THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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PUBLIC HEARING TO CONSIDER
THE ADOPTION AND AMENDMENT OF
PROPOSED RULES

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Transcript of Proceedings
August 2, 2007

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THURSDAY, AUGUST 2, 2007

COMMISSIONER JOHNSON: Good morning. We are now going to begin the public hearing to consider adoption of proposed rules as listed in the notice of public hearing. This hearing is being held in Room 413 on the fourth floor of the State Capitol here in Pierre. The date is August 2, 2007, and the time is approximately 9 o'clock in the morning. I am Commissioner Dusty Johnson. Joining us here this morning are Commissioners Gary Hanson and Steve Kolbeck. Persons interested in presenting data, opinions and arguments for or against the proposed rules may do so today by appearing in person at this hearing or by sending their comments to the PUC at the State Capitol, 500 East Capitol in Pierre. Material sent by mail must reach the PUC by August 13th of 2007 to be considered.

The commission will consider all written and oral comments it receives on the proposed rules. The commission may modify or amend the proposed rule at that time to include or exclude matters that were described in the public notice. Our intention this morning is to take comments on the proposed rules. I don't know that we have any formal structure in mind or any particular speaking order, so if somebody wants to jump up to the mike, certainly feel free. We would request that you give us a heads up as to which portion of the proposed rules you would like to address, and with that, the microphone is

open. It reminds me of those Disney chipmunks, you go first, no, you go first. Mr. Coit, good morning.

MR. COIT: Good morning. We don't have too much. Do we need this? We have people on the phone?

COMMISSIONER JOHNSON: The World Wide Web.

MR. COIT: That's right. My name is Richard Coit and I serve as the executive director and general counsel for the South Dakota Telecommunications Association and on behalf of the SDTA members, we do have some comments on the rules, on several of them anyway.

The first one that we would like to offer some comment on would be 20:10:32:03. The subsections 13 and 14 of that particular section will eliminate the requirement to file a tariff or price list indicating the prices, terms and conditions of each contemplated local service offering and would eliminate the need for cost support for rates shown in the company's tariff or price list or rate or price regulated noncompetitive or emerging competitive services.

The only concern that we have with this language is that one of the noncompetitive services offered by local exchange carriers is switched access services, and I don't think the intent of this provision is to exempt from tariff filing or cost support accessed services, which are wholesale telecommunications services, so you may want to clarify that these provisions don't extend to access services that are

subject to tariffing elsewhere.

MS. WIEST: And if I could, just to clarify, the rationale for getting rid of that just in the COA process is that we understand that switched access rates would still need to be filed, it's just that they would be a separate docket and we didn't think that in the COA application itself that it necessarily was part of this docket, that the switched access would be a part of a separate docket, because we recognize that they would have to have those filed and approved.

MR. COIT: Yeah, and I kind of figured that was the case, but it might also be worthwhile to indicate in the rule that it doesn't affect that tariffing, just so local exchange carriers entering the marketplace understand that they are still subject to that requirement. Just a thought.

The next one that we would like to comment on would be 20:10:32:10, which deals with service obligations of all providers. In looking at this section, I'm just kind of guessing that maybe one of the --

COMMISSIONER JOHNSON: I'm sorry, Mr. Coit, can you give us that cite again?

MR. COIT: 20:10:32:10, which is on page 20 and 21.

COMMISSIONER JOHNSON: Thank you.

MR. COIT: Specifically going to page 21 or the last part of the section, which includes the newly proposed language, I'm guessing that one of the reasons that this is

being offered is because of VoIP providers I would guess. We are just a little bit concerned that the standard of public interest may not be specific enough. The purpose of these provisions when they were initially put into the rules, at least to my understanding, was to insure that carriers would not come in and maybe try to cherry pick customers by offering only a few select services. Obviously another purpose I think was just to safeguard the rights of consumers, that there are certain essential type services that they need and that carriers coming in and not offering those various services might put customers at a disadvantage or harm consumers.

There are some different standards that would be a little more specific that are referenced in 20:10:32:11, which is the statute that deals with the offering of a different local calling scope by alternative providers. That standard or those standards which reference, let's see here, universal service, public safety and welfare, quality of service and consumer rights concerns, those standards, the source for those I think were out of Section 253B of the federal act, which is kind of the safe harbor for states to take action in regulation and avoid the barrier to entry requirement that's in the federal law. Those standards in that section are very similar.

Just being a little bit more specific than just referencing the public interest could be helpful and I think that if we would have one concern about not being specific with

the standard, it would be that in applying this provision, I don't think it should be done in a discriminatory fashion. Obviously we are dealing with a pretty competitive environment and certain carriers shouldn't be saddled with the burden that other carriers aren't saddled with, which as a result of that gives them some unique competitive advantage. Understanding that all carriers are different and all have their different services, still we would encourage the commission to look at a standard that is a little bit more specific and maybe avoids discriminatory regulation and treats competitors more on an equal footing.

The next section that we have some comments on would be 20:10:32:29.

COMMISSIONER JOHNSON: Mr. Coit, I have a question or comment, do you want me to save them for the end?

MR. COIT: Go ahead.

COMMISSIONER JOHNSON: Is your concern specifically with the wording or more with concerns about how the commission may -- its application of these exemptions in the future, waivers?

MR. COIT: I would say it has a lot more to do probably with the wording and just the standard, public interest, that's very broad. I would think that perhaps the rule could be challenged just if that's the only reference that you are going to make, giving yourselves maybe a little bit

more direction in the sort of things that you need to consider when you decide whether or not you are going to impose those obligations or not.

COMMISSIONER JOHNSON: Do you have any particular suggestions?

MR. COIT: Well, I think looking at the standards that are in 20:10:32:11 or looking at 253B in the law, and you don't necessarily have to follow that specific language, but I think that certainly gives you some ideas and maybe you want to look at some of those standards that more particularly might address the concerns that arise when you look at whether you are going to grant the waiver or not.

COMMISSIONER JOHNSON: Thanks.

MR. COIT: The petition for arbitration section, which is 20:10:32:29, we understand that the commission is up against a very tight time line on arbitration proceedings. At the same time, our preference would be rather than requiring prefiled testimony with the filing, that the commission maybe needs to focus more on just making sure that the procedural schedule in the case is established very early on in the process, and requiring the company to file a proposed procedural schedule we think is a good idea, but we also think that the commission just needs to commit itself, whether it sets itself a guideline in the rule or a deadline in the rule to establishing the procedural schedule very early in the process, it seems like

from the arbitrations that I've seen, that sometimes that might be five, six weeks after the petition is filed. There's a lot of wasted time early and we think the better approach might be to just get that hammered down real early.

