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OCT 6 4 2006
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

October 4, 2006

Patricia Van Gerpen
Executive Director
SD Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Re: Docket No. CT 05-001
Our File No. 05-006C
In the Matter of the Complaint of WWC License LLC
Against Golden West Telecommunications Cooperative, et al

Dear Ms. Van Gerpen:

Attached you will find the original and four (4) copies of Golden West Telecommunications Cooperative, Inc.'s Brief in response to plaintiff's Complaint and Amended Complaint.

By copy of this letter and attached Brief, same is being forwarded to all counsel of record.

Thanking you for your professional courtesies.

Sincerely yours,

Margo D Northrup

Darla Pollman Rogers
Margo D. Northrup

/mdb
Enclosures

cc: Rolayne Ailts Wiest
Talbot J. Wieczorek

BEFORE THE PUBLIC UTILITES COMMISSION
OF THE STATE OF SOUTH DAKOTA

RECEIVED
OCT 04 2006
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE COMPLAINT OF WWC LICENSE LLC AGAINST GOLDEN WEST TELECOMMUNICATIONS COOPERATIVE, INC.; VIVIAN TELEPHONE COMPANY; SIOUX VALLEY TELEPHONE COMPANY; UNION TELEPHONE COMPANY; ARMOUR INDEPENDENT TELEPHONE COMPANY; BRIDGEWATER-CANISTOTA INDEPENDENT TELEPHONE COMPANY; AND KADOKA TELEPHONE COMPANY	DOCKET NO. CT05-001 BRIEF OF GOLDEN WEST COMPANIES AND SDTA IN SUPORT OF AMENDED COUNTERCLAIM AND IN RESPONSE TO WWC'S BRIEF IN SUPPORT OF ITS AMENDED COMPLAINT

COMES NOW, Golden West Telecommunications Cooperative, Inc. ("Golden West Coop"), Vivian Telephone Company ("Vivian"), Sioux Valley Telephone Company ("Sioux Valley"), Union Telephone Company ("Union"), Armour Independent Telephone Company ("Armour"), Bridgewater-Canistota Independent Telephone Company ("Bridgewater-Canistota"), Kadoka Telephone Company ("Kadoka") (collectively "Plaintiffs", "Golden West Companies", or "Golden West") and South Dakota Telecommunications Association ("SDTA"), and hereby submits this Joint Brief in Support of the Amended Counterclaim and Response Brief to WWC License LLC's ("WWC") Brief in Support of its Amended Complaint.

Golden West Companies will use the following format for citations: citations to the hearing transcript will be made as "HT___", citations to exhibits will be ("WWC Ex. ___") or ("Golden West Ex. ___" or "GWC Ex. ___") and citations to the South Dakota

Public Utilities will be ("Commission"). Specific e-mail trails within an exhibit will be referred as WWC Ex. ___, Trail ___.

FACTS

I. Negotiation of Agreement

WWC and the Golden West Companies were parties to Reciprocal Interconnection Transport and Termination Agreement ("ICA" or "agreements") which terminated on December 31, 2002 between Golden West Companies and WWC. HT 227. When the parties were unable to negotiate a replacement agreement, a formal arbitration petition was filed. (TC02-176). The arbitration was resolved by agreement of the parties in March of 2003, and a settlement agreement was entered. Based on the settlement agreement, a final contract was ultimately executed by the parties on various dates after January 1, 2003.[1] This litigation arises out of those ICA agreement which terminated in December of 2005.

The ICAs were nearly identical for each company. The agreements had a provision that the rates would be retroactively approved to January 1, 2003. The parties agreed to continue billing under the previous rate as if the previous agreement was still in place. HT 232. Golden West Companies had legitimate questions as to whether the Commission would approve the agreements retroactively based on the Commission's nonretroactive rate application when approving the previous agreement. GWC Ex 1; HT 230; HT 232. Thus, it was unclear to the parties whether there would be an overbilling or an underbilling. HT 232. The executed agreements were submitted to the Commission

[1] The signature dates for the Golden West companies ranged from January 28, 2004 through June 4, 2004. Commission approval dates ranged from May 13, 2004 through August 26, 2004.

for approval. Each of the ICAs was approved[2] (WWC Amended Complaint). The rates were approved retroactively. The agreements did not provide any procedure for truing up this retroactive approval. HT 234.

After approval of the agreements, WWC claimed its accounting department made several requests for a true up. HT 35. However this is contradictory to the testimony of Dennis Law, the Regional Manager of Golden West Companies. The first request by WWC was made just prior to a letter Dennis Law sent to WWC with calculations of the amounts Golden West believed they owed to WWC. WWC Ex. 4. In that letter, Golden West stated it would credit the amount owed to WWC on each invoice. WWC stated this credit process would take over 30 months for Golden West Coop. HT 36. Again, this is not supported by the record. Dennis Law testified this process would have taken substantially less time. HT 448-449.

On January 14, 2005, Ron Williams sent the first formal request to Golden West requesting the true-up. WWC Ex. 5. On January 25, 2005, Dennis Law responded asserting that any money owed by WWC should be offset by the money WWC owed to Golden West for the appropriate InterMTA factor. WWC Ex. 6. Subsequently, this action was commenced.

II. Negotiation of Traffic Study

The ICA called for an original placeholder or initial InterMTA factor of 3%. GWC Ex. 2. This factor was to stay in effect for three months following execution of the agreement. It would then be adjusted three months after the execution of the ICA based upon a mutually agreed to traffic study, and every six months thereafter.

[2] Due to an oversight by the parties, Kadoka does not have an executed or approved agreement in place. The parties stipulated that Kadoka would be treated as if the ICA was signed and approved. HT 498, 953.

Larry Thompson of Vantage Point Solutions ("VPS") was involved in negotiations of the ICA. In July of 2003 after the agreements were negotiated, Larry Thomson began contacting WWC on behalf of the Golden West Companies (and all ILEC's) to develop a traffic study methodology. Larry Thompson believed developing the traffic study was straightforward and that sufficient language was included in the agreement to allow the parties to develop the study. HT 251. Initially, WWC expressed concerns about getting the CDR data off of their switch. HT 263. In response, VPS began developing a preliminary InterMTA study called the SS7 methodology which would not require CDR data. Id. On September 17, 2003, VPS delivered the SS7 methodology to WWC. VPS had identified all of WWC's NPA-NXXs in Golden West territory and developed a Sequence Query Language program to analyze the InterMTA traffic.

On July 25, 2003, Mr. Williams sent an e-mail to Larry Thompson with an attachment that identified an InterMTA traffic study methodology that had allegedly been performed in Oklahoma. HT 240; GWC Ex. 7. The traffic study was simply a one page document that Mr. Thompson considered inadequate. Mr. Thompson requested the raw data associated with this study so as to better understand the methodology.

Larry Thompson left several voicemail messages for Ron Williams in September and October of 2003, but did not receive a reply. On October 20, 2003, Ron Williams responded to the SS7 methodology report. HT 270. A two month delay ensued. Mr. Thompson continued to leave voicemail messages with WWC. Finally on December 18, 2003, WWC provided some wireless InterMTA data which from the e-mail string, Ron Williams had in his possession for the previous four months. WWC Ex. 14, Trail 4. The

data provided was for Missouri. HT 268-269. VPS immediately responded and pointed out the data was not appropriate for the analysis since the parties were concerned with InterMTA calls terminating to a landline, not a wireless caller's calling patterns.

In the early months of 2004, Mr. Thompson left numerous telephone messages for Ron Williams. On April 2, 2004, VPS sent an e-mail to Ron Williams trying to get the status of the methodology. HT 271-272. On May 3, 2004, VPS sent another email to Ron Williams about the status of the InterMTA methodology.

During the months of May, June, July, August and September of 2004 numerous voice mail messages were left by Larry Thompson of VPS for Ron Williams. On September 28, 2004, after a delay of 9 months, an email was received from Mike Wilson describing their proposed methodology for South Dakota. HT 272. WWC committed to having the InterMTA analysis complete by no later than October 29, 2004. HT 273. VPS responded two days later with some questions and concerns regarding the proposed analysis. VPS again requested the raw data used in the WWC calculation.

On October 29, 2004, Mike Wilson sent an e-mail requesting more time to complete the analysis and stated it would be completed by November 5, 2004. On the same day, Larry Thompson responded to Mike Wilson and asked why his September 30, 2004 e-mail had been ignored. WWC Ex. 14, Trail 9.

On November 5, 2004, Mike Wilson sent the preliminary InterMTA analysis using another company, Interstate Telecommunications Cooperative ("ITC") as the initial study company. The analysis was just a summary, however, and according to Mr. Thompson, left many questions unanswered. In addition, the raw data was not provided as agreed. WWC Ex. 14, Trail 10. The next day, VPS asked for some analysis

clarification from WWC. Mike Wilson responded to the questions and agreed to provide another company, Venture Communication Cooperative ("Venture"), data by November 12, 2004. WWC later informed VPS they would need an extension for the delivery of the Venture data.

On November 27, 2004, VPS had still not received the Venture analysis data. VPS sent an e-mail to find out the status on November 27, 2004. WWC did not respond to this e-mail. On December 7, 2004, VPS sent another e-mail to WWC requesting the status of the WWC Venture analysis. On December 13, 2004, VPS received the analysis from WWC for Venture. WWC stated in its e-mail that the analysis has some "data integrity issues". HT 278. WWC stated that they expected to have the analysis rerun to resolve the data integrity issues by the end of the week, which would have been December 17, 2004.

Also in that e-mail, WWC stated "I don't know that we will be able to commit much more in terms of resources to this project in the future." WWC Ex 14, Trail 11. VPS sent another status update e-mail on December 19, 2004, to WWC. WWC Ex. 14, Trail 11. WWC responded on January 6, 2005. HT 279, WWC Ex. 14, Trail 12. VPS did not receive the raw data associated with the analysis. HT 279. On February 5, 2005, Mr. Thompson sent an e-mail to Mike Wilson stating that the CDRs for Venture were still not valid because only 9,776 were in the file rather than 126,636 which was the appropriate number. HT 279.

On March 16th and 17th, 2005, WWC finally began sending valid CDR data files. The CDR files included information for Golden West Coop and four other LECs. HT

279. WWC refused to provide the CDR files for Vivian, which is a Golden West company.

On March 18, 2005, VPS and WWC had a conference call to discuss the results of the CDR analysis. VPS shared their analysis results with WWC, but WWC did not share any of its results. On March 28, 2005, after unreturned e-mail, and voice mail, to WWC, Mike Wilson finally sent an e-mail response to Mr. Thompson confirming that the WWC analysis and the VPS analysis were essentially identical. HT 252, WWC Ex. 14, Trail 17. The results for Golden West, Midstate, and James Valley were given in the e-mail. ITC and Venture were discussed on the telephone and the analysis also matched for those two companies.

On April 7, 2005, WWC e-mailed a proposed Settlement Agreement to VPS that proposed one InterMTA factor for all ILECs. The proposed InterMTA rate was less than the consistent CDR study results of the parties for five of the ILECs. In addition, the offer proposed a fifty-percent (50%) correction factor to be applied to the proposed InterMTA factor. HT 283-285, WWC Ex. 14, Trail 19. WWC also proposed eliminating the carrier common line portion of the intrastate access rate. This settlement proposal was unacceptable to the ILECs.

On August 5, 2005, Golden West received WWC's responses to their Second Set of Interrogatories in the current case. These Responses stated for the first time that the CDR data provided in March of 2005, was "significantly flawed". Larry Thompson was shocked and surprised by this assertion. HT 286-287. On August 22, 2005, the PUC ordered WWC and Golden West technical experts to meet in a good faith effort to resolve the outstanding issues between the parties.

On September 9, 2005, WWC, Golden West, VPS, and PUC staff attorney met in Rapid City, South Dakota, to attempt to resolve outstanding issues. Prior to the September 9, 2005 meeting, Golden West provided a list of information they requested WWC to bring to the meeting. HT 289; GWC Ex. 11. Larry Thompson testified that at this meeting WWC was not able to provide the information requested of them by VPS in advance of and in preparation for the meeting. HT 290-291.

In early October, 2005, WWC sent VPS 1500 pages of technical documentation on the WWC switching network to define the AMA records needed in the InterMTA analysis. On October 12, 2005, VPS e-mailed Mike Wilson, in response to his request that VPS provided the fields of CDR records that VPS needed for the Golden West Companies' InterMTA analysis. VPS stated that if WWC provided all the fields they provided for the other five companies, it would be adequate.

On December 2, 2005, less than one month before the ICAs would expire, VPS finally received the CDR data from WWC for all seven (7) of the Golden West Companies.

LEGAL ANAYLSIS

I. Section 7.2.3 of the ICA is not an "Agreement to Agree"

WCC has alleged that Section 7.2.3 of the Agreement is an "agreement to agree". Whether an agreement is final or merely an agreement to agree depends upon the parties' intentions. Dominium Management Services v. Nationwide Housing Group, 193 F.3d 358 (8th Cir. 1999), (citing Beck v. American Health Group Int'l, Inc., 211 Cal. App. 3d 1555, 260 Cal. Rptr. 237, 241 (Cal.Ct.App. 1989)). If the agreement is indefinite, the parties' conduct after execution and prior to any controversy may be considered to

determine their intentions. Dominimum at 367, (citing Oceanside 84, Ltd. v. Fidelity Fed. Bank, 56 Cal. App. 4th 1441, 66 Cal.Rptr.2d 487, 492 (Cal.Ct.App. 1997)). Moreover, pursuant to South Dakota law, "a contract is to be read as a whole, making every effort to give effect to all provisions." Nelson v. Schellpfeffer, 2003 SD 7, ¶8, 656 NW2d 740, 743. " An agreement must be sufficiently definite to enable a court to give it an exact meaning" Weitzel v. Sioux Valley Heart Partners, 2006 SD 45, ¶23, 714 NW2d 884, 892 (citing In re Estate of Aberle, 503 NW2d 767, 770 (SD 1993) (citing Deadwood Lodge No. 500 Benevolent and Protective Order of Elks of the United States of America v. Albert, 319 NW2d 823, 826 (SD 1982)). "However absolute certainty is not required; only reasonable certainty is necessary." Id. If an agreement leaves open essential terms and calls for the parties to agree to agree and negotiate in the future on essential terms, then a contract is not established.

