STATE OF SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION

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

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CERTAIN ISSUES RAISED BY WESTERN WIRELESS

The Golden West Companies identified in the caption of these matters submit this Memorandum in support of the Motion to Dismiss Certain Issues Raised by Western Wireless (the "Motion") filed contemporaneously herewith, seeking an order from the South Dakota Public Utility Commission ("Commission") dismissing certain issues raised by WWC License L.L.C. ("WWC").

I. Procedural History

On October 21, 2005, WWC notified the Golden West Companies of WWC's intent to terminate the existing interconnection agreements with the Golden West Companies effective December 31, 2005, and WWC also requested that the Golden West Companies enter into negotiations with WWC to establish a new interconnection agreement for the transport and termination of telecommunications traffic between the Golden West Companies and WWC. The parties engaged in negotiation, as recited in the Golden West Companies' arbitration petitions, until May 3, 2006, when during the arbitration window as set forth is 47 U.S.C. § 252(b), Golden West Companies filed for arbitration.

Each of the Golden West Companies filed separate petitions for arbitration before the Commission to arbitrate certain unresolved terms and conditions of proposed interconnection agreements between each of the Golden West Companies and WWC. On May 30, 2006, WWC filed a response (the "Response") to the Petitions to which WWC attached a proposed interconnection agreement as Exhibit 1. On June 5, 2006, the Commission entered its Order consolidating the Arbitration Proceedings, and on June 9, 2006, the Commission entered its further Order setting a procedural schedule and hearing.

In its Response, WWC introduced for the first time new "sub-issues" in connection with the issues set forth in the Petitions, raised twelve additional issues not raised in the arbitration petitions filed by the Golden West Companies, and attached a draft interconnection agreement that had never been previously provided to Golden West Companies. Included in these issues were the following issues and previously undisclosed interconnection agreement form that had not been part of the negotiation process (the "Non-negotiated Issues"):

- New Sub-issue to Issue 1: WWC's proposal to bill a reciprocal compensation rate based on its own forward-looking rates.
- New Sub-issue to Issue 2: WWC's request that the interconnection agreement provide that WWC be paid compensation for the termination of interMTA traffic originated by the Golden West Companies.
- Issue 6: What is the appropriate term of the Interconnection Agreement?
- Issue 13: Is Alltel entitled to a tandem compensation rate on all calls that pass through its mobile switching center?
- Issue 14: Whether the Petitioners must allow resale of retail services?
- Issue 15 Whether Petitioners should allow Alltel to connect to any selective routers of Petitioner for the purpose of implementation of E911?
- Previously undisclosed Interconnection and Reciprocal Compensation Agreement attached to the Response as Exhibit 1.

II. Statement of Facts

During the negotiation process, under 47 U.S.C. § 252, WWC did not raise Non-negotiated Issues. The evidence that demonstrates this fact with regard to each Non-negotiated issue is as follows.

A. New Sub-issue to Issue 1: WWC's proposal to bill a reciprocal compensation rate based on its own forward-looking rates.

The proposal that WWC would bill a reciprocal compensation rate based on its own forward-looking rates was never presented by WWC during the parties' negotiations or raised by WWC. Consequently, WWC should be barred from now raising the possibility that it may present its own forward-looking cost study for the ostensible purpose of establishing a separate reciprocal compensation rate. The following evidence supports the foregoing factual statements:

1. The affidavit of Denny Law, paragraph 7, attached to the Motion as Exhibit A;
2. The affidavit of Dan Davis, paragraph 7, attached to the Motion as Exhibit B; and
3. The affidavit of George Strandell, paragraph 7, attached to the Motion as Exhibit C.

B. New Sub-issue to Issue 2: WWC's request that the interconnection agreements provide that WWC be paid compensation for the termination of interMTA traffic originated by the Golden West Companies.

The proposal that WWC would include provisions in the interconnection agreements to provide that WWC be paid compensation for the termination of interMTA traffic originated by the Golden West was never presented by WWC during the parties' negotiations or raised by WWC. Consequently, WWC should be barred from now raising a claim that it is entitled to such a provision in interconnection agreements or to claim in this arbitration that it is entitled to compensation for the termination of interMTA traffic originated by the Golden West Companies. The following evidence supports the foregoing factual statements:

1. The affidavit of Denny Law, paragraph 7, attached to the Motion as Exhibit A;
2. The affidavit of Dan Davis, paragraph 7, attached to the Motion as Exhibit B; and
3. The affidavit of George Strandell, paragraph 7, attached to the Motion as Exhibit C.