The concern that we have here relates to the fact that you have had no chance really to do any discovery. You are required to file your prefiled testimony really before you have done any discovery or had any opportunity to do that. The other concern -- and there are obviously other due process issues in trying to get yourself in a position to really know what needs to go in your prefiled testimony isn't always that easy. If you require that filing with the initial filing of the petition, you know, are you going to end up with a situation where you have got a lot of initial testimony that needs to be revised or supplemented? And I realize that most often there's an opportunity for reply, but it seems like there's problems with doing it this way, not just due process, but flexibility wise.

There might be cases where the parties feel, depending on the issues that are presented, that it's not even necessary to proceed with prefiled testimony. We really haven't seen that in the arbitrations that have come before the commission in the past, but I think that's certainly a possibility. Parties might just decide they don't want prefiled testimony in light of tight time lines or whatever. And we would ask that

the commission consider just giving itself the flexibility to look at different things in terms of the procedural schedule and so we are not really in favor of the idea of requiring the filing of prefiled testimony with the initial filing.

The other concern that we have is by requiring that, are you going to actually create an environment where there are more arbitrations, because the parties are going to be less focused on negotiating in advance of the time line or the deadline for filing of the petition? I mean, obviously it takes time to put all that stuff together. If parties the last 30 days are just focused on prepping their petition or the party that has initiated things is focused on prepping its petition, maybe you will have more arbitrations.

The same concern would apply to 20:10:32:30 and probably even more so from a due process standpoint. It seems like that is kind of a harsh requirement to require the filing of prefiled in the response. Twenty-five days would be a real tight time frame for parties to -- for the responding party to get all their positions formulated and get testimony filed and exhibits and all of that.

And with 20:10:32:39, which is the provision dealing with suspensions and modifications, the commission has 180 days to complete that process. Again, we would ask that the commission maintain some flexibility there and not actually require the filing of prefiled testimony with the petition for

suspension and modification. Going back to what I said earlier, I think the important thing in these cases is just to make sure that you get that procedural schedule established as quickly as possible and that way people will accelerate their activities to the extent they need. But just looking at the way things have gone in a lot of these things in the last five years or so, it seems like a lot of time goes early in the process and no schedule gets set. So we would like to see the commission just focus on the procedural schedule, allowing for some flexibility with regard to prefiled testimony.

Lastly, there's a section in here that deals with acquisitions, 20:10:34:02.02, which is on page 29 of the copy that I have, and we are not really sure what is meant by sub part E of that section, which deals with PIC freezes. It seems like some of that language is kind of confusing. So perhaps some clarification is needed there, unless we are just not reading it correctly.

COMMISSIONER KOLBECK: Which part, Rich?

MR. COIT: Sub part E, which starts, all subscribers receiving the notice. What I find particularly confusing is the language "unless they have selected a different carrier before the transfer date," I don't know what that was -- what is meant by that and if that means that customers are supposed to be given some additional opportunity to select a different carrier before the closing date, I don't know. Maybe I'm just

reading it wrong and somebody can clarify that.

COMMISSIONER JOHNSON: Well, maybe I'll back up just a little bit and ask some questions on your prefiled testimony portion. I think your suggestion with regard to procedural schedule is well taken, but it seems to me there would have been instances, even if that schedule could have been set three weeks earlier, that there still would have been a tremendous crunch because of the 180 days. To me that isn't a silver bullet that's going to solve -- as you know better than I do, this is a very tight time frame, almost unworkable. So I think the commission is struggling with how do we try to make this 180 days work better. Do you really think an expedited procedural schedule is going to get everything done we need to get done?

MR. COIT: Well, with regard to the filing of the prefiled testimony, if you look at the two sections, one dealing with the filing of the petition and one dealing with the response, I have a lot more heartburn and trouble with requiring the responding party to file the prefiled, you have got 25 days there, that's it, and you have -- maybe you don't know what the issues are going to be. We have had arbitrations that have been filed in the past with not a lot of negotiation going on because there was just an impasse and the parties knew there was an impasse on the most important issues and the time frame lapsed and it gets filed. You don't really know

necessarily what all those issues are going to be.

I mean, in a lot of cases the negotiations process will give you a pretty good idea, but you don't always know, and you might be faced with an issue that you didn't expect at all which requires you to go out retain a consultant, formulate your position, make sure that consultant has the time available to file -- to prep the prefiled testimony. I mean, there's some real due process issues and I know that the time frame is incredibly tight. If you look at the history, the parties have been somewhat willing to kind of extend that out by altering the date of the interconnection request, and I know that can't happen in every case, it doesn't happen in every case, but it has happened quite often.

You know, the other thing is that maybe some of these cases the better approach is, depending on the issues, you might be better off just not requiring prefiled testimony, just going to hearing. I think that you don't want to short the discovery process, and I would be concerned about parties not really having any ability to do any discovery and having to file their positions in prefiled testimony. That's kind of hard to do. So I know the problems, I understand how tight those time frames are, but also maybe rather than approaching it in a rule, just issuing an order really early on just depending on what the circumstances are. I mean, do you have to put in a rule that parties have to file prefiled testimony?

If that's something that you want, but it's not always been done.

COMMISSIONER JOHNSON: Well, and I understand the frustration and the concerns with prefiled testimony and I think you made some strong points. I do think, at least in my mind, I'm thinking, well, okay, if there's not prefiled testimony, when we look at this process, the way it's been running heretofore is not going to cut it. It's too tight a time frame. So there needs to be some structural change, at least in my mind, maybe I'm wrong about that. But other than moving up the scheduling order two or three weeks, what other structural changes can be made? Could it be that requiring prefiled testimony is cumbersome but is the least cumbersome structural change that could be made to make this process work? Maybe I just haven't talked to enough people, but I'm not hearing a lot of people offer up other ideas for how to improve this process.

MR. COIT: To some degree just getting tougher on the parties in terms of the time that they have to respond to things, the time that they have to submit their prefiled testimony, and if you are going to not require it with the filing, you would want to issue a procedural order and you wouldn't want to give maybe the amount of time that you have given in the past in people filing their testimony or responding to their testimony. I mean, attorneys, we all like

to have as much time as we can get and I think I've been involved in a lot of these calls where we are all talking about what the schedule should be and everybody is trying to work around this and work around that and everything else.

If you are faced with a time line that's really tight, you know, those parties really need to understand that there's just not a lot of flexibility, but I'd rather see you as a commission address that stuff on a case-by-case basis than put it in a rule and say, we are going to file prefiled testimony right when the petition is filed and right with the response. What's wrong with maybe putting something in the rule that says the commission is going to establish a procedural schedule within this many days after the petition is filed? Something like that and at least giving the parties some ability to talk with the commission and determine whether they are going to need prefiled testimony.

