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January 12, 2006

VIA FAX: 605-773-3809
and NEXT DAY DELIVERY
Patricia Van Gerpen
Executive Director
SD Public Utilities Commission
500 E Capitol Avenue
Pierre SD 57501

RE: WWC's Complaint against Golden West Companies Regarding Intercarrier Billings
Docket CT 05-001 GPGN File No. 5925.050089

Dear Ms. Van Gerpen:

Enclosed please for filing, please find WWC's Response to Joint Motion in Limine, along with the Certificate of Service. The original and ten copies will be sent by Next Day Delivery to the Commission

Please feel free to contact me with any questions.

Sincerely,

Talbot J. Wieczorek

TJW:klw
Enclosures
c: (w Encl) Darla Pollman Rogers via fax
Rich Coit via fax
Rolayne Wiest via fax
Client

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

In the Matter of the Complaint WWC License LLC against Golden West Telecommunications Coop., Inc.; Vivian Telephone Company; Sioux Valley Telephone Company; Union Telephone Company; Armour Independent Telephone Company; Bridgewater-Canistota Independent Telephone Company; and Kadoka Telephone Company	))))))))))	DOCKET NO. TC05 - 001 **WWC's BRIEF IN RESPONSE TO JOINT MOTION IN LIMINE**

WWC License LLC, of 3650 131st Avenue SE, Suite 400, Bellevue, Washington 98006, a subsidiary of Alltel (hereinafter "WWC"), by and through its attorney, Talbot J. Wieczorek of Gunderson, Palmer, Goodsell & Nelson, LLP, hereby submits this Brief in Response to the Joint *Motion in Limine presented by Golden West Telecommunications Cooperative, Inc.*, and its affiliated companies (hereinafter "Golden West" or "the Golden West Companies") and Intervenor South Dakota Telephone Association (hereinafter ("SDTA"). WWC respectfully requests the motion in limine be denied.

BACKGROUND

In their motion, Golden West and SDTA anticipate "that WWC intends to argue that Section 2.1 of the Interconnection Agreement is ambiguous because it does not mirror the language in the Settlement Agreement negotiated between the parties relating to the InterMTA Factor." See Joint Motion in Limine at pages 2 through 3. Golden West and SDTA mischaracterizes WWC's position. The matter at issue is not a simplistic as whether Section 2.1 read in isolation is ambiguous or not. Section 2.1 states "InterMTA traffic is subject to telephone companies' interstate or intrastate access charges." (emphasis added). The ambiguity that arises

is what rate is the InterMTA traffic subject to, when is the traffic subject to one rate or the other, and who makes the determination of when to apply these rates.

As noted in a previous briefing on another motion, WWC initiated this proceeding against the Golden West companies seeking a refund for excess payments. Golden West has answered and filed a counterclaim.

After this matter was filed, Golden West companies disclosed they were charging intrastate rates on all InterMTA traffic. It is WWC's position that the InterMTA use factor minutes were to be charged at an interstate rate. In their most recent damage analysis, the Golden West companies have claimed they are entitled to recalculate their bills back to January 1, 2003, using a higher InterMTA factor where the resulting minutes are split pursuant to another factor into interstate and intrastate minutes. These are then in turn charged by the respective rates. No where in the agreement is this procedure agreed to.

The settlement agreement, which SDTA and the Golden West companies seek to bar from evidence, addresses InterMTA traffic, stating:

> RTC may apply an InterMTA factor to Western Wireless mobile-to-land terminating minutes to derive usage that may be billed as interMTA traffic at RTC terminating interstate access rates. The factor is subject to adjustment based upon mutually agreed traffic study analysis to be conducted by September 2003.

The settlement agreement clearly identifies that interstate access rates would be used to determine the charges for InterMTA traffic.

The expired interconnection agreement was replaced after the execution of the settlement agreement by the Reciprocal Interconnection, Transport and Termination Agreement (hereinafter "the Agreement") which was retroactive to January 1, 2003, the day after the previous interconnection agreement expired. The Agreement addresses, incompletely, the agreement

between the parties with respect to the determination of the InterMTA factor as well as the proper applicable access rate necessary to calculate the InterMTA traffic charges.

With respect to the InterMTA factor, Section 7.2.3 of the Agreement provided for an initial factor of three percent (3%). Pursuant to Section 7.2.3, if the parties were not able to classify the traffic delivered as local or InterMTA, the factor was to be multiplied by the total minutes of use. After the completion of this initial step, the number resulting from the multiplication of the factor and the minutes was multiplied by the appropriate access rate to determine the charges for InterMTA traffic. This present issue centers upon whether the Agreement requires the use of interstate or intrastate access rates. [1]

The Agreement fails to specify factors to consider in determining which of the two access rates to utilize in determining the InterMTA traffic charges. Similarly absent is the critical identification of the party responsible for choosing the applicable rate. Moreover, the contract is silent with respect to any explanation concerning when/if/how the rate could or should change and the party with the right or responsibility for making such changes. The materiality of these omissions is clearly apparent from the fact that the difference between the interstate access rate and the intrastate access rate is significant. The corresponding difference in the total charges for InterMTA traffic, depending upon whether interstate or intrastate access rates are used, is substantial.

