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RECEIVED

MAY 20 2005

May 20, 2005

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Pamela Bonrud, Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

Re: DOCKET NO. CT05-001
COMPLAINT OF WWC AGAINST GOLDEN WEST COMPANIES
Our File Number 05-006C

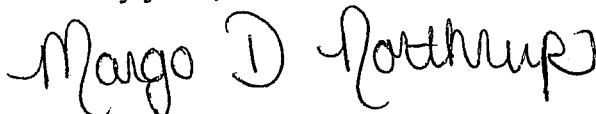
Dear Pam:

Please find enclosed herein original and ten copies of each of the following:

1. Memorandum in Response to Complainant's Motion for Partial Summary Judgment; and
2. Affidavit of Dennis Law in support of the above document. The Affidavit is a facsimile of the original document, which has been mailed to my office. I will file it with the Commission on Monday or as soon as I receive it.

By copy of this letter, I am also serving Talbot J. Wieczorek, attorney for WWC.

Sincerely yours,



Margo D. Northrup
Attorney at Law

MDN/ph

CC: George Strandell (with enclosures)
Dennis Law (with enclosures)
Talbot J. Wieczorek (with enclosures)

RECEIVED

MAY 20 2005

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

In the Matter of the Complaint)
WWC License LLC against Golden West)
Telecommunications Cooperative, Inc.,) DOCKET NO. CT05-001
Vivian Telephone Company; Sioux Valley)
Telephone Company; Union Telephone) MEMORANDUM IN RESPONSE
Company; Armour Independent Telephone) TO COMPLAINANT'S
Company; Bridgewater-Canistota) MOTION FOR PARTIAL
Independent Telephone Company; and) SUMMARY JUDGMENT
Kadoka Telephone Company.)

COME NOW the above-entitled respondents, collectively referred to as "Golden West Companies," by and through their attorneys, Riter, Rogers, Wattier & Brown, LLP, and hereby submit this Response to Complainant's Motion for Partial Summary Judgment.

Golden West Companies request that the South Dakota Public Utilities Commission ("Commission") deny the Motion for Partial Summary Judgment with respect to the issues raised therein. Summary Judgment on those issues is not proper because there are genuine issues of material fact regarding the same.

FACTS

In its memorandum, WWC License LLC, hereinafter "WWC," set out certain facts which it believes pertinent to the issues raised in its Motion. That statement of facts references certain Interconnection Agreements entered into by the parties between May 13, 2004, and October 20, 2004. Section 13.1 of the Agreements does reference an effective date and that the parties will file a joint application seeking approval.

The Agreement also references prices that are established for the various services and provisions as set forth

in Golden West Companies' Answer and Counterclaim. Section 7.23 references certain charges WWC agreed to pay Golden West Companies and the required adjustments to be made thereto. In their pleadings, Golden West Companies sought either a refund or offset and requested that, pursuant to statute, treatment of all unidentified traffic be classified as non-local and subject to the Companies' intrastate access charges. See, ¶¶ 37-40 Golden West Companies' Answer and Counterclaim.

Section 7.2.4 of the Interconnection Agreement references payment for all charges". . . within the thirty days from the receipt of the billing statement" and that charges, ". . . not paid within the thirty days from the receipt of the billing statement may be subject to a late charge at the rate of 1.5% per month or the maximum amount allowed by law."

Attached hereto as Exhibit 1 is copy of Order Approving Agreement entered in the Sioux Valley matter. It is similar to the Orders entered for the other companies. The Order merely approves the agreement and does not set forth when any payments are owing to either party under and pursuant to the agreement, nor the manner in which the respective parties shall receive their compensation.

As shown on the attachment to WWC's Complaint, since December 1, 2004, the amount claimed owing from Golden West Companies to WWC has been reduced each month, through credits on WWC's statements from Golden West Companies. During the same

time, however, WWC has underpaid InterMTA traffic because of its failure to negotiate an adjusted InterMTA percentage for each of the Golden West Companies.

WWC has filed an Answer to the Counterclaim apparently admitting that the default InterMTA factor should be adjusted, which would result in amounts due and owing to Golden West Companies, but is contesting the period of time involved and referencing that the particular amounts owing have not yet been determined.

DISCUSSION

1. Standard for Summary Judgment

Wilson v. Great Northern Railway Co., 157 NW 2d 19, 21 (S.D. 1968) sets forth certain guidelines for consideration of matters by way of summary judgment. The moving party in a summary judgment motion has the burden to show no genuine issues of material fact exist.

