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July 7, 2006

VIA FAX 1-605-773-3809
 Patricia Van Gerpen
 SD Public Utilities Commission
 500 E Capitol Avenue
 Pierre SD 57501

FROM: Talbot J. Wieczorek

**RE: Alltel Communications and its wholly owned subsidiary WWC License, LLC –
 Arbitration consolidation
 SDPUC Docket File Numbers TC 06-036 thru TC 06-042
 GPGN File No. 5925.060285**

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VIA FAX 1-605-773-3809

VIA EMAIL: Patty.VanGerpen@state.sd.us

Patty Van Gerpen, Executive Director
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre SD 57501-5070

RE: Alltel Communications and its wholly owned subsidiary WWC License, LLC –
Arbitration consolidation
SDPUC Docket File Numbers TC 06-036 thru TC 06-042

Dear Ms. Van Gerpen:

Enclosed for filing please find WWC's Brief in Response to Golden West Companies' Brief in Opposition to Request of WWC License, LLC to Use the Office of Hearing Examiners. The original plus ten copies will be sent via Next Day Delivery today.

If you have any questions, please call me.

Sincerely,



Talbot J. Wieczorek

TJW: klw
Enclosure

- c: Meredith Moore via email
- Paul Schudel via email
- Sara Greff via email
- Rich Coit via email
- Clients

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

Petition of Armour Independent Telephone Company of)	
Hartford, Bridgewater-Canistota Telephone Company)	Docket Nos.
of Hartford', Golden West Telecommunications)	TC06-036
Cooperative, Inc., Kadoka Telephone Company, Sioux)	TC06-037
Valley Telephone Company, Union Telephone)	TC06-038
Company of Hartford, and Vivian Telephone Company)	TC06-039
of Hartford (Collectively the "Golden West)	TC06-040
Companies") for arbitration to resolve issues relating to)	TC06-041
interconnection agreements with WWC License L.L.C.)	TC06-042

**RESPONSE TO GOLDEN WEST COMPANIES' BRIEF IN OPPOSITION TO
REQUEST OF WWC LICENSE, LLC TO USE THE OFFICE OF HEARING
EXAMINERS**

WWC License L.L.C., (hereinafter "WWC") by and through its attorneys of record, Talbot J. Wieczorek of Gunderson, Palmer, Goodsell & Nelson, LLP and Stephen B. Rowell of Alltel Communications, Inc., hereby file this Response to Golden West Companies' Brief in Opposition to Request of WWC License, LLC to Use the Office of Hearing Examiners.

FACTUAL BACKGROUND

WWC License, L.L.C. (hereinafter "WWC") exercised its right to use the Office of Hearing Examiners early in this case. This right was not exercised without regard to the other parties. In fact, after counsel for WWC had preliminary contacts with Commission Counsel and Staff regarding available dates and deadlines, WWC counsel discussed with Golden West's local counsel whether a hearing officer would be more appropriate given the limited days the Commission had for scheduling over the course of several months.

The use of a hearing officer was additionally discussed during a conference call with all counsel including, Commission counsel. Finally, anticipating the fact that there might be several motions filed in this proceeding and the limited number of available days the Commission may

have to hear this matter or preliminary motions, WWC License exercised its right under SDCL § 1-26-18.3 to request the Office of Hearing Examiners to hear the matter and provide proposed Findings and Conclusions and decision to this Commission.

Contrary to Golden West Companies' position, delegation to the Office of Hearing Examiners plainly does not, "contravene[s] the basic tenets of both South Dakota and federal law." Rather, it is WWC's right under South Dakota law to have a contested case heard by the Office of Hearing Examiners. As this Commission has defined arbitration proceedings to be contested cases, the statutory framework that provides WWC the aforementioned right is plainly applicable. Furthermore, this state statutory right is consistent with, and therefore not preempted by, federal law.

Moreover, this Commission's delegation to the Office of Hearing Examiners does not, as Golden West Companies' suggest, strip this Commission of its congressionally delegated authority to preside over arbitration proceedings. Nor is WWC's election to have this contested case heard before the Office of Hearing Examiners a usurpation of this Commission's authority. Rather, the hearing examiner merely provides proposed findings that are later either adopted, modified or rejected in this Commission's final decision. As such, this Commission maintains at all times its authority to render a final decision in the arbitration proceeding.

