BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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 IN OPPOSITION TO WWC's MOTION FOR PARTIAL SUMMARY JUDGMENT

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

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

I. BACKGROUND

On December 31, 2002, the existing Reciprocal Interconnection, Transport and Termination Agreements (hereinafter "Interconnection Agreement(s)" or "Agreement(s)") between Golden West Companies and WWC were set to expire. Prior to the expiration date, the parties began negotiations to replace the expired Agreements. Upon

failure of the negotiation process, a petition for arbitration was filed in October of 2002. Ultimately, the parties reached a settlement, but the negotiations were not final until 2004, and the Commission then approved the Agreements with a retroactive effective date of January 1, 2003. Section 7.2.3 of the Agreement contained a clause that provided for an initial InterMTA factor of three percent (3%), which was agreed to for only the first three months. After those first three months, the factor was to be adjusted every six months based upon a mutually agreed to traffic study analysis.

II. LEGAL STANDARD

WWC has made a motion for Partial Summary Judgment, and requests that Section 7.2.3 be found unenforceable as a matter of law. The summary judgment standard is authorized only "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 material fact, and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c); MGA Ins. Co. Inc. v. Goodsell, 2005 SD 118, ¶8 ___ N.W.2d ___. WWC alleges that Section 7.2.3 is an "agreement to agree," and is therefore unenforceable as a matter of law. Case law dictates that whether a provision is in fact an "agreement to agree" is a question of fact for the fact finder. Svoboda v. Bowes Distillery, 745 F.2d 528 (8th Cir. 1984) (citing 1 *Corbin on Contracts*, § 30, at 97)); Robinson v. Sweeney, 301 AD2d 815, 818, 753 N.Y.S.2d 583.

The facts must be viewed in the light most favorable to the non-moving party. Luther v. City of Winner, 2004 SD 1, ¶ 6, 674 N.W.2d 339, 242. Whether WWC engaged in good faith efforts to develop a traffic study is a disputed question of fact. Therefore, for purposes of this motion, the version of these facts alleged by Golden West must

be accepted as true. Golden West has alleged in its complaint that WWC has not engaged in good faith negotiations. Thus, WWC's Motion for Partial Summary Judgment should be denied because a genuine issue of material fact exists.

III. SECTION 7.2.3 IS NOT 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 N.W.2d 740, 743.

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 Interconnection Agreement cannot be described as "an agreement to agree." Everything necessary for an agreement is present, and the intent of the parties is clearly ascertainable. 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.

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 to assist the parties in developing a traffic study. Section 5.4 of the Agreement ("Measuring Traffic") instructs the parties on how to measure traffic to determine whether traffic exchanged between the parties' networks is local or InterMTA traffic for purposes of determining compensation.

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). 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 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, a review of the language at issue here, even in the most limited way, shows that the language is not an "agreement to agree." 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.

IV. CASES CITED BY WWC ARE DISTINGUISHABLE

WWC has cited several cases in its Brief to support its contention that Section 7.2.3 of the Agreement is unenforceable. WWC also points to the "good faith" language in Section 7.2.3 as being particularly suspect. The cases relied upon by WWC are distinguishable from the current case, and the good faith language in Section 7.2.3 does not negate or render ambiguous the clear intent of the parties as expressed within that section of the Agreement.

As an initial matter, all of the cases cited by WWC involved subsequent agreements for which the terms were not determined in the agreement under review. For example, the case of Estate of Fisher v. Fisher, 645 N.W.2d 841 (SD 2002) involved an agreement that referred to a future agreement with a third party who was not even a party to the original contract. The court found that it was not a function of the court to fix prices of an agreement among parties and nonparties to the agreement.

Similarly, in Deadwood Lodge No. 508 Benevolent and Protective Order of Elks of the United States of America, a South Dakota Corporation, Plaintiff and Appellee, v. William J. Albert, a/k/a W. Alberts, and Wabec, Inc., a South Dakota Corpora-

tion, Defendant and Appellant, 319 N.W.2d 823 (SD 1982), the court declined to fix the terms of a future new lease of the parties, where there was no agreement between the parties as to the terms of this separate agreement. In the current case, there are discernable standards frequently used and considered by the State Commission and the communications industry.