The evidence must be viewed most favorably to the non-moving party and reasonable doubt should be resolved against the moving party. Mackintosh v. Carter, 451 NW 2d 285, 286 (S.D. 1990), citing in part Wilson v. Great Northern Railway Co., 157 NW 2d 19 (1968).

If a Court is forced to engage in fact finding to resolve a summary judgment request, it should not be granted. Johnson v. Rapid City Softball Association, 514 NW 2d 693, 698 (S.D. 1994). Summary judgment should be granted only where the right to judgment is shown with "such clarity as to leave no room for controversy." Id. (citation omitted).

WWC has submitted no affidavits in support of its Motion. Our Court has held that a party may not rely upon mere allegations.¹ Butler Machinery Co. v. Morris Construction Co., 2004 SD 81, 682 NW 2d 773. Evidence presented in a summary judgment motion must be viewed "in the light most favorable to the non-moving party." Id.

2. Jurisdictional Claims Before Commission

WWC suggests that the South Dakota Public Utilities Commission ("Commission") has jurisdiction to consider all the claims asserted. However, the specific nature of the claim asserted by WWC appears uncertain. In its Brief, WWC states that it wants the Commission to clarify the Interconnection Agreement (WWC Brief, at p. 7) and that it is:

Requesting the Commission clarify the proper handling of overpayments, made in good faith, during the interim period. WWC Brief, p. 4-5.

It later requests the "Commission order immediate payment of damages with respect to the undisputed amount of overpayments". WWC Brief, p. 7. It also asks that the Commission order it is entitled to prejudgment interest as a matter of law. WWC Brief, p. 8. And in its Complaint, WWC suggests that Golden West Companies will be "unjustly enriched" if they do not have to make

¹The numbers provided in Dennis Law's letter, attached to WWC's Motion, are not factually correct, both as to amount and as to the non-inclusion of recalculated rates after adjustment of the interMTA factor(s).

certain payments to WWC. (Complaint, at ¶11)

It would seem as suggested by WWC that the Commission is authorized to interpret the parties' obligations under the Interconnection Agreement. This Agreement references claimed overpayments by WWC as well as monies owed to Golden West Companies for InterMTA traffic. One issue raised by the pleadings is whether the overpayments should be handled by monthly credits on the statements WWC receives from Golden West Companies, and that they would also be offset by the InterMTA traffic monies owing to Golden West Companies in an amount as later determined.

However, any action of the Commission must recognize its jurisdictional limitations as imposed by the legislature and by our Court in In the Matter of Northwest Public Service (Hub City), 560 NW 2d 925, 930 (S.D. 1997),² and as discussed in People's Natural Gas Co. v. Minnesota Public Utilities Commission, 369 NW 2d 530, 531 (Minn. 1985). In the latter case, the Minnesota Supreme Court recognized that, while its Commission does have broad powers:

. . . the power to order refunds would introduce a new factor of considerable consequence into the regulatory equation. At p. 535.

²The Court in Hub City held that the PUC exceeded its statutory authority when it enforced a contract between several suppliers and a customer. At p. 930. Golden West does agree that it may interpret an Interconnection Agreement, such as that involved herein, which it approved.

The question presented was whether the Commission had authority to enforce its own Order through a refund.

WWC attempts to distinguish People's Natural Gas because the Minnesota statutory scheme did not provide refund powers, but South Dakota expressly provides such power. (WWC Brief, p. 6) The statute cited by WWC actually grants the Commission the authority to promulgate rules for handling billing disputes and refunds. (SDCL 49-31-5(4)) WWC does not cite, however, to any specific rule that had been adopted, but rather appears to rely upon the Commission's general implied powers by virtue of that statute. Certainly, assuming the Commission does have that authority, it can be exercised in a broad manner based upon all the factual circumstances presented to it. As WWC indicates in its Brief, a request for clarification of the Interconnection Agreement methodology to resolve the issues presented does appear to be within the authority of our Public Utilities Commission. The factual circumstances involved must, however, dictate the proper result.

