

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT
FILED BY WWC LICENSE, LLC AGAINST
GOLDEN WEST TELECOMMUNICATIONS
COOPERATIVE, INC., VIVIAN TELEPHONE
COMPANY, SIOUX VALLEY TELEPHONE
COMPANY, BRIDGEWATER-CANISTOTA
INDEPENDENT TELEPHONE COMPANY,
KADOKA TELEPHONE COMPANY REGARDING
INTERCARRIER BILLINGS

CT05-001

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Transcript of Proceedings
January 27, 2006

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BEFORE THE PUBLIC UTILITIES COMMISSION,
BOB SAHR, CHAIRMAN (by telephone)
DUSTY JOHNSON, VICE CHAIRMAN (by telephone)
GARY HANSON, COMMISSIONER

COMMISSION STAFF
Rolayne Ailts Wiest
John Smith
Harlan Best
Keith Senger
Dave Jacobson
Bob Knadle
Nathan Solem
Tina Douglas
Heather Forney

APPEARANCES

Talbot Wieczorek (by telephone)
Darla Pollman Rogers
Richard Coit

Reported By Cheri McComsey Wittler, RPR, CRR



APPEARANCES BY TELEPHONE

Bob Sahr
Dusty Johnson
Talbot Wieczorek
Denny Law
Roxi Hacker

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State
Capitol, Room 464, 500 East Capitol Avenue, Pierre,
South Dakota, on the 27th day of January 2006,
commencing at 1:30 p.m.

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1 CHAIRMAN SAHR: I'll call the
2 Commission meeting of Friday, January 27, 2006 to
3 order. And the issue before the Commission today
4 is CT05-001. Two items are set for Motion. Today
5 shall the Commission grant the Motion for Partial
6 Summary Judgment, and shall the Commission grant
7 the Motion in Limine?

8 And, Ms. Rogers, you indicated you had a
9 preliminary matter to bring before the Commission.

10 MS. POLLMAN ROGERS: Yes. Thank
11 you, Chairman Sahr.

12 Late yesterday afternoon or yesterday we were
13 advised that the brother-in-law of our expert
14 witness, Larry Thompson, passed away. He is out of
15 state. This will take our expert witness,
16 Larry Thompson, to the state of Kansas. I'm not
17 sure if he left today or tomorrow. At any rate,
18 the memorial service is going to be Sunday night.
19 The funeral service is in Wichita, Kansas on
20 Monday, and the internment is going to be in Omaha
21 late Tuesday morning, which means that the soonest
22 that he could get back here, assuming he left
23 immediately after the internment would be late
24 Tuesday evening.

25 This would not give us any prep time with our

1 witness, in addition to which this -- the person
2 that died is leaving Larry's sister as the
3 surviving spouse with three fairly young children.

4 I just reluctantly but nevertheless out of
5 deference to my witness and putting someone in that
6 position, I am asking this Commission to continue
7 the hearing date currently set for February 1
8 through the 3rd. I believe that Larry's priorities
9 in this situation need to be with his family. This
10 is a very tragic time for him, and I understand how
11 hearing dates are certainly at a premium.

12 Nevertheless, I feel compelled to bring this
13 Motion because I don't believe it's fair to put
14 Mr. Thompson in the situation of having torn
15 loyalties like this. And so I am respectfully
16 requesting the Commission to continue the hearing
17 date currently set for February 1 through the 3rd.

18 CHAIRMAN SAHR: Well, thank you very
19 much. And certainly our thoughts go out to
20 Mr. Thompson and his family. It sounds like a
21 very, very difficult situation.

22 Ms. Rogers, have you had an opportunity to
23 discuss this with any of the other parties?

24 MS. POLLMAN ROGERS: Yes, sir. I
25 have discussed it with Mr. Wieczorek. Obviously

1 I've discussed it with my clients. And SDTA has
2 joined in my Motion for a continuance. I've also
3 had consultation with staff counsel, and I did file
4 a written Motion just prior to the hearing so that
5 everyone was aware. I believe I -- in fact, I
6 talked to Mr. Wieczorek immediately after I found
7 out what was happening and indicated my intention
8 to do that, and he can speak for himself as to his
9 response.

10 CHAIRMAN SAHR: Thank you.

11 Mr. Wieczorek.

12 MR. WIECZOREK: I agree that she
13 told me yesterday afternoon. At that time it was
14 my understanding that she was going to talk to
15 Mr. Thompson in follow up because her concern was
16 him simply getting back Tuesday night. This is a
17 case where we would go first.

18 I must admit that I haven't had a chance to
19 talk to my client so I can't at this point agree to
20 the continuance because I don't have the authority
21 to do that without conferring with my client first.
22 And it might have been a misinterpretation. As I
23 understood what she told me -- Darla told me
24 yesterday was she was considering it depending on
25 that she needed to talk to Larry again. It doesn't

1 surprise me that she had to file it to preserve it.
2 But at this point I have not had a chance to confer
3 with my client to say whether I have the authority
4 to agree to a continuance.

