

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT  
OF KENNEBEC TELEPHONE COMPANY,  
INC. AGAINST ALLTEL  
COMMUNICATIONS, INC. FOR  
NONPAYMENT OF TRANSITING  
CHARGES

TC08-031

**BRIEF IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

This matter is before the Commission upon the Motion of Kennebec Telephone Company, Inc. (“Kennebec Telephone”) for summary judgment against Defendant Alltel Communications, Inc. (“Alltel”). This Brief is respectfully submitted in support of said Motion and is supported by the Affidavit of Counsel filed herewith.

**FACTUAL BACKGROUND**

Kennebec Telephone seeks payment of transiting charges billed to, but not paid by, Alltel, Inc. from April 2007 to date.

In January 1999, the parties entered into an interconnection agreement through which Kennebec agreed to transit traffic for Alltel, f/k/a WWC License, LLC, at an agreed upon rate per minute of use per route mile. See Statement of Undisputed Material Facts at ¶1. The Agreement set the applicable rate for transit traffic at .0005. Id. Alltel, then WWC License, paid the applicable charges billed to it pursuant to this agreement. Id. at ¶1¶, 2. The 1999 Agreement was effective until the parties executed a new interconnection agreement which became effective as of January 1, 2003. Id. at ¶3. That interconnection agreement did not set forth the terms of any transiting services as it was intended only to address 47 U.S.C. § 251 functions. Id. at ¶4.

In the spring of 2004, Kennebec Telephone, through its agents, entered into negotiations with Alltel for the development of an agreement to govern the terms, conditions and pricing

applicable to the provisioning of transiting services. Id. at ¶5. Based upon these negotiations, Kennebec Telephone continued to provide transiting services for Alltel at a rate of \$.0005 per minute of use per route mile and Alltel continued to pay Kennebec for transiting services. Id. at ¶6; see also Complaint at ¶6; Bowar Aff. at ¶8. To date, Kennebec Telephone continues to provide Alltel with transiting service from its central office in Presho, South Dakota, where it transits the traffic to a meet point with Golden West Telecommunications Cooperative, Inc., along the White River. See Statement of Undisputed Material Facts at ¶7; see Complaint at ¶7. There are direct interconnects available to Alltel in Kennebec's exchange; however, Alltel has chosen not to use these interconnects and therefore a transiting charge is applicable and appropriate. See Statement of Undisputed Material Facts at ¶8.

In approximately April 2007, Alltel ceased paying Kennebec Telephone for transiting services and since that time has made no payments to date, despite repeated requests. Id. at ¶7; see also Complaint at ¶7. The amount currently due and owing from Alltel to Kennebec Telephone is approximately \$266,491.26. See Undisputed Statement of Material Facts at ¶8.

#### **ARGUMENT AND ANALYSIS**

Because there are no disputed facts in this case, Kennebec Telephone respectfully submits that summary judgment is appropriate. Moreover, because of the significant monetary amount at issue and the Commission precedent in existence, Alltel's deliberate pattern of non-payment should not be allowed to continue.

##### **1. Legal Standard for Summary Judgment**

The standard for the Court's consideration of a motion for summary judgment is well established:

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.” We will affirm only when there are no genuine issues of material fact and the legal questions have been correctly decided. All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.

Discover Bank v. Stanley, 2008 S.D. 111, ¶16, 757 N.W.2d 756, 761-762; SDCL § 15-6-56(c).

Generally, summary judgment should never be viewed as “a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed ‘to secure the just, speedy, and inexpensive determination of every action.’” Morgan v. Baldwin, 450 N.W.2d 783, 785 (S.D. 1990). While the moving party bears the burden of showing that it is entitled to summary judgment, “the party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment.” Witte v. Goldey, 1999 S.D. 34, ¶7, 590 N.W.2d 266 (citations omitted). “A disputed fact is not ‘material’ unless it would affect the outcome of the suit under the governing substantive law in that a ‘reasonable jury could return a verdict for the nonmoving party.’” Weitzel v. Sioux Valley Heart Partners, 2006 SD 45, ¶17, 714 N.W.2d 884, 887 (quoting South Dakota State Cememt Plant Comm’n v. Wausau Underwriters Ins. Co., 2000 S.D. 116, ¶9, 616 N.W.2d 397, 401) (additional citations omitted).

"The court's inquiry is to determine 'whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may not reasonably be resolved in favor of either party.'" Garay v. Missouri Pacific Railroad Co., 38 F.Supp.2d 892, 896 (D. Kan. 1999) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)).

**A. Kennebec Telephone has Established a Valid Cause of Action for Breach of Implied Contract.**

South Dakota law allows for both express and implied contracts. See SDCL § 51-1-3 (providing that: “A contract is either express or implied. An express contract is one, the terms of which are stated in words. An implied contract is one, the existence and terms of which are manifested by conduct.”). Four elements must exist for the creation of a contract: (1) the parties must be capable of contracting; (2) they must consent; (3) the purpose for contracting must be lawful; and (4) there must be sufficient cause or consideration. See SDCL 53-1-2. Just like an express contract, “an implied contract must satisfy all four of these elements.” Setliff v. Akins, 2000 S.D. 124, ¶24, 616 N.W.2d 878, 888 (citing Cole v. Cole, 517 N.E.2d 1248, 1250 (Ind. Ct. App. 1988) (holding that “where there is no express contract, the right to recover may rest upon implied contract or implied promise to pay[.]”). The South Dakota Supreme Court has held:

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.