Also, our Court in Northwest Public Service recognized that while the Commission does hold certain implied powers, they can only be utilized consistent with statutory intent. Certain requests of WWC are clearly outside the Commission's jurisdiction. Double damages and attorney's fees as sought by WWC (see ¶13 of Complaint) are not authorized in this proceeding; rather, only if there is a recovery by a "suit" does the statute providing such

authority apply. SDCL 49-13-14.1. WWC has elected under SDCL 49-13-1.1 to make complaint to the Commission and hence, it has waived its right "to bring suit . . . for the recovery of damages in any court of competent jurisdiction. . . ." Id. (Emphasis added) Hence, no jurisdiction exists for claimed double damages and attorney's fees, as well as other portions of WWC's claims, including the equitable claim of unjust enrichment. (§11 of Complaint) Also, WWC's request for damages would exceed the Commission's jurisdictional authority under the circumstances involved. Rather, this proceeding should be limited to the interpretation of the Agreement and the parties' rights under it. As a result, WWC's request for an Order acknowledging jurisdiction over all of the issues raised must be denied.

3. The Commission has Authority to Fashion an
Appropriate Remedy in its interpretation of the
Interconnection Agreement.

The issues presented under the Interconnection Agreement relate to prices charged for services by Golden West Companies to WWC, which include the percentage of InterMTA traffic to which those prices apply. The Commission has implied powers to not only establish prices within the Interconnection Agreement, which it has approved, but to establish the proper procedures for payment. Administrative agencies, including the Commission, have implied powers to get their job done. Our Court in In Re Application No. 5189-3, 467 NW 2d 907, 911 (S.D. 1991), said:

In addition to powers expressly conferred, an agency has such implied powers as are reasonably necessary to effectuate its express powers. An agency may exercise some degree of discretion in construing its obligations under a statutory grant of authority. (Citations omitted).

The authority of the Commission is extensive and crucial to the overall regulatory scheme. Cheyenne River Sioux Tribe Tel. Authority v. Public Utilities Commission, 1999 S.D. 60, 595 NW 2d 604, 609. Of course, SDCL 49-31-3 grants the Commission "general supervision and control of all telecommunications companies" and thus the Commission has authority to exercise powers necessary to supervise and control those companies.

One of the earlier cases from our Court discussing authority of an administrative body is In Re Application of Kohlman, 263 NW 2d 674, 678 (S.D. 1978). That case involved a "pooling order" by the South Dakota Board of Natural Resources, the purpose of which was to apportion expenses and risk associated when multiple entities drilled for oil. Two pooling statutes were involved, neither of which specifically addressed inclusion of a "risk penalty" provision in a pooling order. One party to the order challenged the Board's authority to include the risk penalty provision. The Court upheld the provision because the solution had to be based on the facts as found by the Board. The statute provided sufficient guidance for the Board's activities. At pp. 678-679.

". . . the authority to set a risk compensation," our Court held, "is necessarily implied and reasonably necessary to effectuate the power and duty of the Board to impose a compulsory pooling order . . ." Id., at 679. Hence, the Commission has authority to establish the manner and method of the payment of the prices owing under the Interconnection Agreement as asserted in the Answer and the Counterclaim of Golden West Companies. That determination is necessarily fact driven based upon the amount of money involved and the impact certain procedures would have upon the interests of the public. Clearly, the purpose of the Act is advanced when a fair and reasonable price is established and the payment of it is made in a manner fostering the interests of the public.

This Commission is not mandated to disregard the facts surrounding the execution and implementation of the Interconnection Agreement, but rather, even as suggested by WWC, it is authorized to interpret the Interconnection Agreement and the proper handling of the reimbursement of payments made by WWC prior hereto, as well as amount and manner of payments owing by WWC as a result of adjustment of the InterMTA factor as raised in the Counterclaim. This could include approval of a credit system on Golden West Companies' billings as currently being utilized. Accordingly, there certainly remain questions of material fact that need to be resolved.

4. WWC is not Entitled to Partial Summary Judgment
on damages or interest.

A. Damages

The Interconnection Agreement, which the parties agree the Commission may interpret, involves monies claimed owing to WWC from Golden West Companies for reciprocal compensation. The Interconnection Agreement also establishes a default percentage of 3% for InterMTA traffic, which default percentage is to be adjusted following good faith negotiations between the parties to arrive at a methodology upon which to base the adjustment. The companies' switched access charges apply to the adjusted percentage of InterMTA traffic.

Preliminary studies by both parties indicate that the InterMTA adjustment to all Golden West Companies will result in a higher InterMTA percentage. This, in turn, will result in an underpayment of access charges by WWC, which is the basis of the offset claimed by Golden West Companies in their Counterclaim.

While a prior date certain calculation has been made as to the reciprocal compensation charges, substantial credits have been received by WWC since that date and the amount has been reduced accordingly. Additionally, an offset to that figure is subject to the final determination of the InterMTA traffic charges owed by WWC that result from the same Interconnection Agreement. This determination is an intricate part of the Commission's interpretation of the Interconnection Agreement and there are

specific disputed facts and circumstances existing between the parties that need to be determined at a hearing.