DISCUSSION

The South Dakota legislature authorized this Commission to implement and comply with the provisions of the Telecommunications Act of 1996. SDCL §§ 49-1-2; 49-31-81. Under this Act, in the case of an interconnection agreement State Commissions are expressly authorized to, "arbitrate any open issues." 47 U.S.C. § 252(b)(1). As such, in 1998, this Commission adopted

administrative rules to govern its arbitration responsibilities as set forth under § 252. *See Generally* A.R.S.D. 20:10:32:29 to 20:10:32:36.

Under these administrative rules, this Commission specifically stated that arbitrations were to be handled as contested cases.

Arbitration conducted as a contested case – Prehearing conference. A petition for arbitration shall be conducted as a contested case. Within 30 days of receiving a petition for arbitration, the commission may hold a prehearing conference.

A.R.S.D. 20:10:32:31 (*emphasis added*). Undeniably, when this Commission adopted this rule, it was aware that the South Dakota statutory scheme contained specific statutes that set forth the proper procedures to handle contested cases. Following this statutory scheme, it is the right of any party to have the Office of Hearing Examiners hear a contested case,

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.

SDCL § 1-26-18.3 (*emphasis added*). It is under this express authority that WWC requested that the Commission use the Office of Hearing Examiners.

WWC's request is properly granted for several reasons. First, state law expressly provides WWC such a right. Second, as delineated below, federal law does not preempt this Commission's authority to delegate to the Office of Hearing Examiners. To the contrary, federal law contemplates such a delegation. Finally, delegating this responsibility to the Office of Hearing Examiners is proper and appropriately preserves this Commission's authority to render a final decision in this arbitration proceeding.

I. Contrary To Golden West Companies' Argument, Federal Law Does Not Preempt SDCL § 1-26-18.3 Because The Federal And State Statutory Schemes Do Not Conflict.

The South Dakota Supreme Court has articulated the preemption doctrine as follows:

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid. The ways in which federal law may pre-empt state law are well established and in the first instances turn on congressional intent.

Dakota Systems, Inc. v. Viken, 2005 SD 27, ¶ 25, 694 N.W.2d 23, 33 (*quoting Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604-05, 111 S.Ct. 2476, 2481-82 (1991)). In analyzing congressional intent, the Eighth Circuit has set forth three distinct circumstances under which preemption may be found,

- (1) ...when Congress expressly forbids state regulation (express preemption);
- (2) when it 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 a law enacted by it directly conflicts with state law (conflict preemption).

Wuebker v. Wilbur-Ellis Co., 418 F.3d 883, 886 (8th Cir. 2005)(*citing English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)). Golden West Companies have not raised an argument under the first two prongs. As a result, Golden West Companies' claim of preemption fails unless they demonstrate conflict preemption. Id.

The federal statutory scheme set forth in § 252 does not conflict with SDCL § 1-26-18.3. To the contrary, federal law expressly authorizes this Commission to delegate arbitration responsibilities. To illustrate, Federal law provides "a State commission" authority, "...to arbitrate any open issues." 47 U.S.C. § 252(b). Notably, the applicable definition of "State

commission” demonstrates that the FCC expressly granted State commissions authority to delegate the arbitration responsibilities set forth under § 252.

Specifically, 47 C.F.R. § 51.5 defines “State commission” as follows,

State commission. A state commission means the commission, board, or official (by whatever name designated) which under the laws of any state has regulatory jurisdiction with respect to intrastate operations of carriers. As referenced in this part, this term may include the Commission if it assumes responsibility for a proceeding or matter, pursuant to section 252(e)(5) of the Act of § 51.320. This term shall also include any person or persons to whom the state commission has delegated its authority under sections 251 and 252 of the Act and this part.

(emphasis added). Under this express language, a State commission consists of its board, officials, and any individuals to which the commission delegated responsibilities. *Id.* Therefore, while § 252 provides “State commissions” the authority to arbitrate any open issues, the FCC contemplated those commissions to include individuals to whom responsibilities were delegated. *Id.* As a result, this federal statutory scheme acknowledges this Commission’s right to delegate certain responsibilities it maintains under §§ 251 and 252, including arbitration responsibilities. As such, the applicable federal authority is consistent with the statutory right in contested cases to have the matter heard by the Office of Hearing Examiners under SDCL § 1-26-18.3.

The above definition of “State commission” renders Golden West Companies’ preemption argument wholly without merit. The argument is without merit because federal law expressly contemplates delegation of the responsibilities set forth under § 252. As such, there is no conflict between the applicable federal and state laws, and as a result no preemption. The Golden West Companies’ brief acknowledges as much. It concedes that 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.” *See* page 6 of Golden

West Companies' brief. As a result, there is no basis for this Commission to conclude that SDCL § 1-26-18.3 is preempted by federal law.

