GUNDERSON, PALMER, GOODSELL & NELSON, LLP

ATTORNEYS AT LAW

ASSURANT BUILDING
440 MT. RUSHMORE ROAD
POST OFFICE BOX 8045
RAPID CITY, SOUTH DAKOTA 57709-8045

TELEPHONE (605) 342-1078 • FAX (605) 342-0480
www.gundersonpalmer.com
ATTORNEYS LICENSED TO PRACTICE IN
SOUTH DAKOTA, NORTH DAKOTA, IOWA, NEBRASKA
COLORADO, MONTANA, WYOMING & MINNESOTA

J. CRISMAN PALMER
G. VERNE GOODSELL
JAMES S. NELSON
DANIEL E. ASHMORE
TERENCE R. QUINN
DONALD P. KNUDSEN
PATRICK G. GOETZINGER
TALBOT J. WIECZOREK
MARK J. CONNOT
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DAVID E. LUST

THOMAS E. SIMMONS
TERRI LEE WILLIAMS
PAMELA SNYDER-VARNS
SARA FRANKENSTEIN
AMY K. KOENIG
JASON M. SMILEY
SHANE G. PENFIELD
JONATHAN M. OOSTRA
WYNN A. GUNDERSON
Of Counsel

August 23, 2006

Leo Disburg
Hearing Examiner
Office of Hearing Examiners
210 East 4th Street
Pierre SD 57501

RE: In the Matter of the Petitions of Golden West companies for Arbitration Pursuant to the Telecommunications Act of 1996 to Resolve Issues relation to Interconnection with WWC License, L.L.C. - Arbitration consolidation
SDPUC Docket File Numbers TC 06-036 thru TC 06-042
GPGN File No. 5925.060285
OHE File PUC 6-06

Dear Mr. Disburg:

Enclosed for filing please find WWC's Brief in Opposition to the Golden West Companies' Motion and Memorandum in Support thereof Seeking Order Admitting Evidence from CT05-001 Proceeding and WWC's Motion To Dismiss Arbitration Petition and Response to Petitioners' Motion to Dismiss Certain Issues Raised by Western Wireless in the above-entitled matter.

Please note the motions these pleadings respond to were originally filed in front of the South Dakota Public Utilities Commission. The Commission is in the process of transferring the file to the Office of Hearing Examiners based on a request under SDCL §1-26-18.3. Because of this, I am filing these responses directly with the Office of Hearing Examiners.

I have served all counsel electronically and by U.S. Mail with these pleadings. Please let me know if you need anything else.

Sincerely,

Talbot J. Wieczorek

TJW:klw
Enclosures
c: Clients
Meredith Moore via email
Paul Schudel via email
Rich Coit via email
Rolayne Wiest via email
Kara Vanbockern via email

BEFORE THE SOUTH DAKOTA

OFFICE OF HEARING EXAMINERS

In the matter of the Petitions of Armour Independent Telephone Company of Hartford, Bridgewater-Canistota Telephone Company, Golden West Telecommunications Cooperative, Inc., Kadoka Telephone Company, Sioux Valley Telephone Company, Union Telephone Company, and Vivian Telephone Company of Hartford (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'S BRIEF IN OPPOSITION TO GOLDEN WEST'S MOTION AND MEMORANDUM IN SUPPORT THEREOF SEEKING ORDER ADMITTING EVIDENCE FROM CT05-001 PROCEEDING

WWC License L.L.C. (Alltel), by and through its attorneys of record, Talbot J. Wieczorek, of Gunderson, Palmer, Goodsell & Nelson, LLP, and Stephen B. Rowell of Alltel Communications, Inc., respectfully presents this brief in opposition to Golden West's motion requesting this Court to take judicial notice of the entire proceedings of the matter captioned under court docket no. CT05-001. The entire proceedings of CT05-001 do not fall within the statutory framework of South Dakota's judicial notice statute. Additionally, judicial notice of the proceedings in CT05-001 would effectively eliminate both parties' abilities to attack contrary evidence.

