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**VIA EMAIL TO PATTY.VANGERPEN@STATE.SD.US
AND FEDERAL EXPRESS OVERNIGHT DELIVERY**

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

RE: Petitions for Arbitration

Dear Ms. Van Gerpen:

Enclosed for filing, please find an original and ten copies of the Golden West Companies' Brief In Opposition to Request of WWC License, LLC To Use The Office Of Hearing Examiners. As indicated above, these documents have been sent to you via electronic mail in PDF form as well as by Federal Express Overnight Delivery. If you have any questions or concerns regarding these documents, please do not hesitate to contact me.

Best regards.

Sincerely,

CUTLER & DONAHOE, LLP

Meredith A. Moore
For the Firm

MAM/jlh
Enclosures/Attachments

**STATE OF SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION**

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

**BRIEF IN OPPOSITION TO REQUEST OF WWC LICENSE, LLC TO
USE THE OFFICE OF HEARING EXAMINERS**

The Golden West Companies identified in the caption of these matters submit this Brief in opposition to the Request of WWC License L.L.C. (“WWC”) to utilize the South Dakota Office of Hearing Examiners for the arbitration of the interconnection agreement at issue in this consolidated proceeding.

ARGUMENT AND ANALYSIS

On June 16, 2006, WWC, pursuant to SDCL § 1-26-18.3, filed a Request with this Commission seeking to have the above-captioned matters directed to the Office of Hearing Examiners. Simply stated, the request of WWC to use the Office of Hearing Examiners for the arbitration of an interconnection agreement between the Golden West Companies and WWC contravenes the basic tenets of both South Dakota and Federal law.

The South Dakota legislature has enacted statutes prescribing procedures by which an administrative agency reviews a contested case.¹ See SDCL §§ 1-26-16 *et seq.* WWC would

¹A contested case is a proceeding, “including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” SDCL 1-26-1 (2).

have the Commission believe that the terms of SDCL § 1-26-18.3² deprive it of its jurisdiction to preside over the arbitration of this matter. However, to look only to the language of the statute is to ignore the responsibility of this Commission as delegated by the United States Congress in 47 U.S.C. § 252, as well as the legal and practical ramifications that such a delegation of this Commission's authority would produce.

1. SDCL § 1-26-18.3 IS PREEMPTED BY FEDERAL LAW.

SDCL § 1-26-18.3 is clearly preempted by federal law. Federal law preempts state law in several situations: (1) where Congress has specifically stated that state law is expressly preempted; (2) when federal law “creates a scheme of federal regulation so pervasive that the only reasonable inference is that it meant to displace the states (field preemption);” and (3) when state law and federal law conflict (conflict preemption). See Sheesley v. Cessna Aircraft Co., 2006 D.S.D. 6, ¶75 (citing Davenport v. Farmers Ins. Group, 378 F.3d 839, 842 (8th Cir. 2004). “Congressional intent is the touchstone for determining the preemptive effect of a statute.” Wuebker v. Wilbur-Ellis Co., 418 F.3d 883, 886 (8th Cir. 2005). Further, federal regulations can preempt state law “if the agency intends its regulations to have preemptive effect, and the agency is acting within the scope of its delegated authority.” Chapman v. Lab One, 390 F.3d 620, 634 (8th Cir. 2004).

Congress has enacted a comprehensive statutory scheme providing for the negotiation and arbitration of interconnection agreements between incumbent local exchange carriers and requesting telecommunications carriers. 47 U.S.C. § 252 establishes specific procedures for the

² SDCL § 1-26-18.3 provides:

In any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17.

arbitration and approval of interconnection agreements by state commissions. Congress has further delegated rule making powers to the Federal Communications Commission (the “FCC”), which, in turn, promulgated rules in accordance with which state commissions are to approve interconnection agreements, and Congress specifically delegated the power to arbitrate any open issues regarding interconnection requests to the “state commission.” See 47 U.S.C.A. § 252 (b) and (c).³

In keeping with this Congressional intent, the South Dakota legislature, as envisioned by Congress and the FCC, authorized this Commission to resolve issues regarding interconnection pursuant to Congress’ prescribed procedures. See generally SDCL §§ 49-1-2; 49-31-81 (“...either party may petition the commission to mediate or arbitrate any unresolved issues as provided in 47 U.S.C. § 252”). This Commission operates in a unique federally deputized capacity, charged with carrying out those responsibilities as delegated to it by 47 U.S.C. § 252. It is significant to note that this Commission holds a position exceedingly different from that held by the State Office of Hearing Examiners and those officials who comprise it.

