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VIA EMAIL TO PATTY.VANGERPEN@STATE.SD.US

Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

RE: *TC08-031: In the Matter of the Complaint of Kennebec Telephone Company, Inc.
Against Alltel Communications, Inc. for Nonpayment of Transiting Charges*

Dear Ms. Van Gerpen:

Attached for filing in the above matter, please find the following documents:

1. Complainant's Reply Brief in Support of Motion for Summary Judgment;
2. Affidavit of Counsel with Exhibits;
3. Supplemental Affidavit of Rod Bowar.

Should you have any questions or concerns, please do not hesitate to contact me. Thank you for your assistance.

Best regards.

Sincerely,

CUTLER & DONAHOE, LLP



Meredith A. Moore

For the Firm

MAM/cmc
Attachments
cc: Service List

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

**COMPLAINANT'S REPLY 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 reply to the opposition filed by Alltel and in further support of Kennebec Telephone's Motion for Summary Judgment.

ARGUMENT AND ANALYSIS

This matter is far simpler than what Alltel makes it out to be. Moreover, there is no need for further discovery. As indicated by the second Affidavit of Ron Williams filed on Wednesday, June 17, Kennebec Telephone did work with former counsel for Alltel to discuss matters relating to the original transiting agreement between the parties, the proposed agreement and the transiting services provided. Unfortunately, it does not appear that any of the conversations or e-mails exchanged between the undersigned and then-counsel for Alltel were passed on to Alltel's current counsel. However, that does not change the scope of the issue in this proceeding nor does it justify a denial of summary judgment. In fact, it appears that Alltel's primary argument in support of a denial for summary judgment is based upon the undersigned's supposed failure to respond to its inquiries. Alltel's inquiries were answered and at no point did Alltel produce any evidence that it was Qwest from whom Kennebec Telephone should be seeking payment. To that end, Alltel's claim that Qwest is the culpable party and that discovery is necessary to establish that fact are merely attempts to muddy the waters and further avoid its obligations of payment in this matter.

1. Alltel has failed to refute the existence of an enforceable implied contract.

As previously indicated, an express contract is established if the following elements are met:

1. The parties must be capable of contracting;
2. The parties must consent;
3. The purpose for contracting must be lawful; and
4. There must be sufficient cause or consideration.

See SDCL 53-1-2; Setliff v. Akins, 2000 S.D. 124, ¶24, 616 N.W.2d 878, 888. Alltel does not disagree that the above-referenced elements create the basis for a valid and enforceable contract, whether it is express or implied. Instead, Alltel engages in a series of arguments that, frankly, defy common sense. It is well-established that “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). Alltel’s general denials of the facts produced by Kennebec fail to show diligence in resisting this motion.

A. Alltel and Kennebec Telephone are parties capable of entering into a contract.

The facts of this matter are simple. As set forth in its initial brief, Kennebec Telephone engaged in negotiations with Alltel for the provision and compensation of transiting service. Alltel, however, argues that Kennebec has failed to establish the first element of a valid contract: that the parties are capable of contracting. This argument is absurd. Alltel is certainly more than capable of engaging in negotiations for a contract, which it clearly did in this case. Consent to contract is “a question of *law* and is to be judged on the objective facts of the particular case.” Amdahl v. Lowe, 471 N.W.2d 770, 774, (S.D. 1991)) (citing Federal Land Bank v. Houck, 68 S.D. 449, 4 N.W.2d 213 (1942); McPherson v. Fargo, 10 S.D. 611, 74 N.W. 1057 (1898)). Alltel admits and agrees in the Affidavit of Ron Williams that it had discussions with representatives of Kennebec Telephone in regard to this matter. See Williams Affidavit at ¶4. While Alltel makes

no mention of specific discussions with Kennebec Telephone's representative, such discussions clearly occurred as did the transmittal of an agreement for the purpose of covering transport traffic. See Affidavit of Counsel, Exhibits 1 and 2. Alltel makes no argument that it lacks the requisite legal capacity to engage in contract negotiations nor does it claim that it is incapable of entering into a contract. As such, Alltel cannot make a valid argument that Kennebec Telephone has failed to meet the first element of a valid contract.

B. Alltel used the services provided by Kennebec, and through its conduct, consented to be bound by a valid and lawful contract.

Kennebec has also established Alltel's assent to be bound by the implied contract and that such contract is not unlawful. Notably absent from Alltel's response to the Motion for Summary Judgment is any attempt to establish its own record. Alltel claims that it never consented to any agreement with Kennebec and that it, in fact, made it very clear to Kennebec that it did not deserve to be compensated by Alltel. However, Alltel produced no correspondence indicating that it ever rejected Kennebec's proposed transiting agreement. It did not do so because it cannot do so. There is nothing which indicates that Alltel ever specifically rejected the agreement. Conversely, of course, Kennebec Telephone has not produced a signed agreement for transiting traffic. However, that does not negate the fact that a valid relationship existed between the parties.