The other thing that you might want to think about is maybe prefiled testimony isn't needed on all issues, maybe you want to just identify the issues that prefiled -- you would like prefiled testimony on. That might be one way of looking at shortening the process, at least in terms of prep time on prefiled. I don't know if you would need to have prefiled on absolutely every issue.

COMMISSIONER JOHNSON: Thanks. Let's see if there are any other questions on the prefiled testimony piece. I think

we do have questions on the last issue as well. Anything else on the testimony? Then on your subsection E on page 31, I think maybe there were questions on that. Maybe not.

MR. COIT: My question is, what is meant by this "unless they have selected a different carrier before the transfer date"?

COMMISSIONER JOHNSON: You had a question, that's right. Thanks.

MS. WIEST: I can look into that further, Rich. This is Rolayne Wiest, but I will say that this language does come from the FCC's.

MR. COIT: That explains it. Okay, thank you.

COMMISSIONER JOHNSON: Thank you, Mr. Coit. Mr. Topp, good morning.

MR. TOPP: Good morning. Jason Topp from Qwest. And first of all, I wanted to compliment the efforts of Ms. Wiest and whoever else was involved in putting together these rules. It's clear that a lot of thought went into them. I think there were a lot of great decisions made in the proposed rules and we don't have much in the way of suggested changes. However, we did want to come out and comment on a few, and the first one we wanted to comment on is the section related to petitions for arbitration that we were just discussing on page 22.

First of all, the proposed written testimony and exhibits being filed with the arbitration petition, that's

something I've been through a number of arbitrations in a number of states, and I don't think that I've seen that requirement before and I really kind of go back and forth and I think within our company, we kind of go back and forth on whether that's a good idea or not. We see a lot of positives associated with that.

The concern about the procedural schedule that has been raised by Commissioner Johnson is certainly there, although in practical terms often that's alleviated through negotiated extensions. Often in my experience we are going to arbitrations in a number of states and the way the federal statute is set up, it would just simply be impossible to go to arbitration in all those states at the same time, so you wind up trying to negotiate with the states and the parties to come up with a reasonable approach.

The other big advantage we see to that requirement is that it requires that a company, when they file a petition for arbitration, they are going to need to be ready to go to arbitration as opposed to using it as a negotiating pressure ploy or something along those lines. We have seen many petitions for arbitrations in a number of states that have been filed, the dates have been delayed and then there has -- there may be other aims, and this certainly would require that once an arbitration petition is filed, that you are ready to go.

I do think there are risks associated with these

requirements, that you might have some arbitrations when things could be negotiated out. I think that that's a relatively remote risk. I do think that it's more likely that you would have some issues included in the arbitration or at least testimony filed with it that later get resolved, because it's often the case at the time you start an arbitration, you will have, say, 20 issues and by the time you get to hearing, you have got five or ten and you are negotiating throughout that entire time period as a party, and filing testimony would be some extra effort that might be unnecessary by the time you actually get to hearing.

So from our perspective, the requirement of written testimony and exhibits at the time of filing the petition is something that the commission should just balance the pros and cons on and make a decision on. We certainly can be supportive of going in either direction with respect to those two provisions.

With respect to sub part 10, which relates to prices and proposed rates and cost studies, of filing those at the time of the petition, it's our position that having a cost proceeding in the context of an arbitration is a very poor forum for making those decisions, extremely complicated decisions. You have only got two parties as opposed to anyone else that may be interested in those rate determinations, and so our suggestion would be that that piece of the rule be

dropped. It has, up until recently, been extremely rare in our experience that you actually have a rate dispute associated with an arbitration. A case I'm handling with Echelon that is in six states right now, we have had some rate disputes and have tended to argue for interim rate types of arguments as opposed to filing cost studies because of just the time and the burden associated with full out cost studies being filed. So that is our suggestions on that point.

I do think that the concern about filing testimony and exhibits with the response, you may want to think about a little bit more flexibility on that front. While generally, in my experience at least, you know what the issues are going to be when the arbitration petition is filed. If you did have a situation where there wasn't much in the way of negotiation, that may be a real quick, difficult time frame to meet.

Probably the rule, however, related to arbitrations that causes us the most concern is 32:31.01 on page 23, participation by nonparties. In Minnesota, I don't know if there's a rule, but there's certainly a similar practice in which nonparties are able to file comments. And from Qwest's perspective, that ability has been very problematic and the reason it's been problematic is because you have parties who are often attempting to advance their own interests in separate negotiations who are not bound by the decision, don't really have an interest because the proceeding is designed entirely to

address a contract between two parties who are taking a free shot at getting a favorable ruling that they can use as a part of their negotiation.

And often we have had to litigate in front of the commission after the hearing is over language that's proposed that neither party who is actually going to be bound by the contract has proposed, none of the testimony has addressed, none of the proceedings have focused on and it's been thrown in at the last minute. We would submit that's a very unfair position to put either of the parties to the arbitration into. It detracts from the proceeding and any rights that a third party might have with respect to language, they have an ability to raise those, propose those and have those determined through their own arbitrations and own proceedings. And so it would be our recommendation to strike that provision from the proposed rules. But that is the extent of the rules that we have comments on. And we appreciate the work and think that these are very well done.

COMMISSIONER JOHNSON: Thanks, Mr. Topp. With regard to participation by nonparties, I understand your concerns. I think the commission's perspective is likely that we have parties, on a number of occasions we have had parties request to do this because they see the de facto precedential setting possibilities with even an arbitration, a very fact specific proceeding. Is there a better mechanism that you can imagine

allowing third parties to weigh in on these weighty issues that might happen during an arbitration proceeding?

MR. TOPP: I think the most offensive portion of doing that is having a third party propose language. If you are going to have entirely different language, if you think of a contract negotiation in a private setting, then having somebody else come in and propose something completely different, that's fine if the parties agree to it, but if you are litigating over it, that's not what's happened. And so I think if you are going to allow third-party participation, you would not want to have proposed language from those sources is one recommendation that I would make.

But I do think that often you are getting that sort of participation because you have parties who are going to -- that have their own negotiations taking place and if they have got a different case to make, they can certainly make that as a part of their proceeding. I recognize it's a de facto decision, but even with that decision out there, they are going to have the opportunity to explain why the situation is different for them.

COMMISSIONER JOHNSON: Would it make you feel any better to know that the South Dakota commission is far more common sense and restrained with regard to these proceedings in other states? Perhaps we wouldn't bite so hook, line and sinker on a third party's proposed language.

