

Transcript of  
Proceedings

July 11, 2006

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THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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IN THE MATTER OF THE PETITION FOR  
ARBITRATION ON INTERCONNECTION AGREEMENTS  
IN DOCKETS TC06-036, TC06-037, TC06-038,  
TC06-039, TC06-040, TC06-041 AND TC06-042

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Transcript of Proceedings  
July 11, 2006

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BEFORE THE PUC COMMISSION

Chairman Robert Sahr  
Vice-Chair Dusty Johnson

ORIGINAL

COMMISSION STAFF

John Smith  
Rolayne Wiest  
Harlan Best

APPEARANCES (continued on next page)

TALBOT J. WIECZOREK,  
GUNDERSON, PALMER, GOODSSELL & NELSON,  
Attorneys at Law, P.O. Box 8045,  
Rapid City, South Dakota 57709,  
appearing on behalf of WWC License LLC;

MEREDITH A. MOORE,  
CUTLER & DONAHOE, Attorneys at Law, 100 North  
Phillips Ave., #901, Sioux Falls, South Dakota 57104,  
appearing on behalf of Golden West Companies;

PAUL M. SCHUDEL,  
WOODS & AITKEN LAW FIRM, Attorneys at Law,  
301 South 13th Street, Suite 500,  
Lincoln, Nebraska 68508,  
appearing on behalf of Golden West Companies;

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1 APPEARANCES (continued)

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RICHARD D. COIT,  
Executive Director and General Counsel,  
South Dakota Telecommunications Association,  
P.O. Box 57, Pierre, South Dakota 57501,  
appearing on behalf SDTA.

Reported by Carla A. Bachand, RMR, CRR

1 TUESDAY, JULY 11, 2006

2 CHAIRMAN SAHR: I will ask our court reporter to  
3 please go on the record. We are under what initially was  
4 docketed on the regular agenda as item number three under  
5 telecommunications. Please go to the correction of the agenda  
6 for the commission meeting and it's item number one under  
7 telecommunications. It's in the matter of the petition for  
8 arbitration of interconnection agreements in Dockets TC06-036,  
9 06-037, 06-038, 06-039, 06-040, 06-041 and 06-042. And they  
10 involve Armour Independent Telephone Company and WWC,  
11 Bridgewater-Canistota Independent Telephone Company and WWC,  
12 Golden West and WWC, Kadoka Telephone Company and WWC, Sioux  
13 Valley Telephone Company and WWC, Union Telephone Company and  
14 WWC, Vivian Telephone Company and WWC. And the question today  
15 is shall the commission grant intervention to SDTA and shall  
16 the commission grant the request to use the Office of Hearing  
17 Examiners? Mr. Coit, you were at the mike. Please proceed  
18 back on telecom, not electricity.

19 MR. COIT: Thank you, Mr. Chairman. First, I should  
20 thank the commission for their treatment of my interventions in  
21 the past. I'm not sure that I necessarily agree with the  
22 characterization of being granted intervention liberally, but I  
23 do thank you for how you have approached them in the past, and  
24 actually seriously, I am a believer, and I hope that you share  
25 this, and I think you do, that the more input that you can

1 receive from parties that are either directly affected or at  
2 least potentially affected, given the matters at hand, is  
3 probably the best practice.

4           With respect to the intervention here, I think Mr.  
5 Wieczorek is on the phone and we have reached an agreement as  
6 parties, and I have not spoken with staff with respect to our  
7 intervention request, but as parties we have agreed to  
8 permitting SDTA to intervene based on certain restrictions and  
9 that would be that we will only intervene to cross-examine  
10 Western Wireless witnesses and that we will have the  
11 opportunity to present argument on procedural issues and based  
12 on the substantive record, and that we will not call any of our  
13 own witnesses. We will not engage in any discovery. Does that  
14 sound right, Tal?

