

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION OF  
KENNEBEC TELEPHONE COMPANY FOR  
SUSPENSION OR MODIFICATION OF  
47 U.S.C. SECTION 251(b)(2) OF THE  
COMMUNICATIONS ACT OF 1934 AS  
AMENDED

TC04-025

=====

Transcript of Proceedings  
April 6, 2004

**ORIGINAL**

=====

BEFORE THE PUBLIC UTILITIES COMMISSION,  
ROBERT SAHR, CHAIRMAN  
GARY HANSON, VICE CHAIRMAN  
JIM BURG, COMMISSIONER

COMMISSION STAFF  
Rolayne Ailts Wiest  
John Smith  
Karen Cremer  
Greg Rislov  
Harlan Best  
Jim Mehlhaff  
Steve Wegman  
Tina Douglas  
Dave Jacobson  
Michele Farris  
Sue Schaefer  
Pam Bonrud

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**SOUTH DAKOTA PUBLIC**  
**UTILITIES COMMISSION**

APPEARANCES  
Darla Pollman Rogers  
Rich Coit  
David Gerdes  
Jeff Larson

ALSO PRESENT: Rod Bowar

Reported By Cheri McComsey Wittler, RPR

**PRECISION REPORTING**

**L I M I T E D**

1 THE PUBLIC UTILITIES COMMISSION  
 2 OF THE STATE OF SOUTH DAKOTA  
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 4 IN THE MATTER OF THE PETITION OF  
 5 KENNEBEC TELEPHONE COMPANY FOR TC04-025  
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3  
 1 CHAIRMAN SAHR: TC04-025, In the  
 2 Matter of the Petition of Kennebec Telephone  
 3 Company for Suspension or Modification of 47 U.S.C.  
 4 Section 251(b)(2) of the Communications Act of 1934  
 5 as Amended.  
 6 And the question today is how shall the  
 7 Commission proceed. And this one is also on the  
 8 addendum as item No. 3, and the question under that  
 9 is shall the Commission grant the petition for an  
 10 interim suspension of any obligation that may exist  
 11 for a petitioner to provide LNP until six months  
 12 after entry of a final order.  
 13 With that, I would ask the attorney for  
 14 Kennebec to come forward. Thank you.  
 15 MS. ROGERS: Thank you, Mr. Chair,  
 16 members of the Commission.  
 17 I thought it might be helpful to just review a  
 18 little bit the background of how we came to the  
 19 point we're at today and that is for a review and  
 20 ultimately a decision on a temporary suspension  
 21 request of Kennebec.  
 22 Of course, the original obligation of number  
 23 portability is found in Section 251(b)(2) of the  
 24 Act, but that requirement back in 1996 was  
 25 contingent upon technical feasibility, number one,

2  
 1 APPEARANCES BY TELEPHONE  
 2 Mary Sisak  
 3 Ben Dickens  
 4 Talbot Wieczorek  
 5 Dan Wall  
 6 Dan Davis  
 7 Mary Lohnes  
 8 Nancy Vogel  
 9 Colleen Sevold  
 10 Melissa Thompson  
 11 Pamela Harrington  
 12 JoAnne Hohrman  
 13 Warren Vandestadt  
 14 Rich Helsper  
 15 Wayne Akland  
 16 Todd Hansen  
 17 -----  
 18 TRANSCRIPT OF PROCEEDINGS, held in the  
 19 above-entitled matter, at the South Dakota State  
 20 Capitol, 500 East Capitol Avenue, Pierre, South Dakota,  
 21 on the 6th day of April 2004, commencing at  
 22 9:30 a.m.  
 23  
 24  
 25

4  
 1 and, number two, requirements prescribed by the  
 2 Commission.  
 3 Well, as you are aware, those requirements  
 4 came in the form of an FCC order, and it was dated  
 5 November 10, 2003. In that order the FCC required  
 6 local exchange carriers in the nation's top 100  
 7 MSAs to provide LNP to all telecommunications  
 8 carriers including CMRS carriers or wireless  
 9 carriers, and that deadline was May 24, 2003.  
 10 At that time, though, the FCC did recognize  
 11 that small LECs in rural areas would face  
 12 technical, financial, operational, and other  
 13 difficulties by implementing LNP so they gave them  
 14 until May 24, 2004 to comply with the LNP  
 15 requirement.  
 16 So with that background, which is the big  
 17 picture, basic, let's look at Kennebec Telephone  
 18 Company, and that's the docket before you.  
 19 Kennebec has two exchanges. It has 766 access  
 20 lines. Its received LNP requests from two CMRS  
 21 providers, Western Wireless and Verizon.  
 22 Kennebec, once the Order was handed down by  
 23 the FCC, looked at the costs for this small  
 24 company. They studied the implementation issues.  
 25 They looked at routing issues, which have not even

1 yet been addressed or at least definitively by the  
 2 FCC and they ultimately looked at their legal  
 3 options. And that led them to file a petition for  
 4 suspension or modification of the LNP requirement,  
 5 and they did this on February 12 of 2004.

6 Included in that petition was a request for  
 7 temporary suspension of the LNP requirement or a  
 8 relief from the May 24, 2004 implementation  
 9 deadline.

10 So I think what we need to look at today,  
 11 bottom line, is what is the appropriate standard to  
 12 apply when considering the interim temporary  
 13 suspension. At the last Commissioner's meeting,  
 14 which was May 23, 2004, you directed the parties  
 15 and staff to get together to see if we could agree  
 16 upon a procedural schedule.

17 We did that. We made an effort. We made a  
 18 good-faith effort and ultimately determined that we  
 19 could not agree on the proper procedural schedule.

20 Western Wireless argues that this Commission  
 21 needs to look to other areas of the law such as a  
 22 preliminary injunction procedure for an appropriate  
 23 standard and that this Commission needs to hold an  
 24 evidentiary hearing or some type of a hearing prior  
 25 to granting interim suspension.

1 carrier for LNP. These are for the consideration  
 2 on the actual merits of the case, i.e., is the  
 3 Commission going to suspend or modify the  
 4 requirements for these particular carriers.