C. Non-negotiated Issue 6

The interconnection agreement form that was transmitted between the Golden West Companies and WWC contained a provision for the term of the interconnection agreement. Changing or modifying the term in the interconnection agreement was never negotiated between the parties or raised by WWC. Consequently, the term in the draft agreement attached to the arbitration petitions should be accepted as the term of the agreement, and Issue 6 raised by WWC in the Response should be dismissed. The following evidence supports this factual statement and WWC failed to provide any evidence to support WWC's denial of the request for admission regarding Issue 6 sent to WWC:

1. The affidavit of Denny Law, paragraph 7, attached to the Motion as Exhibit A;
2. The affidavit of Dan Davis, paragraph 7, attached to the Motion as Exhibit B;
3. The affidavit of George Strandell, paragraph 7, attached to the Motion as Exhibit C; and
4. The responses to discovery served by WWC upon the Golden West Companies, dated June 30, 2006, and attached to the Motion as Exhibit D. See response to Request for Admission 6 and response to Interrogatory 37.

D. Non-negotiated Issue 13

The issue of tandem compensation was never negotiated between the parties or raised by WWC. Consequently, this issue should be dismissed. The following evidence supports this factual statement and WWC failed to provide any evidence to support WWC's denial of the request for admission regarding Issue 13 sent to WWC:

1. The affidavit of Denny Law, paragraph 7, attached to the Motion as Exhibit A;
2. The affidavit of Dan Davis, paragraph 7, attached to the Motion as Exhibit B;
3. The affidavit of George Strandell, paragraph 7, attached to the Motion as Exhibit C; and
4. The responses to discovery served by WWC upon the Golden West Companies, dated June 30, 2006, and attached to the Motion as Exhibit D. See response to Request for Admission 7 and response to Interrogatory 37.

E. Non-negotiated Issue 14

The issue of resale of retail services was never negotiated between the parties nor was it raised by WWC. Consequently, this issue should be dismissed. The following evidence supports this factual statement and WWC admitted in discovery that Issue 14 had not been raised in negotiations:

1. The affidavit of Denny Law, paragraph 7, attached to the Motion as Exhibit A;
2. The affidavit of Dan Davis, paragraph 7, attached to the Motion as Exhibit B;
3. The affidavit of George Strandell, paragraph 7, attached to the Motion as Exhibit C; and
4. The responses to discovery served by WWC upon the Golden West Companies, dated June 30, 2006, and attached to the Motion as Exhibit D. See response to Request for Admission 8.

F. Non-negotiated Issue 15

The issue of connection to selective routers was never negotiated between the parties or raised by WWC. Consequently, this issue should be dismissed. The following evidence supports this factual statement, and WWC admitted in discovery that Issue 15 had not been raised in negotiations:

1. The affidavit of Denny Law, paragraph 7, attached to the Motion as Exhibit A;
2. The affidavit of Dan Davis, paragraph 7, attached to the Motion as Exhibit B;

3. The affidavit of George Strandell, paragraph 7, attached to the Motion as Exhibit C; and

4. The responses to discovery served by WWC upon the Golden West Companies, dated June 30, 2006, and attached to the Motion as Exhibit D. See response to Request for Admission 9.

G. Previously undisclosed Interconnection and Reciprocal Compensation Agreement attached to the Response as Exhibit 1.

WWC attached to the Response a previously undisclosed draft interconnection agreement. This undisclosed draft has different language than that contained in the draft interconnection agreement proposed by the Golden West Companies which was the subject of negotiations between the parties. Consequently, this undisclosed draft interconnection agreement was not the subject of any negotiation between the parties. The following evidence supports this factual statement, and WWC has admitted the undisclosed draft was never presented to the Golden West Companies during negotiations.

1. The affidavit of Denny Law, paragraph 7, attached to the Motion as Exhibit A;

2. The affidavit of Dan Davis, paragraph 7, attached to the Motion as Exhibit B;

3. The affidavit of George Strandell, paragraph 7, attached to the Motion as Exhibit C; and

4. The responses to discovery served by WWC upon the Golden West Companies, dated June 30, 2006, and attached to the Motion as Exhibit D. See response to Request for Admission 2.

III. A Party May Not Present an Issue for Arbitration That Was Not Raised During The Negotiation Process

A. History of 1996 Act

For almost fifty years following the passage of the 1934 Communications Act, AT&T was granted a regulated monopoly position as the provider of long distance service in the United States. This structure changed in 1982 with the approval by a Federal Court of a judgment in the

United States Government's antitrust case filed against AT&T which dismantled the Bell System and paved the way for competition in the long distance telephone business. *U.S. v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982). Twelve years later, the telecommunications landscape changed again dramatically in 1996 with the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.*) (the "1996 Act") in which Congress endorsed competition in local exchange telephone markets.