MR. TOPP: No comment.

COMMISSIONER JOHNSON: Any other questions or comments for Mr. Topp? Thanks very much. Morning, Mr. Gerdes.

MR. GERDES: Good morning, Mr. Chairman, members of the commission, I'm Dave Gerdes, I'm a lawyer from Pierre and I represent Midcontinent Communications. I think just for continuity, I'll pick up where Mr. Topp left off because this particular section on arbitration was one that also caught my eye. I have a couple of other reasons I think that the commission should be careful about putting something like this in the rules or even in practice. I agree with everything Mr. Topp has said.

It also occurs to me that the way this is set up right now, you have an arbitration, you go through the testimony of the parties, prefiled and otherwise, go through the entire hearing, get down to the end and then you have some third party jumping in and raising new matters or raising new language, as has been mentioned, or raising anything else that might be new, about which they have not offered evidence, that evidence has not been subject to cross-examination and the parties have not had any chance to conduct discovery. Basically you are talking about deciding an arbitration by ambush.

I think it has some basic -- this concept has some basic due process arguments, but to cut to the chase, if you look at your rules, 20:10:32:31 states that arbitration is to be conducted as a contested case. Well, if you look at the

Administrative Procedures Act and specifically at section 1-26-17.1 of the Administrative Procedures Act, it says that as to a contested case, a person who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency's order made upon the hearing may become a party to the hearing by intervention, if timely application is made. In other words, that makes them a party, so it makes them -- then they have got a stake in the thing, they are subject to cross-examination and I believe that the due process arguments are taken care of to a large extent. So I mean if you are going to do something like this, make them be a party all the way across.

Now, I have a particular -- I agree with Mr. Topp, I think an arbitration, however, is different than most other things because it is a private situation between two parties negotiating over a contract. Why should some third party be able to come in and affect a private contract between two contracting entities? It's been said many times, primarily by Karen Cremer of your staff, that there is no precedent in administrative law, and that's true and the courts recognize that. If you want to do something, I would suggest that you add to your rules that in making an arbitration decision, it's not precedent for anything else the commission does later in similarly situated arbitration proceedings.

But as far as allowing this kind of a what I'd say

after the fact participation by nonparties to me just is offensive to due process and it's not fair to the two parties that have been trying to negotiate a contract and finally they have come at loggerheads and they have come to the commission for a solution to try and get them into their contract, which is what they want, they want a contract, but they can't agree on it and the commission is trying to provide one, why have a third party stick their oar in that water? I ask that rhetorically, but that's why I kind of reacted when I saw that provision in the rules. So we do oppose that part of the rule and can't see much good associated with it, unfortunately.

COMMISSIONER JOHNSON: If you have got other issues.

MR. GERDES: I do.

COMMISSIONER JOHNSON: Maybe I'll ask a question now. One potential good, and I might offer this up to get your take on it, one potential good that has been mentioned by parties in arbitrations we have had in the past, those in fact that we have denied intervention to, they had mentioned there could be incredible efficiencies in allowing somebody to make comments because there's no legal precedent through an arbitration or through administrative law, but from a de facto perspective there often is. And if you have got 10 or 12 companies that may be also interested in having some sort of relationship through arbitration or through a contract, maybe it would be easier, rather than going through that process ten times, to go

through it once with those parties having an opportunity to weigh in on some of the issues that would address them all. Is there any value in those efficiencies?

MR. GERDES: Well, I still go back to the point that it's the contract between the two parties that we are talking about here. Now, certainly obviously a company such as Qwest is going to have a lot of arbitrations out there and so they are going to know that there are similar issues out there. But to say that each situation has to be in cookie cutter form dealt with the same way is wrong, and again, I don't see the value to it, quite frankly, if you are looking at the overall good that this arbitration process is supposed to produce. In private life, if you go through an arbitration with the American Arbitration Association or somebody like that, there aren't any third parties, there aren't any after the fact comments. It's between the two parties.

COMMISSIONER JOHNSON: This would just be reason number 1,732 that the telecommunications realm is a little different than --

MR. GERDES: Could be, and I respect your comment, Mr. Chairman, but we really do think that it's a bad idea to have after the fact comments. It's sort of like arbitration by ambush because that commentator has not been part of the process. They are coming in after the fact.

COMMISSIONER JOHNSON: With regard to the arbitration

by ambush, is there -- to me I think you are right, I think there could be issues raised at relatively late date that don't belong in that proceeding. My fix is that I think most commissions would give those comments the weight they deserve, which in some cases would be very little.

MR. GERDES: I do agree with that, but here you are legitimizing the process. You are saying you may not be a party, but you can show up and you can say all this stuff and you can do this and you can do that and we will listen to you, and like Mr. Topp said, what if they come up with something, some new language that neither side is interested in? I think that's just not what the process is designed to produce.

COMMISSIONER JOHNSON: Thank you.

MR. GERDES: For whatever it's worth.

COMMISSIONER JOHNSON: Other questions?

COMMISSIONER KOLBECK: Yes, Mr. Gerdes, as far as 20:10:32:31.01, would you be interested -- do you think it would clear it up if you put a period after "an interested person who is not party to a proceeding may attend the hearing as an observer," period?

MR. GERDES: Yeah, I don't --

COMMISSIONER KOLBECK: They can do that, but then are you against the filed written comments or are you against the oral argument or all of it?

MR. GERDES: I'm against the last two. If somebody

wants to observe without commenting, I don't see anything wrong with that.

COMMISSIONER KOLBECK: You would throw it out.

MR. GERDES: Filing written comments and offering oral argument, that's all after the fact and I would --

COMMISSIONER KOLBECK: If you were going to -- I would think oral argument is after the fact, I would think written comments would actually be -- you would have to have them in earlier.

MR. GERDES: Not necessarily. People write briefs at the conclusion of a proceeding. Those are written comments. I'm going to file written comments on this rule making proceeding after it's concluded.

COMMISSIONER KOLBECK: So you as -- say you have got six company As and you are company B. If you are dealing with one of the six company As, you would rather deal with each one of those specifically or would you rather deal with them all at one time?

MR. GERDES: I think I'd like to have my choice.

COMMISSIONER KOLBECK: Your feeling is with this in here, you don't have the choice?

MR. GERDES: Right. Correct.

COMMISSIONER KOLBECK: Thank you.

MR. GERDES: Now, Mr. Chairman, if I may go up to the top of the list, which is where I was going to start, but I

thought that since Mr. Topp had covered that, that we might as well ventilate that thoroughly.