5 Then the Act provides pending such action the  
 6 state Commission may suspend enforcement of the  
 7 requirement or requirements to which the petition  
 8 applies with respect to the petitioning carrier or  
 9 carriers, such as Kennebec in this case.

10 So what are the actual requirements under the  
 11 Act? The requirements are, number one, that the  
 12 carrier has less than 2 percent of line in the  
 13 aggregate nationwide. And, number two, there must  
 14 be a pending suspension petition before the  
 15 Commission.

16 So the arguments -- to the arguments of  
 17 Western Wireless and others that there is no  
 18 standard, I respectfully disagree. There is a  
 19 standard. There's two standards, and they're right  
 20 here and in the Act. There is a petition pending  
 21 before you. Kennebec has filed a petition.  
 22 Kennebec with 766 lines also clearly has met the  
 23 size standard as well.

24 So it is fair, I think, to conclude that if  
 25 Congress or our State Legislature wanted to impose

1 And I would suggest to you that that's not  
 2 necessary. We are not seeking a preliminary  
 3 injunction. If we were, that's the procedure that  
 4 would be followed.

5 What we are seeking is a temporary suspension  
 6 that you as a State Commission are authorized to  
 7 grant both under the Federal Act and under our  
 8 state law, 49-31-80.

9 So instead of looking at other areas of the  
 10 law or other bodies of law, I suggest that we focus  
 11 on the Act and on our state law to determine the  
 12 proper standard.

13 The Act is entitled Suspensions and  
 14 Modifications For Rural Carriers. And 49-31-80 is  
 15 entitled Suspension or Modification to Carrier With  
 16 Small Service Area.

17 Well, what does the Act do? A LEC with fewer  
 18 than 2 percent of the nation's subscriber lines in  
 19 the aggregate may petition a State Commission for  
 20 suspension or modification of Sections B or C of  
 21 251. And, of course, that would include the number  
 22 portability requirement.

23 Then the Act gives specifically guidelines for  
 24 the state to consider in looking at suspending or  
 25 modifying the requirements of the carrier, a rural

1 standards or additional guidelines to you as a  
 2 State Commission for a temporary suspension, they  
 3 would be here in the Act. And there is a reason --  
 4 the Act is clear on its face.

5 And, remember, in addition, there are --  
 6 there's a safety net. You as a Commission have 180  
 7 days, six months, to decide the ultimate question,  
 8 and that is whether you're going to suspend or  
 9 modify the LNP requirement.

10 So it's not like these cases can drag on  
 11 forever. There's a reason that the bar is low in  
 12 this case, and that is that you have to show that  
 13 there's a pending application. And Kennebec has  
 14 one.

15 So I think that Kennebec has clearly shown  
 16 that a suspension is appropriate under the Act, and  
 17 they've met the burden there.

18 I would further point out that a grant of the  
 19 interim suspension would allow the status quo to be  
 20 maintained while the petition for suspension is  
 21 pending. It would ensure that the Petitioner is  
 22 not required to expend resources for LNP such as  
 23 ordering software or ordering a new switch, which  
 24 ultimately may be unnecessary if you as a  
 25 Commission decide in the hearing on the merits that

1 you're going to either suspend or modify the  
 2 requirements for Kennebec.  
 3 Furthermore, if the interim suspension  
 4 petition is not granted, Petitioner would incur  
 5 costs to begin implementing LNP. They may not be  
 6 recoverable. So it's Petitioner that's going to  
 7 be -- or could potentially be irreparably harmed if  
 8 this suspension is not granted on the interim.  
 9 In addition, if the interim suspension is not  
 10 granted and the Petitioner does not implement LNP  
 11 by May 24, a formal Complaint could be filed  
 12 against the Petitioner in front of the FCC and  
 13 there could be fines levied or forfeitures imposed  
 14 there.  
 15 There is also a question of whether or not if  
 16 Kennebec would have filed a petition for suspension  
 17 earlier, would we still be here requesting an  
 18 interim suspension? And the answer is yes. It is,  
 19 as you've pointed out, unlikely that these cases  
 20 can be physically, realistically heard and  
 21 completed and the Petitioners implement LNP by  
 22 May 24. It's just probably, frankly, impossible.  
 23 And what happens under the Act, and again  
 24 looking at the Act in our statute, there are two  
 25 six-month periods here. The Petitioners have six

1 months -- or the companies have six months to  
 2 implement LNP, and you as a Commission have six  
 3 months to decide a petition or application for  
 4 modification or suspension.  
 5 So those six-month periods cannot  
 6 necessarily -- they can't run simultaneously. If a  
 7 company exercises its option to file for a  
 8 petition, you've got six months. We need the  
 9 interim suspension so that we don't have to incur  
 10 costs ahead of time in case the ultimate outcome is  
 11 a modification or suspension of the requirement.  
 12 Finally, I would also point out that an  
 13 interim suspension would maintain the status quo  
 14 between the Petitioners and the Interveners, and  
 15 the Interveners in this case are not harmed. It's  
 16 going to be business as usual.  
 17 So for those reasons we respectfully request  
 18 the Commission to grant Kennebec's petition for  
 19 temporary suspension.  
 20 CHAIRMAN SAHR: Thank you.  
 21 Mr. Coit.  
 22 Mr. Coit: Thank you. My name is  
 23 Richard Coit. I'm here today representing SDTA.  
 24 Mr. Chairman, Commissioners, and staff, I don't  
 25 think I need to add too much. I think Ms. Rogers

1 stated the case very well in terms of why an  
 2 interim suspension should be granted.  
 3 I would like to offer just a couple of  
 4 comments. We disagree as well with the argument  
 5 that the preliminary injunction standard should  
 6 apply in regards to deciding the request for  
 7 interim suspension.  
 8 And I think it's helpful to just ask the  
 9 question why did Congress include in the Federal  
 10 Act the language that specifically allows for an  
 11 interim suspension?  
 12 And I would say they did that for two reasons.  
 13 They recognize, number one, that the process of  
 14 reviewing a petition for suspension or modification  
 15 on the merits may take some time. And they also  
 16 recognize that if a decision -- if no interim  
 17 suspension is permitted and the deadline passes and  
 18 the company is required to, as a result, implement  
 19 the requirement or obligation that's being debated,  
 20 effectively the case is moot at that point.  
 21 You can't take it back. You don't implement  
 22 LNP and then later say, well, we don't need to  
 23 implement LNP so we're going to take it out of our  
 24 switch and we're going to get our money back. It  
 25 doesn't work that way.