Yans Video, Inc. v. Hong Kong TV Video Programs, Inc., 133 A.D.2d 575 (NY App. Div. 1987), also involved good faith negotiation of a subsequent renewal contract without any terms for the new renewal contract. The court refused to enforce the provision finding that "before the power of law can be invoked to enforce a promise, it must be sufficiently certain or specific so that what was promised can be ascertained." Id. at 578. In the current case, the intent of the parties to adjust the PIU factor based on a traffic study is easily ascertainable. The good faith requirement in the current Agreement does not negate that clear intent, nor does it obligate the parties to negotiate a renewal of the current agreement.

Likewise, in First National Bank of Maryland v. Burton, Parsons Co., Inc., 470 A.2d 822 (Md. Ct. Spec. App. 1984), the contract under review allowed the parties to negotiate a subsequent Agreement. In contrast, the current Agreement provision under review does not involve a separate or subsequent contract. Rather, Section 7.2.3 simply concerns the method to be used in the current Agreement to determine what portion of the traffic between the parties is InterMTA traffic.

In any event, 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. Thus, the latest edition of the *Williston on Contracts* treatise, which supersedes the edition cited in First National Bank of Maryland, 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. Although South Dakota has not had the opportunity to address the enforceability of an "agreement to negotiate," courts in other jurisdictions have. 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 agree-

ments 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. In fact, this is the true test of whether an agreement is enforceable. 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 cited by WWC, the InterMTA factor at issue here is quantifiable and measurable, and thus sufficiently definite to be enforced.[1]

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. Therefore, all of the major terms and conditions required to implement and enforce the clause are expressly set forth within the clause.

[1] We again point out that the South Dakota cases cited by WWC concern agreements to agree, not agreements to work towards a certain goal or even agreements to negotiate. Yet even these "agreement to agree" cases do not command a unanimous decision. The two most recent of these cases, Albert and Fisher, are both 3-2 decisions. In Albert, the dissent directly rejects the rule that agreements to agree are unenforceable, and in Fisher the dissent impliedly does so. The fact that the Court is divided on these cases involving straightforward "agreements to agree" suggests that if the Court were faced with a more definitive agreement to engage in negotiations in the future, or a still more definitive agreement such as this one, such agreement would very likely be deemed sufficiently definitive to be enforceable.

V. AUTHORITY OF COMMISSION PURSUANT TO FEDERAL ACT

In addition, a clear distinction between the current case and all of the cases relied upon by WWC is the authority of the adjudicating body. In each of the cases cited by WWC, the courts indicated it is not the function of courts or a jury to fix the prices or terms of an agreement.

By contrast, it clearly is within the authority of this Commission to arbitrate and settle disputes arising out of interconnection agreements and, specifically, to arbitrate disputes concerning the use of traffic studies to set an InterMTA factor. State Commissions are granted authority to arbitrate the terms and conditions of interconnection agreements under Section 252(b)(1) of the Federal Telecommunications Act of 1934, as amended in 1996 (the Act).

> (1) ARBITRATION.—During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

This Commission has resolved "open issues" in the context of interconnection agreements, pursuant to its authority under Section 252(b)(1) of the Act. In fact, in Docket No. TC96-160, entitled In the Matter of the Petition for Arbitration on Behalf of Western Wireless Corporation with US WEST Communications, Inc. (Dec. 1996), this Commission rendered a decision on all unresolved issues between the parties, including the percentage of traffic subject to reciprocal compensation. In this proceeding, Western Wireless presented evidence "that it had conducted a traffic study of its South Dakota network for calls between the networks of Western Wireless and US WEST" for a one-month time period (¶ XXV). The WWC analysis showed that the percentage of land-to-

mobile calls on Western Wireless network from US WEST's network was 25.8%. US WEST presented evidence that the appropriate percentage of traffic to be compensated at reciprocal compensation rates was 17%. The Commission considered all the evidence and determined that 17% was the reasonable percentage.

> XXVIII. The Commission finds that US WEST's number of 17% as the percentage of traffic originated on US WEST's network and terminated on Western Wireless' network is the more reasonable number. Western Wireless' number of 25.8% included traffic that originated from inter-exchange carrier toll numbers, other CMRS customers, and independent local exchange company customers. US WEST presented testimony that this additional traffic would be, at a minimum, 11%. Therefore, US WEST's proposed 17% is reasonable. In order for Western Wireless to be compensated for any traffic originated by non-US WEST carriers, it will have to negotiate agreements with the other carriers for reciprocal compensation.

The Commission went on to determine the effective date of the new rates and the definition of and applicable charges for local traffic within this docket.