COMMISSIONER JOHNSON: And I apologize for breaking it up, we have done it with all the other commenters as well. Sometimes I think the informal give and take let's us shed more light on the comments rather than holding them to the end. Thanks for your indulgence.

MR. GERDES: I'd like to go to page one. I have comments on several of the subparagraphs in 20:10:24:02, and I hope I don't sound picky here, but sometimes having had some experience, I can be of assistance. Subparagraph two talks about a description of the organizational structure of the applicant's company. I would recommend that you insert the words "legal and" in front of organizational and the reason I say that is this. If you go through the entire section as rewritten, basically I think you are relying upon obtaining a certificate -- a copy of a certificate of authority from the South Dakota Secretary of State to give you the organizational structure of the applicant. You get that when you get the certificate. The problem I see is in Midcontinent's case at least, it's a partnership and partnerships don't necessarily file with the Secretary of State, and so you wouldn't receive that information in the case of a partnership. Another one that I can think of would be a joint venture, so you might want to ask for the legal and organizational structure of the

applicant.

And then going on to subparagraph 14, I spent some time on this section. I think the idea behind the language is good. As a matter of fact, as Mr. Topp mentioned, there was a lot of thought that went into these proposed rules and I commend those that worked on them. That talks about information concerning how the applicant will notify a customer of any materially adverse change. I think probably gramatically, the word should be "material adverse change." I Googled it and that's what you find just about universally, and gramatically I would say that "materially" is the adverb and "material" would be the adjective and in this case it would modify "change" and change is a noun, so I think it should probably be material adverse change.

I think you need to define the term. What is a material adverse change? Well, clearly as to rates, raising rates, that's the easy part of it and as a matter of fact, in another section, 30:10:34:10, you talk about that as being an adverse change, a materially, I would say material adverse change, so that is answered. But what is a material adverse change in a term or what is a material adverse change in a condition? Well, certainly it can't be just because the customer subjectively doesn't like it, because we all have different ideas as to what we like and don't like. And so it seems to me that in order to be consistent, there ought to be a

definition.

I worked on a definition, which I'll give you, and I'm not -- there's no pride in authorship, this is just a suggestion, and I'll read it to you. It was after I had done some research and I've got a sheet here that I'll leave with you that has the results of sort of an abstract of my Google research and then also a recommended definition, and this will be with my written comments as well. But the definition I would propose would read, material adverse change in relation to a telecommunications service means any change which increases a rate or which modifies a term or condition, making it more burdensome as determined from the perspective of a reasonable person in the average customer's position. So for whatever it's worth, I'll just leave that with you.

COMMISSIONER JOHNSON: Are you done with your comments on that section?

MR. GERDES: Yes.

COMMISSIONER JOHNSON: With regard to the "material" versus "materially," you know, to me it sort of seems like the sentence makes sense if "material" modifies "adverse" or if it modifies "change," that gramatically it could be correct either way.

MR. GERDES: I don't know how an adverse is material, but a change is material. And I'll tell you, just turn on Google and Google "materially adverse change," you won't find

it.

COMMISSIONER JOHNSON: A repository of all grammatical knowledge.

MR. GERDES: You won't find any returns on it. I think I found one and "material adverse change" is used as a term of art in mergers and acquisitions, large asset purchases where you are purchasing the assets of a company and things like that, and what it's designed to mean is if the company's revenues go to pot during the time between you signing the contract and -- between the time you sign the contract and the closing, then the deal is off. I probably missed something in a pocket part I see.

COMMISSIONER JOHNSON: I think after all of the hours we spent talking about this in January, I think maybe we -- if "material" is indeed the gramatically correct, I think we missed it in the legislation. It doesn't mean that we have to have it that way in the rules.

MR. GERDES: I probably wrote it.

COMMISSIONER JOHNSON: Maybe that's the one Google that popped up in the South Dakota legislation.

MR. GERDES: In any event, that's a suggestion.

COMMISSIONER JOHNSON: Then my other question would be I think your desire to define -- I understand your desire to define "material adverse" a little more clearly. I wonder if your suggested definition really does that, though. Does that

shed any more light on this than the existing wording?

MR. GERDES: I showed it to another lawyer in the office and he thought it did, but it's up to you.

COMMISSIONER JOHNSON: What did Google think? I'm just giving you a hard time.

MR. GERDES: It didn't have an opinion, but I did find, if you want to know, I do have a definition that's very similar to that that isn't related to telecommunications I did find on Google in an article on material adverse change, and in the article they talked about what the classic definition of a material adverse change is. And since you asked, Mr. Chairman, that is -- maybe I didn't bring it. This is from a professor that teaches in the area of material adverse changes and he had written an article, part of which I read, and he said this is the definition of a material adverse change in the business context that I mentioned. Material adverse change means any material adverse change in the business, results of operations, assets or financial condition of the seller as determined from the perspective of a reasonable person in the buyer's position. But for whatever it's worth, I offer that. I do think that it would be beneficial to people to define it.

COMMISSIONER JOHNSON: Thanks.

MR. GERDES: And then as to 20:10:32:03 on page 14, that's the certificate of authority for local exchange service, I would just have the same comments that I made. And I did the

same Googling for those comments, too.

COMMISSIONER JOHNSON: So you mean the insertion of "legal and"?

MR. GERDES: Yeah, it's the same comments as to the same language in each. Page 27, 20:10:33:22, this talks about notification of maintenance service interruptions. There's probably no easy way to deal with this situation, but I know what we got from our people was that this literally requires you to notify of anything that even would have the most momentary of service interruptions, just a minute or two, when you change from one cable to another, and it would be nice to have some relief from that.

When they are out changing cables, for instance, and they have got two cables strung and they change from one cable to another, there might be a five-minute interruption or something like that, or a two-minute, I don't know how long it takes to change a cable, but that seems to us to go just a little too far. I understand the unhappiness with the term "extended," so in any event, we would prefer that there be some description of the interruption that doesn't require a notice in each and every event.

COMMISSIONER JOHNSON: Did you have --

MR. GERDES: I don't have a definition for that one.

COMMISSIONER JOHNSON: Did the folks you were talking to in Midcontinent, did they have any sort of operational

threshold they thought made sense?

MR. GERDES: Five or 10 minutes or maybe 15, something like that, where it's just -- and I hesitate to even put a number of minutes in there, though, because then you have got somebody out there with a stopwatch, at least potentially.

COMMISSIONER KOLBECK: Maybe a number of customers, Mr. Gerdes.

MR. GERDES: Could be. That's a very good point. Sounds like a guy that was in the business.