II. Golden West Companies' Purported Questions Regarding The Office Of Hearing Examiner's Authority, Its Procedures, And This Commission's Final Decision Making Powers Are Without Merit Because Each Topic Is Addressed In The Pertinent Statutory Scheme.

There should be no question; the Office of Hearing Examiners is vested with authority to hear contested cases. SDCL § 1-26D-4. While this statute sets forth specific contested cases that must be heard by the Office of Hearing Examiners, this does not limit another agency's ability to have contested cases heard. SDCL §§ 1-26D-1; 1-26D-11. While this specific statute requires certain contested cases to be heard, taxation and insurance cases, it does not overrule or eliminate SDCL § 1-26-18.3. That statute is an elective statute. That statute applies to all commissions and agencies subject to SDCL Chapter 1-26. It borders on the ridiculous to imply that the Office of Hearing Examiners only can hear taxation and insurance cases, which it is obligated to do, but then some how does not have the ability to hear cases that people elect to have them hear under SDCL § 1-26-18.3.

Additionally, the Golden West Companies' suggestion that the Office of Hearing Examiners lacks the appropriate procedural guidance to bring forth its recommended findings and decision is nonsensical. This position ignores the long-term statutory approach adopted by the South Dakota Legislature under the Administrative Rules. *See* SDCL Chapter 1-26. Moreover, by the very statutes cited in the Golden West Companies' brief, this position is incorrect. To illustrate, SDCL § 1-26D-1 provides that a hearing examiner may apply hearing procedures as set forth in the South Dakota Civil Rules of Procedure Chapter 15.6. The South Dakota Rules of Civil Procedure are very extensive and can be used to ensure a proper proceeding. The rules of civil procedure are broader in scope than those established under SDCL

Chapter 1-26 and grant the Office of Hearing Examiners latitude to ensure necessary expert testimony is made available to determine all issues.

Not only is Golden West Companies' argument nonsensical under the pertinent administrative rules and statutes, it is also unsupported by any applicable precedent. While Golden West Companies' purport to rely upon S.D. Migratory Bird Assoc. v. S.D. Game, Fish and Parks Commission, a cursory review of this opinion demonstrates it is not applicable to the facts before this Commission. 312 N.W.2d 374 (S.D. 1981). It is inapplicable because it deals with the legislature delegating responsibilities to an administrative agency. Id. at 375. At no point in the brief opinion does the court have an opportunity to review delegation from an agency to the Office of Hearing Examiners. As such, the authority set forth therein provides no guidance to the Commission. Therefore, Golden West Companies have failed to provide the Commission any basis to find that there are no applicable statutory guides or standards to aid the Officer of Hearing Examiners.

Finally, hearing the contested case does not divest this Commission of its ultimate decision making authority. Rather, the hearing examiner merely makes proposed findings,

The hearing examiner, after hearing the evidence in the matter, shall make proposed findings of fact and conclusions of law, and a proposed decision. The agency may accept, reject, or modify those findings, conclusions, and decisions, and an appeal may be taken therefrom pursuant to chapter 1-26.

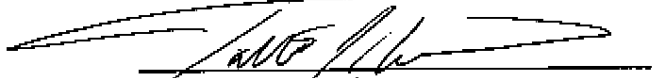
SDCL § 1-26D-6 (*emphasis added*). This Commission retains the final decision making authority. As a result, under § 1-26D-6, there is no support for Golden West's suggestion that the Office of Hearing Examiners would, "subvert this Commission's authority to make the ultimate determination in arbitration proceedings." Therefore, the Commission is bound under SDCL § 1-26-18.3 to utilize the Office of Hearing Examiners for this arbitration proceeding.

CONCLUSION

Based upon the aforementioned arguments and authorities, WWC License, L.L.C., respectfully requests the Commission have the Officer of Hearing Examiners hear this contested case as required by SDCL § 1-26-18.3.

Dated this 7th day of July, 2006.

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CERTIFICATE OF SERVICE

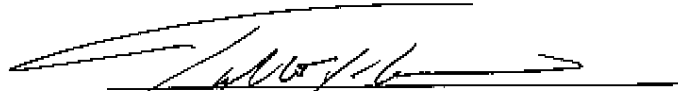
I hereby certify that on the 7th day of July 2006, a true and correct copy of WWC's **REQUEST TO USE OFFICE OF HEARING EXAMINERS PURSUANT TO SDCL § 1-26-18.3** was electronically and by first-class, U.S. Mail, postage paid to:

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