The intentions of the parties are evident from the plain language of Section 7.2.3:

> For billing purposes, if either Party is unable to classify on an automated basis the traffic delivered by CMRS as local traffic or InterMTA traffic, a Percent InterMTA Use (PIU) factor will be used, which represents the estimated portion of InterMTA traffic delivered by CMRS provider.
>
> The initial PIU factor to be applied to total minutes of use delivered by the CMRS Provider shall be 3.0%. This factor shall be adjusted three months after the executed date of this Agreement and every six months thereafter during the term of this Agreement, based on a mutually agreed to traffic study analysis. Each of the Parties to this Agreement is obligated to proceed in good faith toward the development of a method of traffic study that will provide a reasonable measurement of terminated InterMTA traffic. (Emphasis added).

The ICA cannot be described as "an agreement to agree." Everything necessary for an agreement is present, and the intent of the parties is clearly ascertainable. The parties knew the terms and conditions of the agreement. HT 498. There was a clear

meeting of the minds. The parties intended the 3% initial PIU to be a "placeholder," and that this InterMTA factor would be adjusted, based upon traffic studies, throughout the term of the Agreement. Golden West Ex. 2.

Not only does the language of Section 7.2.3 identify the intent of the parties to adjust the initial InterMTA factor based upon traffic studies, the Agreement also contains specified conditions and terms that dictate the traffic study methodology. Section 5.4 of the Agreement ("Measuring Traffic") instructs the parties on how to define customer location, as follows:

> 5.4 Measuring traffic – In order to determine whether traffic exchanged between the Parties' networks is Local or InterMTA traffic for purposes of determining compensation, the Parties agree to define the customer location as follows: for Telephone Company, the origination or termination point of a call shall be the Telephone Company's end office which serves, respectively, the calling or called End User. For CMRS Provider, the origination or termination point of a call shall be the connecting cell site, which serves, respectively, the calling or called party at the time the call begins.

This language is mandatory, and not left to the discretion of the parties.

During the hearing, Mike Wilson confirmed that CDR data is necessary in order to determine the customer location by the connecting cell sets for an InterMTA study. HT 750, 782. Thus, the study methodology is dictated within the four corners of the agreement itself because of the ICA's definition of the origination/termination of a CMRS call as the connecting cell sets serving the calling or called party at the time the call begins. GWC Ex. 2. Other industry experts such as Roger Musick agreed that the ICA defined how the study should be done. HT 881; 918; 1007-1018; 1040.

It is also important to note that in the telecommunications industry, "traffic studies" are part of the ordinary course of business for all companies. Even the NECA

tariff refers to the development of PIU factors to determine jurisdiction of telecommunications traffic. (See Sections 2.3.11 and 2.3.12 of NECA Tariff). This Commission has the authority to analyze traffic studies and, in fact, has reviewed and approved such studies. There is no ambiguity in what Section 7.2.3 of the Agreement, read in conjunction with Section 5.4, requires of the parties, and the intentions of the parties with regard to this section are clear. Section 7.2.3 is not an "agreement to agree" clause, and under clear and current case authority, it should remain as an enforceable part of this Agreement.

Moreover, the precise sentence at issue here reads: "Each of the parties to this Agreement is obligated to proceed in good faith toward the development of a method of traffic study that will provide a reasonable measurement of terminated InterMTA traffic." This sentence contains nothing about an agreement to agree. It is an agreement to "proceed in good faith toward the development of a method of traffic study that will provide a reasonable measurement of terminated InterMTA traffic." Or, more simply stated, it is an agreement to engage in a particular activity in good faith. Regardless of whether the goal of this activity is accomplished, the agreement requires that the parties engage in the work.

The enforceability of an "agreement to negotiate" is an issue of first impression in South Dakota. The Courts' view of whether contract provisions are "definite" is changing in favor of more intervention by the Courts to interpret and enforce such provisions. The latest edition of the *Williston on Contracts* treatise, states:

> Some modern courts, recognizing the practical business utility of such clauses in a lease, treat them as sufficiently definite by interpreting them as meaning a reasonable rental under the circumstances in case the parties cannot agree. A similar rule has been adopted by the

> Uniform Commercial Code with respect to open price terms in a contract for the sale of goods; when the parties have agreed to subsequently agree to a price and they fail to do so, the price is to be set at a reasonable price at the time for delivery so long as the parties intended to conclude a contract. The Restatement (Second) adopts this modern view, maintaining that agreements to agree should be enforced if the parties intend to be bound and an appropriate remedy can be given for breach. 1 *Williston on Contracts*, § 4.26 (4th Ed.)

The good faith requirement in Section 7.2.3 also does not negate the enforceability of the section. Other jurisdictions have had the opportunity to address the enforceability of an "agreement to negotiate". One court has discussed the issue as follows:

> The modern view, and the view endorsed by most scholars, is that agreements to negotiate in good faith, unlike mere "agreements to agree", are not unenforceable as a matter of law. See, e.g., Channel Home Ctrs. v. Grossman, 795 F.2d 291, 299 (3rd Cir.1986) (letter of intent obligating landlord to negotiate with prospective tenant enforceable if it comports with other requirements of binding contract under Pennsylvania law); Thompson v. Liquichimica of America, Inc., 481 F.Supp. 365, 366 (S.D.N.Y.1979) (clause obligating parties to use best efforts to come to agreement may be enforceable if parties intended clause to impose binding obligation); Itek Corp. v. Chicago Aerial Indus., Inc., 248 A.2d 625, 628 (Del.1968) (letter of intent requiring parties to make reasonable effort to agree upon contract for sale of goods enforceable under Illinois law); J. Calamari & J. Perillo, Contracts § 2-9(a)(3) (3d ed.1987); E.A. Farnsworth, Precontractual Liability and Preliminary Agreements: Failed Dealing and Failed Negotiations, 87 Colum.L.Rev. 217, 266-67. Howtek, Inc. v. Relisys, 958 FSupp 46, 48 (D.N.H. 1997).

This case provides solid and well reasoned authority for the enforceability of agreements to negotiate. The Howtek, Inc. case goes on to explain that such agreements can be enforced as long as the terms of the agreement are "sufficiently definite to render them enforceable." Id. Likewise, under South Dakota law, an agreement must be "sufficiently definite to enable the court to give it an exact meaning." Fisher at ¶18. The underlying rationale for the unenforceability of certain agreements to agree or (in some

jurisdictions) certain agreements to negotiate, is that such agreements are not sufficiently definite to be enforceable. Unlike the agreements deemed unenforceable in Fisher and the other cases previously cited by WWC, the InterMTA factor at issue here is quantifiable and measurable, and thus sufficiently definite to be enforced.

A recent South Dakota case has found an agreement that leaves certain terms and conditions open to later negotiation is valid. Weitzel v. Sioux Valley Heart Partners, 2006 SD 45, ¶25, 714 NW 2d 884. That agreement stated that a future employment agreement to be signed a year later would contain "terms and conditions of which shall not be materially different than the current [1999 staff] Physician Agreement, except as mandated by law or regulation". SVHP argued that since the future terms and conditions of the contract were unknown on the date the initial agreement was signed, it lacked sufficient definiteness and must fail. The Supreme Court did not buy into this argument and found that there were no specific essential terms left from the agreement. Id at 893.

The basic goal of Section 7.2.3 is to mandate that the PIU factor be adjusted, and there is no question that the provision requires the parties to make the adjustment. Further, the Section provides that these adjustments are to be made after three months and every six months thereafter. Finally, according to the last sentence of the clause, the degree of the PIU factor adjustment is to be reasonably reflective of the actual measurement of terminated InterMTA traffic. Although this adjusted amount had not been calculated as of the date of the agreement, it is a certain and definite amount. In addition, other provisions throughout the agreement dictate the required methodology.

> Q. (by Mr. Coit). So in your view in looking at the contract, are there various provisions in the contract executed between the parties outside of - - not just looking at 7.2.3, but other provisions throughout the contract that gave the parties a good indication of

how a traffic study was to be completed?

> A. (by Mr. Thompson). Sure. Like I mentioned earlier, we had a definition of local traffic and InterMTA traffic. We had definitions of how to measure the traffic or a description in paragraph 5.4, paragraph 2.1. We also stated the interstate/intrastate access was going to be applied, so obviously we needed to determine those factors as well. HT 1018.

Therefore, all of the major terms and conditions required to implement and enforce the clause are expressly set forth within the agreement. Further, as was pointed out by Commissioner Johnson at the hearing, referring to GWC Ex.9, "if everyone agreed on the inputs and these are the outputs and this box shows analysis of the traffic study, where is the lack of agreement?" HT 762. The evidence revealed there is no lack of agreement and 7.2.3 is an enforceable provision.

II. WCC Breached the ICA by Failing to Act in Good Faith

A. Duty of Good Faith

In the current case, WCC's duty to exercise good faith in performance of the ICA is buttressed on two things. First of all, there is the language of the ICA itself, which provides in pertinent part:

> Each of the Parties to this Agreement is obligated to proceed in good faith toward the development of a method of traffic study that will provide a reasonable measurement of terminated InterMTA traffic.

In addition to the contractual obligation to proceed in good faith found in ¶7.2.3. of the Agreement, South Dakota imposes a duty of good faith and fair dealing in all contracts:

> Every contract contains an implied convent of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract. Garrett vs. Bank West, Inc.

> 459 NW 2d 833, 841 (S.D. 1990) (citing Restatement Second of Contracts, §205 (1981)).

Accordingly, the duty of good faith not only arises within the language of the ICA itself, but also Golden West Companies' claim of breach for failure to act in good faith would be actionable under settled South Dakota case law.

South Dakota cases also give guidance as to what conduct constitutes bad faith. The Garrett case, supra, points to "some categories [that] identify bad faith in performance of a contract includ[e]: evasion of the spirit of the deal; abuse of power to determine compliance; and, interference with or failure to cooperate in the other party's performance." Garrett at 845. Other examples of "bad faith performance include depriving the other party of a negotiated right under the contract, preventing the aggrieved party from receiving the benefits of the bargain, or interfering in the other party's performance of the contract." Mahan vs. Avera St. Luke's, 621 NW 2d 150, 160 (SD 2001).

Further guidance of South Dakota's standards for good faith and fair dealing can be found in the case of Heinrich v. R.L. Oil and Gas Co., Inc., 442 NW 2d 467 (S D 1989). In that case, the Court found that R. L. Oil and Gas Co., Inc., who were attempting to sell their business, acted in bad faith by refusing to make financial records available to Buyer, thus making it impossible for Buyer to secure financing and consummate the transaction. The failure to provide financial records in this case easily correlates with WWC's failure to provide CDRs. The Court elaborated on what constitutes good faith performance:

> Restatement (Second) of **Contracts** § 205 (1979). Imposes a duty of good faith and fair dealing in contracts, generally....

> d. *Good faith performance. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified.* But the obligation goes further: *bad faith may be overt or may consist of inaction,* and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance (Emphasis added.) Heinrich at 471.

B. Actions of WWC

Under the guidelines set forth under South Dakota case law, WWC breached its obligation to act in good faith under the ICA and the obligation of good faith and fair dealing implied in all contracts. In fact, the record is replete with evidence and examples of WWC's bad faith. The actions of WWC, or at times inactions, fit squarely into the case law definitions of bad faith.

1. Untimely and unresponsive responses of WWC

It is clear from the language of the ICA and from the evidence in the record that the parties intended an adjustment of the InterMTA factor, as that factor was designated as an "initial" factor. (¶7.2.3. of ICA).

> During that time when we were negotiating the Agreement and we put in what we called in the agreement the initial InterMTA factor of three percent, we all knew at the time that for all companies most likely that was low and for quite a few companies it was very low, and so we thought there would probably also be some sort of an offset if the recip comp rate was to come down. That three percent was unusually low and there could have been a refund associated with that as well. HT 235-236.

The evidence further revealed that initial negotiations of a traffic study methodology began as early as February of 2003, which was prior to actual signing of the ICA. Furthermore, this was not to be an open-ended delayed process, because the Agreement itself specified that the initial InterMTA factor "shall be adjusted three months after the executed date of this Agreement." (ICA¶ 7.2.3.).

The ICA also established the traffic study methodology in Section 5.4 by defining the connecting cell site at the beginning of the call as the origination or termination point.[3] The evidence revealed that it would be necessary to utilize CDRs in order to determine the customer location by the connecting cell site for the InterMTA study.

> Q. (by Ms. Wiest). In order to determine the customer location by the connecting cell site for an InterMTA study, do you need to utilize CDRs in some manner?
>
> A. (by Mr. Wilson). Yeah, in some manner, yes. HT 750.
>
> Q. (by Mr. Coit). With respect to identity of the tower, you need CDR data to identify the originating tower site, don't you?
>
> A... (by Mr. Wilson). You need the CDR data to identify the ID of the tower.
>
> Q. Right, so you need CDR results in order to come up with the originating cell site location that's required under this contract.
>
> A. No, you need CDR data to identify a cell site and join two data sets that would get an originating point.
>
> Q. You need to do a little bit more with the data, but without the CDR results, you can never identify the originating cell site location, can you?

[3] Section 5.4 Measuring traffic states: – "In order to determine whether traffic exchanged between the Parties' networks is Local or Inter MTA traffic for purposes of determining compensation, the Parties agree to define the customer location as follows: for Telephone Company, the origination or termination point of a call shall be the Telephone Company's end office which serves, respectively, the calling or called End User. For CMRS Provider, the origination or termination point of a call shall be the connecting cell site, which serves respectively, the calling or called party at the time the call begins."

A. Of a particular call, no. HT 782.

It is within this context that WWC's continued stalling and refusal to provide CDRs to Mr. Thompson becomes so significant. Golden West Ex. 6, which is a summary of the correspondence between the parties, indicates that the parties started discussions on a study analysis as early as mid-2003, which should have allowed the parties ample time to comply with the required InterMTA adjustment within ninety (90) days of the execution date. WWC provided the outline of an abbreviated study methodology from Oklahoma (the "Oklahoma Study"), but it was not specific to South Dakota, nor was it sufficiently detailed to allow Mr. Thompson to ascertain how the methodology would work. Golden West Ex.7. Further, WWC did not provide any CDR data with the Oklohama data after repeated requests made by VPS. By contrast, Mr. Thompson provided WWC with a detailed study methodology, referred to as the SS7 study. WWC Ex. 14, Trail 2.

In addition to providing the SS7 as an alternative study, Mr. Thompson also responded to the Oklahoma study and requested the underlying data to allow analysis of the study. HT 268.