Setliff v. Akins 2000 S.D. 124, ¶12, 616 N.W.2d 878, 885 (quoting Weller v. Spring Creek Resort, Inc., 477 N.W.2d 839, 841 (S.D. 1991) (quoting Mahan v. Mahan, 80 S.D. 211, 215, 121 N.W.2d 367, 369 (1963))). An agreement which is implied by facts or conduct “must be sufficiently definite to enable a court to give it an exact meaning.” Id. (quoting In re Estate of Eberle, 505 NW2d 767, 770 (SD 1993) (citing Deadwood Lodge No. 508 Benevolent and Protective Order of Elks of the United States of Am. v. Albert, 319 NW2d 823, 826 (SD 1982))). “However, absolute certainty is not required; only reasonable certainty is necessary.” Id. (citing 17A AmJur2d Contracts § 196 (1991)).

In this case, it is clear that from 1999 to 2002, both parties were bound by the terms of an agreement that covered the terms of and compensation for the transiting service provided by

Kennebec to Alltel. See Statement of Undisputed Material Facts at ¶¶1-3. Following the termination of that agreement, Kennebec Telephone approached Alltel to commence with negotiations for the development of an agreement to pertain only to the transiting service. Id. at ¶5. The parties subsequently engaged in negotiations for a transiting service. Id. Although a formal agreement was never executed, this does not negate the fact that Kennebec Telephone agreed to provide a service, that Alltel reasonably expected to receive such a service and that Alltel paid bills related to this service until 2007, at which time it ceased payment without notice or explanation, thereby constituting a breach of the parties' implied conduct. Id. at ¶¶6-7.

This Commission was presented with a similar issue in the matter styled as *In the Matter of the Complaint By WWC License LLC Against Golden West Telecommunications Cooperative, Inc., et al.*, CT05-001. In that case, WWC License, now Alltel, claimed that it was entitled to reimbursement for sums paid to Golden West Telecommunications Cooperative ("Golden West") for a transiting service. In support of its argument, Alltel claimed that the transiting charges billed to it by Golden West were charges which the parties intended to be included in their negotiated 2003 interconnection agreement. See CT05-001, Staff's Reply Brief dated October 23, 2006 (noting that WWC argued that its "former interconnection agreements provided for transiting services and the current Interconnection Agreements do not provide for transiting charges, the logical conclusion is that under this Interconnection Agreement, transiting charges are part of the reciprocal compensation rate." (citing WWC License's Brief date September 6, 2006)). This Commission determined that Alltel was not entitled to reimbursement for those sums paid for transit. Rather, an implied contract for transiting service existed between the two parties. Under the terms of that implied contract, a benefit was conferred upon Alltel such that Golden West should have been compensated for the services provided.

The facts of the case at hand are no different and are in fact stronger than those which were presented in the Golden West case. It is clear under the circumstances of the case currently before this Commission that an enforceable implied contract for the provision of transit services exists. As evidenced by the conduct of the parties, Kennebec Telephone understood that a separate agreement relating to transiting was necessary. Kennebec Telephone therefore engaged in negotiations with Alltel for the provision and compensation of the transit service. Despite the fact that Alltel had a direct connection available to it such that it would not be required to utilize the transiting service provided by Kennebec, Alltel chose not to do so. Thereby, Alltel's conduct in utilizing the transiting service provided by Kennebec Telephone is evidence of its assent to be bound by this implied contract. See Setliff, 616 N.W.2d at 885 (holding that "if a party voluntarily indulges in conduct reasonably indicating assent he may be bound even though his conduct does not truly express the state of his mind."). Alltel claims that it paid the invoices by mistake; however, this statement is not plausible under the circumstances. Moreover, it is also clear that the terms of the implied contract are sufficiently definite. Alltel was billed the same rate it was under the 1999 agreement and the rate which was proposed during the parties' negotiations.

When the evidence establishes that a contract has been breached, the law provides the courts, and similarly this Commission, with the authority to enter summary judgment on the issue of liability, and if appropriate, damages. See SDCL § 15-6-56(c)(3) (providing that summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."); see also Weitzel v. Sioux Valley Heart Partners, 2006 S.D. 45, 714 N.W.2d 884. Both liability and damages can be conclusively established and an award of summary judgment is thus appropriate.

**CONCLUSION**

Under the facts and circumstances of this case, Kennebec is entitled to an award of summary judgment on its claim for breach of implied contract.

Dated in Sioux Falls, South Dakota, this 12th day of May, 2009.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was sent electronically to the following on this 12th day of May, 2009:

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