BEFORE THE SOUTH DAKOTA

OFFICE OF HEARING EXAMINERS

In the Matter of the Petitions of Armour Independent Telephone Company, Bridgewater-Canistota Telephone Company, Golden West Telecommunications Cooperative, Inc., Kadoka Telephone Company, Sioux Valley Telephone Company, Union Telephone Company, and Vivian Telephone Company (collectively the "Golden West Companies") for Arbitration Pursuant to the Telecommunications Act of 1996 to Resolve Issues Relating to Interconnection Agreements with WWC License L.L.C. ("Western Wireless").	Docket Nos. TC06-036 TC06-037 TC06-038 TC06-039 TC06-040 TC06-041 TC06-042

WWC LICENSE L.L.C.'s BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

COMES NOW, the above-named WWC License, L.L.C. (hereinafter "WWC"), by and through its counsel of record, Talbot J. Wieczorek of Gunderson, Palmer, Goodsell, & Nelson, LLP, and Stephen B. Rowell of Alltel Communications, Inc., and hereby files this Brief in Support of WWC's Motion for Reconsideration of the Decision of Hearing Officer Hillary J. Brady dated September 26, 2006. WWC brings this motion requesting the Hearing Officer reconsider and modify a decision WWC believes is contrary to law and facts. This motion is also presented for the purpose of clarifying the record before review of the Hearing Officer's proposed decision is pursued before the South Dakota Public Utilities Commission (hereinafter "PUC").

FACTUAL AND PROCEDURAL BACKGROUND

The facts relevant to the resolution of the Motion to Dismiss Certain Issues Raised by Western Wireless presented by the Golden West Companies (hereinafter Golden West) can be summarized in a very brief manner. The pleadings are clear and the only relevant underlying facts include sparse negotiations between the parties.

Dan Davis, a representative of Golden West, proposed an interconnection agreement for WWC's review on February 23, 2006. Memorandum in Opposition to Western Wireless Motion to Dismiss Entire Proceeding, Exhibit A at 4.[1] On March 17, 2006, Ronald Williams, a representative of WWC, expressed his interest in discussing anticipated negotiations. Id. at 3. Several days later on March 20, 2006, Mr. Davis suggested that the parties develop a list of "potential" issues of disagreement. Id. The same day, Mr. Williams responded by enumerating "some" of the "significant issues" the parties would need to resolve. Id. at 2. Mr. Williams expressed a willingness "to negotiate both factors and applicable rate for interMTA traffic." Id. Over the course of the next week Mr. Davis and Mr. Williams attempted to determine the distance between their respective positions regarding the list of issues identified by Mr. Williams. Id. at 1-2. On March 22, 2006, Mr. Davis indicated a desire to avoid arbitration and requested that Mr. Williams "draft some proposed contract language on the issues you presented in your email[.]" Id. at 2. Golden West sought arbitration on May 3, 2006.

Essentially, this email string constituted the entirety of the negotiations concerning the new interconnection agreement. The parties never discussed the specific terms or language of the interconnection agreement and WWC never agreed to Golden West's proposal. Affidavit of Ronald Williams in Support of Motion to Reconsider Dismissal, Exhibit A at ¶4. A representative of Golden West agreed. Denny Law stated in his Prefiled Testimony at p. 6, l. 4-5 that "[n]egotiations between the parties did not result in an agreement on the terms and the conditions of new interconnection agreements."

Golden West moved to dismiss issues raised by WWC in its Response to the petition for arbitration. A telephonic motion hearing was conducted by the Hearing Officer. Pursuant to SDCL § 1-26D-6, the Hearing Officer issued a decision resolving the motion to dismiss in favor

[1] The email string is also included as Exhibit A to the Affidavit of Ronald Williams in support of this motion.

of Golden West's motion and requested Golden West's attorney draft the proper order. Based upon Golden West's proposed interconnection agreement, affidavits indicating that negotiations occurred but not specifying any relevant discussions, one short email string, and WWC's admission that their own proposed interconnection Agreement was first submitted to Golden West in their response to the arbitration petition, the Hearing Officer determined the issues that are deemed open and those that are closed for the purpose of the upcoming arbitration. The Hearing Officer should reconsider the decision, as it is contrary to the law and further based upon a misinterpretation of the underlying facts of this matter.

