this, Mr. Law claims, as does Golden West's brief, that there is no discriminatory treatment of traffic. *See* HT 579. *See* also Golden West Companies' brief at page 63 ("As Mr. Law explained, however, there are not transiting charges assessed to Qwest for traffic routed over the skyline to the Custer transport facility because the terminating traffic is strictly "toll traffic" it would instead be subject to access charged.")

The record is clear that interMTA traffic is toll traffic. Given the fact that the Golden West Companies have relied on the distinction of toll traffic versus local traffic to establish it is not discriminating amongst like traffic and, thus, not in violation of SDCL § 49-31-11; clearly all interMTA traffic should not be assessed transiting charge. Golden West Cooperative cannot claim on one hand it is not discriminating between WWC traffic and Qwest traffic because Qwest traffic is toll traffic, but then request transiting for the toll traffic that WWC is delivering. Therefore, WWC respectfully requests the Commission find Golden West Companies may not

[1] The initial interMTA factor was 3%. Pursuant to settlements of the parties, this interMTA factor increases at a set point in the term of the Interconnection Agreement. As the settlement documents have not been finalized, WWC, pursuant to A.R.S.D. 20:10:01:24.03, will request to supplement the record with the new factor upon completion of the settlement documents or submit that factor through stipulation of the parties.

charge transiting on toll traffic.

CONCLUSION

Based on the facts established at the hearing, the legal analysis contained in WWC's original brief and herein, this Commission should find that the Golden West Cooperative is not entitled to charge transiting where there is no transiting charge provided for in the interconnection agreement and the traffic was routed to an affiliated company.

Should the Commission find that transiting is permissible under these facts, the Commission should specifically find that transiting charges are not permissible on any toll traffic delivered by WWC as Golden West Companies' brief has admitted that transiting is not charged to other carriers who are sending toll traffic over the same route to the Custer exchange.

Dated this 26 day of October, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of October, 2006, a true and correct copy of WWC's REPLY BRIEF REGARDING TRANSITING ISSUE was sent via facsimile and by first-class, U.S. Mail, postage paid to:

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