5 CHAIRMAN SAHR: Ms. Rogers, I know
6 this has all happened sometime relatively suddenly.
7 Have you had an opportunity to check with our staff
8 to see when the next schedule date that would work
9 would be?

10 MS. POLLMAN ROGERS: I have not.
11 And perhaps staff has talked about it without me
12 being there.

13 CHAIRMAN SAHR: All right.
14 Ms. Forney, if you're there, if you could just let
15 us know without necessarily getting into specifics
16 if you don't have them, what are we looking at for
17 possible dates?

18 MS. FORNEY: We might be able to
19 squeeze it in the following week, which would be
20 the 6th through the 10th. The next possible dates
21 after that, and I'm a little nervous to really
22 propose these because it would be the last week of
23 session, which would be the 21st through the 24th
24 of February, and that's also coming off of that
25 three-day President's Day weekend.

1 So it's possible to try to schedule something
2 the week of the 6th through the 10th or as the next
3 alternative probably the 21st through 24th of
4 February.

5 CHAIRMAN SAHR: So it does look like
6 there's some pretty good dates coming up. And, of
7 course, this one is not as long as some of the
8 hearings we have for the allotted time.

9 MS. FORNEY: That's correct.

10 CHAIRMAN SAHR: Any other questions
11 from the Commissioners or comments?

12 VICE CHAIRMAN JOHNSON: No, sir.

13 CHAIRMAN SAHR: Mr. Hanson.

14 COMMISSIONER HANSON: None.

15 CHAIRMAN SAHR: Certainly I think
16 the loss of an important expert witness on a
17 hearing of this magnitude and such a critical
18 witness I think is in my mind and certainly through
19 nothing but completely understandable circumstances
20 it's in my mind certainly enough to grant the
21 request for a continuance.

22 And then, Ms. Rogers, if you'd please work
23 closely with staff, the PUC staff, and
24 Mr. Wieczorek to see if some of these dates in the
25 very near future would work as substantive dates,

1 we would appreciate that.

2 With that, I would make the Motion that we
3 grant the continuance.

4 VICE CHAIRMAN JOHNSON: Second.

5 COMMISSIONER HANSON: And I concur.

6 MS. POLLMAN ROGERS: Thank you,
7 Mr. Chairman.

8 CHAIRMAN SAHR: You're certainly
9 welcome. Again, on behalf of the Commissioners and
10 Commission, our thoughts go out to Mr. Thompson.

11 The two issues that we have before us now, we
12 have two pending motions, and one of the reasons
13 that we're looking at taking them today and during
14 the ad hoc meeting, of course, was the pendency of
15 the hearing next week and the need to prepare
16 witnesses.

17 I would look to my colleagues and to the
18 Commission staff. We certainly can act on these
19 today. At the same time, we now are no longer
20 under the gun, so to speak, with the pending
21 hearing starting the middle of next week.

22 Any thoughts either from the Commissioners or
23 advisors whether we should rule on these today or
24 wait until perhaps next week?

25 COMMISSIONER HANSON: This is

1 Commissioner Hanson. I'm prepared to act on them
2 today. I'm sure you both are as well.

3 From the standpoint of giving the parties an
4 opportunity to perhaps know where we're coming from
5 and in preparation of their materials, it might be
6 good to act today. That's my only comment.

7 CHAIRMAN SAHR:

8 Commissioner Johnson.

9 VICE CHAIRMAN JOHNSON: I'm prepared
10 to vote today. I think we probably should. I
11 don't know that I'm 100 percent in my decision, but
12 having read through the case law and everything
13 else four times, I suspect doing it a fifth and
14 sixth time isn't necessarily going to get me any
15 closer than I am to certainty.

16 CHAIRMAN SAHR: Well, with that in
17 mind then the first question is shall the
18 Commission grant the Motion for Partial Summary
19 Judgment. And, Mr. Smith, just to make sure we're
20 all fresh in mind, this is the Western Wireless's
21 Motion for Summary Judgment, and it's the Motion
22 that deals with the language that's talking about
23 the -- I guess focuses at least partially, if not
24 primarily, the mutually agreed upon language?

25 MR. SMITH: That's right. This is

1 the Motion that deals with sections -- with the
2 claims -- portions of the Counterclaim that relate
3 to Section 7.2.3. I was going to try to dig out
4 the precise language here.

5 Well, I'm like Commissioner Johnson. I've
6 been pouring over the cases for so long I haven't
7 actually looked at the actual Motion for a while.

8 CHAIRMAN SAHR: I do think we
9 probably are familiar with it enough. I just want
10 to make sure for people that we had it correctly,
11 but do either one of the Commissioners have a
12 Motion on this particular issue?