WWC's response was both untimely and unresponsive:

> A. (by Mr. Thompson) So after a <u>few months,</u> finally in I guess it was December 18th, they did send some data. I received that actually from Mr. Mike Wilson, and he sent me some data from a study that they had done in Missouri, it appeared, and I analyzed the data, responded the same day and it appeared that the data they were extracting, it must have been for a different purpose because it didn't appear that it would measure InterMTA traffic the way we would like to measure it. So I responded with some questions regarding the data trying to figure out exactly am I interpreting it properly or is it the wrong data. HT 268-269 (emphasis added).

Mr. Thompson immediately responded with questions and concerns about the data:

> Mike,
>
> Thanks for the data. It appears that you selected an MTA and then logged all calls from a wireless caller in this MTA to NPA-NXXs that were outside of this MTA. I would be interested in the opposite. Can I provide you a listing of landline NPA-NXXs in a given MTA and have you provide all wireless calls that originate outside this MTA that terminate to these landline NPA-NXXs?
>
> Larry Thompson (WCC Ex. 14, Trail 5)

That e-mail message trail included a message from internal WWC personnel conveying the Missouri data to Ron Williams on August 13, 2003. WWC then apparently sat on that data for approximately four (4) months before forwarding it to Mr. Thompson.

The evidence also revealed the reason for Mr. Thompson's diligent attempts from the onset to collect meaningful data from WWC:

> Q. (by Ms. Rogers) And so again throughout even these initial negotiations, was receipt of meaningful data specific to the South Dakota companies important to you?
>
> A. (by Mr. Thompson). Oh, yeah, especially if the procedure was that two-thirds of a page long like we said before, I thought the data could probably fill in a lot of that gap and so that's why I was, and I think also in addition to that, I thought it was important that we independently analyze the data. Extracting it from the switch is not the difficult part, the difficult part is the actual analysis of it. That's where you could actually introduce some error, so I thought there was some value in both of us independently analyzing it once we actually had the raw data from the switching network. HT 269.

Following the receipt of the unresponsive Missouri data in December of 2003, Mr. Thompson was stonewalled by complete, absolute silence on the part of WWC.

> Q. (by Ms. Rogers) Then after you received the requested data, so to speak, which turned out to be from Missouri and not from Oklahoma, and I believe you indicated it didn't really give you the information you needed, when was your next contact with WWC?

A. (by Mr. Thompson). Well, on April 2nd, and I believe the e-mail is in this stack here, I did send an e-mail to Mr. Ron Williams to find out what the status is and why I hadn't heard back from him because we were all, as an industry, quite interested in getting this resolved, and as you can see from the time frame, by the time we are getting to April 2nd, that's when quite a few of the contracts were being executed and our three-month interval was starting so we were all interested in getting this resolved. I didn't get a response back from that e-mail. Again, on May 3rd I forwarded that e-mail back to him again asking why he had not responded...Still no response. HT 271-272.

Despite e-mail messages and voice mail messages, Mr. Thompson did not get anything from WWC for over nine months. Golden West Ex. 19, page 34[4]). HT 988-989.

Q. (by Ms. Rogers). So when Mr. Wilson testified that there were contacts between the two of you during that time, do you disagree with that?

A. (by Mr. Thompson). There may have been some contracts with regard to LNP or other things, but with regard to the proceedings here, I could not get anything out of them during that time. HT 988-989 (emphasis added)

This clearly falls within the categories of subterfuge, evasions, and inaction that are identified by the Restatement of Contracts and adopted by our Courts as bad faith. Heinrich, supra, at 471.

When correspondence between the parties finally resumed after the "black hole of communication" the unresponsiveness did not improve. HT 992 On September 28, 2004, Mike Wilson informed Mr. Thompson that WWC was going to do a "direct pull" of the data, and that WWC would be able to derive InterMTA factors for South Dakota by no later than October 29, 2004. WWC Ex. 14, Trail 8. This is now well after the adjustment deadline established in the ICA. But, the data was not produced on October 29, 2004, as

[4] The pages of Golden West Ex. 19 is not numbered. The email message referenced begins on page 34 of the Exhibit.

promised. Instead, Mr. Wilson asked for more time---until November 5, 2004. WWC Ex. 14 Trail 9.

On November 5, 2004, Mr. Wilson finally provided preliminary InterMTA analysis for one company, but it was an incomplete summary only and triggered many questions. Despite Mr. Thompson's repeated requests, no CDRs were provided. WWC Ex. 14 Trail 10. This token provisioning of a summary "analysis" was approximately one (1) year and three (3) months after initial negotiations on methodology commenced - - nine (9) months of which constituted complete silence and inaction by WWC.

The stalling continued over the next few months. On November 9, 2004, Mr. Wilson promised to provide call records for the first company (ITC) "soon", and he promised to provide records for a second company (Venture) by "the end of this week," (i.e., November 16, 2004). WCC Ex. 14, Trail 10. Then ensued another silence from WWC. On November 27, 2004, Mr. Thompson inquired as to the status of Venture data, but again, there was no response. Because Mr. Wilson did not respond, on December 7, 2004, Mr. Thompson e-mailed Mr. Williams in an effort to get a response. There was no response to this message, either. Golden West Ex. 19, page 46.

Finally, on December 13, 2004, Mr. Thompson received the summary analysis for the second ILEC, Venture, but Mr. Wilson questioned the integrity of WWC's own data. Mr. Wilson promised a "clean data set for Interstate and Venture" by December 17, 2004. WWC Ex. 14, Trail 11. Mr. Thompson did not receive the re-run data by December 17, so on December 19, 2004, Mr. Thompson once again followed up with a request for the re-run data. WWC Ex. 14, Trail 11. Even when Mr. Thompson finally received the re-run CDRs for Venture on January 5, 2005, they were not complete (9,776 total records

provided, should have been 126,636) total records. HT 993. Mr. Thompson informed Mr. Wilson of the inadequacy of the call detail records on February 5, 2005. WWC Ex. 14, Trail 13. Thereafter another month elapsed with no response from WWC. On March 15, 2005, WWC for the first time in nearly two (2) years sent valid CDR data files for some of the ILEC's, including Golden West Coop. WWC Exhibit 14, Trail 15. Mr. Thompson described his attempts to get data from WWC as "very frustrating", HT 1017, and summarized WWC's behavior as follows:

> Q. (by Ms. Rogers) With regard to the responses of WWC to your efforts to get call detail record data, do you believe that WWC was timely with their responses?
>
> A. (by Mr. Thompson) Absolutely not.
>
> Q. And why do you say that?
>
> A. You can see through the e-mail trail like that large gap from December and when I sent additional follow up e-mails without any response all the way to September of '04, and then even after that fact, after that date, you can see multiple times where they called—or they sent e-mails asking for more time. They had issues with their data integrity, which later didn't amount to anything. I mean, time and time again there was slippings and they continually sent apologetic e-mails asking for more patience and it just seemed like it was always just slightly out of our grasp, and if you look at when we started negotiating to get this data all the way back to September of '03 and I never got actual data until March of '05, that just seems pretty excessive.
>
> Q. And in fact for the Golden West Companies, other than the first round of Golden West, you didn't receive that data until December of '05; is that correct?
>
> A. That is correct.
>
> Q. Larry, as you sit here today, do you believe that you sincerely and diligently tried to get the issue of the traffic study resolved on behalf of your clients?

> A. Of course. They were terminating no (sic) interstate/intrastate traffic and my clients weren't able to bill properly for it. HT 1048-1049.

Based upon Mr. Thompson's considerable experience in dealing with these issues, Mr. Thompson's opinion was that WWC's delays in responding, and not responding at all, constituted bad faith.

> Q. (by Ms. Rogers)...do you believe that they (WWC) acted in good faith to negotiate a mutually agreed to traffic study methodology for purposes of InterMTA adjustment?
>
> A. (by Mr. Thompson)....It would be my opinion that they did not. You could see my chronology I presented before that there was significant delays continually with the process of just being able to get data from Western Wireless. There were months on end where I never received a response. Once we got the data, oftentimes it was somehow impuned by themselves, as you saw on our second round of discovery, where they claimed that there was interexchange carrier traffic where I later proved that there had not been any interexchange carrier traffic, and to me it seemed like it was continually a delay tactic to be able to not adjust the InterMTA factor to a level that would more represent the toll traffic that's actually being delivered to these companies over their local facilities. HT 317-318.

C. Other Acts of Bad Faith

In addition to being unresponsive and dilatory in responding, the record evidences other bad faith actions of WWC. There were occasions throughout the contractual period when WWC refused to comply with the requirements of the contract.

Probably the most blatant example of this is manifested in an e-mail message from Mike Wilson to Larry Thompson, dated December 13, 2004. Golden West Ex. 14, Trail 11. It is important to recognize that WWC voluntarily executed the ICA with all the ILECs and therein committed to adjustment of the initial InterMTA factor within ninety (90) days of execution of the Agreement. Within that same paragraph of the ICA

(¶7.2.3.), WWC obligated itself to proceed in good faith toward development of a method of traffic study. That obligation is an affirmative duty on both parties, and Golden West Companies clearly demonstrated its continued efforts to comply with that good faith negotiation effort. WWC, on the other hand, either refused to proceed and continue with negotiations, or used the "mutual argument" clause within ¶7.2.3. as an excuse not to engage in good faith negotiations.

As noted above, one clear example of this is found in the e-mail message from Mike Wilson to Larry Thompson dated December 13, 2004. This message accompanied the Venture data Mr. Wilson finally provided to Mr. Thompson. After commenting on the integrity of the Venture data, Mr. Wilson stated, on behalf of WWC:

> We've found that the processes surrounding the extraction of the detailed data that supports InterMTA factors is extremely time consuming and convoluted. I don't know that we will be able to commit much more in terms of resources to this project in the future. In short, I'm hoping to work out a solution without involving too many more WCC I.T. personnel, as it is amounting to quite a large cost. WWC Ex. 14, Trail 11.

This message flies in the face of WWC's good faith obligation to negotiate a traffic study methodology. As was pointed out by Ms. Wiest, under the ICA, it was "an obligation of Western Wireless to commit its resources to use CDRs to determine and identify all towers by originating carrier." Despite Mr. Williams claims that WWC had taken all of the initiative (HT 954), WWC's own acts and messages belie his claim.

Another example of WWC's noncompliance with its good faith obligations was its refusal to provide any data for Vivian.

> Q. (by Mr. Coit) Now, to your understanding, what was the problem or the specific problem in getting the Vivian data?

> A. (by Mr. Thompson) I don't know what the specific problem was. We had requested that, he had come back and specifically said he was not going to provide that about a year earlier. HT 335.

See also WWC Ex. 14, Trail 16, Mr. Wilson's e-mail of March 17, 2005, to Londa at VPS: "We will not include Vivian."

In fact, refusal to provide CDR's for the Golden West Companies prevailed throughout the period of the ICA. With the exception of Golden West Cooperative, Mr. Thompson did not receive the CDRs for the other six (6) companies until December 2005, just weeks before the end of the ICA, and after WWC had given notice of termination of the ICA. HT 334. The CDRs for the other companies were not provided until after commencement of this action and Golden West's Counterclaim, and until after a September 2005 meeting that had been ordered by the Commission and attended by Staff Attorney Rolayne Wiest. Mr. Thompson's statement, "I just couldn't get anything more out of them" (HT 989) turned out to be very prophetic. It took intervention by this Commission to force WWC to turn over the data that was necessary to arrive at a traffic study methodology that complied with the requirements of the ICA.

Another example of WWC's failure to negotiate in good faith is found in a purported settlement offer submitted by WWC, found in Golden West Ex. 10. In that April 7, 2005 e-mail message from Mr. Wilson to Mr. Thompson, WWC proposed a 50% correction factor to a proposed adjusted InterMTA factor of 10%, resulting in a 5% InterMTA factor for all of the Golden West Companies and for all other ILECs as well. The InterMTA factor for the Golden West Companies, based on CDR analysis, ranged from a low of 13.2 for Sioux Valley and a high of 29.2 for Vivian. HT 726-727; Golden West Ex. 14. Mr. Thompson was justifiably taken aback by such an offer:

> Q. (by Ms. Rogers). Let me ask you this. What was your reaction to the 50 percent correction factor?
>
> A. (by Mr. Thompson) I had never heard of such a thing. It appears that they are asking us to terminate toll traffic as if it was local traffic by applying a 50 percent correction

As if that portion of the offer was not outrageous enough, WWC added another new twist: they did not want to pay the carrier common line portion of the intrastate access rate. Mr. Thompson's response was similar:

> Q. (by Ms. Rogers). And, again, was this particular proposal or that part of the proposal a surprise to you?
>
> A. (by Mr. Thompson). Yeah, I have never heard of such a thing.
>
> Q. And carrier line portion of the access rate, we are talking about the LECA rate that is approved by this commission?
>
> A. That is correct. HT 285.

Mr. Wilson admitted that there was no justifiable basis for eliminating the carrier common line charge, other than "the economics were to make the rate reasonable on our end." HT 651 (emphasis added)

According to South Dakota case law, "implied in the definition of bad faith is the idea that the actions were unreasonable." Mahan, supra, at 31. WWC's actions in presenting the settlement proposal contained in Golden West Ex. 10 were on their face unreasonable. They inserted new, never before heard of, elements into that offer that flew in the face of reasonableness. In fact, when asked specifically why WWC's insertion of a 50% correction factor, Mr. Wilson was unable to come up with any justifiable reasons.

> Q. (By Mr. Coit) Point to me specifically a few reasons as to why this is reasonable, this 50 percent correction.

> A. (By Mr. Williams) The 50 percent correction, in retrospect, looking again at the POI method, looking at how our intermachine trunking network was set up and how IXC traffic is in the CDR data, I think those are good reasons.

When questioned further about the reasonableness of that settlement offer by Commissioner Johnson, Mr. Williams defended it on the basis of a 60% increase over the initial InterMTA factor in the ICA. As Commissioner Johnson correctly noted, however, the increased percentage over the 3% factor was immaterial under the contract—the increased percentage does not have to be reasonable, but the efforts of the parties to negotiate an adjusted InterMTA factor must be reasonable. WCC's actions in proposing as a settlement Golden West Ex. 10, were not reasonable. HT 959-960.

In August of 2005, WWC responded to Golden West Companies Second Set of Interrogatories, and as part of those responses, WWC for the first time informed Golden West Companies that the CDR data provided for the October 2004 time period (which included CDR's for Golden West Coop) was significantly flawed. This is yet another instance of WWC's failure to act in good faith. Mr. Thompson's reaction was "shock and surprise."