15           MR. WIECZOREK: Yes, commission, I believe Rich has  
16 fully stated our agreement.

17           CHAIRMAN SAHR: Thank you, Mr. Wieczorek. Do you have  
18 anything else?

19           MR. COIT: I don't have anything to add, no, unless  
20 there are questions.

21           CHAIRMAN SAHR: I will look to staff. Do you want to  
22 comment first? We also have the request to use OHE, and do we  
23 want to hear from WWC first and then staff or how do you want  
24 to do it or do you want to comment now?

25           MS. WIEST: I think you should vote on the SDTA

1 intervention because they want to argue the OHE.

2 CHAIRMAN SAHR: I will move that the commission grant  
3 intervention to SDTA, subject to the agreement amongst the  
4 parties.

5 VICE-CHAIR JOHNSON: Second.

6 CHAIRMAN SAHR: Between, amongst, I don't know how  
7 many parties we have. Sounds very legalistic. The next  
8 question is shall the commission grant the request to use OHE,  
9 and Mr. Wieczorek, you filed that request so I'm going to let  
10 you go first, then we will go to SDTA and any of the parties  
11 that wish to comment and then we will come around to staff, if  
12 that's okay. Great.

13 MR. COIT: I would prefer that the Golden West  
14 Companies proceed before us since we are intervenors.

15 CHAIRMAN SAHR: However you guys want to arrange that.  
16 Good point. Mr. Wieczorek, if you want to start off, that  
17 would be great.

18 MR. WIECZOREK: Thank you, Mr. Chairman. WWC  
19 submitted a brief in response to the objection last Friday and  
20 I don't want to retread all that legal analysis, but just to  
21 hit a couple highlights. It's never been WWC's position,  
22 although it was implied it was in the objection filed by Golden  
23 West, that this commission doesn't have final decision making  
24 authority in this arbitration. We have established procedures  
25 for the Office of Hearing Examiners. The statutes are clear

1 that it's this commission's final decision and you can reject,  
2 modify or adopt anything proposed by Office of Hearing  
3 Examiners, both in findings and conclusions and decision.

4 Our statutes are also fairly clear that in a contested  
5 case situation, you have an absolute right to request the use  
6 of Office of Hearing Examiners. That statute was in existence  
7 when this commission set its how to handle petitions for  
8 arbitration, and when this commission addressed that and set  
9 down the rules, it said it is going to be treated like a  
10 contested case and under our rights under contested case, we  
11 can request Office of Hearing Examiners and that's what we did.  
12 And I think that's all laid out in our analysis in our brief  
13 and that's all I would have, unless you would have specific  
14 questions on any of the analysis.

15 CHAIRMAN SAHR: Thank you. Do any of the -- I think  
16 they would be parties -- wish to comment at this point in time?

17 MS. MOORE: Yes, Mr. Chairman. This is Meredith Moore  
18 appearing on behalf of the Golden West Companies. Also  
19 appearing telephonically is Mr. Paul Schudel from the Woods &  
20 Aitken Law Firm in Lincoln, Nebraska. Both of us would request  
21 an opportunity to provide you with some comments on two  
22 specific areas and we would obviously rely upon the arguments  
23 previously submitted with our written briefs and I will be  
24 addressing those arguments in inverse order and starting with  
25 the practical considerations of the request that has been made



1 by Western Wireless.

2 CHAIRMAN SAHR: Ms. Moore, would you do me one favor  
3 and you are coming through pretty well, could you talk just a  
4 little bit louder and you don't have to slow it down a lot, but  
5 maybe just a little bit slower just because it's going to be  
6 easier for our court reporter here in Pierre. Thank you.

7 MS. MOORE: Certainly, I'll try to do that. I do have  
8 a habit of speaking quickly, so please feel free to interject  
9 and slow me down if necessary. Essentially this commission is  
10 being asked to view SDCL 1-26-18.3 to the exclusion of all  
11 other statutes, both federal and state, as well as all relevant  
12 administrative rules which have been spoken to in this area.  
13 And when you review SDCL 1-26-18.3 in light of all of the  
14 relevant statutory provisions, it becomes clear that neither  
15 Congress nor the state legislature nor this commission ever  
16 intended that one party be able to unilaterally divest this  
17 commission of federally and state mandated authority to review  
18 interconnection agreements.