13 VICE CHAIRMAN JOHNSON:
14 Mr. Chairman, I might have a question, if it would
15 be in order, for staff attorney Wiest first.

16 CHAIRMAN SAHR: Please proceed.

17 VICE CHAIRMAN JOHNSON: And, you
18 know, her answer may change my mind somewhat, you
19 know, if we would need to delay this decision. I
20 suspect not. But, Ms. Wiest, last week the Supreme
21 Court released Ziegler's Furniture case.

22 MS. AILTS WIEST: Yes.

23 VICE CHAIRMAN JOHNSON: I've read
24 through that. Do you think there's anything in
25 there that changes the landscape of the case -- of

1 the Docket before us?

2 MS. AILTS WIEST: You know, I just
3 read through that once so I'm not sure if I can say
4 exactly if it would change it. I mean, I think
5 there are probably some parallels.

6 But, on the other hand, it didn't specifically
7 state that it was relating to an agreement to
8 agree.

9 VICE CHAIRMAN JOHNSON: Mr. Smith,
10 did you have any --

11 MR. SMITH: Well, I -- you know, I
12 agree with what Ms. Wiest just said. It doesn't
13 expressly deal with an agreement to agree. Its
14 proximity to this case would strictly be in what --
15 it seems to be taking a slightly more liberal
16 attitude than what has been taken previously with
17 respect to contract terms that are not completely
18 fleshed out or a contract that may not have been
19 100 percent fleshed out.

20 In that particular holding, if I'm not
21 mistaken, the court did base its finding or its
22 holding on the fact that all material terms of the
23 contract had been "agreed to" in the term sheet.
24 And then the course of conduct of the parties was
25 such that it reflected -- it was consistent with

1 them having reached agreement in the court's mind.

2 The parallel to this case is that, in fact,
3 the term -- she contemplated the execution of a
4 formal agreement and the parties never did that.
5 So in that sense they never had the agreement that
6 it was contemplated by the term sheet, and yet the
7 court held that it was enforceable.

8 VICE CHAIRMAN JOHNSON: Okay. Thank
9 -you, Mr. Smith.

10 CHAIRMAN SAHR: All right.
11 Mr. Johnson, I don't want to put you on the spot.
12 I have a feeling you may be the swing vote in this
13 one.

14 Do you want to make a Motion, or do you want
15 me?

16 VICE CHAIRMAN JOHNSON:
17 Mr. Chairman, I would make the Motion to deny the
18 Motion for Summary Judgment.

19 COMMISSIONER HANSON: This is
20 Hanson. I second that Motion.

21 CHAIRMAN SAHR: And I dissent on
22 that Motion. And I should say a couple of concerns
23 that I have is, one, I do think the contract law
24 issues in the State of South Dakota are fairly well
25 settled on this matter. And in different context

1 cases over types of contractual relationships might
2 lead to a different answer, but in my mind it is
3 something that is well settled in South Dakota Law
4 and the reason that I reached an independent basis
5 was very similar to what staff attorney
6 Rolayne Wiest recommended as well at the last
7 hearing.

8 And I also think you could rule in favor of
9 granting the Motion for Partial Summary Judgment
10 and it might be possible then for the Commission to
11 still come back and interpret that provision and
12 give it meaning and make the determination on the
13 traffic study as part of the hearing as well.

14 Then the second Motion is shall the Commission
15 grant the Motion in Limine? Mr. Smith, do you want
16 to just give a two-sentence --

17 MR. SMITH: The Motion in Limine is
18 to restrict the admission of Parole Evidence
19 related to clause -- just a minute -- Section 2.1
20 of the Interconnection Agreement on the grounds
21 that there is no basis for -- under South Dakota
22 Law for the admission of Parole Evidence. There's
23 no ambiguity nor any of the other grounds met here.

24 CHAIRMAN SAHR: Thank you. And I
25 will move that the Commission grant the Motion in

1 Limine.

2 VICE CHAIRMAN JOHNSON: I would
3 second the Motion.

4 COMMISSIONER HANSON: And I concur.

5 CHAIRMAN SAHR: Thank you. Is there
6 anything else to come before the Commission on this
7 matter?

8 Hearing none, Ms. Rogers, Mr. Wieczorek,
9 excuse me -- Mr. Wieczorek, if you would please
10 work with staff and look at the dates where we
11 could get this hearing scheduled, I would
12 appreciate that.

13 That will conclude the Ad Hoc Commission
14 meeting hearing of Friday, January 27. Thank you.

15 (The hearing is concluded)

1 STATE OF SOUTH DAKOTA)

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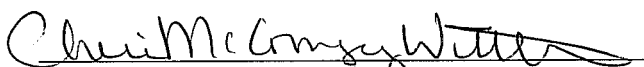
CERTIFICATE

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 27th day of
11 January 2006, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 30th day
14 of January 2006.

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