> A. (by Mr. Thompson). So at this point (when informed that data integrity issues had been resolved) I had believed that all of the data was accurate data until I received the second round of discovery responses.
>
> Q. (by Ms. Rogers). And again, what was your response or reaction to that?
>
> A. Shock and surprise. HT 287

Applying the litmus test of "reasonableness" to WWC's claim of contamination of their own CDR data, WWC's actions failed the test. First of all, in response to questions about discovery of potential contamination, WWC's response was not clear:

> Q. (by Ms. Wiest). And it is your understanding that Western Wireless is unable to determine how much IXC traffic was included in either the 2004 or 2005 studies?
>
> A. (by Mr. Wilson). That's my understanding.
>
> Q. And if you were unable to determine the amount of IXC traffic, how come Western Wireless determined that the 2004 study, then, had significant flaws?
>
> A. Well, I think there were, in the 2004 study there were some other issues that impacted that in addition to IXC traffic, with the understanding that there was IXC traffic was provided by our network group, who indicated that they hadn't fully implemented the hat we would call intermachine trunking solution between these switches.
>
> Q. And even after the intermachine trunking solution was fully deployed in 2005, it's your position that the 2005 study was still contaminated by IXC traffic?
>
> A. That's what I was told. HT 952.

In point of fact, WWC did not raise other data integrity issues in its August 2005 Interrogatory Responses. Furthermore, it appears from the testimony of Roger Musick that WWC would have been capable of determining the extent of contamination, particularly after it implemented intermachine trunking.

> Q. (by Mr. Coit). So with respect to these overflows, traffic overflows, which you had mentioned on your exhibit, Golden West Ex. 45, by looking at the traffic overflow registers that you referenced or the peg count registers, would a carrier be in a position to tell rather quickly the extent to which any data might be contaminated?
>
> A. (by Mr. Musick). Yes, you would know immediately how many calls, how many calls were processed and how many overflowed, so you would know is it a one percent effect or point zero percent effect.
>
> Q. So you wouldn't actually have to do any sort of a review or analysis of actual CDR data in order to get some idea of the extent of that contamination?

A. That's correct. HT 891-892.

Mr. Williams basically confirms that in his response to Ms. Wiest's continued questioning on examination:

> Q. (by Ms. Wiest). Were you surprised when Mr. Thompson found that there was no IXC traffic in the 2004 study?
>
> A. (by Mr. Wiliams). Yes.
>
> Q. Were you surprised when he found that there was deminimis IXC traffic in the 2005 study?
>
> A. Less surprised. HT 952.

By raising the issue of contamination of data at the eleventh hour, so to speak, without any way to quantify or eliminate the contamination, WWC was not acting in good faith. The data was certainly "testable", as was evidenced by VPS (HT 318), despite WWC's claimed inability to test its own data. Furthermore, it was WWC's data, over which it has control. WWC impeached its own data. WWC could have provided "good" data either by correcting the CDRs or running new, uncontaminated CDRs. But to use contaminated data as a reason for not negotiating a new InterMTA factor when it was WWC's own data falls short of the standard of good faith.

Larry Thompson pointed to other bad faith action by WWC:

> Q. (by Ms. Rogers) Are there any other actions specifically that you can point to that you believe demonstrated a lack of good faith.
>
> A. (by Mr. Thompson) I would think, for example, the PUC meeting in Rapid City where I believe we came very prepared for, we exchanged our letters in advance, and they didn't have any. They partially answered a coupled of the questions, but never responded adequately to the questions we had provided a week in advance. HT 318.

Mr. Thompson testified as well to WWC's motivation for dragging its feet on adjustment of the InterMTA factor

> Q. (by Ms. Rogers) Based upon the results of the study that was finally arrived at, how would adjustment of the interMTA have affected the amount of interMTA factor and resulting compensation therefore?
>
> A. (By Mr. Thompson) Well, by increasing the interMTA factor, since the recip comp rate in all instances is lower than either the inter or intrastate rate, there would be a substantial amount of compensation due Golden West and the seven Golden West Companies if the rate would have adjusted.

D. WWC's claimed Justifications did not Erase Bad Faith

As noted above, instead of fulfilling its obligation under the ICA to "proceed in good faith" toward the development of a method of traffic study that would provide a reasonable measurement of terminated interMTA traffic, WWC seemed to focus on the words "mutually agreed to traffic study analysis" as an excuse or justification for noncompliance with the ICA.

> Q. (by Ms. Rogers) Western Wireless or WWC signed an agreement that requires adjustment to the InterMTA factor after three months based upon a mutually agreed to traffic study.
>
> A. (by Mr. Wilson). Based on a mutually agreed to traffic study analysis, yes. HT 744.
>
> Q. (by Ms. Rogers) Is the fact that it's burdensome to you, your company, does that give you a justification or a reason not to comply with what you are required to do under the terms of the agreement?
>
> A. (by Mr. Wilson). The language of the contract is mutually agreed upon study analysis.
>
> Q. I'm not arguing that. I'm asking you if you view the fact that it is costly and burdensome to your company as a

> reasonable justification not to comply with the terms of the agreement.
>
> A. I believe both parties needed to come to an agreement on a reasonable method, mutually agree to a methodology study analysis for InterMTA. HT page 746.

The "mutual agreement" language came up again as a justification for WWC's noncompliance with the ICA.

> Q. (by Ms. Wiest) Okay. Just to summarize your testimony, in trying to come up with an InterMTA study utilizing CDRs, is it your position that that is very timely and expensive?
>
> A. (by Mr. Wilson). It's time consuming, yes, and it beared out to be fairly expensive for us, if you consider all the costs of the two studies and consultants and lawyers, yes.
>
> Q. So why did Western Wireless agree that the study would be conducted that way, that in Section 5.4, the origination or termination point of a call shall be the connecting cell site?
>
> A. The contract also included language that said that both parties mutually would agree upon a traffic study analysis and negotiating that analysis and that methodology, we could possibly reasonably come up with an InterMTA factor. HT 750.

Of course, Ms. Wiest correctly pointed out that mutual agreement was not a prerequisite to the requirements of §5.4 of the ICA.

It is clear that bad faith can exist even when the actor believes his conduct is justified.

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified.....Heinrich at 471.

In the current case, WWC highlighted several justifications for its failure to supply CDRs in a timely fashion so as to be in compliance with the ICA's InterMTA factor adjustment. Mr. Wilson and Mr. Williams alleged several barriers to compliance

with the terms of ICA, including the differences between CDRs for wireline vs. wireless companies (HT 621), voluminous amounts of data (HT 631), failure of WWC to keep CDRs for any appreciable time (HT 171-172), the task of providing CDRs was costly, onerous and burdensome (HT 745-746), and lack of a request for CDRs from VPS (HT 637, 686).

The financial impact and burdensomeness of providing CDRs occupied much of the testimony.

> Q. (by Mr. Wieczorek) Did it make sense to Western that you needed to do or spend all the money to mine the data for every company when some of these companies it's a very minor monthly amount?
>
> A. (by Mr. Wilson). Again, the process of putting this methodology together, one of the items in that process would have been to look at economics of putting together these studies, and again, this was very costly for us, so pulling individual studies, running individual studies for companies where we are paying out reciprocal compensation a couple thousand dollars wouldn't make sense. There is no return on investment really. HT 6470.
>
> Q. (by Mr. Coit) So you are admitting, then, that return on investment, the financial impact to your company's, to Western Wireless was certainly a consideration in looking at whether you were going to go forward with some of these InterMTA solutions?
>
> A. (by Mr. Wilson). Well, no, I think the cost impact certainly was and so yeah, you could bake that in. HT 682.

But much of Mr. Wilson's testimony on the onerous or burdensomeness of the process to provide CDRs was refuted by Mr. Musick. Mr. Musick pointed out that AMA (raw CDR) collection is the same process for wireless and wireline switches (HT 859, 870), that production of raw data was doable (HT 867), that disc storage was not an issue (HT 868), and that the process for extracting data was not nearly as onerous as Mr. Wilson

implied (HT 863-871). Mr. Oliver, WWC's expert rebuttal witness, confirmed that aside from privacy issues, raw CDR data could be turned over to VPS without difficulty (HT 1151), and the hardest part about the parties agreeing to a traffic study would be the types of queries and the length of the study. HT 1156. But, Mr. Oliver also testified that he would be capable of developing the queries in approximately a 15-25 day time frame. HT 1132.

Nor was Mr. Wilson's claim that Mr. Thompson never requested raw CDRs supported by the evidence. Mr. Thompson's requests for CDR data are replete throughout the record. (HT 991-993).

> Q. (By Ms. Rogers). There has been some questions concerning what exactly you were requesting from Western Wireless and when the requests were first made. Could you please address first of all what you were requesting from WWC, and second of all, when you began making those requests.
>
> A. (By Mr. Thompson).The primary thing I wanted was the actual data so that we could run the analysis...and I made numerous requests to receive the data, which as you saw, I didn't receive real CDR data until March of 2005.
>
> Q. Did you ever request raw data from WWC?
>
> A. Certainly. HT 991.
>
> Q. So you were requesting data all along, whether it was raw data, whether it was extracted, you wanted the data?
>
> A. That is correct. I think that's clear from my correspondence....I don't know how I can be more clear than that. HT 993, 995.

In addition, WWC had a viable alternative that would have avoided all of the so-called obstacles, and that was to accept the SS7 study methodology. The results of

that study were "pretty darn close" to the CDR study, yet WWC refused that option as well. HT 768.

In fact, none of the "obstacles" WWC attempted to portray in its testimony serve as a justification for never agreeing to an adjustment of the initial InterMTA factor. At the end of the day, the parties had reached a consensus on the most reasonable and accurate study methodology (HT 958, 981, and 1004), on the inputs to the study, the outputs to the study, and the results of the study. (HT 761-62; Golden West Exhitit. 9). There was nothing left upon which the parties had not agreed. HT 1004-1019.

Even then, WWC would not agree to adjust the InterMTA factor in accordance with the matched study results. HT 762. The reason was fairly obvious.

> Q. (by Mr. Coit) Now, looking at the CDRs that have been presented thus far and some of the percentages that have been arrived at through those CDRs, and also looking at the SS7 results that you have seen thus far through Vantage Point, with respect to adopting any of the methods that are proposed, looking at all of that data that's been provided thus far, what occurs with respect to the financial impact on Western Wireless of adopting any of those methodologies?
>
> A. (by Mr. Williams). Well, any time we would increase the InterMTA factor, the compensation due to Golden West would increase.
>
> Q. So basically under any of these methodologies, we are talking about an increase in the InterMTA factor?
>
> A. Correct.
>
> Q. And that really results in you paying more for terminated traffic, correct?
>
> A. For the Golden West Companies, yes. HT 979-980.

One final example of bad faith is the fact that at the hearing, after repeatedly refusing to adjust the InterMTA factor based upon the studies proposed by

VPS, Ron Williams states he believes the SS7 study and the CDR study are both "reasonable studies". HT 956. Taken as a whole, WWC's actions constituted bad faith for which there is no justification. To delay the process until after the ICA expired, to avoid the adjustment obligation, constitutes a breach of the ICA, for which this Commission must fashion a remedy.

E. When did the Breach Occur and What are Golden West Companies Damages?

The evidence clearly established a breach of the ICA by WWC. The next question facing this Commission is an equitable determination of damages to the injured party, the Golden West Companies. South Dakota Courts have held that the measure of damages for the breach of an obligation arising from contract "is the amount which will compensate the injured party 'for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.'" Garnett, supra, at 843.

In a contractual relationship such as the ICA, which is an ongoing obligation, it becomes more of a challenge to determine when the actions of WWC crossed the line of bad faith. Once again, South Dakota case law gives some guidance. "Good faith is derived from the transaction and conduction of the parties," and this implies throughout the term of the contract. Garrett at 541. With regard to the implied covenant of good faith and fair dealing, the Garrett Court said:

> The application of this implied covenant allows an aggrieved party to sue for breach of contract when the other contracting party, by his lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain. Id.

That is precisely what happened in the current case. The overall course of conduct of WWC in failing to provide CDRs, in failing to respond for months on end, in articulating an unwillingness to continue negotiations all constituted bad faith that resulted in WWC being completely prevented from receiving the expected benefits of the bargain, which in the current case was adjusted InterMTA factors.

The ICA required that the initial InterMTA factor "shall be adjusted three months after the executed date of this Agreement."[5] That was not done because of WWC's bad faith actions of lack of diligence, willful rendering of imperfect performances, and interference with or failure to cooperate in Golden West Companies performance (i.e., thwarting mutual agreement). Heinrich at 471.

For purposes of determining the damages caused to Golden West Companies as a result of the breach of the ICA by failure to adjust the InterMTA, this Commission should focus on Golden West Exhibits 33, 34, and 35. While there are other issues involved in the final analysis of who owes who what, the focus of the Commission on this issue is to determine the damages caused to Golden West Companies by WWC's breach of the ICA. Adjustment of the InterMTA factor in accordance with the terms of the contract would affect three areas under the ICA: the switched access portion of the traffic, the reciprocal compensation portion of the traffic, and the total terminating charges. HT 494. These three exhibits graphically portray each of these areas.

Exhibit 34 (Switched Access Portion) shows that GWC billed just over $200,000.00 from July 1, 2004, through the end of the ICA term, for all seven companies. If the InterMTA factor had been adjusted as per the ICA, GWC should have billed

[5] Each of the Golden West Companies executed the ICAs on different dates. For ease of calculation, Mr. Law selected a "median' adjustment date for the InterMTA factor.

approximately $1.5 million. HT 495. GWC billed $350,000.00, but should only have billed $50,000.00. HT 496.

The exact amount of cumulative underbilling is depicted in GWC Exhibit 51. The basis for this adjustment was articulated clearly by Mr. Law, and is consistent with the evidence in this case.

> Q. (by Ms. Northrup). So, on behalf of the Golden West Companies, what is it that you are requesting from this commission at the end of the hearing?
>
> A. (by Mr. Law). I'm asking this commission to set the InterMTA factor as per the terms of this agreement based on the statistical analysis of the data provided by Western Wireless back to approximately July of 2004 and using the jurisdictional splits contained within that InterMTA factor, they are available for each company. I am requesting that the factor be set at that time and that Golden West be allowed to collect those funds. HT 496.