19 When you look at the administrative rules,  
20 specifically ARSD 20:10:32:35, it's clear that the tone and the  
21 language of that rule is mandatory and that this commission  
22 shall discover the arbitration of interconnection agreements  
23 and it shall approve or disapprove of agreements either reached  
24 by negotiation between the parties or through the actual  
25 arbitration of the interconnection agreement. At no point was

1 it ever intended that this commission essentially be forced to  
2 give up its authority to hear those arbitration agreements, and  
3 taken to its logical extension, in this case Western Wireless's  
4 argument would argue that any time there's a contested  
5 proceeding, a statute can be used by a party to divest an  
6 agency of its jurisdiction. And that's not the intent. And  
7 the statutes and the administrative rules, which include the  
8 mandatory language with regard to the arbitration, are in  
9 significant contrast to the enabling statutes contained in SDCL  
10 Chapter 1-26D for the Office of Hearing Examiners.

11           Those specific statutes reference the process by which  
12 an agency would utilize the Office of Hearing Examiners and it  
13 specifically references taxation and insurance as being  
14 definitely addressed and it also further indicates that another  
15 agency can contract with the Office of Hearing Examiners on a  
16 case-by-case basis to analyze those cases. To date I don't  
17 believe this commission has ever contracted with the Office of  
18 Hearing Examiners for the interconnection -- excuse me, for the  
19 arbitration of an interconnection agreement, and that's because  
20 this commission has always had the intention of arbitrating  
21 those interconnection agreements itself.

22           And when you go through the specific statutes  
23 contained in Chapter 1-26D, you begin to see why this  
24 commission should retain jurisdiction to arbitrate an  
25 interconnection agreement and that's precisely because the

1 Office of Hearing Examiners contemplates a more simple type of  
2 proceeding than the realities that are inherent and the  
3 complexities that are inherent in the interconnection of an  
4 arbitration agreement.

5           And to look at those statutes, you also begin to see  
6 the little nuances that are present in the language which  
7 conflicts with the more mandatory language of this commission's  
8 statutes as it relates to arbitration. And Mr. Wieczorek  
9 indicated that it has been intimated that the Golden West  
10 Companies have argued that this commission would not have the  
11 final authority or final approval of the interconnection  
12 agreement, and that wasn't our intent to plant that seed in  
13 your minds. But it certainly raises numerous questions as to  
14 what authority this commission does have with regard to  
15 whatever recommendations would be made by the Office of Hearing  
16 Examiners.

17           The statutes, it's specifically 1-26D-7 and 8  
18 reference the procedure by which a reviewing agency reviews a  
19 recommended decision by the Office of Hearing Examiners, and it  
20 contemplates a full review of the record, it contemplates  
21 review of the findings, it contemplates written submissions by  
22 the parties, and quite frankly, that simply does not comport  
23 with the mandatory language of ARSD 20:10:32:35. And I'm not a  
24 proponent of tempering argument with rhetorical questions by  
25 any means, but I think the fact that we are trying to figure

1 out the exact interplay between this commission's  
2 administrative rules, the enabling statutes for the OHE, the  
3 federal mandates as contained within the Telecommunications Act  
4 of 1996 begs the asking of rhetorical questions, and that is,  
5 what exactly would this commission's role be if there is a  
6 recommended decision by the OHE? Do we have to go back and  
7 review the entirety of the record? Can you overrule that?

8           And you would not have had the benefit of having heard  
9 the testimony yourself, having viewed the exhibits yourself.  
10 Your specific involvement would be coming secondhand as opposed  
11 to firsthand, and that in and of itself exemplifies the  
12 difference between this commission, which has been charged with  
13 the authority to arbitrate interconnection agreements because  
14 it has the requisite expertise to undertake the analyses of the  
15 issues inherent in that type of proceeding.