This decision not only demonstrates the authority of the Commission to resolve disputes that arise under interconnection agreements, but it confirms that this Commission has exercised that authority in the past. Clearly, then, the current case is distinguishable from other court cases dealing with unenforceable agreements to agree. Section 7.2.3 is not an agreement to agree in this Interconnection Agreement. The development of a traffic study by the parties is clearly articulated, and if the parties are unable to do so, or to arrive at an adjusted InterMTA factor as required by the Agreement, this Commission has the federal/state statutory authority to do so.

Further, § 252 of the Act requires approval of all interconnection agreements by state commissions:

> (1) APPROVAL REQUIRED.—Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to

> the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

If this Commission had believed that developing a traffic study was an unenforceable way to determine an adjustment to the initial InterMTA factor, the Commission could have rejected the Agreement on that ground. Instead, this Commission approved the entire Agreement, including the effective date of the new rates.

VI. BAD FAITH ARGUMENT

WWC's Motion for Partial Summary Judgment clearly shows that WWC has failed to negotiate this matter in good faith. After extensive negotiations, the parties agreed that, in reference to InterMTA, the initial PIU would be adjusted after a traffic study could be completed. The traffic study was to be ongoing in nature, and the PIU was to be adjusted every six months. WWC subsequently refused to negotiate in good faith and repeatedly refused to give Golden West the Call Detail Records ("CDRs") needed to develop a traffic study. After Golden West conducted the traffic study and determined a rate with CDRs ultimately provided by WWC within the context of this proceeding, WWC claimed the very data WWC had provided to Golden West was corrupt. Now, on the eve of hearing, after Golden West had finally calculated the PIU with data provided by WWC, WWC claims that what it agreed to is now unenforceable as a matter of law. This is merely one of many calculated maneuvers to avoid the obligations that WWC is required to pay compensation to Golden West under federal law, under state law, and under the negotiated and executed terms of the Interconnection Agreement.

Despite the definite and certain requirement that the parties act in good faith to develop a method of traffic study that reasonably measures terminated InterMTA traffic,

an objective quantity, WWC has refused to do so prior to the current litigation. WWC's motive for refusing to provide CDRs is clear. Once the CDRs are provided, the methodology, in essence, becomes moot. Therefore, once Golden West received the raw data (CDRs) from WWC, the method of calculation for both companies was obvious. The resultant InterMTA factor for each of the Golden West Companies is significantly higher than the initial 3% factor in the Agreements. Thus, WWC had ample motivation to breach the clear requirements of the Agreement to develop an accurate traffic study methodology, and instead claims that the adjustment provision cannot be enforced because the terms of the adjustment are indefinite, vague and uncertain. WWC should not be rewarded for its breach of the Agreement. The obvious and appropriate remedy, and one which this Commission is well within its authority to impose, is for the Commission to enforce the provisions of Section 7.2.3 and establish an appropriate InterMTA factor for each of the Golden West Companies. Farm Credit Services of America, 2005 SD 94, 704 N.W.2d 24 at ¶12. ("Good faith honors a party's justified expectations. To hold otherwise, would jeopardize the institution of contract[.]").

Finally, it is not clear what WWC achieves by arguing that Section 7.2.3 is unenforceable, as there must be some mechanism to determine InterMTA and IntraMTA traffic for purposes of applying the appropriate compensation rate. Clearly, striking this provision does not invalidate the entire Agreement. 1 *Williston on Contracts*, § 4:26 (4th Ed.). And, just as clearly, if the traffic study negotiation section of Section 7.2.3 is unenforceable, then the 3% InterMTA factor also must be stricken. Striking Section 7.2.3 would, therefore, result in an "open issue," which, as contemplated under the Federal Act, would need to be resolved by the Commission.

VII. CONCLUSION

WWC has mischaracterized Section 7.2.3 as an "agreement to agree" clause. Even if the Commission were persuaded by this argument, summary judgment is not proper. Whether a clause is an agreement to agree is clearly a question of fact.

For all of the foregoing reasons, the partial motion for summary judgment should be denied.

DATED this thirteenth day of January, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF GOLDEN WEST COMPANIES IN OPPOSITION TO WWC's MOTION FOR PARTIAL SUMMARY JUDGMENT was served via the method(s) indicated below, on the thirteenth day of January, 2006, addressed to:

Talbot J. Wieczorek	(X)	First Class Mail
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P. O. Box 8045	(X)	Facsimile
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