1 So I think, you know, those are the two basic  
 2 reasons. They understood the process was going to  
 3 take some time, and they also understood that  
 4 without an interim suspension you may force  
 5 companies prematurely -- before you can actually  
 6 look at the case and decide the case on the merits,  
 7 you may prematurely decide that they're subject to  
 8 the requirement or obligation.  
 9 There are due process concerns with respect to  
 10 not granting the interim suspension. And it's been  
 11 noted a couple of times this morning, you know, how  
 12 much time is it going to take to complete these  
 13 cases?  
 14 Realistically, I don't think anybody can say  
 15 we can complete all of these cases by May 24. It's  
 16 not going to happen. And if that's something that  
 17 could happen, we wouldn't be here today. But  
 18 that's not something that can happen, to my  
 19 understanding.  
 20 Western Wireless has submitted a letter dated  
 21 April 5 that references an FCC case that I would  
 22 just like to comment on. There are certain  
 23 standards in that FCC case that deal with a request  
 24 for a stay. That decision deals with something  
 25 different than what we're dealing with here.

1 We're asking for relief that is specifically  
 2 provided for under the federal statute and under  
 3 the state statute. That case dealt with a  
 4 challenge to the FCC's underlying order that has  
 5 led to all of this, and the question of whether  
 6 there should be some stay of that order pending the  
 7 review of the petition that was filed by USDA and  
 8 Century Tel and others.

9 And we don't have that situation here. It's  
 10 just not the same situation. So I don't believe  
 11 that that decision really offers much here in terms  
 12 of deciding what the standard should be on the  
 13 interim suspension.

14 We believe that the Commission can grant this  
 15 interim suspension based on the petitions  
 16 themselves. There's plenty of information in those  
 17 petitions. And, as I indicated, without granting  
 18 interim suspensions you're effectively deciding the  
 19 case before you have an opportunity to sit back and  
 20 look at all of the evidence and evaluate it and  
 21 determine whether it really does make sense and  
 22 whether it's in the public interest to implement  
 23 LNP or not.

24 The other thing that I would like to comment  
 25 on is harm. Ms. Rogers mentioned the potential

1 harm to Kennebec. And I think it's worthwhile to  
 2 look at, you know, harm on both sides. What's the  
 3 harm to the other parties. We're facing a  
 4 situation here where the Commission has to get this  
 5 done in 180 days. You don't have any choice but to  
 6 do that.

7 And in addition to that, does Western Wireless  
 8 have information that there are a bunch of  
 9 customers in Kennebec requesting LNP right now that  
 10 want it tomorrow? I don't believe that's the case  
 11 either.

12 So I think that, you know, it is also helpful  
 13 to look at the harm and who would be harmed by not  
 14 granting interim suspension.

15 That's all I have. Thank you.

16 CHAIRMAN SAHR: Thank you.  
 17 Mr. Wiczorek.

18 MR. WIECZOREK: Mr. Chairman?

19 CHAIRMAN SAHR: Yes. Do you have  
 20 any comments?

21 MR. WIECZOREK: Yes. First on a  
 22 couple of issues. We did work in good faith. I  
 23 think all counsel got together and tried to figure  
 24 out the best way to deal with this interim relief  
 25 request. As I understood it when we went apart,

1 the big question and the big problem we were having  
 2 in how to exactly do a procedural schedule on the  
 3 interim relief question was what standard did the  
 4 Commission wish to use in making the interim relief  
 5 determination.

6 It's true Western Wireless has said this is  
 7 akin to a preliminary injunction. Though, in  
 8 conversation with counsel and staff I've always  
 9 admitted under the statute, the federal statute and  
 10 the state statute, they don't specifically set  
 11 forth a standard. Neither the federal government  
 12 nor the state government. The legislative branches  
 13 did not specify to the Commission this is the  
 14 standard you should use.

15 So essentially the question that is my  
 16 understanding that is going to be posed today is  
 17 what standard do you want to use.

18 Now, as I understand it, Commissioners, based  
 19 on Ms. Rogers argument her argument is, look, there  
 20 is no -- you're almost obligated as long as we file  
 21 a petition to grant this.

22 I disagree. I think there has to be some kind  
 23 of showing. I don't think it's disputed that they  
 24 have the burden to show why they should get interim  
 25 suspension and the suspension at the full hearing.

1 And that burden then needs to be met at some level  
 2 by Kennebec.

3 I think that level, a reasonable level, is  
 4 some type of analogy to the preliminary injunction  
 5 standard. It doesn't say that you have to show you  
 6 can win, but it requires them to put on some  
 7 factual information, factual information supported  
 8 by not just a petition, not verified petitions, but  
 9 by some sort of testimony or at a minimum  
 10 affidavits setting forth these are our numbers,  
 11 this is why we can't meet it.

12 Now the second problem I have with this is  
 13 they keep talking about having a decision within  
 14 180 days. But Ms. Rogers seems to argue that, hey,  
 15 if you give us this interim suspension, it requires  
 16 you have to order that we don't have to comply with  
 17 LNP until six months after your final decision.

18 So if that's the approach, then you're talking  
 19 about an additional six months past your final  
 20 decision. You know, Kennebec is one of the smaller  
 21 companies that have filed for suspension. But if  
 22 the -- there are a number of other companies here,  
 23 and if the standard's simply going to be all you  
 24 have to do is file and you get it, what happens if  
 25 we get to that full hearing and it's obvious some

1 other company could have complied by May or very  
2 soon thereafter and they just get an additional  
3 10 months then to not comply?

4 Finally, as to harm, you know, it's an impact  
5 of human nature that people don't call to ask for  
6 things until you can advertise it and let them know  
7 it's available. And, frankly, we're not  
8 advertising line number portability because we  
9 don't know when we're going to get it.

10 And once we have that, that's when the people  
11 will come, and that's when the people will want to  
12 switch over. So the longer that line number  
13 portability is pushed out, the greater that  
14 inherent harm is to us to our customer base.