Most tellingly, 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 Kenenbec, Alltel chose not to do so and continued to send its traffic over this route. Alltel's conduct belies its denials that it ever intended to utilize the transiting route and service provided by Kennebec Telephone. This is evidence of Alltel's assent to be bound. 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 was billed the same rate it was under the 1999 agreement and the rate which was proposed during the parties' negotiations. Alltel has not produced any dispute notices or other correspondence indicating that Kennebec was incorrectly billing Alltel for transiting traffic. Alltel now seeks to cast blame upon Qwest. While Mr. Williams indicates in his affidavit that Alltel made it clear to Kennebec that it had contracted with Qwest Communications to transit calls, it produced no records of such communications with Kennebec Telephone. Again, it has not done so because it cannot do so. Kennebec Telephone has no such record of any communications. Instead, Alltel paid the transiting rate until April 2007. Moreover, in the discussions which occurred between the undersigned and former Alltel counsel in the spring of 2008, there were no specific discussions regarding any agreement between Alltel and Qwest nor was any agreement between the two produced. It was not until Kennebec Telephone filed the instant Motion that this issue was raised. Most significantly, contrary to Alltel's claims, if it does have an agreement with Qwest for a transiting service, Alltel's grievance is with Qwest, not with Kennebec Telephone.

C. Alltel's acceptance of the transiting service and its payment to Kennebec for the same establishes evidence of proper consideration.

The South Dakota Legislature has defined consideration as:

Any benefit conferred or agreed to be conferred upon the promiser by any other person to which the promiser is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promiser, is a good consideration for a promise.

See SDCL § 53-6-1; see also Harms v. Northland Ford Dealers, 1999 S.D. 143, 602 N.W.2d 58; Garrett v. BankWest, Inc., 459 N.W.2d 833 (S.D. 1990). Kennebec promised to provide a service in exchange for the appropriate compensation from Alltel. Such promises constitute sufficient consideration for the formation of a contract. Again, while Alltel claims that it entered into an agreement with Qwest to transit traffic, Alltel has not produced any evidence of having done so.

Even if it had or still does so, Qwest does not control the 17.5 miles over which Alltel has transited its traffic. 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.

D. Kennebec Telephone has suffered damages as a result of Alltel's breach of the implied contract.

Kennebec Telephone seeks payment of transiting charges billed to, but not paid by, Alltel, Inc. from April 2007 to date. The amounts billed, but not paid by Alltel, total \$255,577.31. See Supplemental Affidavit of Rod Bowar. Even if Alltel disagrees with the rate at which it was billed, Alltel has produced no evidence of a different rate nor did it produce evidence that it disputed the rate. Moreover, this was the rate utilized under the prior agreements between Alltel and Kennebec Telephone. Therefore, an award of summary judgment for the amount of the damages claimed is appropriate.

Even if this Commission were to determine that some additional discovery on the issue of damages is warranted, the Commission may still award summary judgment on the legal issue of whether an enforceable contract exists between the parties. If necessary, a hearing on damages can then be conducted. 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. While Kennebec Telephone does not believe that such an approach is necessary or justified by the

facts, this Commission does possess the authority to make such a decision should it believe it is warranted.

2. The decision reached by this Commission in the Golden West matter represents valid precedent in this matter.

Contrary to Alltel's assertions, the arguments presented 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, are not inapposite to the facts and issue currently before the Commission. Alltel argues that the facts of that matter were so different from those currently before this Commission, that the Commission cannot possibly look for guidance in its ruling in that matter. However, the facts to which Alltel cites in its opposition are wholly irrelevant to the case at hand and also do nothing to change this Commission's ultimate conclusion that Golden West provided a service for which payment was due. The facts of that case and its recommended resolution are clearly laid out in Staff's Reply Brief dated October 23, 2006. Alltel has shown no reason to deviate from the Commission's decision in that matter.

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, Alltel has not diligently resisted Kennebec Telephone's Motion for Summary Judgment, but has instead attempted to create new issues not before raise. These arguments are insufficient to defeat the known facts and Kennebec Telephone therefore respectfully requests that this Commission grant summary judgment on its claim for breach of implied contract.

Dated in Sioux Falls, South Dakota, this 22nd day of June, 2009.

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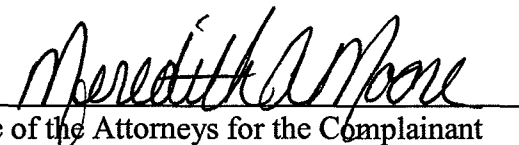
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent electronically to the following on this 22nd day of June, 2009:

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