COMMISSIONER KOLBECK: Causing interruption to more than X percentage of your total customers or maybe even just 25 to 30 customers, something like that.

MR. GERDES: Yeah, that makes sense to me. I haven't run that back by my folks, but I'll do that after I leave here. That makes sense.

COMMISSIONER KOLBECK: I guess the percentage probably wouldn't work as good as numbers, but you affect 25 people in Irene is a heck of a lot more than 25 people in Sioux Falls.

MR. GERDES: You are probably talking about the same context really, I would think.

COMMISSIONER JOHNSON: I wonder if -- I don't know that we completely solve the issue you have raised. You could again have 25 customers disrupted for one minute and there's a policy discussion in front of us as to whether or not we want them to be notified about a one-minute delay or one-minute

interruption.

MR. GERDES: Right.

COMMISSIONER JOHNSON: Thanks.

MR. GERDES: I'm just about done. And the audience breathed a sigh of relief. Those are all the comments I have, thank you.

COMMISSIONER JOHNSON: Thank you very much, Mr. Gerdes. We will have an opportunity when all the comments have been received to see if anybody wants to sort of do reply comments to those that have been made by the other interested parties. Any other initial comments on the proposed rules? Ms. Rogers, good morning.

MS. ROGERS: Good morning. I think that probably most of the items that I wanted to comment on --

COMMISSIONER JOHNSON: I'm sorry to interrupt. Can you state a name.

MS. ROGERS: My name is Darla Rogers. I represent several local exchange carriers, including Venture and Golden West and Valley, and I also represent SDTA. I think that, like I said, most of the comments that I was going to present have been covered, but I did want to focus just a little bit on the sections dealing with the arbitration petitions and the suspension petitions.

Looking in particular at 20:10:32:29, I, too, appreciate the tight time frames of these particular

proceedings, but as I look at the arbitrations that I've been involved in, I really think that to have a rule requiring that we would need to file written testimony, exhibits and then the cost and price information with the arbitration petition would be extremely hard to comply with in every instance. And I think it would also take away some of the flexibility that you might want as a commission in those arbitration dockets, and so I would suggest that you would delete subsections eight, nine and 10 of that rule and leave in 11 and 12 and maybe even beef up subsection 12 a little bit, again to make sure that the procedural schedule is set right up front. And again, I don't have a problem if there's a request for a protective order, that may be something you would want to consider at the very beginning of the process.

And as we have discussed your concerns about the tight time frames, it seems to me like maybe the solution would be at least in some of the cases to do away with prefiled testimony and just go straight to hearing, and I mean we do that in a lot of other court cases that we try to courts. Prefiled testimony I think seems to be kind of a unique thing with proceedings before the commission, and there's a reason for that and that is because sometimes the issues are pretty complex and you want an opportunity to look at how the testimony is going to go. But in these proceedings where you are on a tight time frame, I think that maybe that might be a better tool to make sure that

you comply with the time frames.

I think that the other thing that happens is even if we set a procedural schedule early on, and a lot of times in the course of complying with the deadlines in the procedural schedule, additional issues will arise, so for example, if you get into a discovery dispute that maybe you didn't anticipate at the beginning of the proceeding, then you have to do motions to compel and maybe more than one motion to compel and I think that that's when the deadlines get really, really tight, and that's also when I think as a practical matter the parties generally agree to an extension by changing the request date. So I think a lot of those time constraints really sort themselves out in the process and are eased by the parties themselves just because of those unforeseen disputes.

The other problem I see with sub parts eight, nine and 10 would be that if I know even when I start negotiations that if we end up in arbitration, then I'm going to have to have testimony, exhibits and the price or cost information filed with the petition, it really seems to me that that is a disincentive to continue negotiations, and in the cases that I've been involved in, we tend to negotiate continually throughout the process. I mean, we really make a sincere effort to try to resolve the issues without having to bring an arbitration petition, but if I know that at the time I file I'm going to have to have all that stuff in place anyway, which

means I'm going to have to prepare my case from the very beginning, it gives me less of an incentive to continue the negotiations and at least resolve some of the issues.

So I think that this maybe takes away some of the flexibility that we need in the process, in the arbitration proceedings, and I do understand the tight time frames and the tough job it is to try to schedule these, but I really think that by putting these requirements in rules, it takes away from other parts of the process that I think should continue, like negotiations and also the flexibility to say we will not do prefiled testimony in this case.

The exhibits, too, that's really problematic because in almost every case that I'm involved in, whether it's a court case or a PUC proceeding, you have like maybe 15 days before the trial date or something like that to come up with your exhibit list and it takes time to put that together and you don't always know what your exhibits are going to be at the outset of your case. In fact rarely do you know that.

So I would urge you to reconsider those three subsections in particular and maybe make subsection 12 a little bit more specific as to so many days after the petition is filed, there will be a procedural schedule. And I don't have any problem with requiring us to file a proposed procedural schedule when we file our petition. I think that's a good idea. So those would be my comments on that section and then

also those comments would carry over into the suspension section as well.

As I reviewed the federal act, it seemed to me that there are very, very few requirements as to what needs to be included in the suspension petition. It's a little bit different than in the arbitration section and you do have a little more time to complete a suspension petition and so the requirement of filing your written testimony, including exhibits supporting the petition, seems equally problematic and maybe even more so in a suspension petition. Those would be my comments. Thank you.

MS. WIEST: Just one, maybe it's more of a comment than a question. And the reason that I did propose having that in the suspension part, I realize that we are talking about the 180 days, you are talking about the arbitration, you are talking about a little over three and a half months, because people can file 135 to 160 days after negotiations and invariably they always file on day 160, so I have a little over three and a half months to do a complete case, and that's why we talked about filing the written testimony up front. And I understand when you are talking about other cases, you do have much more time, but in other cases you don't have to have a decision out in three and a half months either. But I think your point about maybe not even having prefiled testimony, I think that's something that we certainly can consider. The

commission might want to consider that.

The only reason I put the written testimony in the suspension or one of the reasons is the problem we came up with when we are talking about the ability to grant an interim suspension right away, and then we always run into problems because we really don't have much in the way of a factual basis for that interim suspension, so I was just going to give you some background on some of the rationale for that.

MS. ROGERS: I appreciate that. I don't know that I have any particular solution to that, but it seems like maybe in the suspension, in the suspension dockets, if there is a request for interim relief, again maybe having a procedural schedule right up front so we know that there's going to be a hearing shortly on the interim issue in particular I think might get the process moving a little bit more expeditiously.

MS. WIEST: Thank you.

MS. ROGERS: Thank you for the opportunity to comment.