The total due all Golden West Companies, exclusive of interest, is $1,173,348.03. This figure was properly calculated by Mr. Law by adjusting the InterMTA factors in accordance with the CDR study results of both parties, effective July 1, 2004, and application of the appropriate intrastate and interstate access charges. That is the appropriate remedy for WWC's breach. For Golden West Companies to be made whole as a result of injury from WWC's breach of the ICA, this Commission should award Golden West Companies $1,173,348.03, plus any appropriate interest pursuant to law.

III. WWC's Claim that the Golden West Companies cannot charge Intrastate Access on InterMTA Traffice should be rejected

A. WWC's claims concerning the application of intrastate access rates should be dismissed outright based on the Commission's "Order Granting Motion in Limine" dated February 28, 2006.

WWC also raised as a new claim with the filing of its Amended Complaint, a claim that the Golden West Companies were overcharging for terminated InterMTA traffic by assessing intrastate access charges on such traffic. As indicated by Mr. Law, the Golden West Companies in determining the compensation owed by WWC for terminated InterMTA traffic beginning January 1, 2003, applied intrastate switched access rates to all traffic falling into the InterMTA category. This action was taken based on the specific language of Section 2.1 in each of the ICAs which stated clearly that InterMTA traffic would be subject to "interstate or intrastate access charges," and because WWC did not at any time come forward with any data that would demonstrate that any of the InterMTA traffic was interstate. HT 462, 463, 469, 470. WWC challenges the actions of Golden West in applying intrastate rates to the InterMTA traffic. It argues, despite the specific language found in Section 2.1 of the ICAs, that the parties instead had agreed to apply only interstate switched access rates to the InterMTA traffic.

In regards to these claims by WWC concerning what access rates should be applied to InterMTA traffic, the Golden West Companies and SDTA believe the claims should be dismissed outright given this Commission's "Order Granting Motion in Limine" issued on February 28th, 2006. In that Order, this Commission granted a Motion in Limine brought by the Golden West Companies and SDTA which requested specifically a bar of any "parole evidence" of WWC that was to be submitted for the purpose of contradicting the clear terms found in Section 2.1 of the ICA. In identifying the types of parole evidence that should be barred, the Motion in Limine, as filed, referenced: (1) "any contracts or agreements signed prior to the Reciprocal Transport and Termination Agreement ("ICA") . . . including but not limited to the Western Wireless –

South Dakota RTC Settlement Agreement ("Settlement Agreement"), dated March 1, 2003"; and (2) "[a]ny evidence in reference to negotiations or conversations, electronic, written, or verbal, that led to the execution of the ICA." This Commission, in ruling on the Motion in Limine, stated:

> The Commission finds and concludes that the last sentence of Section 2.1 of the parties' Reciprocal Interconnection, Transport and Termination Agreement (Agreement) at issue in the Motion in Limine is straight-forward and unambiguous and that InterMTA traffic is subject under the Agreement to intrastate and interstate access charges in accordance with the definitions in the Agreement, applicable access tariffs and laws, rules and decisions applicable thereto. [*Emphasis added*].

The above language, from the Golden West Companies' and SDTA's perspective, could not be clearer. This Commission determined with its Order Granting Motion in Limine that the language contained in Section 2.1 of the ICA is clear and unambiguous and, accordingly, it rejected all parole evidence that would be offered for the purpose of showing that the parties had reached some contrary agreement.

WWC appears to have accepted the Commission's Order Granting Motion in Limine insofar as it precludes any consideration of the "Settlement Agreement" of March 1, 2003, on the intrastate rate application issue, but obviously has not accepted that the Order also bars any other parole evidence on the issue. WWC references in its brief certain statements made by Ron Williams where he indicated that it was his understanding that the parties had agreed to use the interstate rate. HT 65. These statements are obviously intended by WWC to show some contrary intention of the parties with respect to what rates would apply to the InterMTA traffic and, as such, are also "parole evidence" related to Section 2.1 of the ICAs. As parole evidence these statements are also covered by the Commission's Order Granting Motion in Limine and

thus barred from consideration at this time. WWC had an opportunity to request a reconsideration of the Commission's Order prior to hearing in this matter, but did not do so. It is not appropriate to simply ignore the Order at this stage. The Order stands and there is no basis for WWC to present further evidence challenging the language of Section 2.1 of the Agreements as not reflecting the actual intent of the parties.

B. In any event, Mr. William's statements suggesting the parties intended to apply interstate access rates to all InterMTA traffic are contradicted by other evidence.

In any event, even if the statements of Mr. Williams were viewed as admissible or relevant, they are contradicted by substantial other evidence in the record. In addition to challenging the language of Section 2.1 of the ICAs, which this Commission has determined to be "straight-forward and unambiguous," WWC in suggesting that the parties "agreed" to something different, also ignores the plain language of Section 14.18 contained in each of the Agreements. That Section states that:

> [t]his Agreement together with its appendices and exhibits constitutes the entire agreement regarding the exchange and compensation for Local Traffic between the parties and supersedes all prior discussions, representations or oral understandings reached between the Parties. Appendices and exhibits referred to herein are deemed attached hereto and incorporated by reference. Neither Party shall be bound by any amendment, modification or additional terms unless it is reduced to writing signed by authorized representative of the Party sought to be bound.

Mr. Williams indicated by his testimony that the parties had agreed that only interstate access rates would be charged, but other communications between the parties during the term of the ICAs indicated that this was not true. These other communications indicated that the parties intended to identify InterMTA traffic as being either intrastate

or interstate, and apply access rates, either intrastate or interstate, based on this identification.

Mr. Williams claims it was his understanding that only interstate rates would be applied to the InterMTA traffic, yet as early as July 25th, 2003, he himself sent an e-mail to Larry Thompson with a proposed InterMTA study method, based on an Oklahoma study, that specifically identified the development of an "intrastate/interstate factor" as one item within the study "approach." GWC Ex. 7; HT 240, 241. Subsequent to these communications, there were a number of other communications between Mr. Thompson and Mike Wilson, of WWC, that further indicated that it was always the intention of the parties to apply both intrastate and interstate access rates to identified InterMTA traffic. See, for example, e-mail dated September 28, 2004, from Mr. Wilson where WCC proposed a "methodology for deriving InterMTA factors in South Dakota," and included a specific reference to developing an "ILEC specific intrastate/interstate factor for InterMTA calls." HT 1006. Later, in an e-mail dated March 28, 2005, Mr. Wilson, in reviewing and confirming certain InterMTA study results exchanged between the parties, specifically referenced an "Interstate Factor" percentage related to three different ILECs being studied. GWC Ex. 9; HT 242, 243. Also, a specific "Interstate Factor (on InterMTA calls)" was included as part of an e-mail from Mike Wilson to Mr. Thompson on April 7, 2005. GWC Ex. 10; HT 285.

In light of all of these documents, it is hard to understand how WWC can in good faith make claims that the parties somehow agreed to only apply Interstate access rates to

InterMTA traffic. These documents directly contradict Mr. William's statements concerning his "understanding" or the parties intentions.[6]

C. The Golden West Companies acted reasonably in assessing intrastate access rates to all InterMTA traffic absent information from WWC identifying the traffic as either intrastate or interstate.

As noted earlier, the Golden West Companies determined that they should apply intrastate access rates to all terminated InterMTA traffic back to January 1, 2003, based on the clear language in the ICAs that permitted the assessment of "interstate or intrastate" access charges and because it had no information from WWC pertaining to its wireless originated traffic that would demonstrate whether any of the traffic was interstate. HT 462, 463, 469, 470, 517, 578. WWC claims that the Golden West Companies had no right to decide on their own to apply intrastate access rates to all of the InterMTA MOU and suggests that the Companies acted unreasonably in applying such rates.

With respect to the charges applicable to InterMTA traffic, WWC did admit that InterMTA traffic is "non-local traffic" that is "subject to access charges." HT 152. It was also established that it is common practice in the telecommunications industry, when applying access charges that minutes of use identified as intrastate through either traffic records or studies would be charged under the intrastate access tariff and that interstate traffic identified through such means would be charged under the interstate access tariff. HT 578. In this particular case, however, the Golden West Companies were given absolutely no information by the originating carrier, WWC, that would permit them to classify the actual terminated InterMTA traffic as either intrastate or interstate. WWC

[6] It should further be noted that Mr. Williams also admitted during cross examination by Golden West counsel that the parties were bound to the four corners of the final agreement. HT 124.

was uncooperative in developing any InterMTA study method that would not only identify actual terminated InterMTA MOU, but also provide an intrastate and interstate breakdown of these minutes. WWC also at no time during the entire term of the 2003 Agreements presented any of the Golden West Companies with an approximate "Percent Interstate Usage" factor that could have been utilized to fairly separate the terminated InterMTA traffic between the intrastate and interstate jurisdictions. Thus, the Golden West Companies, as a direct result of WWC's inaction, were left with no ability to determine that any of the InterMTA traffic was interstate.

Further, it must be noted, that pursuant to the LECA tariff, WWC has the ability under the tariff to provide information demonstrating that some percentage of the traffic was interstate and not appropriately billed under the LECA tariff. As indicated, WWC failed to provide such information at the time the Golden West Companies billed for the services, and it has failed to provide such information in this proceeding.

Under these circumstances, it was entirely appropriate to apply intrastate access rates to all of the MOU. The reasonableness of this approach is demonstrated by the results of the InterMTA studies that have been conducted based on the WWC CDR records for the period of October 2005. Those records indicate that the interstate percentages of traffic, with respect to each of the Golden West Companies, are much lower than the intrastate percentages. GWC Ex. 13 shows the following Interstate traffic percentages: Golden West Coop – 14.9%, Vivian Telephone – 2.9%, Union Telephone – 0%, Armour Independent Telephone – 2%, Bridgewater/Canistota – 3.4%, Sioux Valley – 1.6%, and Kadoka Telephone – 7.5%. Given these minimal small interstate

percentages, it was certainly more reasonable to apply the intrastate access rates than the interstate access rates to the InterMTA traffic.

D. Application of the intrastate access charges to all InterMTA traffic was consistent with the provisions of SDCL 49-31-111.

The provisions of SDCL § 49-31-111 provide in pertinent part that "[i]f accurate and verifiable information allowing for appropriate telecommunications traffic is not provided by the originating carrier, the terminating carrier may classify all unidentified nonlocal telecommunications traffic terminated for the originating carrier as intrastate telecommunications traffic."

The actions of the Golden West Companies in applying intrastate access rates to the InterMTA MOU were entirely consistent with the above cited statutory provisions. As indicated by Mr. Law, the Golden West Companies at no time received any data from WWC which indicated that any of the InterMTA traffic was interstate. HT 470, 517. Without any such data, in situations where the originating carrier does not provide "accurate and verifiable information" allowing for an appropriate classification of the traffic, the terminating carrier is given express authority under state statute to classify all of the non-local traffic as "intrastate . . . for service billing purposes."

The above cited language from SDCL § 49-31-111 indicate that the Golden West Companies were acting in full accord with state law after June 30, 2004 (the effective date of SDCL §§ 49-31-109 through 49-31-115). The language also serve to underscore that, prior to June 30, 2004, the Golden West Companies were taking a reasonable approach in assessing all of the InterMTA traffic at intrastate rates.

WWC argues that none of the provisions found in SDCL §§ 49-31-109 through 49-31-115 should be considered applicable or relevant to this matter because the effective

date of the ICAs predated the effective date of such statutes. It is argued that applying these statutory provisions to the case at hand would violate Art. VI, § 12 of the South Dakota Constitution, insofar as that Section of the Constitution forbids "ex post facto laws," or laws "impairing" contract obligations.

These WWC arguments claiming a constitutional violation are completely without merit because, contrary to what WWC suggests, the provisions of SDCL § 49-31-111 do not impose any result that conflicts with the ICA language. The agreed to contract language found in Section 2.1 of the ICAs specifically provides that "InterMTA traffic is subject to Telephone Company's interstate or intrastate access charges." Applying the provisions of SDCL § 49-31-111 and assessing intrastate access charges to all unidentified traffic does not work to "impair" or change any contractual provisions agreed to between the parties. The contract permits the charging of interstate or intrastate access rates. This being the case, there is simply no "impairment" to the contract that may form the basis for a constitutional claim.

WWC also argues that none of the provisions found in 49-31-109, et. seq. may be applied to the ICAs executed between the parties because the statutes are preempted by federal law. It is claimed that the statutes, to the extent they apply to CMRS carriers, are unconstitutional in that they conflict with federal law and because the established state regulation has been displaced through federal statute, FCC rulemaking and decisions. In response to these arguments of preemption, the Golden West Companies and SDTA would refer this Commission to its arguments as set forth in the "Reply of Defendant and Intervenors to Summary Judgment Motion of Verizon Wireless," which is incorporated in this Brief by this reference, dated December 22, 2005, filed with the U.S. District Court

for South Dakota in Civil No. 04-3015 (Verizon Wireless LLC, et. al. v. South Dakota Public Utilities Commission). As indicated by such filing, the provisions addressing "phantom" traffic issues, found in SDCL§§ 49-31-109 through 49-31-115 have not to this point been either expressly or impliedly preempted by federal law.

E. Calculation of Interstate Rate

In its brief, WWC argues that when calculating the interstate rate applicable to the interMTA traffic, the actual route traversed by the call should be used. WWC claims that Golden West asserted that it could determine the rate for terminating interstate traffic based upon a "fictitious route" based on "the authority stated in the case of In re the Application of SDCEA, Inc., 5 F.C.C.R. 6978 (1990)." Brief at 18. WWC goes on to state that Golden West is wrong because the relationship of the Parties is governed by the interconnection agreement. Brief at 19.

Although the Golden West Companies agree that the relationship between the Parties concerning the rates, terms and conditions that apply to intraMTA traffic is governed by the interconnection agreement, interMTA traffic is governed by the Companies' interstate and intrastate access tariffs. However, because WWC commingled both types of traffic on its facilities, the interconnection Agreements discussed how the amount of interMTA traffic will be determined. WWC sought to frustrate the intent of the Agreements and the Golden West Companies' rights under their interstate and intrastate access tariffs to proper compensation for interMTA traffic by simply refusing to conduct a study to determine the appropriate amount of interMTA traffic exchanged between the Parties. The threshold question before the Commission is whether the Commission agrees with the Golden West Companies that WWC violated the

interconnection agreement by refusing to agree to a traffic study to determine the percentage of inter MTA traffic exchanged between the Parties.