15 Finally, addressing something that Mr. Coit  
16 said, I believe my letter was clear, I was not  
17 trying to imply the FCC decision set forth a  
18 standard for this question. I was analogizing to  
19 that, that's a different standard -- or that the  
20 FCC has used an injunctive type relief standard in  
21 making determinations in certain issues. And  
22 Mr. Coit is correct that was a question of a stay  
23 on appeal. It was not a request for interim relief  
24 at this level.

25 But, again, frankly if the FCC had made that

1 decision, that would probably provide a little bit  
2 more guidance to the Commission as to what the  
3 standard should be, but, you know, frankly,  
4 statutes don't set forth the standards. I don't  
5 believe it's simply filed and you get it. I  
6 believe there's something more, and I believe the  
7 preliminary injunction standard is the standard the  
8 Commission should use.

9 CHAIRMAN SAHR: Mr. Wiczorek, you  
10 were cutting out at the end, but I think the court  
11 reporter picked it all up. Although Midcontinent  
12 is not a party to this case, I think it is  
13 appropriate because the decision we may make may  
14 affect the case and it is involved and I'd ask  
15 Mr. Gerdes if he has any comments to make.

16 MR. GERDES: Mr. Chairman, thank  
17 you. I was counting during the interim between the  
18 last time I talked and this time, and I think there  
19 are 18 dockets and we've intervened in eight of  
20 them, that is Midcontinent has intervened in eight  
21 of them. And I appreciate being able to address  
22 the Commission on this issue.

23 Because if the Commission is going to decide  
24 on what standard it will follow in granting  
25 temporary suspensions, then we certainly seek to be

1 heard.

2 The first point I'd like to make, to the  
3 extent that the Commission would or would not grant  
4 a temporary suspension to wireline to wireline LNP,  
5 that would be very significant to us.

6 For instance, if the Commission was just going  
7 to enter an order ordering a temporary suspension  
8 as it related to wireline to wireless, we have no  
9 dog in that fight and we would have no objection  
10 whatsoever.

11 However, to the extent that the Commission is  
12 considering granting temporary suspensions as it  
13 relates to wireline to wireline, then we are  
14 interested. So I want to make that point here,  
15 first of all.

16 Secondly, Mr. Chairman, members of the  
17 Commission, I do disagree with Ms. Rogers as it  
18 relates to the standard she suggests for the  
19 granting of an interim suspension.

20 If you look at the Federal Act and  
21 specifically 251(f)(2), which we've been talking  
22 about here, there really is no standard. All it  
23 says is if you've filed -- if someone has filed a  
24 petition, "The State Commission shall grant the  
25 petition to the extent that and for such duration

1 the State Commission determines that such  
2 suspension or modification is necessary to avoid a  
3 significant adverse economic impact, to avoid  
4 imposing a requirement that is unduly economically  
5 burdensome or to avoid imposing a requirement that  
6 is technically infeasible and is consistent with  
7 the public interest."

8 Now I would submit to you that that is the  
9 standard upon which you also must grant temporary  
10 suspensions. Because they have placed no other  
11 burden upon you. And I would submit that that  
12 is -- in other words, there has to be a showing  
13 beyond the mere allegations of a petition that the  
14 applicant has the ability to prove these items, I  
15 would submit.

16 There is nothing in subparagraph 2 here that  
17 places any requirement that the Commission do or  
18 don't -- that the Commission does or does not grant  
19 a temporary suspension. And, therefore, your  
20 discretion is free. Given the fact that you have  
21 discretion, you have to look somewhere for  
22 guidance, I think, as to what the standard is.

23 And I would point to the South Dakota case of  
24 Daisy vs. Gors, 471 N.W.2d 576 in which the  
25 South Dakota Supreme Court embraced the standard of

1 the Data Phase case handed down by the Eighth  
2 Circuit Court of Appeals. It's a very well-known  
3 case to anybody dealing with temporary injunctions  
4 and temporary restraining orders wherein the court  
5 adopted the four standards that must be proven in  
6 order to grant a temporary restraining order.

7 And that is, number one, whether or not there  
8 is a threat of irreparable harm to the movement,  
9 that is irreparable harm to the Petitioner in this  
10 case. Number two, you then balance the harm  
11 between the Petitioner on the one hand and the  
12 other litigants. In other words, who's going to be  
13 hurt the worst. Thirdly, what is the probability  
14 of the Petitioner's success on the merits and,  
15 fourthly, the public interest.

16 And the public interest here is in LNP, is in  
17 implementing LNP. The public interest is in  
18 implementing the LNP. That is what the  
19 Telecommunications Act says. That's what  
20 South Dakota statutes says. It has been decided it  
21 is in the public interest for people to have local  
22 number portability.

23 So we believe that based on those standards  
24 that there must be an evidentiary showing beyond  
25 the mere allegations of a Complaint as to whether

1 or not a temporary suspension is in order.

2 Mr. Coit said in Kennebec there's no bunch of  
3 customers out requesting LNP. That is true, but  
4 there are customers wanting LNP in other exchanges  
5 as we talked about a little bit earlier.

6 The final point I'd make is that the  
7 Commission orders that the -- the FCC orders that  
8 were mentioned talking about the May 24 deadline,  
9 those, as I read them, apply to wireline to  
10 wireless. There are no orders that apply to  
11 wireline to wireline, which means the statute is in  
12 place and that is -- and is operative and that is  
13 that LNP as it relates to wireline to wireline is  
14 supposed to be permitted now, last week, whenever.  
15 I mean, it's due now subject to the proof of  
16 temporary -- or subject to the proof of suspensions  
17 or modifications as is in the Act.

18 But, nonetheless, if those things do not  
19 exist, then LNP is in order. That's why we believe  
20 that there has to be a showing, a factual showing,  
21 that would support a temporary suspension. And I  
22 probably talked too long, and I apologize.

23 CHAIRMAN SAHR: Thank you. Staff.  
24 MS. CREMER: I believe Mr. Larson is  
25 here for Santel and I don't know if you want to

1 take that one separate because it's next but if you  
2 wanted to listen to them all at one time --

3 CHAIRMAN SAHR: Why don't we go  
4 ahead since we've opened it up to Midcontinent,  
5 let's open it up to anyone else who's a party in  
6 any of the other cases as well. We'd be more than  
7 happy to have him testify.