FACTS

The Golden West Companies seek to introduce into evidence in this arbitration the entire record proceeding in CT05-001. The Golden West Companies claim they are entitled to enter the entire proceeding to prove up an interMTA analysis. The Golden West Companies mischaracterize the evidence and issues in CT05-001.

As the Commission realizes, CT05-001 concerns a number of issues. The direct cause of action initiated by WWC License, L.L.C. did not address the interconnection agreement or interMTA issues at all. The counterclaim by the Golden West Companies dealt with the contract language under the previous interconnection agreement.

The Golden West Companies in CT05-001 asserted that WWC had failed to negotiate an interMTA study in good faith. WWC countered that the parties had attempted in good faith to negotiate an analysis but had been unsuccessful. Moreover, WWC contends in that action that the language being relied upon by the Golden West Companies was an agreement to agree and unenforceable. Therefore, the evidence on the counterclaim primarily dealt with how the negotiations had been conducted as opposed to how any studies should be conducted or whether any specific study was accurate.

In fact, it is WWC's position in CT05-001, that the interMTA factor remains at 3% since the parties were never able to mutually agree on how to proceed with a study before the Golden West Companies' advisor unilaterally broke off negotiations in April 2005. The Golden West Companies' evidence was a claim that negotiations should have succeeded and there were various ways to calculate interMTA analysis.

Because WWC's position has always been in CT05-001 that there had been no mutual agreement, WWC did not put on alternative measures of interMTA analysis. Any interMTA study analysis, beyond the negotiations, was secondary. Any testimony regarding how the various interMTA studies, CDR and SS7, proposed by the Golden West Companies (or were conducted) was fairly limited and there was no extensive cross-examination because WWC's position was that the 3% simply stays in place.

Review of the testimony will show that there was little or no testimony by the Golden West Companies' representatives regarding the specific analysis of the CDR information, such

as what search parameters were ran, which numbers were used, etc. For proper cross-examination in this situation, it is necessary for that testimony to be live to allow examination on how the studies were performed, which search criteria were used, and that the raw results be produced by the Golden West Companies, something not done in CT05-001.

It is interesting to note that the Golden West Companies never filed this motion to take judicial notice until after discovery had expired. This appears to be a planned approach to prevent WWC from requesting additional information from Golden West Companies' experts to justify the interMTA study results.

ARGUMENT AND AUTHORITY

Taking judicial notice of evidence deprives a party of the opportunity to attack contrary evidence through the use of cross-examination, rebuttal evidence, and oral and written argument. *Intn'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F3d 66, 70 (2nd Cir. 1998). Therefore, caution must be used when determining a fact to be beyond controversy as required by the federal and state rules authorizing the taking of judicial notice. Fed. R. Evid. 201(b) Advisory Committee Notes.

The taking of judicial notice of an entire record is inappropriate. The Golden West Companies contend the entire record presents an undisputed fact. This is not so. SDCL § 19-10-2 provides the kinds of facts that may be judicially noticed. This section reads:

> 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.

SDCL § 19-10-2. SDCL § 19-10-2 is identical to Federal Rule of Evidence 201(b).

Facts previously adjudicated do not meet either test for indisputability found in Fed. R. Evid. 201(b) and SDCL § 19-10-2. *See Intn'l Star Class Yacht Racing Ass'n,* 146 F3d at 70. For this reason, "[a]s a general rule, a court may not take judicial notice of proceedings or records in

another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F2d 1483 (9th Cir. 1983).

In this situation, the facts the Golden West Companies are asking the Commission to take judicial notice of are not even yet adjudicated. It is testimony in a contested, unresolved case. While there may be an argument that any testimony could be used for cross-examination, this could be done without taking judicial notice of the entire records. Taking judicial notice of the entire record means taking the entire record in CT05-001 and placing it in this record as if all that testimony was rendered in this case. That leaves that prior testimony available for citation for any argument in this arbitration.