16           No one at the OHE, at least to my knowledge, has ever  
17 handled an arbitration agreement, or excuse me, an  
18 interconnection agreement before, and I would think certainly  
19 wouldn't have the requisite expertise, and what this truly  
20 exemplifies is the absolute lack of rules for procedural  
21 guidance that would be in place for this commission to delegate  
22 its authority, and again this commission would have to  
23 affirmatively delegate its authority to the Office of Hearing  
24 Examiners for them to arbitrate the matter.

25           And it would further, we would suggest, not be able to

1 affirmatively delegate that authority until it has put in place  
2 some sort of procedural framework with which to guide the  
3 Office of Hearing Examiners, and that's not present in the  
4 administrative rules as they currently stand, the statutes on  
5 this area as it currently stands or the South Dakota Rules of  
6 Civil Procedure. It's simply not there.

7           And from a practical standpoint, it's been suggested  
8 that many other states handle arbitration of interconnection  
9 agreements like this, and I think that's true, but the fact is  
10 that those other states have put into place already definitive  
11 statutes to guide the arbitrators and they require that those  
12 arbitrators or bodies that are essentially created to arbitrate  
13 the matter have the requisite expertise to take a look at the  
14 issue. And Mr. Schudel is a member of the Nebraska bar and is  
15 an individual who practices before the Nebraska commission and  
16 can set forth for this commission I believe the procedures that  
17 have previously been put into place by the Nebraska commission  
18 that this commission simply doesn't have at this point in order  
19 to provide for a delegation of authority.

20           I'd like to turn it over to him to address some of  
21 those practical aspects as well as to address the federal  
22 preemption arguments that were raised first, but not to  
23 understate our position here in any way, I don't think there is  
24 any authority which would require that this commission simply  
25 accede to the request of one party to a contested hearing and

1 give up this matter. Thank you for your time. I turn it over  
2 to Mr. Schudel.

3 CHAIRMAN SAHR: Thank you. Mr. Schudel.

4 MR. SCHUDEL: Mr. Chairman and Commissioner Johnson,  
5 thank you for this opportunity to address the commission on  
6 this matter. Picking up with Ms. Moore's comment concerning  
7 procedures in Nebraska very briefly, in Nebraska and under our  
8 practice, which is the product of an open docket that began in  
9 1997 and was reopened in 2003, we have established a mediation  
10 and arbitration policy and as it relates to arbitration and  
11 selection of arbitrators, our commission has solicited and has  
12 obtained the names of qualified telecommunications  
13 practitioners who are willing to act as private arbitrators and  
14 maintains that list of arbitrators, which is initially provided  
15 upon its receiving notice that the parties are -- one of the  
16 parties is requesting arbitration.

17 The policy allows the individual parties to, by  
18 negotiation, identify one or more additional arbitrators if  
19 they wish to add those to the list. The process then proceeds  
20 to alternate striking process, which finally results in the  
21 selection of a neutral arbitrator, in those instances where the  
22 commission does not itself arbitrate the case, who is qualified  
23 in the telecommunications area. So that is an example of what  
24 is being done in Nebraska on that particular point.

25 I'd like to go back and talk just a little bit more

1 directly about the interplay between the federal -- excuse me  
2 for my raspy voice -- about the federal Telecommunications Act  
3 and the statute that's been implicated by the request submitted  
4 by Western Wireless. As you know, pursuant to Section 252 of  
5 the 1996 Telecommunications Act, Congress has deputized this  
6 commission to mediate and to arbitrate open issues in  
7 interconnection agreements. Further, in formulating the rules  
8 to implement the Telecommunications Act, the FCC determined in  
9 47 CFR Section 51.5 that statutory terms state commission,  
10 quote, shall also include any person or persons to whom the  
11 state commission has delegated its authority under Sections 251  
12 and 252 of the act, closed quote.