ARGUMENT AND ANALYSIS

Initially, WWC must point out the unjust result produced by the Hearing Officer's decision. Golden West submitted a proposed interconnection agreement to WWC for review. WWC did not accept one single term of the contract. This fact is acknowledged by both parties. Instead, WWC chose to initially focus the discussions of the parties, at the request of Golden West, upon several of the most significant issues. The parties never even reached the stage of negotiating the entire myriad of issues which must be resolved prior to the creation of an interconnection agreement. The negotiations were sparse, in large part because of the substantial litigation involving Golden West and WWC concerning the previous expired interconnection agreement. Within this present matter, Golden West elected, as they are entitled under federal law, to seek arbitration of disputed unresolved terms of the interconnection agreement. Golden West claims that their proposed interconnection agreement constitutes the base contractual terms of the contract and asserts that every issue WWC seeks to arbitrate, but did not specifically discuss during the so-called negotiations is completely off limits.

Apparently Golden West believes that the proposed interconnection agreement, which WWC never accepted, somehow closed discussion and negotiation concerning essential terms

and conditions of the final agreement of the parties with respect to many of the issues. Although the most basic contract principles indicate that silence cannot be construed as acceptance, see Terminal Grain Corporation v. Rozell, 272 N.W.2d 800, 802 (S.D. 1978), Golden West believes this to be the case. However, Golden West's argument is contrary to basic contract law. The absurdity of this matter simply cannot be understated. Every single term of Golden West's proposed interconnection agreement was open when they filed for arbitration.

Golden West's ridiculous argument does not end here. Not only does Golden West seek to force its own proposed interconnection agreement upon WWC, but subsequently requested that the issues available for resolution through arbitration be significantly limited. The Hearing Officer agreed with Golden West and exacerbated this absurd situation with an exceptionally narrow interpretation of federal law which effectively prevents WWC from addressing issues related to interMTA traffic, presenting an alternative contract and issues related to a tandem compensation rate on all calls that pass through WWC's mobile switching center.

Golden West's legal analysis misinterprets the applicable law. 47 U.S.C. § 252(b)(1) allows the parties to pursue mandatory arbitration of "open issues." The statute does not define the phrase or further address the applicability of the language in any manner and only a limited number of cases discuss the interpretation of this statutory provision. The lack of authority regarding this matter is likely due to the fact that matters which are considered "open" are generally not subject to dispute. Such matters are not generally disputed because the issues normally enumerated in the petition and response are critical to the formulation of the interconnection agreement and, therefore, are open. In fact, 47 U.S.C. § 252(b)(4)(C) affirmatively requires that a state commission "shall resolve each issue set forth in the petition and the response[.]"

Golden West cites US West Communications, Inc. v. Minnesota Public Utilities Commission, 55 F.Supp.2d 968 (D. Minn. 1999), in support of their argument. In US West, the federal court resolved arguments concerning the "open issue" language of 47 U.S.C. § 252. Id. at 976-977, 985. Notably, the primary dispute concerned the authority of the Minnesota Public Utilities Commission to require US West to provide information to the other party. The court recognized that the only limitation the federal statutes place upon an "individual issue addressed by a state commission during arbitration are that the issue must be: (1) an open issue and (2) that resolution of the issue does not violate or conflict with § 251." Id. at 986. The court appropriately noted that the phrase "open issue" simply reflects limiting language for the purpose of preventing a state commission from imposing any requirement of its choosing. Id. at 976-977. The court also recognized that the parties can bring "any" unresolved interconnection issue before the state commission for arbitration." Id. at 985.

Golden West, however, takes a quotation from this case out of context and argues that the statute limits the scope of the arbitration to issues which the parties specifically negotiated. Memorandum in Support of Motion to Dismiss Certain Issues Raised by Western Wireless at 8 (citing US West, 55 F.Supp.2d at 985). Within the context of construing the phrase as a limitation upon the scope of a state commission's authority and conduct, Golden West's argument is plausible. A state commission simply cannot raise issues or impose conditions which the parties have not placed before them for resolution. However, Golden West's incorrect argument has resulted in a decision adopting a very strict and narrow interpretation of the phrase "open issue" to include the requirement that an issue be actively negotiated before it is considered "open." Golden West's argument is based on US West and a second case, Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co., 350 F.3d 482 (5th Cir. 2003). A

careful reading of US West reveals the inescapable conclusion that this case simply lends no support to such a narrow interpretation of the phrase "open issue."