The Golden West Companies urge the Commission to find that WWC violated the Agreement. As shown by the Golden West Companies, the amount of damages to the Companies, which was determined as the difference between what the Golden West Companies billed WWC for reciprocal compensation and the access charges to which the Companies were entitled on interMTA traffic, is significant. This does not change even if the damages associated with interstate interMTA traffic are recalculated as suggested by WWC. This is so because the vast majority of the interMTA traffic exchanged between the Parties is intrastate traffic subject to the LECA tariff and LECA rates are not distance sensitive. Therefore, WWC's criticisms concerning the Golden West Companies' calculation of damages does not apply to the portion of interMTA traffic that is intrastate. Further, even if the interstate portion of damages is recalculated as suggested by WWC, it would reduce the damages owed to the Golden West Companies by only a small amount.

This being the case, given the minimal amount of interstate InterMTA traffic at issue, Golden West Companies are willing to re-compute the interstate charges based on the actual report route that was utilized by WWC in terminating such traffic. This concession, however, should not in any way be interpreted as an acceptance of WWC's arguments concerning SDN and the applicability or non-applicability of *In re the Application of SDCEA, Inc.*, 5 F.C.C.R. 6978 (1990).

IV. WWC IS NOT ENTITLED TO A REFUND OF CHARGES ASSESSED BY GOLDEN WEST TELECOMMUNICATIONS COOPERATIVE (GOLDEN WEST COOP) FOR TRANSITING SERVICES PROVIDED IN CARRYING WWC'S ORIGINATING TRAFFIC.

As part of its claims against the Golden West Companies, WWC seeks a refund of certain charges that it has paid to the Golden West for the provisioning of transit services. HT 76, 139, 140. WWC Hearing Ex. 7. WWC "Amended Complaint" p. 5. Despite the fact that Golden West Coop was billing WWC for transiting service as of January 1, 2003, the proposed effective date of the "ICA", and continued to bill for this transiting service even after execution and subsequent approval of the ICA on May 13, 2004, WWC did not first present any dispute in this case concerning its payment of transiting charges until the filing of its Amended Complaint on February 16, 2005. Prior to that time, Golden West Coop had received no notice from WWC that the transit charges were in dispute. HT 490, 491. Generally, WWC argues in its brief that Golden West Coop was not entitled to charge for transiting because (1) transiting charges were not addressed in the 2003 ICA; and (2) the particular WWC calls involved are transported through the transiting service to Vivian Telephone Company ("Vivian Telephone"), more specifically, the Custer exchange. According to WWC, Golden West Coop cannot legally charge for the transiting service to a Vivian Telephone exchange because Vivian Telephone is a wholly owned affiliate of Golden West Coop and its telecommunications network is "integrated" with the network of Golden West Coop.

A. Description of the Transiting Service.

The transit services at issue provided to WWC include transport over certain facilities owned by Golden West Coop which interconnect with Vivian Telephone transport facilities in the Custer exchange. More specifically the transport facility involved extends from the "Skyline Meetpoint" with Qwest Communications ("Qwest") in Rapid City, near the Qwest exchange boundary, down to Golden West Coop's Hot

Spring's wire center and then on over to the Custer exchange, which is owned an operated by Vivian Telephone. HT 316, 317, 484, 485, 492, 493, 559, 560, and Golden West Ex. 30. Traffic using this transport facility is not switched at the Hot Spring's end office. The Hot Springs and Custer end offices are stand alone end offices and the transport facility being utilized simply runs through the Hot Springs wire center. HT 78, 79, 316, 317. WWC has used these transport facilities for a number of years in order to send traffic originating from its wireless subscribers to landline end users in the Custer exchange. Golden West Coop has provided the transiting service to WWC since at least January 1, 1999. The transit service was separately addressed in the prior ICA existing between the parties. HT 76, 77, 423, 424, 489. In that agreement a rate of $0.0005 "per MOU per route mile" was specifically established for the transit service. WWC Ex. 2, "Exhibit A, p. 2", HT 166. The testimony also indicated that Golden West Coop currently bills other wireless carriers for the transit service at the $0.0005 rate and receives payment from these other carriers for the service. HT 491.

Even though the testimony indicated that there is no separate formal agreement currently in place between Golden West Coop and WWC which relates to the transiting service, Golden West Coop has taken steps to notify WWC on a monthly basis of applicable transiting charges. As shown by Golden West Ex. 31 and Ex. 32, the transit charges related to usage of the transport facility extending between Golden West Coop's meet point with Qwest in Rapid City and Vivian Telephone's Custer exchange are set forth as a separate line item on the monthly "CABs invoice." HT 485. In addition, Mr. Law testified that since sometime during the term of the prior ICA between the parties, sometime in the 1999 to 2002 timeframe, Golden West Coop has with each monthly

CABs invoice also provided a separate sheet which briefly describes the transit route and provides a separate calculation of the "Transit Traffic Rate" element included on the invoice. HT 487-490.

During the period of the ICA underlying the various disputes in this proceeding, between January 1, 2003, and December 31, 2005, WWC made in excess of 20 payments to Golden West Coop for its transiting services. HT 182, WWC Hearing Ex. 7, column C. In addition, during the period from December 1, 2004 to December 1, 2005, WWC received credits on Golden West Coop billings which were applied to offset monthly transit billings. HT – 505, GWC Ex. 40, "Other Charges Billed." The total amount of these payments and credits attributable to the transiting service utilized by WWC, by the Golden West Companies' calculations, is $183,847.81. The transit charges on a monthly basis approximate $6,000, yet since March, 2006, WWC has halted the payment of any further transiting charges. HT 499. WWC continues to receive the transiting service and Golden West Coop continues to bill for the same. At this time, however, all such charges are being disputed by WWC and no payments are being made for the service.

The Golden West Companies and SDTA believe that WWC is under a continuing obligation to make payment for the transiting services that are being used and also contest the claim of WWC for a refund of transiting charges paid by WWC for the period between January 1, 2003, and December 31, 2005. Contrary to the various allegations of WWC concerning the validity of Golden West Coop's transit billings, there is no basis for this Commission to excuse WWC from its obligation to pay compensation for the transit services used in transporting its originating traffic. The Golden West Companies

for all of the arguments set forth below believe it would be improper for this Commission to excuse WWC from its payment obligations relating to the transiting service.

B. Contrary to what WWC has suggested, WWC has alternatives in routing its originated wireless traffic to landline end user customers in the Custer exchange.

In responding to WWC's challenges to the Golden West Coop transit service charges, it is first important to note that contrary to what is suggested by the testimony of Mr. Williams, WWC is not a carrier-customer that is left with no options in transporting its originated wireless traffic to the Custer exchange. HT 52, 77-81, 131, 133, 135, 183, 187, 188. Rather, the evidence presented indicates that currently WWC has "direct connect" facilities into the Custer exchange. HT 153, 155, 163. WWC for some reason, however, has made the decision to limit the use of its direct connect facilities to only wireline originated traffic (wireline originated calls destined to WWC's wireless customers). HT 156, 164, 184, 185. Mr. Williams was asked about the direct connect facilities that WWC is leasing into the Custer exchange and indicated very clearly that these facilities were only being used to receive wireline originated traffic. HT 164, 184, 185. He was also specifically asked whether his company would "pay any transiting" if that direct connection was also used to terminate its traffic. HT 164. He responded with a "no" and indicated that they would only pay the reciprocal compensation rate (a rate of $0.009 per MOU), the same rate they would pay for termination into any Vivian Telephone exchange. HT 164, GWC Ex. 1. Given these established direct connect facilities into the Custer exchange, WWC already has the ability to change the routing of its originated traffic into the Custer exchange as a means of avoiding the transit charges being assessed by Golden West Coop. WWC to this point, however, has not exercised

this option. When asked why WWC has limited the direct connection for only the pick-up of traffic out of Custer, Mr. Williams indicated simply that the connection right now is "just sized for the capacity for traffic coming to us" and that additional capacity would have to be added to also use these facilities for termination. HT 185. Some concern was also expressed regarding the expense of the direct connect facilities. HT 185.

From the entirety of Mr. Williams testimony concerning transport into the Custer exchange, it is quite apparent that WWC does not like either the expense associated with transiting its traffic over Golden West Coop network facilities or the expense that would be incurred in using the established direct connect facilities to terminate its wireless traffic into the Custer exchange. On the one hand, WWC complains of the expense of transiting its traffic through Golden West Coop to Vivian Telephone in order to terminate traffic into Custer, yet on the other hand it is unwilling to bear any additional direct connection expenses that would permit it to take a more direct route to Custer, bypassing the Golden West Coop route.

WWC is in need of transport into the Custer exchange and continues to use the transit route through Golden West Coop to Vivian Telephone. From the perspective of the Golden West companies and SDTA, what WWC wants this Commission to do is simply excuse it from any expense associated with this necessary transport. As noted, WWC has transport options, but it has made an affirmative decision to use the common transit facilities of Golden West Coop for termination into the Custer exchange. Mr. Williams during cross examination was asked specifically whether WWC desired or wished the "transiting route to continue and for [its] traffic to go over that [route]." HT 143. He responded as follows: "Well the reason its goes over that line now is because

this path is an economical path to deliver the traffic. We have other options on how we deliver that traffic, but under the terms of the agreement, this is the option we have chosen." (Emphasis added). Under these circumstances, where other transport options are available, but WWC has affirmatively chosen to use the Golden West Coop route, there is absolutely no justification for excusing WWC from any transit payments.[7]

It should further be noted concerning WWC's transport options, that as an unregulated CMRS carrier, WWC is also not prevented from building its own transport facilities for purposes of connecting up with the Custer end office. If WWC believes the expense of utilizing the transport facilities provided by Golden West Coop is too great it is certainly free to build its own facilities and interconnect with the Vivian network more directly for the purpose of terminating its telecommunications traffic. This would obviously, however, also require additional expense and WWC has to this point foregone this "build option" in favor of utilizing already existing wireline network facilities.

C. The new reciprocal compensation rates established in the ICA between Vivian Telephone and WWC were not intended to cover the transit service provided separately by GWTC.

[7] It is also suggested by WWC that GWTC is forcing WWC to bear additional undue expense because GWTC is requiring that the GWTC transit route be used rather than a more direct route between Qwest and the Custer exchange. Mr. Williams was asked by WWC counsel on direct examination why the traffic terminating to the Custer exchange is delivered via the GWTC route and not delivered straight to the Custer end office through Qwest. HT 80. He indicated in response that he was "not familiar with the history, but I believe Golden West had requested at some point . . . that this delivery mechanism not be utilized any more and have asked for that traffic to be delivered in this fashion." HT 80, *See also* HT 135 and WWC Ex. 13. This statement was clearly made by Mr. Williams without any personal knowledge, on his part, and accordingly it should be disregarded by the Commission. As testified to by Mr. Thompson, in response, there is no other route going through Qwest into the Custer exchange. "The most direct route would be from the Qwest tandem through Hot Springs to the Custer end office. . . . I don't know of any other method to get in there. That was the closest route." HT 317. Mr. Law also testified concerning these suggestions by WWC of a more direct route into Custer through Qwest. He indicated that he was not aware of any request from Golden West to change the route and further testified that it was his understanding in working with network personnel that "ten plus years ago, . . . there was an analogue referred to as a T carrier route that was an alternate route out of the Custer exchange in the 1990 time frame that was removed when fiber optic transport was placed into that exchange. So there is no alternate [Qwest] route from our perspective into the Custer exchange depicting just a short period of miles." HT 493.

WWC also argues that the "ability to charge transiting" was not "carried over to the 2003 Interconnection Agreements". More specifically, WWC claims that "because the new Interconnection Agreements replaces the old Interconnection Agreement and controls the relationship of the Parties, the failure to bring over a transiting charge is an acknowledgement of the intent of the Parties not to charge transiting." WWC's Brief at p. 26. Further, WWC argues that "[g]iven the fact that the former ICAs provided for [a] transiting charge and the current ICAs do not provide for transiting charges, the logical conclusion is that under this ICA transiting charges are part of the reciprocal compensation rate." WWC's Brief at p. 25.

1.Neither terms nor rates related to "transiting" were included in the 2003 ICAs because "transit service" has not been classified by the FCC as a service subject to Section 251 interconnection agreements..

The Golden West Companies and SDTA strongly disagree with these contentions. There is no specific language in the 2003 ICAs supporting any claim that Golden West Coop or any of the other Golden West Companies gave up a right to charge for any separate transiting service upon execution of the 2003 Agreements, and further it was never indicated by Golden West Coop to WWC that its transit charges would be discontinued after January 1, 2003.

Contrary to what WWC suggests, there is nothing in the 2003 ICAs which can fairly be interpreted to preclude the transiting charges assessed by Golden West Coop subsequent to January 1, 2003. The language regarding transiting that was included in each of these Agreements states simply that "[t]his Agreement is not intended to establish any terms, conditions, or pricing applicable to the provisioning of any transiting service." GWC Ex. 1, p. 1. This language directly contradicts WWC's contention that the transit

service being provided by Golden West Coop, or any other Golden West Company, is part of the reciprocal transport and termination services elsewhere covered in the ICAs. The testimony of Mr. Thompson and Mr. Law confirms this and indicates that it was never the intent of Golden West Coop in executing the 2003 ICA to discontinue the transit charges for the transit services being delivered. Mr. Thompson, who was involved as a consultant in the negotiations of the 2003 ICA, indicated his disagreement with Mr. William's conclusions and indicated that "it was never the intention to include transiting functions" in the ICAs. HT 230, 231, 314-316. He also explained the language addressing transiting that was in each of these Agreements (set forth above), noting that "[t]ransiting is strictly an unregulated service. [That] the agreements were going to be approved by the PUC and we didn't want unregulated services as part of the agreement."[8] HT 313. Mr. Law testified further on the issue, noting that Golden West Coop continued to bill WWC for the transit service through the entire 2003-2005 time frame and indicated that Golden West Coop should be compensated for the service given that it "meets the description of a transiting carrier." HT 490, 493. He also, like Mr. Thompson, noted that the transit service is a "nonregulated service." HT 493.

Contrary to what WWC would have this Commission believe, the transiting service provisions were left out of the 2003 ICAs simply because "transiting" is viewed as a different service, for regulatory purposes, than "reciprocal transport and termination" services. As indicated by the FCC's "Further Notice of Proposed Rulemaking"

[8] Further evidence that the 2003 ICAs were not intended to include transit functions is found in the Appendix B document that was attached to each of the Agreements. As part of each of these Appendix B documents information was included as to the "LEC Local Calling Area." In those situations where the LEC local calling area would extend to the exchange(s) of a third party LEC, it was specifically noted by asterisk and additional comment that access to this "intercompany EAS . . . may be subject to a separate transiting service agreement." The GWTC ICA included such language and specifically references that access to Customer may require a separate transiting service agreement.