8 MR. LARSON: Mr. Chairman, I'm  
9 Jeff Larson, attorney for Santel. I'm not going to  
10 tell you everything that you've just been told, but  
11 I think we agree with Ms. Rogers. By anybody's  
12 definition Santel is certainly a rural telephone  
13 company. We have less than 5,000 lines, and we fit  
14 the requirements of the Federal Act.

15 And I would like to point out that the  
16 requirements there that ultimately the Commission  
17 is going to be making their decision on are, in  
18 fact, leaning on our side based on the petition,  
19 and I believe Mr. Wiczorek indicated that perhaps  
20 to satisfy him all we would basically need to do is  
21 verify our petitions.

22 It's obvious, I think, from everyone's  
23 perspective we can't put together an evidentiary  
24 hearing to have all of these things decided by  
25 May 24, but any significant economic impact on

1 consumers is going to occur to the consumers in our  
2 part of South Dakota and certainly Kennebec and the  
3 others by the requirement, if they had to, of  
4 spending significant amounts of money in order to  
5 prepare for this.

6 There is also in our situation, Santel's, we  
7 have zero requests at this point in time for the  
8 wireline to wireless portability. I'm advised by  
9 our general manager that we do business -- part of  
10 our territory is Hutchinson County, South Dakota,  
11 which has the United States' largest percentage of  
12 people over 85 years of age, and I can tell you  
13 that they are not terribly interested in wireline  
14 to wireless portability.

15 And the economic impact would be severe to our  
16 company. We meet the standards of the Federal Act.  
17 We meet the standards of the State Act, and we  
18 certainly would very respectfully request the  
19 Commission to grant the interim suspension so this  
20 matter can be dealt with in an orderly fashion.

21 CHAIRMAN SAHR: Thank you. Is there  
22 anyone else wishing to appear? Anyone else on the  
23 phone that would like to appear at this point in  
24 time?

25 I'll go back to staff then. Thank you.

1 MS. CREMER: Thank you. This is  
 2 Karen Cremer from staff. The Commission has  
 3 180 days to act on these petitions, and those dates  
 4 will begin to run -- your first decision is due  
 5 August 10. So, I mean, we've all looked at the  
 6 calendar. It's all going to have to be wrapped up  
 7 here. We're going to be starting hearings here in  
 8 June.

9 I checked with Mr. Coit, and I believe that  
 10 most everyone that is going to filed has filed. He  
 11 was going to check to be sure. So we will be done  
 12 with all of these by the middle of September.

13 According to 49-31-80 the Commission may  
 14 suspend enforcement of the requirements pending  
 15 final action on the suspension or the modification.  
 16 And that is what those hearings in June will be  
 17 about will be do you want to implement LNP, and if  
 18 you do, when will be the date? Will you do it  
 19 immediately as of the date of the hearing or, you  
 20 know, when their hearing runs in September or  
 21 August, or will you give them a longer period of  
 22 time?

23 And I think all of that evidence will come out  
 24 during the hearing.

25 Staff's opinion is that the Commission may

1 grant the interim relief during these 180 days.  
 2 And if during the hearing the Commission wants to  
 3 hear evidence during those summer hearings, like I  
 4 said before, that you want to give them an  
 5 additional period of time -- now I think the  
 6 petitions have all said six months. It doesn't  
 7 have to be six months just because that's what they  
 8 asked for. It could be 90 days. Or if Mr. Gerdes  
 9 said, you know, it appears that they could do it  
 10 and they could do it immediately, then it could be,  
 11 you know, a few days thereafter or whatever. But  
 12 that will all come out in your final order.

13 I think today we are merely talking about an  
 14 interim suspension from May 24 through the middle  
 15 of September or whatever would be the 180th day. I  
 16 believe that the harm to the Interveners is  
 17 insignificant during this time period. The public  
 18 interest would suffer a greater prejudicial effect  
 19 than that imposed on the Interveners if the  
 20 Commission were to deny the interim relief.

21 I believe the Commission can base its decision  
 22 on the pleadings filed by all the parties and the  
 23 oral arguments that have been made by the parties  
 24 today.

25 So, bottom line, staff's recommendation is

1 that today I believe that you can grant the interim  
 2 relief until such time as you make a final  
 3 determination on the petitions.

4 CHAIRMAN SAHR: Thank you. I'll  
 5 give Ms. Rogers a chance to respond if she'd like  
 6 it.

7 MS. ROGERS: Thank you. I have just  
 8 a few points to make briefly in response to a  
 9 couple of the other things that were mentioned  
 10 here.

11 First of all, Mr. Wiczorek talked about the  
 12 standards that are set forth in the Act, and  
 13 Mr. Gerdes did too. And when he alluded to the  
 14 avoid significant adverse economic impact and those  
 15 standards that are set forth in 251(f)(2) of the  
 16 Act, it's very specific in the Act that those are  
 17 the considerations and the standards for the State  
 18 Commission upon deciding whether or not to grant  
 19 such petition. Okay. Such petition refers back to  
 20 the first part of that Act, which is the petition  
 21 for a suspension or modification of the requirement  
 22 of the Act.

23 And then when you keep reading at the very end  
 24 it's the last sentence that specifically says,  
 25 "Pending such action the State Commission may

1 suspend enforcement."

2 And that's what we're asking for. So what  
 3 we're saying is we have met the standards and  
 4 burdens that are in the Act. We have fewer than  
 5 2 percent of the nation's subscriber lines, and we  
 6 have pending petitions.

7 And to say, well, because there isn't -- those  
 8 are the only standards in there, we have to leap  
 9 over or look at other areas of law is asking for  
 10 something that's not required here at all. We  
 11 don't agree that preliminary injunction standards  
 12 are applicable here, and we don't believe that they  
 13 should be applied by the Commission.

14 I think that it's also helpful to look at what  
 15 some of the other State Commissions have done. And  
 16 I've reviewed decisions, and I think maybe the  
 17 Commission has too from both the Utah State  
 18 Commission and also Nebraska. And Nebraska has  
 19 said that they granted a petition for interim  
 20 relief from the obligation to implement local  
 21 number portability, and they held that it should be  
 22 granted, again, pending the review of this  
 23 application.