In Coserv, the Fifth Circuit considered the meaning of the phrase "any open issues." Coserv, 350 F.3d at 486. The question before the court focused on whether issues outside the scope of 47 U.S.C. § 251 could be subjected to compulsory arbitration. The court held "that where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under §252(b)(1)." Id. at 487. In other words, any issue addressed during negotiations but not resolved can be arbitrated. The court did limit its holding to provide that only issues voluntarily arbitrated could be subjected to compulsory arbitration. Id. at 484. This limitation precludes arbitration of those issues which an ILEC does not have the duty to negotiate. Id. at 488. Accordingly, in the Fifth Circuit, if an ILEC is not required to negotiate a particular issue it can't be forced to arbitrate that issue. Under certain circumstances, this limitation would be logical to prevent the parties from raising any issue of their choosing during the arbitration. The ILEC in Coserv was not required to negotiate the disputed issue concerning compensated access rate because that issue would potentially be subjected to appropriate state remedies. Id.

This harsh limitation, while logical in certain limited circumstances wherein one party is attempting to abuse the arbitration process, must not be extended beyond the limited facts of Coserv to apply in this instance. Golden West seeks to use the rationale of Coserv as a sword to wield indiscriminately whenever parties do not reach certain issues for negotiation. Contrary to the factual situation in Coserv, tandem switching as a component of reciprocal compensation and WWC's proposed agreement fall within the realm of matters which the PUC is entitled to consider during the arbitration process, within the terms which the parties are required to

negotiate, and within the terms that the parties actually negotiated. The issues relate to reciprocal compensation and rates applicable to terminated traffic.

Regarding the interMTA issue, the Golden West Companies listed interMTA factors and rates as part of their negotiation question. But now, have obtained a dismissal on interMTA factors regarding traffic delivered to WWC. If interMTA traffic is at issue, all things touching on interMTA traffic should be heard. Moreover, it is clear from the emails that were proffered by the affidavit of Dan Davis that interMTA factors were discussed and being considered. As recognized by Mr. Williams, WWC was looking for a net factor where interMTA traffic being delivered to WWC would offset the factor of that being delivered by WWC to the Golden West Companies. Williams affidavit ¶ ____.

If the holding of Coserv was applied in this situation, virtually no term of the proposed interconnection agreement would be subject to arbitration because of the fact that no meaningful negotiation occurred. A literal application of Coserv to this matter would create a result which is patently unfair and contrary to the purpose of federal law.

The Hearing Officer should not read the phrase "open issues" in this matter in the same manner as Coserv, but should look at the true rationale of US West for the true purpose of the phrase and consider the applicable discussion in TCG Milwaukee, Inc. v. Public Service Commission of Wisconsin, 980 F.Supp. 992 (W.D. Wis. 1997).

In every proceeding, "the first requirement imposed on parties petitioning for arbitration is to identify what matters stand in the way of a finished, functioning agreement. Parties must separate unresolved issues from resolved issues and articulate their respective positions on matters under contention." TCG, 980 F.Supp. at 999-1000. State commissions "*are limited to deciding issues set forth by the parties*" and "competing provisions require them to resolve fundamental elements necessary to make an interconnection agreement a working document."

Id. (Emphasis added). For instance, the arbitration and pricing standards indicate that state commissioners "shall" establish interconnection rates. Id. (quoting 47 U.S.C. § 252(c)). Therefore:

> state commissions are accorded considerable latitude to resolve issues within the compass of the pricing and arbitrations standards, *even if these maters are not specifically identified by the parties as open issues in their petitions for arbitration.* An issue as broad and important to an interconnection agreement as what parties will charge one another necessarily will include *sub-issues* that must be addressed by the arbitration panel in order to decide the larger matter. *This is a common sense notion.*

Id. (Emphasis added). Certainly if a state commission is entitled to hear necessary sub-issues which are not even included in the petition for arbitration or in the response, addressing issues critical to compensation which specifically are listed in the pleadings must not be prohibited. The unfair result which would occur if Golden West is allowed to prohibit WWC from arbitrating the issues listed for consideration, while at the same time forcing WWC to accept the terms of the proposed interconnection agreement to which the parties never agreed or negotiated, would seem contrary to the entire purpose of federal telecommunication law – to resolve all the disputed issues so that an interconnection agreement can result.