COMMISSIONER JOHNSON: Thanks very much, Ms. Rogers. Any other initial comments with regard to the proposed rules? Seeing none, maybe we will see if anybody has any reply comments to comments that other people have made.

MR. COIT: Surprise, surprise. This is Richard Coit again with SDTA. I guess I would start with something that I agree with the other parties on, and that would be the need for some clarification on the notification due to service

maintenance interruptions. This was a rule that we had also noted and I forgot to comment on it earlier. It would appear that some clarification is needed there. You know, particularly given the fact that what you are talking about with a lot of these planned service interruptions is service interruptions in the middle of the night. These are generally done at a time when it's certainly best for most consumers and just keep that in mind and try to craft a rule that doesn't impose too much burden is what we would ask.

I do need to comment on the rule that deals with participation of other parties in interventions, which is section -- I think we all know the section. I guess the problem that I have with the perspective that's taken by the other parties is the fact of the matter is that the arbitration process is a regulatory process. The arbitrations that you are involved with are probably a lot different than other contractual arbitrations that really do involve two parties or just a minimal number of parties. The fact of the matter is this arbitration process is kind of set up as a transitioning process to probably complete deregulation at some point.

You know, we have got rules and statute, we have got requirements in statute and in rules. The arbitration process, it's my understanding, was put in place, this entire process of interconnection negotiations and arbitrations, was put in place to allow for more flexibility in the application of regulation

between carriers. The fact of the matter is that you are involved in this process and the reason that you are involved in the process is that the public interest is affected by the process. There are consumers that are affected by the process and there are carriers that are affected, other carriers that are not parties to that arbitration that are affected by that process.

You know, to sit and say that other parties aren't affected by the process, I would ask those companies, then, when they get an approved arbitration agreement, what do they do with it? Generally what happens with an approved arbitration agreement is it gets thrown down the line to the next carrier, that's what happens. And that's your deal and that's the way they approach that. Generally, at least from the start, we have got an approved interconnection agreement, that's your deal.

Now, we see that more as small carriers, as small rural LECs because we don't have the same resources and perhaps the same bargaining power as other carriers do, so their likelihood to come to the table and look at us as an equal negotiating partner, with everything wide open, that's not what we see. So I think you need to start with that premise. That's not what we see.

So there is some importance because of the fact that these agreements do affect other carriers, there is some

importance for other carriers to be involved in this process in some way. We have obviously through the years asked for intervention, we have not been granted intervention, and we can understand the reasons for that, but I think just as we have argued before, there are due process issues. To say that it's not going to affect the other carriers is just wrong, and I think the issues in particular that you can look at would be transport type issues, that sort of thing. Once those issues are settled and decided upon by you in an arbitration docket, nobody is going to convince me that that's not going to affect another carrier. It's very likely to.

Now, in a perfect world, you could look at each one and say, yeah, we are going to look at this one differently, but the fact of the matter is a lot of the decisions involve policy decisions on your part and the application of regulatory philosophy. So you are going to make a decision and then you are going to go to the next one and to be a commissioner who makes decisions on a consistent basis and a rational basis, you are not going to willy nilly change your mind. You are going to want to see something that is completely different.

The fact of matter is that the situation faced by a lot of rural carriers in South Dakota are pretty similar. They are not going to be able to come to you with some completely different factual scenario that's going to justify a completely different policy position on your part. So the fact of the

matter is it will affect other carriers and you need to deal with that and we think that you have dealt with it in a pretty good way with this rule, and it is -- as I had indicated before in arguing on the intervention request and arguing for some level of participation, even though I can understand that parties involved in a contractual negotiation don't want input from outside sources, these contracts are affected by the public interest.

That's been recognized in other states by the crafting of provisions that are similar to this one. You are not the only state that has looked at dealing with this issue. Obviously in Minnesota there's some participation. There is in other states as well. There are some states, remember, that do actually permit intervention in arbitration proceedings. So you are not going that far. I think you have taken a reasonable approach here.

I think that, Commissioner Johnson, to your comment earlier, you can give that the weight that it deserves. If you get comments and you believe that really there's nothing shown by those comments that would indicate that there's some industry impact that you need to be concerned about, you are going to look at it and give it the weight that it deserves. And I think really getting comments, really all it does is that it gives you a better perspective on what the potential impacts of a decision are, and wouldn't you want to do that? It seems

to me that you would want to know if there are going to be other effects. If the other party can come in and respond and say, no, it's not going to affect the other companies this way, great. But to me it's just a matter of allowing some vehicle.

You have other proceedings where I think generally any interested person can come into your hearings and offer some public comment at the last minute. This wouldn't be the only instance where that happens. The way I read the current rules, not every party is necessarily required to file prefiled testimony and be subject to discovery and so forth. There's provisions in your current rules that allow an interested person from the public to come in and offer comment, not sworn testimony, but comment. And you can give that whatever weight you want to give that. But I think to completely shut the door and say that other companies that might be affected cannot at least come in and express their concerns, because that's really all we think is important, is that they have the ability to come in and express their concerns. If there's an issue that you are addressing that we feel has a potential industry-wide impact, we want to be able to come in and say that.

Are we going to be able to come in and comment with a bunch of factual stuff and everything else? I don't think that's going to fly. I think you are probably not going to let that fly, but are we going to be able to come in and say, yeah, we believe there might be an effect here and here is what you

think we should do from a policy perspective? That is really what we are asking for. I would just really ask the commission not to forget how important it is to look at these issues as being issues that affect the public interest and address them accordingly. Thank you.

COMMISSIONER JOHNSON: Thanks, Mr. Coit. Any questions for Mr. Coit? Any other reply comments? Mr. Topp.

MR. TOPP: Thank you. Jason Topp from Qwest. I wanted to respond to a couple of points that were raised. Number one, there were a couple of mentions of skipping prefiled written testimony as a part of the arbitration process as a means of making that process more efficient. And I would just caution that having come from a background as a litigator in district court and then switched to this regulatory process, prefiled written testimony reduces a lot of the burden associated with the proceeding, namely, discovery burden, because if you are going to have a live witness come in and you don't know what they are going to say, you are either going to take the risk of dealing with them by ambush or you are going to conduct discovery to make sure you understand what they are going to say and their basis for their testimony.

So I would be very -- I would caution very heavily against having that as something that you would plan on leaning on in the future in order to meet these deadlines. I think that it raises a number of concerns and I think that the

prefiled written testimony process has developed in most states for good reason and I wouldn't look at cavalierly throwing that out.