13           It is particularly important to note that the power of  
14 delegation rests with this commission and it is only this  
15 commission that may exercise the authority to delegate to a  
16 third entity, if it wishes another entity to conduct an  
17 arbitration. One may ask yourself, why would this be the case?  
18 What's the underlying policy behind the FCC's thinking? I  
19 would submit to you, as Ms. Moore has alluded to in her  
20 comments, this is simply because you as the agency deputized by  
21 Congress are in the position of possessing the expertise to  
22 administer the interconnection obligations of Section 251 of  
23 the act and federal law recognizes that this commission should  
24 evaluate and decide who is qualified and sufficiently  
25 knowledgeable to act on its behalf if it chooses to delegate

1 its Section 252 authority.

2 That is contrasted to the effective impact of the  
3 Western Wireless argument that would constitute your South  
4 Dakota state legislature to determine this delegation issue  
5 under SDCL 1-26-18.3, upon which Western relies, which would  
6 automatically divest the commission of its authority to hear a  
7 Section 252 case and to make its initial findings based upon a  
8 unilateral request of one party to the arbitration. We  
9 respectfully submit that this result is contrary to federal law  
10 and is preempted since Congress has both occupied the field, as  
11 is one prong of preemption, and has also enacted, through the  
12 FCC, 47 CFR 51.5, which conflicts with the section of South  
13 Dakota law relied upon by Western Wireless. Based upon the  
14 legal authority cited in our memorandum at pages two through  
15 five, this preemption alone is a sufficient basis for a denial  
16 of Western Wireless's request.

17 As a further passing reference to the practicalities  
18 of this matter and to follow up on Ms. Moore's comment, I would  
19 simply add that the appointment of a hearing examiner under the  
20 procedure of SDCL 1-26-18.3 would almost certainly cause the  
21 appointment of an individual who has never arbitrated a Section  
22 251 case in South Dakota and most likely such individual or  
23 individuals would be unfamiliar with telecommunications  
24 terminology, which is obviously basic to these cases, with the  
25 technical aspects of network configurations, intercarrier

1 compensation issues and matters such as the forward looking  
2 economic cost model, which is fundamental to setting of the  
3 rate, which is at issue before this commission.

4 I think this underscores the importance that if there  
5 is ever to be a delegation by this commission, it should be  
6 after you conduct a hearing and proper due process to determine  
7 from all inputs that you receive the appropriate amendments to  
8 your rules as they now exist that would cover this matter of  
9 delegation. With that, and for the reasons stated by Ms. Moore  
10 and myself, we would respectfully request that Western  
11 Wireless's request be denied. Thank you very much.

12 CHAIRMAN SAHR: Thank you very much. Mr. Coit, are  
13 you next?

14 MR. COIT: Yes. And given the lateness of the  
15 morning, I will try to keep this brief. We would concur in the  
16 arguments that were just presented by Ms. Moore and Mr.  
17 Schudel. We filed some written comments on this matter, on  
18 this issue on -- that are dated July 3rd, 2006. We would  
19 agree, and Ms. Moore alluded to this, you should not read the  
20 provisions of 1-26-18.3 by themselves. You have to look at the  
21 provisions of that statute, we believe, in conjunction with a  
22 number of other statutes, and I have cited those in my  
23 comments. I noticed that one of the cites was incorrect. I  
24 cited 1-16D-4 and that should actually be 1-26D-4, and also  
25 1-26D-11. If you look at those two statutes, I think you have

1 to read 1-26-18.3 with those two in mind, and under 1-26D-4,  
2 there is an assignment, a direct assignment to the Office of  
3 Hearing Examiners of taxation and insurance cases.