The Golden West Companies' brief relies on a number of cases that have allowed judicial notice of some parts of previous records, but only in criminal matters where a criminal history is in play, such as habeas corpus or habitual offender cases or domestic matters where it entails the same action. The Golden West Companies fail to provide a similar case where similar parties and two distinct actions, one being a contract action while the other being an arbitration mandated under federal law, supporting their proposition to take judicial notice for an entire pre-existing case that has yet to be even completly adjudicated.

For example, the Golden West Companies rely on *State v. Cody*, 322 NW2d 11 (S.D. 1982), as providing the general rule in South Dakota that a court may take judicial notice of proceedings in a case other than the case presently before the court. *Motion and Memorandum In Support Thereof Seeking Order Admitting Evidence From CT05-001 Proceeding (hereinafter Motion), at 5-6.* The applicable language of *Cody* reads, "[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." *Cody*, 322 NW2d at n2 (emphasis added).

Cody was an appeal of a trial court order directing the Tripp County Clerk of Courts to retain all currency in her possession as the result of a murder trial where said currency had been admitted into evidence. *Id.* at 11-12. The Clerk of Courts was further ordered to turn over the cash exhibits to the estate of the murder victim. The trial court considered the evidence and documents presented in the murder trial. *Id.* at 12. The appellate court opened its discussion of the trial court's decision to take judicial notice of the murder trial by proclaiming the motion for release of the cash exhibits as being "ancillary" to the previous murder trial. *Id.* The trial court also referred to the murder prosecution as the "principal action." *Id.* The motion to release cash exhibits was "ancillary" to the murder trial; likewise, the murder trial was the principal action. In fact, all documents filed with the trial court regarding the motion for the release of cash were captioned "State of South Dakota vs. William R. Cody." *Id.* at 11. The appeal of the order releasing the cash exhibits to the estate, the very decision the Golden West Companies rely on as providing the general rule, is captioned "State v. Cody." *Motion at 5, 6.* The hearing regarding the distribution of the exhibits used at trial was an extension of the murder trial, therefore, the court was taking judicial notice of proceedings from the same case.

In the present situation, the cases are certainly not the same. In this matter, the Commission has a number of issues to address, one of them being inter- and intraMTA traffic. Case number CT05-001 revolved around whether the parties came to an agreement. How the interMTA factors were derived by the Golden West Companies' expert was not a direct issue and therefore, there was not a lot of cross-examination on how the tests were done or alternative ways of testing. In this pending matter there would be additional cross-examination of any Golden West expert regarding the integrity of his testing and the specifics of the calls actually

counted. WWC should also have the right to call a witness to examine the testing done by the Golden West Companies in this action to provide testimony of any errors, mistakes or misleading results. This cannot be done because this motion was filed after discovery. The Golden West Companies' reliance upon *Cody* is therefore misplaced.

In support of their motion seeking admittance of the evidence from the CT05-001 proceedings, the Golden West Companies also rely on a South Dakota habeas corpus proceeding. In *Alexander v. Solem*, 383 NW2d 486 (S.D. 1986), the habeas corpus court took judicial notice of the petitioner's underlying criminal file. In *Alexander*, petitioner collaterally attacked the trial court's determination of his status as a habitual offender. *Id.* at 487. Taking judicial notice of the petitioner's criminal file was proper, however, as the habeas court was ascertaining whether the petitioner had been represented by counsel in his four previous convictions. The underlying criminal file contained certified copies of the prior judgments of conviction. *Id.* at 488. Therefore, taking judicial notice of the underlying file was "necessary" to determine whether petitioner had been represented by counsel during his previous convictions. *Id.* at 489. However, the Court never took judicial notice of an entire record. Rather, the Court took judicial notice of the criminal files for the limited purpose to ascertain whether the petitioner had been represented by counsel, not to use previous testimony in any way.

In the present situation, it is not necessary to introduce the evidence admitted during the CT05-001 proceedings. As stated above, the present proceeding involves different issues and will therefore require different witnesses, different avenues of cross-examination, different rebuttal evidence and different oral and written arguments. While *Alexander* involves taking judicial notice of prior proceedings, the nature of the case and limited purpose of the notice renders the decision irrelevant to the issue presently before the PUC.

