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

MOTION AND MEMORANDUM IN SUPPORT THEREOF SEEKING ORDER ADMITTING EVIDENCE FROM CT05-001 PROCEEDING

Armour Independent Telephone Co., Bridgewater-Canistota Independent Telephone Co., Golden West Telecommunications Cooperative, Inc., Kadoka Telephone Co., Sioux Valley Telephone Company, Union Telephone Company, and Vivian Telephone Company (the "Golden West Companies") pursuant to SDCL § 15-6-7(b) move the South Dakota Public Utilities Commission ("Commission") for an Order admitting into evidence in this proceeding testimony and exhibits, identified below, that were admitted into evidence *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 regarding Intercarrier Billings*, CT05-001, ("CT05-001 Proceeding") currently pending before the Commission, and for hearing on this Motion at the earliest feasible date pursuant to SDCL § 19-10-5. The Golden West Companies and WWC License L.L.C. ("WWC") constitute all of the parties to the CT05-001 Proceeding.

In the interest of including evidence from the CT05-001 Proceeding that may be of interest to WWC as well as such evidence that is of interest to the Golden West Companies, it is requested that the following evidence be admitted in this proceeding ("CT05-001 Evidence"):

A. Hearing Transcripts Volumes 1 through 5 (plus the hearing transcript to be prepared in connection with the final day of hearings scheduled for August 7, 2006);

B. WWC Exhibits 1 through 21 admitted in evidence (plus any further exhibits offered by WWC and admitted in evidence by the Commission in connection with the final day of hearings scheduled for August 7, 2006); and

C. Golden West Companies Exhibits 1 through 53 admitted in evidence (plus any further exhibits offered by the Golden West Companies and admitted in evidence by the Commission in connection with the final day of hearings scheduled for August 7, 2006).

The hearing transcripts and exhibits may be accessed on the Commission's website at http://www.state.sd.us/puc/commission/dockets/complaint/2005/CT05-001.htm.

ARGUMENT AND ANALYSIS

I. Procedural History

On February 16, 2005, the CT05-001 Proceeding was initiated before the Commission. The CT05-001 Proceeding involves disputes concerning compensation for the exchange of telecommunications traffic between Golden West Companies and WWC before December 31, 2005. Part of such proceeding involves the presentation of evidence regarding the amount of intraMTA and interMTA traffic exchanged between the Golden West Companies and WWC.

On May 3, 2006, 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 (collectively referred to as "Arbitration Proceedings"). The previous interconnection agreement between the parties was terminated by WWC effective December 31, 2005. On May 30, 2006,

WWC filed a response (the "Response") to the Petitions. 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. Direct pre-filed testimony is currently due on August 11, 2006.

II. Efficient Use of Resources Supports Granting the Motion

The amount of interMTA and intraMTA traffic that is transmitted between the parties (the "MTA Issue") must be resolved in both the CT05-001 Proceeding and Arbitration Proceedings. A review of the CT05-001 Evidence demonstrates that the MTA Issue was one of the primary issues presented by the parties in the CT05-001 Proceeding. Similarly, all of the Petitions in the Arbitration Proceedings contain an issue related to the MTA Issue and identified in paragraph 16 of each Petition as follows:

> 16. Issue 2 (Section 7.2.3): What is the appropriate Percent InterMTA Use factor to be applied to non-local traffic exchanged between the parties? Telco proposes that the parties use an InterMTA Use factor based upon the data gathered by the parties and presented to the Commission in Docket No. CT05-001. . .

Clearly, determining of the amount of intraMTA and interMTA traffic that is exchanged between the Golden West Companies and WWC is necessary to resolve the CT05-001 Proceedings and the Arbitration Proceeding.

Golden West Companies have presented significant amounts of evidence regarding the MTA Issue in the CT05-001 Proceeding. To date, there have been five days of hearings held by the Commission on March 8, 9 and 10 and April 17 and 18 of this year. There is also an additional day of hearings scheduled in the CT05-001 Proceeding for August 7, 2006. In addition to the current amount of approximately 1,000 pages of testimony, there have also been more than 70 hearing exhibits presented. The evidence that would be submitted by Golden West

Companies in the Arbitration Proceedings would be very similar and highly duplicative of the evidence already provided to the Commission in the CT05-001 Proceeding.

All of the CT05-001 Evidence has been previously reviewed by WWC and all of the Golden West Companies' witnesses have been subject to cross-examination by WWC through its attorney, Talbot J. Wieczorek. Mr. Wieczorek represents WWC in both the CT05-001 Proceeding and the Arbitration Proceedings. Clearly, WWC has possessed a fair opportunity to review and examine the CT05-001 Evidence. As such, no prejudice will inure to WWC as a result of the admission of this evidence in these Arbitration Proceedings.

Consequently, instead of repeating presentation of evidence already admitted into the record in the CT05-001 Proceeding, it is an efficient use of Commission's and the parties' resources for the Commission to admit the CT05-001 Evidence as evidence in the Arbitration Proceedings and thereby avoid re-presentation of this evidence.

SDCL § 19-10-2 provides:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) Generally known within the territorial jurisdiction of the trial court; or (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Taking judicial notice is mandatory if requested by a party and the finder of fact is supplied with the necessary information to establish that judicial notice is appropriate. SDCL § 19-10-4. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. SDCL § 19-10-5.