24 So the interim relief gives you as a  
 25 Commission the time that you need to orderly decide



1 the cases. It prevents the companies and the  
2 subscribers from incurring costs that they may not  
3 have to incur later. And, as Mr. Coit said, you  
4 can't undo it. Once we spend the money, you can't  
5 roll back the hand of time and stop it.

6 And I think that with regard to the 60-day  
7 period -- or the six-month period we asked for we  
8 asked for that because that's what we were given  
9 under the Act to implement it. I do not have a  
10 problem with Nebraska's approach and what staff  
11 recommends, leaving it in your discretion. You go  
12 ahead, make the findings, let's go through the  
13 hearings, and as the evidence comes in then I think  
14 that you will fairly treat us as to what we have to  
15 comply with and when.

16 So we would urge you again to grant the  
17 temporary suspensions today.

18 CHAIRMAN SAHR: Thank you. And I  
19 appreciate everyone sticking on point and sticking  
20 to the merits of the question about the suspension.

21 Mr. Wiczorek, I do have a question, and I  
22 look at the Federal Act and state law, and to me it  
23 gives the Commission quite a bit of discretion in  
24 this matter.

25 And, frankly, I also come back to some common

1 sense. Clearly if we don't grant a suspension, the  
2 companies are going to have to undergo significant  
3 cost. It is going to be -- whether it's, you know,  
4 11 to \$12 a month for Kennebec or some different  
5 figure for any of the other cooperatives out there,  
6 it's going to be significant. It's going to run to  
7 the customers ultimately, and you get to the basic  
8 question of, you know, once the bell is rung, once  
9 the work is done, then there really wouldn't be any  
10 sense going forward with the question of whether or  
11 not to suspend these things in the first place  
12 because if they're going to have to go forward with  
13 it and we don't grant the interim suspension, then,  
14 you know, what is the point of having the  
15 proceeding in the first place.

16 And I guess I would ask you that common sense  
17 question. It seems to me to be a very compelling  
18 argument. How can we not grant suspension when  
19 clearly there is a cost and clearly if the  
20 companies had to go forward and offer this, there  
21 really isn't any sense then to look at the issue at  
22 all because that's exactly what they are fighting  
23 with the petitions.

24 MR. WIECZOREK: Mr. Chairman, I  
25 think you're right in your analysis that once that

1 bell's rung, once it's being provided, they're not  
2 going to go back on it or they're not -- well, they  
3 could maybe go back to a certain degree, but they  
4 obviously can't send equipment back from who they  
5 purchased it from and get their money back.

6 The problem is that you have all of these  
7 filed fairly close to the deadline. Some of the  
8 filings even group companies together, small  
9 companies with larger companies.

10 I think the Act was designed in such a way  
11 companies should make some showing this is a  
12 legitimate filing and not simply a filing to put  
13 off potentially offering their customers an  
14 alternative.

15 And that's why we advocated a standard where  
16 they have to actually show here's where we're  
17 coming from, here's some evidence, and this is why  
18 we think we can prevail rather than simply filing a  
19 petition which is fairly cookie-cutter. They are  
20 very similar, all the petitions, no matter the size  
21 of the companies here.

22 So I agree that once the equipment's in place  
23 it would be unlikely that you would undo that, but  
24 at the same time, there are likely some companies  
25 out there that should be able to do this by

1 March 24 (sic) without a real hardship but have  
2 simply put this Commission in the position that  
3 decision's impossible to make and it's  
4 impossible -- or are advocating the Commission  
5 shouldn't look beyond just their mere pleadings to  
6 see if they can accomplish this.

7 I believe I went beyond your question,  
8 Mr. Chairman. I apologize for that. I hope I  
9 answered it.

10 CHAIRMAN SAHR: I think that was  
11 just fine. And I think when you referred to  
12 March 24 you meant May 24; is that correct?

13 MR. WIECZOREK: That's correct. I'm  
14 sorry.

15 CHAIRMAN SAHR: Mr. Smith.  
16 (Pause)

17 MR. WIECZOREK: I'm sorry,  
18 Mr. Chair. I don't believe Mr. Smith's mike's on.  
19 I can't hear him.

20 MR. SMITH: I'm sorry. I think one  
21 of the comments in one of the documents that we got  
22 from the Petitioners, Talbot, was to the effect  
23 that one of the reasons why the companies didn't  
24 just jump on this right away with the -- leading up  
25 to or following the November 10 decision was that

1 the FCC in the wake of that seemed to -- received a  
 2 number of filings from around the country and was  
 3 made aware of these issues related to out of rate  
 4 center requests and the transport and maybe even  
 5 access charges that might accompany that and just  
 6 some complexities that they may not have looked at  
 7 really that carefully before rendering the  
 8 decision.

9 And is it not at least possible that one of  
 10 the reasons the companies didn't just immediately  
 11 bolt out and spend the money is that they might  
 12 have had a reasonable expectation that the FCC  
 13 might revisit some of those things in the rural  
 14 areas?

15 MR. WIECZOREK: Well, that seems to  
 16 be the position that they're taking. That's hard  
 17 for me to accept, their mind-set, because -- I  
 18 believe that's the position they've taken because  
 19 they've actually argued at some point in this this  
 20 proceeding should be stayed pending the FCC making  
 21 some direction there. So certainly I understand  
 22 that that might be a consideration.

23 CHAIRMAN SAHR: Any other questions  
 24 or comments from Commissioners?

25 MR. SMITH: Just one. Do you have

1 any comment on the Nebraska case, Tal?

2 MR. WIECZOREK: The Nebraska case  
 3 essentially, as I read it, seems to say, look, we  
 4 can't get this work done before May 24 so we're  
 5 going to wait for a full hearing.

6 Frankly, I don't think -- I think there are  
 7 better ways to do it, and I think the better way to  
 8 do it is actually say this is our obligation, we  
 9 need to look and see if they're entitled to the  
 10 interim relief.

11 CHAIRMAN SAHR: One of the things I  
 12 think we should consider is I realize we could  
 13 follow the preliminary injunction standard or  
 14 follow some other standard. I don't think that's  
 15 required by federal or state law.