This Commission is a separate elected body tasked with the responsibility of overseeing a highly specialized and federally regulated area of the law. The federal preemption of this field of law is clearly recognized by South Dakota state law as set forth in SDCL § 49-31-3, which provides in relevant part: “The commission has general supervision and control of all telecommunications companies offering common carrier services within the state *to the extent*

³ In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

- (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

such business is not otherwise regulated by federal law or regulation.” (emphasis added).

Those powers regarding interconnection with which this Commission has been charged to administer are prescribed by and firmly entrenched in federal law. Accordingly, any state law which conflicts with the power derived from federal law is preempted.

It must be noted, however, that as defined by federal law, a state commission “shall also include any person or persons to whom the state commission has delegated its authority under sections 251 and 252 of the Act.” 47 C.F.R. § 51.5. Therefore, while Congress specifically requires a state commission to conduct arbitrations in accordance with certain standards, the FCC, pursuant to its rulemaking authority, also permits a state commission to delegate its authority to an individual or group of persons. However, nowhere in the Telecommunications Act of 1996 or in the FCC implementing Regulations, is a state legislature permitted to oust a state commission of its Congressionally delegated authority to preside over arbitration proceedings.

Indeed, the relevant enactments by the South Dakota Legislature reflect this understanding. The Legislature has provided that this Commission will preside over and arbitrate those unresolved issues relating to interconnection agreements. See A.R.S.D. 20:10:01:01.01(1) (defining “Commission” as “the Public Utilities Commission of the state of South Dakota); A.R.S.D. 20:10:32:32 through A.R.S.D. 20:10:32:35 (setting forth basic arbitration procedure). It is the language of the afore-mentioned South Dakota administrative rules, read in concert and consistently with 47 C.F.R. § 51.5, that are intended to be controlling in the instant circumstance, and not SDCL § 1-26-18.3 which, according to WWC, ostensibly requires direction of these consolidated cases to the Office of Hearing Examiners in direct conflict with the directions of federal law.

Because Federal law, not South Dakota law controls this issue, this Commission cannot be forced to surrender the authority delegated to it by Congress to another agency. It *may*, in its discretion, delegate its authority to a designated person or persons should it choose to do so. However, Congress specifically requires that a *state commission* act upon the arbitration of interconnection agreements. See generally 47 U.S.C.A. § 252; see also A.R.S.D. 20:10:32:32 through 20:10:32:35. Even if this Commission determined to delegate the conduct of arbitrations to an administrative law judge or private arbitrator, it is the state commission that is required to approve the final interconnection agreement adopted by arbitration. See 47 U.S.C. § 252(e).

A “state commission” certainly cannot include a person or group of people chosen by one party to an arbitration proceeding and certainly cannot be an administrative law judge chosen by the Office of Hearing Examiners pursuant to state law that is in direct conflict with federal law that has preempted this field. To utilize SDCL § 1-26-18.3 to usurp this Commission’s authority as it relates to interconnection agreements unquestionably conflicts with federal law and was simply not contemplated by the South Dakota legislature. Accordingly, SDCL § 1-26-18.3 is preempted to the extent it conflicts with established federal law.

2. THIS COMMISSION DOES NOT HAVE THE REQUISITE RULES AND PROCEDURES IN PLACE TO PROPERLY GUIDE THE OFFICE OF HEARING EXAMINERS IN ARBITRATING THESE MATTERS.