A party such as WWC cannot demand a determination of monies owing to it under an agreement until a resolution is made as to the final figure involved. This is determined after considering "the full performance" of the agreement "by both sides, . . ." SDCL 21-1-5. Hence, even if it was arguably within the Commission's jurisdiction, WWC's request for partial summary judgment on damages is clearly misplaced. Prior to deciding what net compensation might be owing by one company to the other, there must be a determination made as to the final amount resulting after full performance by both parties of their obligation under the Interconnection Agreement. Bad Wound v. Lakota Community Homes, Inc., 1999 S.D. 165, ¶8, 603 NW 2d 723, 725. In Bad Wound our Court recognized that a party cannot recover more than it would have gained after it has fully performed under the agreement. Id. Hence, one must look to the position WWC will occupy after final determination of the appropriate payments owing under the InterMTA charges.

While the facts in Bad Wound are not similar to those presented herein, it confirms that a partial summary judgment under the circumstances involved is inappropriate. The facts are undisputed that WWC will owe monies to Golden West Companies under the Interconnection Agreement once the InterMTA factor is appropriately adjusted. The further questions are what is the

specific amount of money, will it be greater or lesser than monies owing by Golden West Companies to WWC, and should resolution under the Interconnection Agreement be handled by credits or otherwise? Until this is determined, material facts remain in dispute and summary judgment is inappropriate.

In Butler Machinery Co. v. Morris Construction Co., 2004 SD 81, 682 NW 2d 773, the Supreme Court overturned a grant of summary judgment when the amounts owed under the terms of the contract were still in dispute. Just as in this case, there were various monies that had not yet been credited to calculation of the final balance due between the parties. The Court held that summary judgment was improper because "the amounts owed under the contract depend, at least in part, on the amount of the payments made pursuant to the contract. . ."

Golden West Companies have not contested that prior computations reflect certain credits owing to WWC under the Agreement. In fact, it is reflected on the exhibit attached to WWC's Brief. However, just as in the case of First National Bank of Volga v. Kleijan, 418 NW 2d 326 (S.D. 1988), the claims between the parties do raise genuine issues of fact as to the specific monies, if any, as will ultimately be owing to either party and hence, summary judgment is inappropriate. The interpretation of the Interconnection Agreement as applied to the facts surrounding the InterMTA factor need to be resolved. Only after that is completed will a determination of final obligations of the

respective parties be clear, and summary judgment be possible. This is particularly true because Golden West Companies' claim is not distinct from the Interconnection Agreement but rather arises directly from the computation of the respective parties' obligations owing it. Carlson v. First National Bank, 429 NW 2d 463, 466 (S.D. 1988). Hence, even if jurisdiction does exist, summary judgment cannot be entered as to damages.

B. Interest

WWC has correctly stated the general law in South Dakota on prejudgment interest. What it fails to recognize is that the circumstances involved in this case are different from those involved in either Loen v. Anderson, 2005 S.D. 9, or Alvine v. Mercedes Benz, 2001 S.D. 3, 620 NW 2d 608, 614.

As set out above, Golden West Companies, by way of Counterclaim, have asserted a claim for offset. In First National Bank v. Kehn Ranch, 394 NW 2d 709 (S.D. 1986), our Court held that when a party asserts an offset against a claim, interest cannot properly be awarded. At p. 717. The Kehn Ranch³ case was decided prior to the adoption of SDCL 21-1-13.1, but it affirms the difficulty in finding a date certain for calculation of interest when a claim of offset is approved. A more recent decision from the Eighth Circuit Court of Appeals interpreting South Dakota law

³In support of Golden West Companies' prior discussion, this case also recognizes that a final determination of the parties' respective obligations does not occur until the offset of their mutual debts is made. At p. 716.

does discuss the current status of the law on interest in South Dakota.

In Orion Financial Corp. v. American Foods, 281 F. 3rd 733 (8th Cir. 2002), a party brought an action claiming a right to fees earned on a consulting agreement with the Defendant. The Plaintiff sought prejudgment interest and while the Court did authorize certain prejudgment interest, it first made a factual finding as to when the loss or damage occurred. It stated in part:

The South Dakota Supreme Court has stated that prejudgment interest is allowable only when the 'exact amount of damages is known or readily ascertainable'. Fanning v. Iverson, 535 NW 2d 770, 775 (S.D. 1995) (quotation omitted). The District Court applied this standard and awarded interest from the date Orion demanded payment, April 6, 1995, or any date after that on which American Foods received grants or loans subject to success fees. . . Here, . . ., the damages were uncertain until Orion made demand for payment. At p. 144.