Additionally, the Golden West Companies' reliance on habeas corpus cases is misplaced because habeas corpus proceedings are "collateral" to the principal proceeding. *Smith v. Weber*, 701 NW2d 416, 418 (S.D. 2005). It has been pointed out that courts will take judicial notice of the principal proceeding in collateral matters. 29 Am.Jur.Evid. § 143 (2006). In fact, habeas corpus proceedings have been singled out as allowing liberal taking of judicial notice. *Id.* (*citing Alexander v. Solem*, 383 NW2d 486).

Golden West cites another criminal case, a habitual offender case, *State v. Aspen*, 412 NW2d 881 (S.D. 1987), to support its theory that judicial notice should be taken of the CT05-001 proceedings in their entirety. The South Dakota Supreme Court in *Aspen* stated that the court in a habeas proceeding could have judicially noticed the petitioner's prior criminal record. *Aspen*, 412 NW2d at 884. The relevant portion of *Aspen* relies entirely on *Alexander* and the cases cited therein; therefore, the reasons *Alexander* does not apply to the present situation, as discussed above, apply equally to *Aspen*.

Golden West also cites a proceeding terminating the parental rights of parents, *In the Matter of S.S., T.D., and S.D., Alleged Dependent and Neglected Children*, 334 NW2d 59 (S.D. 1983), for the proposition that courts can take judicial notice of entire files from other cases. The same annotation discussing habeas corpus mentions family law, especially family law cases involving children, as an area allowing liberal taking of judicial notice. 29 Am.Jur.Evid. § 143 (2006). The reasons for liberally taking judicial notice of prior hearings evidencing abuse and neglect specifically in cases involving children are discussed by South Dakota Supreme Court:

> Termination of parental rights are serious matters which touch the basic fabric of our way of life-the family unit. The decision to terminate requires evidence of sufficient magnitude to convince the trial court that the best interests of the children require the breakup of the family unit. This decision cannot be made by focusing the court's attention to one incident while the full picture is ignored.

In the Matter of S.S., T.D., and S.D., Alleged Dependent and Neglected Children, 334 NW2d 59, 61 (S.D. 1983). The same rationale applies to termination proceedings as to habeas proceedings. The only evidence of prior abuse and neglect are the records of previous proceedings. It is therefore necessary to take judicial notice of the previous proceedings in these cases.

Furthermore, both the South Dakota Supreme Court's opinion and the Golden West Companies' memorandum discuss judicial notice being taken of records and proceedings in the "same" case. *Id.*, *Motion at 6.* As has been established, CT05-001 and the present proceeding are not the same case.

The Golden West Companies also rely heavily on Nebraska law. However, the Golden West Companies' interpretation of the case law is again misplaced because Nebraska case law has clearly stated an entire trial record does not fall within the definition of a judicially noticeable fact. Nebraska's version of Federal Rule of Evidence 201(b) is found at Nebraska Revised Statute section 27-210(2), which is identical to SDCL § 19-10-2. In reviewing the extent of judicial notices, the Nebraska Supreme Court has stated that: "an entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in Neb. Rev. Stat. § 27-201(2)." *State v. Ryan,* 444 NW2d 610, 611-12 (Neb. 1989)(emphasis added).

In an attempt to avoid this case, Golden West relies on *J.B. Contracting Servs. v. Universal Surety Co.*, 624 NW2d 13 (Neb. 2001), for the proposition that a court may take judicial notice of its own proceedings and judgments in a former action involving the same parties when the cases are interwoven and interdependent. *Motion at 5.* In *J.B. Contracting,* the Nebraska district court took judicial notice of an order it had entered in a previous case. *J.B. Contracting*, 624 NW2d at 17. The order the district court judicially noted granted summary judgment to one of the parties in a performance bond matter, stating the other party failed to prove the existence of damages. *Id.* The party appealing the taking of judicial notice received

all of its claims based on an assignment from the party against whom summary judgment was granted in the previous matter. *Id.* The order from the previous case granting summary judgment fully determined the controversy between the parties to the appeal. Judicial notice was taken of an order of the district court in a previous case that considered and determined the controversy involved in the case being appealed. *Id.* at 19. In this case, the controversy involved has not been determined by the CT05-001 proceeding. Also, the Golden West Companies seek notice of an entire record. Therefore, the pertinent portion of *J.B. Contracting Servs.* does not apply to the current situation.