As a practical matter, there are no rules currently in place which would provide the guidance required to ensure that the above-captioned matters are handled appropriately if the Commission were to accede to WWC’s request and relinquish its jurisdiction. The South Dakota Supreme Court has held that in order for there to be a proper delegation of authority from the legislature to an administrative body, there must have been previously established “a sufficient guide or standard to guide the agency.” See, e.g., S.D. Migratory Bird Ass’n v. S.D. Game, Etc.,

312 N.W.2d 374, 375 (S.D. 1981) (holding that to establish a proper delegation of authority from the legislature to an agency, there must have been “A sufficient guide or standard to guide the agency.”). The same premise holds true in this instance, where this Commission is being requested to relinquish its authority without having a sufficient guide or standard in place to guide the Office of Hearing Examiners in handling these proceedings. SDCL § 49-1-11 vests this Commission with the authority to promulgate rules which will govern its proceedings. While there are numerous other states in which commissions do delegate their authority to oversee arbitrations of interconnection agreements by a single arbitrator or panel of arbitrators, those states have a well-defined written procedures in place to guide those specially designated individuals. Neither the South Dakota legislature nor this Commission have set forth a statutory guide or standard to aid it in determining whether it should delegate certain of its powers and responsibilities to a person or persons of its choosing.

Moreover, there is a significant question as to whether the Office of Hearing Examiners is even legislatively vested under South Dakota state law with the authority to undertake the arbitration of the interconnection agreements at issue in this proceeding. Interestingly, the State Office of Hearing Examiners is noted as being “attached to the Bureau of Administration for reporting and budgetary purposes.” SDCL § 1-26D-1. Pursuant to statute, “[h]earing examiners . . . shall hear all contested cases that arise under Titles 10 [Taxation] and 58 [Insurance].” SDCL § 1-26-D-4. According to the plain language of these statutes, it certainly does not appear as if the Office of Hearing Examiners has the power to undertake a specific assignment from this Commission. Admittedly, the statutes provide:

Any agency not covered by this chapter may contract with the Office of Hearing Examiners or any other person to conduct hearings on a case-by-case basis and the power to contract with the office is specifically granted. At the option of the contracting agency, the hearing examiner may exercise the powers granted in

chapter 1-26 and in § 1-26D-6, or the hearing examiner may be hired and have the limited power to conduct the contested case, rule on procedural, evidentiary, and other motions raised by the parties, and provide legal assistance to the contracting agency. The Office of Hearing Examiners may bill the contracting agency for services rendered pursuant to such contracts.

See SDCL § 1-26D-11. However, such an exercise of this Commission's discretion again appears highly inappropriate as there are simply too many open questions about the manner in which such a proceeding would be conducted (and in any event, the applicability of SDCL § 1-26-18.3 is preempted as explained hereinabove). This problem is exemplified upon closer review of the responsibilities that have been delineated for the Office of Hearing Examiners.

The Office is tasked with:

Conduct[ing] hearings with the greatest degree of informality consistent with fairness and the nature of the proceeding before it. In those instances where a more formal proceeding is required, the hearing examiner may apply hearing procedures as set forth in the South Dakota Rules of Civil Procedure chapter 15-6.

See SDCL § 1-26D-1. As previously stated, the arbitration of an interconnection agreement is by no means an informal or simple proceeding. Moreover, there is no set of rules present in either the Administrative Rules or the South Dakota Rules of Civil Procedure which set forth an adequate procedural framework from which the Office of Hearing Examiners could find guidance for the arbitration of the highly technical and specialized issues presented by cases such as the instant proceedings.

Furthermore, there is no indication in the request of WWC as to whether the selected administrative law judge or other individual from the Office of Hearing Examiners would be tasked with making the final determination of those issues raised in this arbitration or whether that decision would be subject to final approval from this Commission. As stated above, it is imperative that this Commission has the authority to approve any interconnection agreement as

is contemplated by 47 U.S.C. § 252(e) and by A.R.S.D. 20:10:32:33 and 20:10:32:35⁴ but there is a question as to whether this Commission could overrule those decisions rendered by the Office of Hearing Examiners and whether those issues could be re-litigated in front of this Commission. Specifically, SDCL § 1-26D-7, which discusses the finality of decisions made by hearing examiners, provides:

An agency may provide by rule that proposed decisions in all or in specified classes of cases before that agency, or by order in individual cases, will become final without further agency action unless, within a specified time, the agency determines that the proposed decision should be reviewed or a party to the proceeding files a petition for administrative review of the proposed order. Upon occurrence of either event, notice shall be given to all parties to the proceeding.