The general rule in South Dakota is that judicial notice may be taken of facts that are judicially known, including those facts in a court's own records, prior proceedings in the same case, and the original record in proceedings which are "engrafted thereon or ancillary or

supplementary thereto." *State v. Cody*, 322 N.W.2d, 11, 12 n.2 (S.D. 1982). *See also, Keogan v. Bergh*, 348 N.W.2d 462,464 (S.D. 1984); and *State v. Aspen*, 412 N.W.2d 881, 884 (S.D. 1987).

Similarly, the State of Nebraska has held that when cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *See e.g., J.B. Contracting Servs. v. Universal Surety Co.,* 261 Neb. 586, 624 N.W.2d 13 (2001); *Dakota Title v. World-Wide Steel Sys.,* 238 Neb. 519, 471 N.W.2d 430 (1991).

In *Alexander v. Solem*, 383 N.W.2d 486, 487 (1986), the South Dakota Supreme Court approved a trial court's actions in taking judicial notice of Alexander's entire underlying criminal file, including evidence relating to five prior felony convictions, which the State used to demonstrate that Alexander was a habitual offender. The Court expressly rejected Alexander's argument that the State "improperly supplemented the record" by moving the trial court to take judicial notice of the entire underlying file. *Id.* at 488. The Court cited the above general rule that "[a] court may generally take judicial notice of its own records or prior proceedings in the same case and may take judicial notice of an original record in proceedings which are engrafted thereon or ancillary or supplementary thereto," in making its decision. *Id.* at 489 (quoting *State v. Olesen*, 331 N.W.2d 75, 77 (S.D. 1983)).

Furthermore, in *In the Matter of S.S., T.D., D.D., and S.D., Alleged Dependent and Neglected Children,* 334 N.W.2d 59, 61 (S.D. 1983), the South Dakota Supreme Court specifically rejected the appellants' argument that since the trial court did not rule on the admissibility of evidence from prior cases, the "trial court's references to and reliance on prior

proceedings in its findings of fact and conclusions of law was in error." Rather, the Court stated: "Even if prior proceedings were not formally admitted at the hearing, we have said that 'trial courts may take judicial notice of their own records or prior proceedings in the same case.'" *Id.* (quoting *State v. Olesen*, 331 N.W.2d 75, 76 (S.D.1983)) (citing *State v. Cody*, 322 N.W.2d 11 (S.D.1982)). The Court went on to hold that the trial court was "clearly" taking notice of its own records or prior proceedings in the same case, and that the trial court's actions did not amount to error.

Two noted authors of treatises on evidence have written as follows with regard to the applicability of judicial notice to records of prior cases before the same finder of fact. According to M. Graham, Handbook of Federal Evidence § 201.3 at 72-73 (2d. ed. 1986):

> A court will take judicial notice of its own acts and records in the same case, of facts established in prior proceedings in the same case, of the authenticity of its own records of another case between the same parties, of the files of related cases in the same court, and of public records on file in the same court.

Further, as expressed in McCormick on Evidence § 330 at 927 (E. Cleary 3d ed. 1984):

> It would seem obvious that the judge of a court would take notice of all of the records of the institution over which he presides, but the courts have been slow to give the principle of judicial notice its full reach of logic and expediency. It is settled, of course, that the courts, trial and appellate, take notice of their own respective records in the present litigation, both as to matters occurring in the immediate trial, and in previous trials or hearings. The principle seemingly is equally applicable to matters of record in the proceedings in other cases in the same court, and some decisions have recognized this, but many courts still adhere to the needless requirement of formal proof, rather than informal presentation, of recorded proceedings in other suits in the same court.

That the foregoing authorities speak in terms of "courts" rather than administrative agencies should be of no moment to the Commission. SDCL § 1-26-19 provides that "[t]he rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed."

Thus, the Commission should be guided in its disposition of this Motion by evidentiary principles concerning judicial notice as would be applied by the circuit courts in South Dakota.

The commonality of the MTA Issue, identity of the parties and attorney and the efficiency that would be achieved by not repeating multiple days of testimony and evidence presentation support the granting of the Motion as do applicable legal precedents.

III. Time Constraints on Procedure Schedule Require that Action on Motion is Expedited

Currently, pre-filed direct testimony and exhibits are required to be filed by Friday, August 11, 2006. Accordingly, immediate action is needed on the Motion to have the admittance of the CT05-001 Evidence determined prior to the date for filing of pre-filed direct testimony so as to avoid the preparation and presentation of inefficient and duplicative evidence.

CONCLUSION

For the above reasons, the Golden West Companies respectfully request that the Commission immediately grant the Motion and issue an Order that the CT05-001 Evidence be received into the record in this proceeding, that if necessary a hearing on this Motion be scheduled at the Commission's earliest convenience pursuant to SDCL § 19-10-5, and to take such other and further actions as it deems necessary and appropriate in the premises.

DATED this 1st day of August, 2006.

Respectfully submitted,
THE GOLDEN WEST COMPANIES

By: Meredith A Moore

Ryan J. Taylor
Meredith A. Moore
Cutler & Donahoe, LLP
100 North Phillips Avenue 9th Floor
Sioux Falls, SD 57104
Tel. 605-335-4950
Fax 605-335-4961

and

Paul M. Schudel, NE Bar #13723
James A. Overcash, NE Bar #18627
WOODS & AITKEN LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
(402) 437-8500
(402) 437-8558
Their Attorneys