I do feel some need to respond to the plea regarding petition by nonparties. Again, as I indicated earlier, the most -- the biggest concern I have and something that has happened repeatedly in Minnesota is entirely new language proposed by a party, not just simply comment about public interest, but some third party indicating specific language that they think should resolve a dispute and may deal with issues that were not even contemplated at the time of the negotiations, not even contemplated at the time of the arbitration proceeding, not even contemplated at the time of post hearing briefing, but you get to the commission meeting at the end and a lot of times those will have quick appeal and the commission is asked to make a decision on the fly as to whether to adopt this language or not. And I would suggest that that is a very difficult environment in which to make a decision regarding new proposed language and in our view results sometimes in unfair and poor language being adopted. And so I would be very reticent to allowing that sort of participation in an arbitration proceeding by third parties.

With regard to the practical impact of a commission decision, I mean, I do think it's fair to say that when you have a commission decision in an arbitration, that that is

quite likely to be the proposal in the next interconnection agreement negotiation. But having said that, if this is a significant issue, there is the forum of the arbitration proceeding the next time around to pursue that. That's all I have.

COMMISSIONER JOHNSON: Mr. Topp, there's been some discussion about notification of customers for outage. Do you know if Qwest has any thought as to whether or not a set threshold makes sense, and if so, what kind of a threshold it would be?

MR. TOPP: I think that the comments have been quite good, that it makes sense to both have a number of customer threshold as well as some sort of time frame. I would suggest that the commission think hard about whether -- you want a practical requirement, I understand the concern that you are attempting to reach there, but if it's a three a.m. very short interruption, requiring notification in that instance probably does not make sense and so we would echo the comments that other parties have made.

COMMISSIONER JOHNSON: Thanks. Any other comments?

MS. ROGERS: I apologize, this is not necessarily a reply comment, but it was a rule that was commented on earlier and I just wanted to maybe follow up a little bit on that. And that is in 20:10:34:02.02, which is on page 29. These are the notification requirements for an acquisition. I just want to

make sure that we understand what the requirements are, but it appears to me that what the rule is doing is it's saying that the acquiring carrier has to give notice 30 days to the commission in sub part one, and then if there are any material changes, kind of relevant to our earlier discussions, then there has to be notification of that.

Then if you go to sub part three on page 30, that is the notice, it appears to me, that's being required of the acquiring carrier, so if I have -- one of my companies has acquired another exchange, then I have to give notice to the customers within 30 days and it says the "following information must be included in the advanced subscriber notice." So A, the date when we are going to be taking over, B, the rates, C, that I as the new carrier will be responsible for the change charges, and then I have to notify the subscriber in D of his or her right to select a different preferred carrier, and I guess then the confusion that I have is in sub part E and exactly what are my obligations as the carrier with regard to notice.

So am I putting in my notification to these subscribers that all of you that receive this notice, even though you have arranged a preferred carrier freeze through your local service provider on the services involved in the transfer, you are still going to be required, unless you have selected a different carrier before the transfer date, and then

the next clause, existing preferred carrier freezes on the services involved in the transfer will be lifted. I don't understand exactly, is that part of my notice or does that relate back to that customer won't be transferred, does that go back to that unless?

So I guess I just want to make sure that we know what our obligations are with regard to this notification. It just doesn't seem like that section maybe is as clear, even if it is FCC language. But it confuses me a little bit and I want to make sure that if I'm advising one of my companies or if I'm drafting the notice, I want to make sure that I'm doing it in conformance with the rules. So I just wanted to maybe clarify that that was my concern with that section as well.

COMMISSIONER JOHNSON: I have actually lost my page 31, so while I share off Commissioner Hanson, maybe Ms. Wiest, if you have any comments, go ahead.

MS. WIEST: I guess I don't at this point. I will look into that and consider it. Like I said, this was based on the FCC language and all I can say is I'll take your comments and consider them and see if we need to clarify something in here.

MS. ROGERS: My point was just that A, B, C, D and even F and G are pretty clear as to what we have to notify them of. I'm just not real sure what my requirements are under sub part E.

MS. WIEST: Okay.

MS. ROGERS: Thank you.

COMMISSIONER JOHNSON: Thanks, Ms. Rogers.

MS. ROGERS: I'm sorry I didn't bring that up earlier.

COMMISSIONER JOHNSON: I think it's more beneficial for us to have a bit of an informal approach toward this. And until everybody gets unruly, we will keep doing that. Any other comments? Anything from Mr. Rislov, Mr. Best, Ms. Wiest?

MR. RISLOV: I would like to make a couple of comments and it's getting back to the arbitration. We have been fighting this battle on who should and should not be included, and frankly, it's a difficult issue for all of us, but there are a couple of things to keep in mind. When Qwest is making its statement, Qwest really is looking at a statewide system as dealing with a number of exchanges within that statewide system, whereas the small companies are dealing with a much smaller geographical area. The problem I have is these small companies are sharing so many facilities, transport facilities especially, and we can say that each and every arbitration is a separate contract to be negotiated among those parties, but it's very hard for me to get around the fact that there's a lot of shared interoperable facilities and there are going to be decisions made in that first arbitration that it's difficult to argue that that decision won't be looked at later on down the line. And because those facilities are shared, it's like

allocating costs among states with one utility, an allocation in one state is going to affect the cost that gets allocated to the other states.

It's just a point I wanted to make, it may make this a little different, and I know each company can explain why their situation is different. But in my mind, there really is a unique situation that we have to deal with in this state, and I understand what Mr. Topp and Mr. Gerdes are saying, and it makes a lot of sense. On the other hand, I understand that Mr. Coit is saying, given the unique situation in South Dakota, I think it makes it very troublesome for this commission not to look at allowing other parties to come into that proceeding and I guess dig a little deeper into this situation where they are sharing these huge I would call them transport facilities that ring the entire state. Just a comment I wanted to make.

COMMISSIONER JOHNSON: Thanks. Anything else? With that, we would thank everybody a great deal for their input. I think it will be very helpful and unless anybody has anything else, we will stand adjourned.

(Whereupon, the proceedings were concluded at 10:30 a.m.)

CERTIFICATE

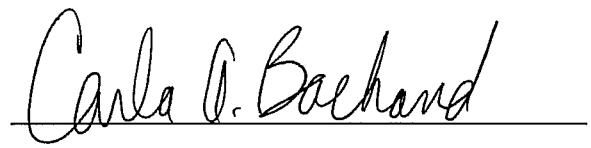
STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Carla A. Bachand, RMR, CRR, Freelance Court Reporter for the State of South Dakota, residing in Pierre, South Dakota, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause;

I further certify that the foregoing pages of this transcript represents a true and accurate transcription of my stenotype notes.

Dated this 6th day of August 2007.



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