(FNPRM) on Intercarrier Compensation issued in CC Docket No. 01-92 (In the Matter of Developing a Unified Intercarrier Compensation Regime) on March 3, 2005 (FCC 05-33), the FCC has not yet issued any determinations as to the scope of its legal authority over "transit service" and whether it should impose any regulations concerning the service.[9] FCC 05-33 pars. 125-133. *See also* "Memorandum Opinion and Order" in CC Dockets 00-218, 00-249, 00251 (DA 02-1731) (In the Matter of In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission) decision of the WCB released July 17, 2002, par. 117.

Given that the FCC had not prior to January 2003 adopted any regulations related to "transiting," it was clear to the Golden West Companies at the time the 2003 ICAs were executed that "transit" services were different than reciprocal transport and termination services -- that they were not viewed as regulated services. As such, neither the Golden West Companies nor SDTA believed that the terms and/or prices related to any transit services should be part of the ICAs, which were to be submitted for PUC approval under Section 252(e) of the Federal Act.[10] This position reflected an appropriate recognition that the FCC had not yet given any indication that "transiting services" were subject to regulation under Section 251 and 252 of the Federal Act.

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[9] The FCC in this FNPRM did specifically note that the "reciprocal compensation provisions of the Act address the exchange of traffic between two carriers, but do not explicitly address the intercarrier compensation to be paid to the transit service provider for carrying section 251(b)(5) traffic." The FCC's FNPRM does signal that transit service regulations may become a reality at some point in time, but effectively, for the time being, "transit service" is not a telecommunications service deemed subject to the provisions of either Sections 251 or 252 of the Federal Act.

[10] In further response to the claims of WWC, it is also important to recognize that South Dakota statutes recognize the difference between "transiting" and "origination" or "termination" services or functions. SDCL § 49-31-109 includes separate definitions for both a "transiting carrier" and for "transit traffic."

2. The reciprocal compensation rates agreed to between the parties were not intended to include costs associated with Golden West Coop's transit service.

WWC also claims that it was the intention of the parties to include the costs of transiting in the reciprocal compensation rates that were established in the 2003 ICAs. In response to this claim, it should first be noted that each of the 2003 Agreements states that "[t]he Parties further agree and understand that the per minute reciprocal transport and termination rates set forth in Appendix A to this Agreement are not based on a specific costing methodology or company specific cost study." GWC Ex. 1, p. 2.

Given this language alone it is incredulous that WWC is now arguing that transiting charges should be disallowed because "costs" underlying the established reciprocal compensation rates were intended to include transiting costs. What WWC is, in effect, arguing is that Golden West Coop not only agreed to reduce its reciprocal compensation rate from 2.8 cents per MOU to .9 cents per MOU, but also at the same time agreed to include as part of the transport services provided under the reduced reciprocal compensation rate an additional 81 miles of transport extending from Rapid City to the Custer exchange boundary. HT 424, GWC Exs. 2, 30, 32. From the Golden West Companies perspective, this is obvious overreaching on WWC's part. The position being advocated, that Vivian Telephone's reciprocal compensation rate was intended to cover Golden West Coop's transit costs, is not supported by any language in the 2003 ICAs nor is it supported by any of the actual circumstances surrounding execution of the Agreements.

As indicated by Mr. Thompson, even though the reciprocal compensation rates set forth in the 2003 Agreements, were not "built upon a cost study," Golden West Coop and Vivian completed separate cost studies in the process leading to the agreements. HT 315,

316. The companies did not "have a unified cost study, they were separate cost studies.... and it was never the intention to include the transiting functions. We didn't include the Qwest transiting function, for example, as part of our cost study either and they pay Qwest [to] transit to most of the companies." HT 315, 316.

And, as further indicated by Mr. Law, "the transiting service specifically is only provided by Golden West Telecommunications Cooperative. It is for transiting service from the Rapid City meet point to the Custer exchange and Golden West Telecommunications Cooperative owns the significant portion of the network between those points." [*Emphasis added*] HT 484, 485. According to Mr. Law:

> Golden West and Vivian Telephone Company are for all intents and purposes certainly part of the same ownership family. However, they are each their own entity, including corporate entity, certainly tax ID entity, all of those things. From a telecommunications regulation perspective, they are their own entity. Each files their own cost study. Each prepares their own data in terms of submission to this commission, any regulatory bodies are all – there's no intermingling of those items both on the state and the federal side. They are separate companies.
>
> In addition to that, all of their assets are owned respectively. In other words, Vivian Telephone Company owns its assets, Golden West Telecommunications Cooperative owns its own assets in the areas which it serves. So I would submit while the companies are part of the same family of companies, that they are treated separately for regulatory purposes and they are certainly treated separately in terms of description of assets.

HT 492, 493.(emphasis added).

The evidence presented indicates very clearly that Golden West Coop and Vivian Telephone are separate corporate entities owning their own network assets, and given this reality there is simply no basis for WWC to contend that charges paid under the Vivian Telephone ICA relating to "reciprocal compensation" also extend to cover the costs of transit services provided by Golden West Coop. As noted by Mr. Law, Golden West

Coop and Vivian Telephone are separate entities for regulatory purposes and each owns its own assets. One of the companies, Golden West Coop operates as a "cooperative" under federal and state law and the other operates as a private corporation. HT 581. In addition, each of the companies operates within its own study area for universal service purposes which means each company receives different universal service fund distributions based on its own unique costs. HT 558. Obviously, each of the companies, especially as a rate-of-return regulated utility, is under a continuing legal obligation to keep its own assets separate for USF related reasons and for other regulatory accounting purposes. WWC's position implies that it would be appropriate for Vivian Telephone to charge, collect, and include in its own books revenue from a Golden West Coop provided service, or vice-versa. This is simply not the case. Neither Vivian Telephone nor Golden West Coop is free to inter-mingle assets or to shift revenues associated with those assets. Vivian Telephone, as noted by Mr. Law, owns its own assets and is required to properly account for those assets in order to meet various regulatory requirements. Golden West Coop is faced with the same requirements. Because Vivian Telephone and Golden West Coop exist as separate regulated entities, it simply would make no sense for Vivian Telephone to include in its reciprocal compensation charges the charges for a separate Golden West Coop transiting service (charges that relate to the use of Golden West Coop assets).

D. Golden West Coop, as a separate legal entity, is entitled to bill WWC for the transport into the Custer exchange.

WWC's claims regarding the transiting should be rejected because it is undisputed that Golden West Coop is a separate corporate entity from Vivian Telephone

and that Golden West Coop owns the transport facilities from the Skyline meetpoint in Rapid City to the Custer exchange.

WWC, in arguing that Golden West Coop should not be assessing transiting charges, tries to make much of the fact that Vivian Telephone and Golden West Coop jointly utilize some of the same backbone network and attempts to portray the transport service provided by Golden West Coop for transport into the Custer exchange as being different than the "traditional view" of what constitutes a transiting service. HT 76-78, 81. Mr. Williams described the Qwest transiting service and in doing so suggested that the Golden West Coop transport service at issue is somehow different because it does not involve any switching and because it is transport provided to a Golden West Coop affiliated company. Despite these differences cited by Mr. Williams, there is nothing in any contract between the parties or in law that supports any claim that the service being provided by Golden West Coop to transport traffic into the Custer exchange is not a "transiting" service.

As mentioned earlier, the South Dakota statutes include provisions addressing the "transiting" service. Under SDCL 49-31-109(7) a "transiting carrier" is specifically defined as a "telecommunications carrier that does not originate or terminate telecommunications traffic, but either switches or transports traffic, or both, between an originating and a terminating carrier." This definition is consistent with the definition of "transit traffic" that was included in the 1999 ICA executed between Golden West Coop and WWC. In that agreement, "transit traffic" was defined as "traffic that originates from one provider's network, transits another telecommunications carrier's network, substantially unchanged, and terminates to yet another provider's network." WWC Ex. 2,

Section 3.9. It is also consistent with the description of transiting which Mr. Williams provided in his testimony. HT 76, 188.

In this case, with respect to the transport that is provided by Golden West Coop between the Skyline meet point and the Custer exchange, there is no question that Golden West Coop is providing a "transiting" service. HT 324, 325. As noted, Golden West Coop from a legal stand point is a separate corporate entity. HT 492, 493, 558. Also, as pointed out by Mr. Law, the company does, in fact, own the transport facility that connects with the Qwest meet point in Rapid City and eventually connects with the Custer exchange. HT 484, 485. These undisputed facts cannot be ignored in analyzing WWC's disputes over the transiting charges. Without question, given these facts, Golden West Coop is providing service as a "transiting carrier" with respect to the transport provided into the Custer exchange. HT 323-325. Golden West Coop is not the ILEC entity that "terminates" the WWC traffic into the Custer area. It is also not an "originating carrier" with respect to landline to wireless calls exchanged with WWC in the Custer exchange. Golden West Coop's role with respect to the wireless traffic that is specifically delivered into the Custer exchange is limited to providing an intermediate transport facility. As testified to by Mr. Thompson, this situation, "appears to be a classic transiting case." Golden West Coop is providing a service to "transit" traffic between WWC and Vivian Telephone. HT 315, 316.

Contrary to what WWC contends, Vivian Telephone's status as an affiliate of Golden West Coop offers no legal justification for denying Golden West Coop the right to assess charges for use of its transport facilities. The existence of Golden West Coop and Vivian Telephone as separate corporate entities should not be accepted as the reality

for only certain regulatory purposes then rejected for others. With respect to WWC's transiting claims, it should also be viewed as significant that WWC found it acceptable to treat Golden West Coop and Vivian as separate corporate entities in executing the underlying ICAs. If WWC was so concerned that Golden West Coop and Vivian should be viewed as a single carrier providing a unified or integrated network, why was it not opposed to the execution of two separate reciprocal compensation agreements – one with Golden West Coop and one with Vivian Telephone?[11]

E. Golden West Coop is not billing transiting on a selective basis.

WWC also contends that GWTC is somehow gaming the system in charging for its transiting service and that it is billing for the service in a "selective" manner.

Mr. Williams testified as to some concerns that permitting the billing of transiting in a situation where two affiliated entities are involved could result in a "game of the system," allowing companies to implement routing changes that would result in more revenue. HT 834. He also suggested that GWTC may not be charging transiting in an appropriate manner, assessing it in some cases and not in others.

In response, there is absolutely no evidence in this record that would indicate that GWTC is utilizing the transport network existing between GWTC and Vivian Telephone to maximize revenue or to, in any other manner, gain advantage over other carriers. As indicated by Mr. Law and Mr. Thompson, there is no other existing Qwest route that may

[11] The mere fact that WWC voluntarily executed separate reciprocal compensation agreements with GWTC and Vivian Telephone gives this Commission good reason to question the veracity of WWC's transiting claims. The Golden West Companies and SDTA believe that WWC did have full knowledge in executing the 2003 ICAs that GWTC would continue to assess its separate transiting charges. This is confirmed by the information provided in Appendix B to the GWTC ICA. Custer was not listed as a GWTC exchange in that Agreement, an exchange that could be accessed through a direct connect facility from GWTC. In addition, in referencing Custer as part of the "Local Calling Data" in that Appendix, it is specifically noted that access to Custer through GWTC would involve "intercompany EAS" and may involve a "separate transiting service agreement."

be used to route traffic in a more direct way into the Custer exchange. HT 317, 493. As explained by Mr. Law, there was an analogue "T carrier route" at one time that was an alternate route, but that was removed sometime in the 1990 time frame. HT 493. The "most direct route . . . [is] from the Qwest tandem through Hot Springs to the Custer end office." HT 317. Moreover, as earlier noted herein, WWC is not a company without options with respect to transport into the Custer exchange. Vivian Telephone has already provided direct connection facilities to WWC that would allow for termination into the Custer exchange over a shorter route. WWC has simply chosen not to terminate its originated wireless traffic destined for the Custer exchange over these direct facilities. Further, there is nothing that would prevent WWC from building additional transport facilities of its own to permit closer connections to the Custer exchange. In short, there is no "gaming" of any sort that is occurring, and it is not even possible to game the system given the transport options that are available to WWC and other interconnecting carriers.

There is also no support for the claims that GWTC is assessing its transiting charge in a selective or unfair manner. WWC suggested that GWTC should be charging transiting to Qwest for Qwest originated traffic that is terminated into the Custer exchange. HT 537. As Mr. Law explained, however, there are no transiting charges assessed to Qwest for traffic routed over the Skyline to Custer transport facility because the terminated traffic is strictly "toll traffic" that would instead be subject to access charges. HT 579. WWC also raised a question as to whether transiting should be charged between GWTC and Vivian Telephone in their process of exchanging telecommunications traffic. Golden HT 542, 559. Mr. Law, in response, indicated that

compensation was being paid between the companies in the form of fixed rates as payments for transport capacity. HT 559, 560.

Finally, there is no evidence to suggest that Golden West Coop is not billing transit charges on a consistent basis to other wireless carriers that are using the Skyline to Custer transport for the transiting of local wireless originated traffic. As confirmed by Mr. Law, GWTC is assessing transiting charges related to the transport facility to not just WWC, but also other wireless carriers. HT 491.

F. WWC is liable to GWTC for the transiting charges assessed based on an implied contract between the parties.

It is a settled rule of law in South Dakota that where services are rendered by one for another, which services are knowingly and voluntarily accepted, without more, the law presumes that such services were given and rendered in the expectation of being paid and will imply a promise to pay what they are reasonably worth. Schmidt v. Clark County, 65 SD 101, 271 NW 667 (SD 1937), See also Ward v. Melby, 82 SD 132, 142 NW 2d 526 (SD 1966). "An implied contract is one, the existence and terms of which are manifested by conduct." Setliff v. Akins, 616 N.W. 2d 878, 885 (S.D. 2000). There are two types or classes of "implied contract," those that can be "implied in fact" and those that can be "implied in law." See Bollinger v. Eldredge, 524 N.W. 2d 118, 123 (S.D. 1994). "A contract is implied in fact where the intention as to it is not manifested by direct or explicit words by the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used, or acts done by them, or other pertinent circumstances attending the transaction." Mahan v. Mahan, 121 N.W. 2d 367, 369 (S.D. 1963). Contracts "implied in law" are generally referred to as "quasi" or "constructive contracts" and "do not arise because of a manifestation of intention to creat

them, but rest upon equitable principle that a person shall not be permitted to enrich himself unjustly at the expense of another." Bollinger v. Eldredge at 123. "Contracts implied in law are fictions of law adopted to achieve justice where no true contract exists." Id.