16 The other thing is what everyone's  
 17 acknowledging is, A, we're under a short time  
 18 frame. And the Interveners would like to see this  
 19 move along more quickly rather than more slowly,  
 20 obviously, so they can get this to the full-blown  
 21 hearing. And if we start at the time setting up a  
 22 series of evidentiary hearings, which quite frankly  
 23 are just going to indicate there are costs involved  
 24 and there is going to be a burden that will support  
 25 the Petitioner's position on these things, I think

1 all we're doing is basically a number of many  
 2 hearings.

3 And, frankly, I'd rather see the time and  
 4 effort be put towards getting prepared for  
 5 hearings, the ultimately hearings, more quickly and  
 6 to try to do so if we can before the 180-day --  
 7 we're approaching the 180-day deadline. I think  
 8 that will serve everybody well, staying focused in  
 9 that regard.

10 COMMISSIONER BURG: I had one just  
 11 real small question about today shall the  
 12 Commission grant the petition for an interim  
 13 suspension of any obligation that may exist for  
 14 Petitioner to provide LNP until six months after  
 15 entry of a final order.

16 What's the final order they're talking about?

17 CHAIRMAN SAHR: I think they mean  
 18 our order on whether or not suspension should be  
 19 granted. Staff has made the argument that we don't  
 20 necessarily have to follow the standard, and I  
 21 think certainly we may be -- we're looking at  
 22 Petitioners that have a lot of differences in their  
 23 service territories and so on and so forth.

24 And I think Mr. Wieczorek makes a pretty good  
 25 argument that it could shake down where one is

1 required to go forward while others are not. That  
 2 could potentially happened. So I would be  
 3 disinclined to look at just going cart blanche six  
 4 months afterward.

5 MR. SMITH: May I address the  
 6 six-month issue? This is just me and my opinion.  
 7 But I think, picking up on Ms. Rogers' argument,  
 8 arguing if we take the position that we don't need  
 9 an evidentiary hearing and that the Commission has  
 10 broad discretion, that discretion, as I understand  
 11 your argument, and I think it's what the statute  
 12 says, is based upon the pendency of a proceeding.  
 13 That pendency by federal law -- it must be  
 14 concluded within the 180-day period.

15 Now in terms of the temporary suspension,  
 16 that's one thing. But this particular provision is  
 17 an interim suspension during the pendency of the  
 18 proceeding. And I guess my own opinion is that the  
 19 Commission to grant an interim suspension like that  
 20 for the pendency of the proceeding is limited by  
 21 the statute to at least the 180-day period. And I  
 22 don't think they can under this particular statute  
 23 go beyond that.

24 And I would appreciate any argument to the  
 25 contrary. But I think to go beyond that and grant

1 a temporary suspension of any obligation under 251  
2 does require a full factual hearing. That's what I  
3 am going to advise the Commission anyway, if you do  
4 determine to go forward with the interim suspension  
5 today that it be limited to the period within which  
6 you must make a decision.

7 CHAIRMAN SAHR: Ms. Rogers, do you  
8 want to comment?

9 MS. ROGERS: I think that you would  
10 also have discretion if you order a company --  
11 after viewing the facts and circumstances of that  
12 particular company if you as a Commission believe  
13 that it's going to take them so many weeks or so  
14 many months to implement LNP, if you order them to  
15 do so, I think you have the discretion to do that.

16 MR. SMITH: But that's after an  
17 evidentiary hearing, after we've heard the facts.

18 MS. ROGERS: Right.

19 MR. SMITH: And right now we're just  
20 talking about the pendency suspension.

21 MS. ROGERS: That's correct. And I  
22 believe that's the approach that Nebraska took is  
23 that then the Commission would have discretion to  
24 determine, A, what's required of the company and,  
25 B, if something is required, when it would be need

1 to be implemented.

2 I would also point out one other thing that  
3 was addressed by Mr. Gerdes. He was trying to draw  
4 a distinction, I believe, between types of LNP.  
5 And as I read Section 251 of the Act, it's number  
6 portability, is whether it's wireline to wireline  
7 or wireline to wireless, and it's just defined as  
8 number portability in accordance with the  
9 requirements prescribed by the Commission.

10 So I don't think that there's that distinction  
11 in the Act.

12 VICE CHAIR HANSON: Darla, what's  
13 the purpose of the May 24 deadline? If we're  
14 talking about having an additional six months, what  
15 was the purpose of delaying having a May 24 in the  
16 first place?

17 MS. ROGERS: My understanding of the  
18 Commission's order was that giving the smaller  
19 companies, the rural telcos, more of an opportunity  
20 or longer opportunity, a six-month window in which  
21 to implement LNP -- that's my understanding of why  
22 they extended that deadline from November 24 to May  
23 24 for the smaller companies. There are just  
24 bigger issues for companies in rural areas. And I  
25 think the FCC acknowledged that.

1 The FCC also noted in their order that there  
2 are other issues that have not been addressed yet  
3 and there are pending actions in front of the FCC  
4 that hopefully would address some of those issues,  
5 like, for example, the Sprint petition.

6 And I think perhaps the FCC was acknowledging  
7 maybe there would be more guidance from those  
8 decisions during that six-month period. Because  
9 those things really do affect small carriers even  
10 more significantly than larger carriers.

11 That's my understanding. Did that answer your  
12 question?

13 VICE CHAIR HANSON: Yes, it did.  
14 But with that in mind, why then would you not  
15 accept the argument that there needs to be  
16 something substantive to cause the PUC to add an  
17 additional six months? Why should we just grant it  
18 because Kennebec qualifies?

19 MS. ROGERS: Well, you're asking me  
20 why you should --

21 VICE CHAIR HANSON: Why shouldn't  
22 there be some evidence -- I'm not a fan of having  
23 more hearings, but why shouldn't there be some  
24 evidence presented to us to show a reason for --  
25 that there is an economic challenge to Kennebec?

1 I'm buying into some of the arguments that  
2 have been presented here, that there needs to be  
3 some reason for the Commission to extend and  
4 provide the additional six-month period. If it's  
5 just because someone qualifies, just because they  
6 have under -- there's no point in us even meeting.  
7 You just send your certificate that says we  
8 qualify, therefore, it's done.