4           If you go to 1-26D-11, it indicates that other  
5 agencies not covered by the chapter may contract with the  
6 Office of Hearing Examiners to conduct hearings of its  
7 contested cases. If you look at those two statutes and then  
8 you read 1-26-18.3 in the context of those, basically I think  
9 what they mean, and I'm not sitting here today and saying I'm  
10 familiar with the legislative history, I'm not, I'm just  
11 looking at the statutory language and reading them together,  
12 but it certainly appears that the provisions of 1-26-18.3  
13 should be limited by those other sections, which would indicate  
14 to me that until this commission has actually made a decision  
15 to contract with the Office of Hearing Examiners or delegate  
16 this hearing function to the Office of Hearing Examiners, that  
17 you have the ability to hear the cases regardless of whether  
18 one party decides that they don't want you to hear it and they  
19 want it to go to the hearing examiners office.

20           Mr. Wieczorek, in the Alltel comments, indicates that  
21 they have the right, they have the right under that statute to  
22 move it. We disagree with that strongly and this commission,  
23 when it looked at the ad -- when it adopted the administrative  
24 rules in response to the 1996 Telecom Act and the state  
25 statutes that were passed in 1998, when these local service

1 competition interconnection rules were adopted, this issue came  
2 up, to my recollection, and the question was, should the  
3 commission arbitrate the case directly itself, arbitrate it and  
4 then also look at the agreement and decide whether they wanted  
5 to approve the final agreement that was the result of that  
6 arbitration. That issue was addressed to my recollection and  
7 this commission decided that no, we are going to arbitrate  
8 these cases.

9 I think some parties brought up potential conflicts or  
10 the fact that basically what you do is you take a process that  
11 was a two-step process and in effect kind of make it a one-step  
12 process because you are the same entity that's involved in both  
13 of those decisions. But the issues were addressed at that  
14 time. This commission made a determination that it was going  
15 to arbitrate. I think that's what the rules are intended to  
16 reflect, and what has the commission done since those rules  
17 have been adopted? You have arbitrated every case. And if all  
18 of a sudden now you are going to take a different approach and  
19 decide that, well, we can parcel this out or delegate to the  
20 Office of Hearing Examiners when somebody makes a request, if  
21 that's going to be done in the future or at some point here, it  
22 should be done in future cases. It shouldn't be done in this  
23 case where we are in the middle of a case, a petition for  
24 arbitration has been filed and the parties filed the petition  
25 for arbitration under certain understandings as to what the

1 process would be.

2 I think if you tried to do that now, you would I think  
3 be violating some due process or certainly raising some due  
4 process concerns. Is it something that the commission may want  
5 to look at in the future? I would think that if the commission  
6 wanted to re-examine the issue of whether it should actually  
7 delegate the hearing function itself, it could certainly do  
8 that. But I think you should do it in the context of changing  
9 your existing rules. And if you are going to do that, you  
10 should establish a process that allows for the arbitration of  
11 these cases by somebody who has the appropriate experience.

12 In looking at the arguments that are made -- just the  
13 motion itself that has been made, I think the biggest concern  
14 that we have as an association, sure, the commission will  
15 ultimately or could ultimately still make the final decision,  
16 but we don't particularly like the idea of having someone  
17 involved in the hearing process that has absolutely no  
18 experience in these complex areas. And right now if you assign  
19 it to the Office of Hearing Examiners, I'm not aware of anyone  
20 over there that does.

21 It's important to us that that person have the  
22 experience because of the fact that all of these issues have  
23 some pretty significant ramifications, impacts, and I'm not  
24 sure that somebody who is not involved with them can understand  
25 what those are. So for those reasons, we oppose the motion and

1 we also would just rely on the written comments. Thank you.

2 CHAIRMAN SAHR: Thank you. Staff.

3 MS. GREFF: This is Sara Greff on behalf of staff.

4 Staff believes that this is an ultimate right of WWC's to  
5 exercise to use the Office of Hearing Examiners. According to  
6 South Dakota law SDCL 1-26-18.3, it is clear that this is a  
7 contested case, no one is disputing that, and that a person has  
8 the right to request the use of the Office of Hearing Examiners  
9 in this matter.