The Golden West Companies and SDTA believe that the record in this matter proves beyond a doubt that WWC is legally liable for payment of GWTC's transiting charges on the basis of an implied contract, either "implied in fact" or "implied in law." WWC seems to believe that it is exempt from any responsibility for the transport services delivered by GWTC simply because no formal written transiting service agreement was executed between the parties covering the 2003 to 2005 period. WWC's counsel seems to attach significance to the fact that WWC was never approached by GWTC to sign a separate formal transiting agreement. HT 80. Whether or not WWC was ever asked by GWTC to sign a written transiting agreement has no real relevance in determining whether an implied contract exists related to the transiting services provided by GWTC. As indicated by the case authorities, all of the attending circumstances must be reviewed, and the circumstances in this case clearly indicate that an implied contract does exist between GWTC and WWC for the transit services provided.

As described by Mr. Law, as part of its monthly CABs billing process GWTC gave clear notification to WWC of the continuing applicable transiting service charges. HT 484-489, GWC Exs. 31, 32. And, even though WWC received this notice on a continual, monthly basis during the term of the 2003 ICAs, it never made a request to GWTC to discontinue the transit service. HT 129, 134. As indicated by Mr. Williams, WWC continues to utilize, and for an extended period of time (23 months) during the

term of the ICAs actually paid GWTC for the transit services. HT 182. WWC continues to have a need for the particular transport services involved and continues to utilize the services. Other alternative routes for transporting its traffic into the Custer exchange are available, but WWC has not taken any steps to change the routing of its originated traffic to avoid usage of the transit route. Instead, WWC has continued to accept the transit services from GWTC and has utilized the services to its benefit.[12]

As stated by the South Dakota Supreme Court in Action Mechanical, Inc. v. Deadwood Historical Preservation Commission, 652 N.W. 2d. 742 at 750 (SD 2002), "[w]hen a party confers a benefit upon another party who accepts or acquiesces in that benefit and it is inequitable to receive the benefit without paying therefore, a contract will be implied between the parties."

Valuable transport services have been and are being provided by GWTC to WWC and there is no basis to contend that the rate being charged for such services exceeds reasonable compensation. The transit rate charged by GWTC during the period from January 1, 2003, to December 31, 2003, is identical to the rate charged in the prior ICA existing between the parties. HT 166.

In view of all of the circumstances surrounding the transit services being provided by GWTC, it is quite apparent that an implied contract was created between the parties with respect to the transit services rendered, and accordingly, GWTC is entitled to reasonable compensation for the services. (cites). The claims of WWC for a refund of

[12] The evidence presented also shows that WWC has taken a similar approach with respect to transiting services it receives from other ILECs. press written contract as a precondition to accepting the obligation to make payment for the services. Rod Bowar, general manager of Kennebec Telephone, testified that his company has been providing WWC transiting services since 1996 and that since January 1, 2003, it has been billing for WWC for the services without a formal agreement. HT 606-609. Despite the absence of a formal agreement, WWC has been paying Kennebec Telephone for those transit service bills. HT 609. In addition, Mr. Williams himself testified that there were other instances where WWC is receiving transit services without an agreement. HT 130.

the transiting charges ignores the implied contract created by WWC's actions in accepting and utilizing the transiting services. Based on the facts presented and applicable contract law, this Commission should rejected the WWC claims for a refund of the transit service charges.

V. WWC Has Paid for Overpayments Resulting from Retroactive Application Of the Reciprocal Compensation Rate Via Billing Credits to WWC

A. Credit Methodology

The Golden West Companies do not dispute that the reciprocal compensation rate was to be applied retroactively, if approved by the Commission. The evidence revealed, however, that the parties legitimately questioned whether the Commission would, in fact, approve the rates retroactively, since it had failed to take such action on the prior agreements. Golden West Ex. 1, HT 230, 232. While Golden West Companies acknowledged that WWC was entitled to a credit, there is nothing in the ICA or in statute that dictates how that credit was to be applied. HT 450. In fact, that was deliberate on the part of negotiators.

> Q. (by Ms. Rogers) So the agreement does not dictate the terms or conditions of refunds?
>
> A. (by Mr. Thomsmpon) There is nothing in the contract regarding terms and conditions of the refund.
>
> Q. And is there anything in the contract or agreement that dictated that interest would be paid on refunds caused by retroactive application of a rate?
>
> A. No.
>
> Q. Does the agreement, did the agreement provide for payment of interest back to the retroactive effective date or the new rate?
>
> A. No.

> Q. Nothing in the agreement on that?
>
> A. No.
>
> Q. And as you stated, different companies in fact did handle refunds differently.
>
> A. That is correct.
>
> Q. Do you believe that leaving the refund methodology up to each company was an acceptable alternative?
>
> A. I believe so. Every company is a little bit different situation and leaving that to their decision seemed to make sense. HT 234-235.

Nor is there a statute that dictates how overpayments are to be credited or paid. In absence of controlling contractual obligations or statute, the parties can determine how credits will be applied.

In the current case, Golden West Companies chose to offset the credit due to WWC as a result of retroactive application of the reciprocal compensation on future billings, for primarily two reasons. The first was based on common practice. The evidence revealed that it is common practice in the industry to utilize credits or offsets, and especially if the parties have an ongoing business relationship. HT 433, 500. The second reason is that the Golden West Companies legitimately believed WWC owed them money resulting from an adjustment of the InterMTA factor.

> Q. (by Ms. Northrup). So it the method of repayment covered under the interconnection agreement?
>
> A. (by Mr. Law). I am not able to find any section in that agreement that addresses how a repayment would be made.
>
> Q. So why did not issue a credit instead of refund on the money as requested by WWC?

> A. Our thought was, and my thought was, at the point in time when we had completed the calculations, it is my opinion that a Western Wireless owed our company monies and would they have 100 percent offset the amounts owed for each individual company? Perhaps, perhaps not. I think the rates would show that for all seven companies had the InterMTA rate—I'm sorry, the InterMTA factor and the appropriate rates been charged for those minutes beginning July 1st, 2004 been charged, the dollar amounts at play, quite frankly, in terms of a credit are significantly less, and in some cases I suspect Western Wireless would have wrote Golden West a check or applied a credit to oour bill or something like that, I don't know. But the reason for applying the credit was probably first and foremost our belief and our continued belief that under the terms of the agreement, Western Wireless had not brought to the table the items that they had indicated they would as per the agreement. HT 450-451.

Mr. Thompson acknowledged that the parties anticipated refunds resulting from those adjustments as well. "That three percent (InterMTA factor) was unusually low and there could have been a refund associated with that as well". HT 236. In addition, the evidence revealed that the other companies had also utilized a credit to future billings as a refund methodology, without being penalized in the manner WWC is attempting to do to the Golden West Companies in this docket. HT 605-604.

B. What is the Proper Refund Amount?

Golden West Companies reject WWC's calculations of the appropriate amount of refund, because said calculations are artificially inflated and include incorrect elements. This was summarized by Dennis Law during the hearing. Mr. Dennis Law, at the hearing, pointed to the first part of his spread sheet as what "I used to determine the credit amount due to Western Wireless from each of the respective companies." HT 465. Mr. Law compared his calculations with those of WWC in WWC Ex. 7 and noted that the

minutes of use were not in dispute between the parties, but "it starts to diverge after that." HT 468, 469. The "divergence", resulted from application of different access rates adjustment of the InterMTA factor, and interest. In addition, at the hearing, Mr. Williams testified that WWC Ex. 7, (later substituted by WWC Ex. 21), did not take into account amounts credited to WWC by Golden West Companies, because "Golden West has made no payments to us." HT 136. This further artificially inflates WWC's claim against Golden West Companies.

It is the position of the Golden West Companies that they should not have to refund credit balances twice or pay back more than is due. Golden West provided this Commission with Golden West Ex. 40, which carefully and clearly articulates all of the credits Golden West Companies have issued to WWC. Any outstanding amounts still owing are reflected on said Exhibit. Mr. Law also explained in detail the basis of his calculations of Golden West Ex. 40, HT 443-448, and Golden West Companies would urge the Commission to rely upon the calculations in Golden West Ex. 40 in calculation of any outstanding refund amounts are due and owing to Golden West.

WWC renews its argument that WWC Ex. 21 contains a mistake resulting from WWC's interpretation of Section 4.0 of Appendix A of the ICA. This issue was argued before the Commission prior to submission of final briefs in this case. This Commission properly ruled that WWC not be allowed to substitute a new Ex. 21 to correct alleged mistakes on the Ex.. HT 1187.

WWC's argument that there is a mistake in WWC Ex. 21 is buttressed upon an incorrect interpretation of Section 4.0 of Appendix A to each ICA. WWC is attempting to argue based on Section 4.0 of Appendix A, that in calculating the reciprocal

compensation credit for local traffic, toll traffic should be included in the credit calculation, not just local traffic. This Commission should reject that argument, for several reasons. It was not timely presented during WWC's case in chief, so WWC has waived this argument.

Aside from the procedural objection, the interpretation is incorrect. Section 4.0 of Appendix A must be interpreted in the context of the entire ICA, and the ICA clearly distinguishes between local traffic and InterMTA or toll traffic throughout. See §2.1, 5.1, 5.11, and 5.1.2 ("The rates applicable to Local Traffic are set forth in Appendix A"). Appendix A clearly applies only to local traffic. Under the ICA and under the law, there is no right to reciprocal compensation charges on toll traffic. HT 1092. Therefore, WWC's urged interpretation of Section 4.0 of Appendix A has no basis and should be rejected by this Commission.

In the final analysis, however, it is Golden West's position that this Commission should reject WWC Ex. 21 in its entirety as an unsupportable and over-inflated calculation of the amount claimed by WWC. Golden West Companies' position is based on the reasons stated herein, and on the arguments within this Brief addressing other components of WWC's claimed amount due. Golden West Companies urge the Commission to deny WWC's claim as articulated in its Brief and in WWC Ex. 21.

VII. WWC IS NOT ENTITLED TO INTEREST

WWC has requested interest on the overpayments made to the Golden West companies. "Any person who is entitled to recover damages, whether in the principal action or by counterclaim, cross claim or third-party claim, is entitled to recover interest thereon from the day that the loss or damage occurred, except during such time as the

debtor is prevented by law, or act of the creditor, from paying such debt." SDCL 21-l-13.1. Accordingly, this Commission must determine whether Golden West was prevented by law, or by act of WWC from paying such debt. If the Commission finds that Golden West was not prevented from paying such debt, then the Commission must determine the date of loss.

A. Golden West was prevented by law, or by act of WWC from paying such debt?

WWC has requested prejudgment interest from January 1, 2003, which is the first day of the contract. HT 97-99. There is no provision in the contract which provides for interest paid retroactively on the refund amount. HT 234. Under the FCC, the ICAs do not come into effect until they are formally approved by the Commission. Thus, no obligation arises until the agreements are approved. Dennis Law testified he had significant doubt about whether the agreements would be approved retroactively. He was concerned about charging rates that were not authorized in a regulated environment. HT 427. This belief stemmed from the fact that the previous agreement between WWC and the Golden West Companies were not approved retroactively by the Commission. HT 427-430; GWC Hearing Ex 1.

As soon as the agreements were approved, Dennis Law instructed his billing department to begin billing the new rates under the new agreement. This was done even before all of the agreements were approved. HT 429. WWC may then argue that the approval of the agreement was the triggering point for the obligation of prejudgment interest to apply.

This is also simply not feasible because at that time, Golden West felt that WWC owed them an offset for the adjustment of the InterMTA factor. HT 235-235. In City of

Aberdeen v. Rich, 2003 SD 27, ¶ 23, 658 NW2d 775, the court held that prejudgment interest can not be applied until the set-off of the award to one party is calculated.

In Orion Financial Corp. vs. 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 vs. 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 addition, the ICA was silent as to the refund methodology. HT 111. Some companies paid via the credit methodology. Others paid in full. HT 112.

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 January of 2005. HT 95. The probable 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 cannot be determined until a decision on that question is made.

Also, the Commission has the authority to determine the manner and methodology of payment even as suggested by WCC 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 WCC 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 ICA 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)

Even WWC was unable to determine a certain amount of damages due to them. WWC quoted different amounts in 1) its initial demand letter, 2) Its original Complaint, and 3) the amended complaint. HT 438-439; GWC Ex 26. This is further evidence that it was impossible for Golden West to determine what the proper amount owed to WWC was. Plaintiff, requesting prejudgment interest, need not make tender demand of defendant, unless defendant could not know what sum he owes with reasonable certainty; interest then accrues after such demand. South Dakota Bldg. Authority v. Geiger-Berger Associates, P.C., 414 NW 2d 15 (SD 1984) It was WWC's actions that made it impossible for Golden West Companies to pay this debt.

B. If prejudgment interest is awarded, the proper rate is dictated by SDCL 54-3-16.

"Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be at the Category B rate of interest specified in § 54-3-16." SDCL 21-1-31.1 Category B dictates an interest rate of 10% per year. SDCL 54-3-16. The first analysis must be whether there is a contract rate for prejudgment interest. The only section in the contract that refers to interest is 7.2.4 of the contract. That section states, "Undisputed charges, not paid within the 30 days from the receipt of the billing statements may be subject to a

late charge at the rate of 1.5% per month or the maximum amount allowed by law." This clearly does not apply to the situation at hand. These charges were not undisputed, they were not ascertained until late in the contract term and were not made pursuant to a typical billing statement arrangement. Thus, the default rate in the statute must apply.

C. Interest must be calculated as simple interest not compound interest.

In WWC's spreadsheets, WWC has clearly tried to use compound interest rather than simple interest. They have calculated interest on interest HT 115-116. This concept is clearly contrary to State law. In Tri-State Refining and Inv. Co., Inc. v. Appaloosa Co., 431 NW2d 311 (SD 1988), the Supreme court clearly stated that prejudgment interest would be calculated using simple rather than compound interest.

CONCLUSION

The Golden West Companies request that the Commission deny the claims of WWC as presented in their Amended Complaint and award damages to Golden West Companies as requested in their Amended Counterclaim.

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Certificate of Service

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