SDCL § 1-26D-8. provides:

The reviewing agency shall personally consider the whole record or such portions of it as may be cited by the parties. If the reviewing agency rejects or modifies proposed findings or a proposed decision, it shall give reasons for doing so in writing. In reviewing proposed findings of fact entered by the presiding hearing examiner, the reviewing agency shall give due regard to the hearing examiner's opportunity to observe the witnesses.

These statutes clearly conflict with those contained in Chapter 49 as well as the Administrative Rules which were promulgated to assist this Commission in complying with its Federal mandate, and further establish that neither the South Dakota legislature nor this Commission ever contemplated relinquishing its power to arbitrate and approve interconnection agreements.

One must question the expediency and efficiency of this process given the myriad questions which exist concerning the arbitration process which the Office of Hearing Examiners

⁴ A.R.S.D. 20:10:32:33 provides:

An arbitrated agreement shall be submitted to the commission for approval within 60 days after the issuance of the commission's decision on the petition for arbitration, unless the commission otherwise orders or good cause is shown to extend the 60 day time period. The request for approval of an arbitrated agreement must set forth each party's position as to whether the agreement should be adopted or modified and contain a separation explanation by each party of whether the agreement meets each of the specific requirements of 47 U.S.C. §§ 251 and 252.

would be forced to develop in the absence of a guiding statutory or administrative scheme, as well as the process which this Commission would be forced to develop for the review of any arbitrated agreement. To follow WWC's directive of transferring these matters to the Office of Hearing Examiners without having first established those rules would effectively subvert this Commission's authority to make the ultimate determination in arbitration proceedings, which is clearly not what was intended by Congress.

CONCLUSION

The Telecommunications Act of 1996, read together with Chapter 49 of the South Dakota Code, and the South Dakota administrative rules, establish the clear and controlling intention of Congress to delegate authority to this Commission to oversee the arbitration and approval of interconnection agreements. Such a comprehensive scheme cannot be ignored nor can it be subjugated to SDCL § 1-26-18.3. WWC's proposed reading of this statute is clearly inconsistent with established federal law and, accordingly, to the extent that it conflicts with this Commission's federally mandated authority, it must be deemed to be preempted.

Under both federal and South Dakota law, this Commission is assigned significant regulatory responsibilities, which it should not delegate to another person or persons. To delegate that authority to another agency not possessed of the necessary skill and knowledge is to render this Commission a nullity.

For all of the reasons set forth herein, the Golden West Companies respectfully request that this Commission deny the Request of WWC to direct these matters to the Office of Hearing Examiners for all further hearings and proceedings.

A.R.S.D. 20:10:32:35 provides: The commission shall enter an order approving or rejecting the arbitrated agreement within 30 days after submission of the agreement by each party."

Dated this 30th day of June 2006.

Respectfully submitted,

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")

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CERTIFICATE OF SERVICE

On this 30th day of June, 2006, a true and correct copy of the foregoing was transmitted via email to Talbot Wieczorek, of Gunderson, Palmer, Goodsell & Nelson, LLP, 440 Rushmore Road, Rapid City, SD 57701 at tjw@gpgnlaw.com, Stephen B. Rowell, Mailstop 1269 B5-F11-C, One Allied Drive, Little Rock, AR 72202, legal counsel for WWC License L.L.C. at Stephen.B.Rowell@alltel.com, Rolayne Wiest of the South Dakota Public Utilities Commission at Rolayne.Wiest@state.sd.us and Sara Greff of the South Dakota Public Utilities Commission at Sara.Greff@state.sd.us.



One of the Attorneys for Petitioners