An important component of the 1996 Act was the manner by which competing telecommunications carriers would interconnect and maintain the communications system that existed in the United States that allowed the user of a telephone from one telecommunications carrier to call a customer of another carrier. This process of interconnecting these separate telecommunications networks was addressed in the 1996 Act, and the procedures for negotiation, arbitration and approval of interconnection agreements is set forth in 47 U.S.C. § 252.

B. Requirements of 47 USC § 252

Section 252 sets forth the interconnection process. Section 252 (a) (1) concerns the negotiation of the terms of an agreement between the parties and provides:

> (1) Voluntary negotiations.
>
> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

If the parties have negotiated for at least 135 days, then the 1996 Act allows for a party to file an arbitration action to complete the interconnection agreement by arbitrating the issues that have been raised between the parties but not resolved. The 1996 Act sets forth a detailed

arbitration process that includes, pursuant to 47 U.S.C.§ 252(b)(1), the time period for filing and the scope of the arbitration proceeding. This section provides:

> (1) Arbitration.
>
> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

This statute sets forth the standard directly applicable to the Motion. A party may petition to "arbitrate any *open* issues." (emphasis added) 47 U.S.C. § 252(b)(1). If an issue regarding the interconnection agreement was not raised during negotiation, then the issue is not an "open issue" and cannot be included in the arbitration proceeding.

U.S. West Communications v. Minnesota Public Utilities Commission, 55 F.Supp.2d 968 (D. Minn. 1999) clearly articulated that "parties can bring any unresolved interconnection issue before the state commission for arbitration. The parties are again not limited to issues explicitly enumerated in §251 or the FCC's rules, *but rather are limited to the issues which have been the subject of negotiations among themselves*." *Id.* at 985 (emphasis added).

Similarly, the application of the relevant statutory sections has also been addressed by the Fifth Circuit Court of Appeals in *Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Co.,* 350 F.3d 482, 487-488 (Cir.5th 2003):

> Thus, compulsory arbitration under § 252 begins with a request by a CLEC to negotiate with an ILEC regarding its obligations under § 251. An ILEC is *required* by the Act to negotiate about those duties listed in § 251(b) and (c). During negotiations, however, the parties are free to make any agreement they want without regard to the requirements of § 251(b) and (c). To that extent, the parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations. If the voluntary negotiations result in only a partial agreement, or in no agreement at all, either party can petition for compulsory arbitration of any open issue.
>
> There is nothing in § 252(b)(1) limiting open issues only to those listed in § 251(b) and (c). By including an open-ended voluntary negotiations provision in § 252(a)(1),

> Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the § 252 framework. In combining these voluntary negotiations with a compulsory arbitration provision in § 252(b)(1), Congress knew that these non- § 251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration by the PUC.
> We hold, therefore, 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). The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations. <u>It may arbitrate only issues that were the subject of the voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations.</u> This interpretation comports with the views of the other courts that have reviewed this provision in similar contexts.[FN15]
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> FN15. *See U.S. West Communications, Inc. v. Minnesota Public Utilities Commission,* 55 F.Supp.2d 968 (D.Minn.1999) (holding that "open issues" are limited to those that were the subject of voluntary negotiations). *See also MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.,* 298 F.3d 1269 (11th Cir.2002) (rejecting a district court's conclusion that the compulsory arbitration provision was so broad as to include any issue raised by the petitioning party).

(*Italics* part of original opinion. Emphasis added in <u>underline</u>.)

The inclusion of the "open issue" requirement in the 1996 Act is not only explicit in the statute, but is also logical. Public resources, in the form of time and expense for state commissioners and their staff, and private parties' resources should not be consumed by arbitrating issues that one party did not raise during the negotiation process but nonetheless presents for commission arbitration. The mechanism that the 1996 Act uses to encourage negotiations between the parties is the requirement that only "open issues" can be arbitrated.

IV. The Non-negotiated Issues are Not "Open Issues" and cannot be considered in this Arbitration Proceeding

Clearly, WWC has raised additional issues that were not the subject of negotiations between the parties during the negotiation process. WWC is now prevented by statute from

attempting to arbitrate the Non-negotiated Issues. The arbitration may only involve "open issues" that were the subject of the voluntary negotiations. Consequently, all Non-negotiated Issues identified above are improperly raised, cannot be considered in this arbitration and must be dismissed.

CONCLUSION

For the above reasons, Golden West Companies respectfully request that the Motion be granted and that the Commission dismiss the Non-negotiated Issues and not use or refer to any part of the Undisclosed Interconnection Agreement.

Dated this 1st day of August, 2006.

Respectfully submitted,
THE GOLDEN WEST COMPANIES

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