The fallacy of Golden West's argument is apparent from considering the practical implications of their assertion. Assume, for the purposes of illustration that Golden West and WWC enter negotiations pursuant to 47 U.S.C. § 252. Under Golden West's contention, as a practical matter both parties must immediately propose the terms of an interconnection agreement or risk having the other party's proposal without negotiations because the operable contract. Applying Golden West's ideology, the parties must not only focus upon terms that must be negotiated - but must also protect their record during the negotiations to ensure that an issue remains adequately "open" for the purpose of later arbitration. Negotiations would require each party to carefully draft language for the sole purpose of protecting their right to arbitrate the

issue. Disputes concerning the scope of the arbitration would increase dramatically and would be resolved based upon whether a party used sufficient "magic" language in their communications to ensure that a term is both negotiated and left open for arbitration. The narrow and restrictive interpretation of the law as asserted by Golden West is illogical, unworkable, and lacks any notion of common sense.

WWC's remaining issues addressed in the Hearing Officer's proposed decision include matters related to interMTA traffic originated by Golden West, the appropriate term of the interconnection agreement, and the tandem compensation rate on calls that pass through a mobile switching center. These issues are properly before the PUC, the Hearing Officer should reconsider her decision, and allow WWC to address these matters during the arbitration. The importance of these issues, considering their clear impact on larger matters before the PUC, simply cannot be understated. For instance, billing for tandem switching is actually a part of the reciprocal compensation. Affidavit of Ronald Williams at ¶10. Reciprocal compensation is an issue of fundamental importance in any interconnection agreement. Reciprocal compensation is an issue which the PUC must resolve and, pursuant to TGC, WWC is entitled to present all the relevant issues and even unmentioned sub-issues which may impact the rate. This issue falls outside any application of Coserv and WWC must not be denied the opportunity seek arbitration of this issue.

Even if 47 U.S.C. § 252 could somehow be interpreted in the manner argued by Golden West, which it absolutely should not under the facts and circumstances of this situation, the decision erred in failing to appropriately consider the applicable facts of this matter. WWC listed as an issue for arbitration its entitlement to receive compensation for terminated interMTA traffic delivered by WWC. The "negotiations" clearly reflect the fact that WWC raised this matter as a "significant" issue. In fact, the issue was addressed, albeit briefly but in the same

manner as all the issues, in nearly half of the emails between the representatives of the parties. Reviewing the facts in a light most favorable to the non-moving party, as the Hearing Officer must for the purpose of this motion, there can be no question that all issues related to interMTA traffic and the applicable factors were subjected to negotiations and left "open" for resolution. Thus, even if the rationale of Coserv is deemed applicable in this instance, the interMTA must be heard.

Although the parties specifically noted interMTA as a significant issue for resolution, the proposed decision prohibits the arbitration of any interMTA issue absent the rates and factors necessary to compensate Golden West for delivering WWC's interMTA traffic. Golden West has listed interMTA factors as one of the considerations. While Golden West wishes to only have its claim for interMTA factors and rates heard, the emails talk of interMTA factors being decided. Moreover, a net factor was under consideration. A net factor would be a reduction of the higher factor by the other party's lower factor. For these reasons, the interMTA issue should be heard.

Finally, as to WWC's proposed contract, given that Golden West's own witnesses have stated the terms and conditions of the agreements have not been agreed to, it leaves those issues as open issues. The alternative to allowing WWC's proposed contract is allowing WWC to challenge any terms within the interconnection agreement proposed by Golden West that are disagreeable to WWC. The practicalities of filing the petition and the response makes it better for all parties, including the decision making authority, to have both sides with proposed agreements and, thus, eliminating the options of language to those agreements. For this reason, the agreement of WWC should also be considered.

CONCLUSION

For the reasons set forth above, WWC requests the Hearing Officer reconsider her decision and allow testimony on tandem switching through the mobile network and related charges, the interMTA factor for the traffic delivered by the Golden West Companies to WWC and testimony on the applicable rate. Finally, that the Hearing Officer consider the language as proposed in WWC's agreement.

Dated this 27 day of September, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **WWC LICENSE L.L.C.'s BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION** was served electronically on the 29 day of September, 2006, addressed to:

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