10 There have been arguments raised by Golden West and by  
11 SDTA that you must look at the statutes in conjunction with  
12 each other in 1-26-18.3 and 1-26D. I think you guys can look  
13 at those statutes together and still come up with the same  
14 conclusion that WWC is purporting here today, yes, 1-26D-4 does  
15 limit or I guess does give the Office of Hearing Examiners the  
16 exclusive power and authority to hear only driver's license,  
17 insurance and tax cases. However, that is not their only  
18 authority. I think 1-26-18.3 gives them authority in other  
19 matters.

20 I think 1-26D-11 also gives you, the commission, the  
21 power to request the use of Office of Hearing Examiners in  
22 other cases. You guys can personally make that request in any  
23 matter, and also I think there is a request that can be made by  
24 a party pursuant to 1-26-18.3 and that is what is being  
25 requested here today by WWC. There is no divestiture of your

1 power or authority to hear Section 252 cases at the federal  
2 level. The ultimate decision with this matter remains with the  
3 commission and will stay with the commission regardless if the  
4 commission hears this or the Office of Hearing Examiners hears  
5 this matter.

6 The hearing examiners at the Office of Hearing  
7 Examiners are all competent attorneys that can catch themselves  
8 up to speed on this telecommunications matter and can hear this  
9 matter competently, and therefore, staff would I guess suggest  
10 or submit that the commission grant WWC's request.

11 CHAIRMAN SAHR: Thank you very much. Tal, can you top  
12 that one?

13 MR. WIECZOREK: I just have a couple comments, if I  
14 could, Mr. Chairman. Specifically, 1-26-18.3 says in any  
15 contested case the request can be made. It's not limited, it  
16 doesn't require that this commission precontract with the  
17 Office of Hearing Examiners. I think if you read these  
18 statutes, it's clear that that's a right.

19 Now, clearly under 1-26D-11, an organization can go  
20 contract for the Office of Hearing Examiners to hear all their  
21 cases, whether they are contested cases or not, or whether they  
22 don't meet the \$2500 threshold requirement under 1-26-18.3. To  
23 read it that you have to precontract pretty much gets rid of  
24 1-26-18.3 because if an agency simply never wanted the Office  
25 of Hearing Examiners to hear any of their cases, they wanted to

1 hear them all, they have to eliminate that statute by simply  
2 failing to precontract. That wasn't the intent of the  
3 legislature.

4           Secondly, as to this preemption as whether you  
5 delegate, as frustrating as it can be sometimes for the  
6 commission, you are a creature of statute. The legislature has  
7 set it up and has established these guidelines, they have made  
8 the commission subject to Chapter 1-26. This commission  
9 acknowledged that these are going to be contested cases under  
10 the rules as established and the commission can't, even though  
11 Mr. Coit now wants to recall the conversation taking place  
12 several years ago, the rules are clear you acknowledge this can  
13 be handled like a contested case. 1-26 is clear that under a  
14 contested case, WWC has the right to make this request to the  
15 Office of Hearing Examiners.

16           Finally I have to endorse staff's positions as to the  
17 hearing officers can get up to speed. This happens every day  
18 where judges hear cases for the first time. In fact the Office  
19 of Hearing Examiners says they can use the civil rules of  
20 procedure, which actually give them more formality than Chapter  
21 1-26 gives this commission. They can use that to educate  
22 themselves, they can use that to get other resources, if  
23 necessary, and for that reason I don't see that that is a bar  
24 to the referral either. With that I'll take any comments.

25           CHAIRMAN SAHR: Thank you. And I think we may end up

1 being okay time wise, but just so everyone knows, we lose this  
2 bridge at noon. Should I let people know what that number is  
3 now? John, would you hand me the number, please? Everyone  
4 ready? Get your pens out there in phone land. 605-773-2327,  
5 pass code is 1446. Again 605-773-2327, pass code 1446 and  
6 pound. You might have to do a couple pounds I think probably,  
7 hopefully it self-prompts you, but maybe it doesn't. But it's  
8 pound 1446 pound. So if we do end up getting to that noon, we  
9 drop, then everyone just come and that line -- I believe it's  
10 live right now, you should be able to then -- we will have to  
11 switch over, I assume.