9 MS. ROGERS: Number one,  
10 Commissioner Hanson, I think that we have made a  
11 showing within our petitions. We've provided you  
12 with numbers for every company that's filed a  
13 petition today.

14 Number two, I don't believe that you need to  
15 have an evidentiary hearing before granting the  
16 relief that we're requesting here because I don't  
17 believe that that's required under the Act. I  
18 think you specifically have the authority and the  
19 discretion to do what we're asking.

20 And, number three, I believe an interim  
21 suspension is appropriate today because, as has  
22 been said, as a practical matter I don't think  
23 everything can be completed by May 24. And our  
24 companies and our -- the customers of our companies  
25 are the ones that are going to suffer irreparable

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1 harm if, indeed, we have to start incurring the  
2 costs and then you in your discretion after a full  
3 hearing determine, in fact, we don't have to meet  
4 those requirements, you can't undo what's been  
5 done.

6 So for those reasons I think that you have the  
7 authority under the Act, under the state statute to  
8 act on what we've presented to you at this point.

9 MR. LARSON: Commissioner, if I  
10 could speak to that just a minute.

11 CHAIRMAN SAHR: Please.

12 MR. LARSON: Because part of  
13 Talbot's argument is we didn't do much after  
14 November. But, you know, a company of Santel's --  
15 anyway, of our size, they spent from November to  
16 about January getting some of this information,  
17 analyzing it, doing a number of different things.

18 We aren't Western Wireless. We're a small  
19 company. It took until January, first of February  
20 to get that stuff done, and in February we filed a  
21 petition. And it is now just a matter simply of  
22 timing. There is no other way to have a good and  
23 sufficient evidentiary hearing that's going to get  
24 us a decision by May 24.

25 And I think you want an orderly process and

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1 not a chaotic one, and I think that's the only way  
2 to do that.

3 VICE CHAIR HANSON: I believe you  
4 said you have less than 5,000 customers.

5 MR. LARSON: Yes.

6 VICE CHAIR HANSON: When you say  
7 5,000 customers, I know sometimes people -- I know  
8 when I was in charge of a utility occasionally we  
9 were talking about we had perhaps 35,000 meters,  
10 but then we talked about having 100,000 customers  
11 because there are obviously more than one person  
12 living there.

13 Are you saying that you have -- in that  
14 particular example you have less than 5,000 actual  
15 hookups or --

16 MR. LARSON: We have less than 5,000  
17 service lines.

18 VICE CHAIR HANSON: Okay. Thank  
19 you.

20 CHAIRMAN SAHR: And I do think, and  
21 I can't remember the exact number for Kennebec but  
22 in the back of my mind it's 11 or \$12, somewhere in  
23 that per customer, per line, per month that they  
24 have alleged there will be cost.

25 MR. LARSON: Ours is 8 to 9.

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1 CHAIRMAN SAHR: And I think we could  
2 have evidentiary hearings and we could argue about  
3 that, but clearly there's a cost to putting in new  
4 equipment and into providing a new service. So I  
5 think to a certain extent we may argue over the  
6 exact dollars, but to me that's what the ultimate  
7 hearing is going to be largely about is how much is  
8 this going to cost plus the other factors we have  
9 to consider. So --

10 VICE CHAIR HANSON: Exactly.

11 Mr. Chairman, if I could continue, that's something  
12 that I was hoping that they would present here  
13 today is at least state their numbers.

14 CHAIRMAN SAHR: And I think they  
15 can. I think, you know, it's in the Kennebec  
16 case -- Ms. Rogers, can you pull that information  
17 or Mr. Bowar, I'm sure, probably knows it off the  
18 top of his head.

19 MS. ROGERS: 11.43 per line is what  
20 we've estimated the cost.

21 VICE CHAIR HANSON: That is on a  
22 monthly basis?

23 MS. ROGERS: Yes.

24 VICE CHAIR HANSON: Thank you. I've  
25 looked at the numbers. I just think that it's

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1 important in a hearing process of this nature that  
2 since there are arguments that are being brought  
3 out on one side that those -- instead of simply  
4 stating it's going to present an economic hardship,  
5 I think since the numbers are well developed at  
6 this juncture, it would be important to at least  
7 present those.

8 MS. ROGERS: I understand your  
9 point, Commissioner, but if we proceed down that  
10 path then --

11 VICE CHAIR HANSON: I know. I'm  
12 aware of that.

13 MS. ROGERS: -- we're going to  
14 certainly have some Interveners that would probably  
15 contest our numbers or question them as well as  
16 staff. And I think that that's going to be  
17 explored and carefully reviewed in the final  
18 hearing.

19 VICE CHAIR HANSON: Thank you.  
20 Thank you, Mr. Chairman.

21 CHAIRMAN SAHR: Any further  
22 questions?

23 Seeing none, then I would move that we grant  
24 interim suspension in TC04-025 for Kennebec  
25 Telephone Company until the final decision is

1 reached by the Commission.  
 2 And I will state that at the hearing I would  
 3 expect arguments as to how long would be  
 4 appropriate after the final decision to require LNP  
 5 if the Commission decides it is appropriate to  
 6 require LNP to go forward.

7 So I think that's something we can argue at  
 8 the hearing and certainly, you know, you can expect  
 9 the Commission would not expect it the next day.  
 10 You would be required if you were to use the  
 11 argument to have LNP available.

12 VICE CHAIR HANSON: Second.  
 13 COMMISSIONER BURG: Concur.

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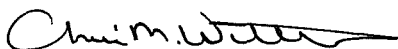
1 STATE OF SOUTH DAKOTA )  
 2 :SS CERTIFICATE  
 3 COUNTY OF HUGHES )  
 4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
 6 Professional Reporter and Notary Public in and for the  
 7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
 9 shorthand reporter, I took in shorthand the proceedings  
 10 had in the above-entitled matter on the 6th day of  
 11 April 2004, and that the attached is a true and  
 12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 19th day  
 14 of April 2004.

15  
 16  
 17



18 Cheri McComsey Wittler,  
 19 Notary Public and  
 Registered Professional Reporter

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