Furthermore, the Nebraska Supreme Court recently rejected the argument that *J.B. Contracting Servs.* could be used to take judicial notice of the entire court record of a previous matter. *Strunk v. Strunk,* 708 NW2d 821, 832 (Neb. 2006). The court held that if the trial court were to take judicial notice of its prior proceedings, it should have limited the notice by individually noticing those elements found to be relevant and competent for the issues presented. *Id.*

Even the cases cited by the Golden West Companies do not stand for the proposition that in a civil matter, such as this arbitration, judicial notice of an entire previous civil filing can occur. Moreover, taking judicial notice of any fact, let alone the entire record, in CT05-001 is inappropriate. That matter is still pending. The record is not yet settled in that matter. Thus, that proceeding is still subject to appeal on evidentiary issues and a successful appeal could substantially change the record in that case.

CONCLUSION

Because these cases represent different issues and different legal arguments that impact the type of evidence to put into the record, simply taking judicial notice of the CT05-001 case would rob WWC of its ability to cross-examine fully Golden West Companies' experts regarding

issues that are currently pending in this proceeding. As a requirement of judicial notice is a finding that the facts are not subject to reasonable dispute, judicial notice should be denied.

Judicial notice should also be denied based on the fact that the motion was filed after completion of discovery, preventing WWC from the ability to obtain information from Golden West Companies' experts regarding these issues to submit evidence to counter any of the testimony submitted in the previous file.

Dated this 23 day of August, 2006.

Attorneys for Alltel Communications, Inc.
WWC License LLC:

Talbot J. Wieczorek
GUNDERSON, PALMER, GOODSELL
& NELSON, LLP
440 Mt. Rushmore Road, Fourth Floor
PO Box 8045
Rapid City SD 57709
605-342-1078
Fax: 605-342-0480

Stephen B. Rowell
Alltel Communications, Inc.
One Allied Drive
Little Rock, Arkansas 72202

CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of August, 2006, I sent electronically and by first-class mail, postage prepaid, a true and correct copy **MOTION TO DISMISS ARBITRATION PETITION AND RESPONSE TO PETITIONERS' MOTION TO DISMISS CERTAIN ISSUES RAISED BY WESTERN WIRELESS** to:

meredithm@cutlerlawfirm.com
Meredith Moore
Cutler & Donahoe, LLP
100 N Phillips Avenue - 9th Floor
Sioux Falls, SD 57104-6725

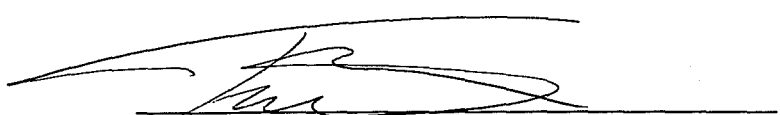
pschudel@woodsaitken.com
Paul M. Schudel
Woods & Aitken, LLP
301 S. 13th Street, Suite 500
Lincoln NE 68508

Kara.Vanbockern@state.sd.us
Kara Vanbockern
Staff Counsel
SDPUC
500 E. Capitol
Pierre SD 57501

Rolayne.wiest@state.sd.us
Rolayne Wiest
Staff Counsel
SDPUC
500 E. Capitol
Pierre SD 57501

Leo Disburg
Chief Hearing Examiner
Office of the Hearing Examiners
210 East 4th Avenue
Pierre, SD 57501

Richcoit@sdtaonline.com
Rich Coit
SDTA
PO Box 57
320 E. Capitol Avenue
Pierre, SD 57501



Talbot J. Wieczorek