12 MS. DOUGLAS: They can call our office and Carol can  
13 help them, too.

14 CHAIRMAN SAHR: I do have some questions or -- maybe I  
15 don't even. I don't think you could have said it any better  
16 than Ms. Greff did. She was absolutely right on point and it  
17 seems like maybe a lifetime ago, but I was in a state agency  
18 where we dealt with the statute a lot. I probably read it 500  
19 times and I think I could probably quote it verbatim. It is  
20 kind of a strange thing, but the interpretation I think that  
21 most people see with it is one party can request to move over  
22 to OHE and all you have to do is show, and I think it's 2500 or  
23 a property right, and it's almost an automatic move as long as  
24 they do it within X amount of days.

25 And I was in a state agency where we had some concerns

1 about expertise and about the commission losing authority, and  
2 frankly, I think Ms. Greff was absolutely right with the level  
3 of competency over at OHE, very, very high. Occasionally they  
4 will have times of the year where they do get backlogged, so I  
5 would just let everybody know that that's a possibility, so  
6 they should realize that sometimes the commission seems slow,  
7 but realize that you are before OHE and following their time  
8 tables, not the commission time tables.

9 I also think we really aren't delegating our ultimate  
10 authority. Ms. Greff was right on that point as well. The  
11 statute is clear that it comes back, we can accept, modify or  
12 reject. I believe, and I don't know, I may be wrong, you might  
13 be able to take additional testimony if need be, I don't know  
14 that, or else you can probably refer it back, but we have the  
15 ability to look at the record. I do agree, though, with the  
16 people who are urging us not to do this, I agree that I think  
17 the commission does have better expertise and I believe that  
18 you are better hearing it live.

19 I didn't write the statute. Frankly, I'm going to  
20 tell you I don't like that statute and I didn't like it in my  
21 previous life and I don't like it now. But it is the law and I  
22 think clearly it is the right of a party, if they meet the  
23 threshold and file timely, to move across and I do think the  
24 people who are proposing that we not allow it to move over  
25 there, I think they raise some interesting points especially on

1 some of the federal interplay and exercise of authority. I  
2 think those are valid points, but I don't know if it trumps  
3 state law in terms of the commission because it does come back  
4 to the commission for a review.

5 So maybe something where I don't know if this thing  
6 will get appealed, we may get direction on it and especially  
7 once we start bringing federal law as opposed to state law, I  
8 think it's pretty clear how it works with strictly a state law  
9 case. Maybe that federal aspect will win the day on this, but  
10 unfortunately, I think it's pretty clear that it goes over  
11 there, but again, I do so saying I don't necessarily like it,  
12 but I do have faith in the -- I know the hearing examiners over  
13 there, they have a very high level of competency and  
14 professionalism and I think we like to do things in more of a  
15 populaced open fashion here in South Dakota and I think for  
16 good reasons. I think the commission likes to hear and take  
17 these cases and it's again something where I don't know if we  
18 really have much of a choice when a party files but to permit  
19 it to go forward. With that, I guess I don't really have any  
20 questions, it's just kind of a long comment, but I'll see if  
21 Commissioner Johnson or if any of the advisors have questions  
22 or comments.

23 VICE-CHAIR JOHNSON: I would agree that there would be  
24 serious complications associated with sending this case to the  
25 Office of Hearing Examiners and I have serious doubts as to

1 whether or not this is the right course of action, but I don't  
2 think those concerns or those complications in any way trump  
3 the right for somebody to have their case heard at the Office  
4 of Hearing Examiners. So I find myself much in the same  
5 position as Chairman Sahr and with that, I would move that the  
6 commission grant the request to use the Office of Hearing  
7 Examiners.

8 CHAIRMAN SAHR: And I will second that.

9 (Whereupon, the proceedings were concluded at 11:55  
10 a.m.)

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