The Golden West companies filed a Counterclaim under the premise that they are entitled to a new InterMTA use factor retroactively applied to January 1, 2003. Answer and

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[1] By way of example, the total minutes of use as calculated by traffic delivered would be charged at the agreed upon reciprocal compensation rate except for those minutes subject to an InterMTA factor. The InterMTA factor agreed upon was three percent (3%). InterMTA factor minutes would then be charged at a different rate. For example, if the total minutes of use was 100,000 minutes, these minutes would be taken times the InterMTA factor of 3%. These 3,000 minutes would then be charged at a different rate. WWC contends that rate was to be the interstate rate as agreed to by the parties in the Settlement Agreement.

Counterclaim at ¶ 35. They apparently believe that they possess the unilateral right to choose the access rate to utilize in calculating the charges for InterMTA traffic and seek to prohibit WWC from using the settlement agreement to clarify and explain the intent of the parties with respect to the terms of the Agreement. The settlement agreement is admissible for this purpose.

ARGUMENT AND AUTHORITY

To resolve this dispute, the PUC must interpret the terms of the Agreement. "The goal of contract interpretation is to see that the mutual intent of the parties is carried into effect." *Nelson v. Schellpfeffer*, 656 N.W.2d 740, 743 (S.D. 2003). In reaching this goal, the plain and ordinary meaning of the written document controls absent some ambiguity in the terms of the written contract. *See Full House, Inc. v. Stell*, 640 N.W.2d 61, 64 (S.D. 2002). Generally, a "written agreement supersedes all previous understandings and the intent of the parties must be ascertained therefrom[.]" *Quick v. Bakke, Kopp, Ballou & McFarlin, Inc.*, 380 N.W.2d 364, 366 (S.D. 1986). However, this general rule is not applicable in cases involving fraud, mistake, or ambiguity. *Id.* Similarly, the rule is not applicable and parol evidence is admissible, "where the contract is not complete on its face, or is not intended by the parties to be complete." *Peter Kiewit Sons' Co. v. Summit Construction Co.*, 422 F.2d 242, 270 (8th Cir. 1969) (resolving a South Dakota dispute).

A contractual provision is ambiguous if "after application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty exists as to which of two or more meanings is the proper one." *Jensen v. Pure Plant Food Int'l*, 274 N.W.2d 261, 264 (S.D. 1979). If an ambiguity or uncertainty is present, parol evidence, evidence beyond the written terms of the agreement, is admissible for the purpose of explaining the written contract. *See Haback v. Sampson*, 221 N.W.2d 483, 486 (S.D. 1974). Under the facts and circumstances of

this case, parol evidence in the form of the settlement agreement is admissible to explain the Agreement.

To interpret the terms of the Agreement and resolve this dispute, the PUC will be required to determine whether the interstate access rate or the intrastate access rate is applicable to compute the InterMTA traffic charges, when a rate is applicable and who between the parties makes that determination. The Agreement states that either rate could apply. Golden West apparently believes this language is entirely clear and no ambiguity or uncertainty is present. WWC disagrees. The PUC simply cannot determine the intent of the parties from this language of Section 2.1 with consideration of only the current language of the Agreement. As previously explained, both Section 2.1 and the Agreement as a whole, fail to include all the important material terms concerning the determination of the applicable access rate. Therefore, the agreement is incomplete and subject to explanation through extrinsic evidence. *Peter Kiewit Sons' Co.* at 270.

The statement of Section 2.1 that either of the two rates could apply is not ambiguous on its face. However, without explanation or any evidence concerning the intent of the parties, the PUC cannot determine which of the two rates the parties intended to utilize, when the rates would be used, and who would determine when the rates would apply. While there may be no inherent ambiguity created by the fact that a contract provides one of two or more options, the same cannot be said with respect to a contractual provision that fails to establish how to choose between the alternative options. Such a contractual provision is clearly and obviously uncertain and subject to explanation by extrinsic evidence.

WWC recognizes that parol evidence is only admissible for limited purposes, and cannot be admitted to vary the terms of the contract or to add or detract from the written agreement.

Jensen, 274 N.W.2d at 263-264. WWC's intent in utilizing the settlement agreement is not to change the terms of the contract. Rather, both the settlement agreement and Section 2.1 provide that the interstate access rate is an appropriate selection. Therefore, the terms of the Settlement Agreement are not inconsistent with the terms of the Agreement and the Settlement Agreement simply clarifies the parties' intent.

In this dispute, the Interconnection Agreement presents a genuine uncertainty as to whether the interstate access rate or the intrastate access rate must be used to calculate the InterMTA traffic charges. Contrary to the belief of Golden West, no where does the Agreement provide Golden West with the unilateral right to choose the access rate to apply in figuring the InterMTA rate. The PUC must consider the intent of the parties to interpret the terms of the Agreement in this case. The PUC should have access to all the relevant evidence concerning the intent of the parties. The settlement agreement was negotiated only months prior to the formal signing of the Agreement and provides the PUC with the only clear expression of the parties intent during the negotiation of the Agreement.

CONCLUSION

WWC does intend to present evidence that the interstate access rate is the proper rate in determining the InterMTA access charges since the parties agreed to that rate in the Settlement Agreement and the Interconnection Agreement does not specify a rate. Because the Interconnection Agreement is silent as to how to determine whether to use interstate or intrastate rates, the PUC must consider the settlement agreement in deciphering the intent of the parties with respect to the terms of the Agreement. The admissibility of the settlement agreement for this purpose is entirely proper.

Dated this 11 day of January, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of January, 2006, a true and correct copy of **WWC's Brief in Response to Joint Motion in Limine** was sent by fax and first-class, U.S. Mail, postage paid to:

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