In the present case WWC seeks to recover interest for over two years even though it had not demanded payment of any particular sums until last fall. The likely reason no payments were demanded was because the amount involved had not yet been accurately computed. Furthermore, because of the offset question involved, the proper amount could likely not be determined until a decision on that question is made. Until that time the Commission cannot determine whether there is an amount actually owing, and if there is, whether it is much less than claimed by WWC.


Also, the Commission has the authority to determine the manner and methodology of payment even as suggested by WWC in its Brief. That can include consideration of prices as impacted by the timing and amount of the interest claimed. Switched Access Rates, supra, at p. 853.

Certainly, the authority necessarily implied by statute which WWC argues the Commission holds, provides it the ability to take action necessary to effectuate the powers granted to it. This would include consideration of all of the factual circumstances surrounding the imposition of the prices under the Interconnection Agreement and the timing and methodology of payments made pursuant thereto. See, e.g. In Re Brookings School Dist. School Bd., 668 NW 2d 538, (S.D. 2003).

The Commission is also reminded that the Orders approving the agreement were entered into between March and October of last year. Accordingly, the claim that Complainant is nonetheless entitled to interest, the computation of which was to commence several years ago, appears misplaced. WWC did not make demand until last winter because the amounts owing were not ascertained prior thereto. Hence, any claim for interest (which Golden West Companies deny) must, at a minimum, be limited to that time frame and be part of the total factual considerations ultimately later considered and properly resolved by the Commission at a hearing on the merits.

WHEREFORE, Golden West Companies request that the Commission deny WWC's Motion for Partial Summary Judgment. The evidence viewed most favorably to the non-moving party shows that there are genuine issues of material fact. Therefore, the Motion should be denied.

DATED this twentieth day of May, 2005.



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Margo D. Northrup
Riter, Rogers, Wattier & Brown, LLP
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Pierre, South Dakota 57501
Telephone (605) 224-7889
Fax (605) 224-7102

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the MEMORANDUM IN RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT was served via the method(s) indicated below, on the twentieth day of May, 2005, addressed to:

Talbot J. Wieczorek	(X)	First Class Mail
Gunderson, Palmer, Goodsell & Nelson,	()	Hand Delivery
LLP	()	Facsimile
P. O. Box 8045	()	Overnight
Rapid City, South Dakota 57709	()	Delivery
	(X)	E-Mail

Dated this twentieth day of May, 2005.


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Telephone (605) 224-7889
Fax (605) 224-7102

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING FOR)	ORDER APPROVING
APPROVAL OF A RECIPROCAL)	AGREEMENT
INTERCONNECTION, TRANSPORT AND)	
TERMINATION AGREEMENT BETWEEN WWC)	TC04-196
LICENSE LLC AND SIOUX VALLEY)	
TELEPHONE COMPANY)	

On September 8, 2004, the South Dakota Public Utilities Commission (Commission) received a filing for approval of a reciprocal interconnection, transport and termination agreement between WWC License LLC (WWC) and Sioux Valley Telephone Company (Sioux Valley).

On September 9, 2004, the Commission electronically transmitted notice of this filing to interested individuals and entities. The notice stated that any person wishing to comment on the parties' request for approval had until September 28, 2004, to do so. No comments were filed.

At its duly noticed October 12, 2004, meeting, the Commission considered whether to approve the agreement between Sioux Valley and WWC. Commission Staff recommended approval.

The Commission has jurisdiction over this matter pursuant to SDCL Chapter 49-31, and the Federal Telecommunications Act of 1996. In accordance with 47 U.S.C. § 252(e)(2), the Commission found that the agreement does not discriminate against a telecommunications carrier that is not a party to the agreement and the agreement is consistent with the public interest, convenience, and necessity. The Commission unanimously voted to approve the agreement. It is therefore

ORDERED, that the Commission approves the agreement.

Dated at Pierre, South Dakota, this 20th day of October, 2004.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u><i>Hilario Kalbo</i></u>
Date:	<u>10/21/04</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Robert K. Sahr
ROBERT K. SAHR, Chairman

Gary Hanson
GARY HANSON, Commissioner

James A. Burg
JAMES A. BURG, Commissioner