**BEFORE THE PUBLIC UTILITIES COMMISSION**

**OF THE STATE OF SOUTH DAKOTA**

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| In the Matter of the Complaint<br>WWC License LLC against<br>Golden West Telecommunications Coop., Inc.;<br>Vivian Telephone Company;<br>Sioux Valley Telephone Company;<br>Union Telephone Company;<br>Armour Independent Telephone Company;<br>Bridgewater-Canistota Independent Telephone Company; and<br>Kadoka Telephone Company | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | DOCKET NO. TC05 - 001<br><br>BRIEF IN SUPPORT OF WWC's MOTION FOR PARTIAL SUMMARY JUDGMENT ON NON-ENFORCEABILITY OF AN "AGREE TO AGREE" CLAUSE |

WWC License LLC, of 3650 131st Avenue SE, Suite 400, Bellevue, Washington 98006, a subsidiary of Alltel (hereinafter "WWC"), by and through its attorney, Talbot J. Wieczorek of Gunderson, Palmer, Goodsell & Nelson, LLP, hereby submits this Brief in Support of WWC's Partial Motion for Summary Judgment.

**Procedural Background**

This proceeding originated as a Complaint regarding the failure of Golden West Telecommunications Cooperative, Inc., and its affiliated companies (hereinafter "Golden West" or "the Golden West companies") to refund excess payments paid under an Interconnection Agreement that expired on December 31, 2002, based on the new rates established under an Interconnection Agreement (hereinafter "the Agreement") that was retroactive to a date certain, January 1, 2003. The Agreement, which replaced the expired contract, was not finalized until 2004. However, the Agreement was retroactive to January 1, 2003. WWC paid the higher previous rates under the expired contract while the Agreement was negotiated.

Since the filing, various other allegations rising out of the Agreement has been made. A Counterclaim was submitted by Golden West asserting that WWC failed to reach an agreement with Golden West under a clause in the Agreement. Section 7.2.3 contained a clause often referred to as an "agree to agree" clause. That section provided for an initial interMTA use

factor of three percent (3%), and also states as follows:

> 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 towards the development of a method of traffic study that will provide a reasonable measurement of terminated InterMTA traffic.

The Agreement was negotiated pursuant to 47 U.S.C. § 252 (a). Prior to completing an agreement, the parties had attempted to negotiate pursuant to the federal statute, but after breakdown of negotiations a petition for arbitration was filed on October 29, 2002, before the Public Utilities Commission (hereinafter "PUC" or "the Commission") in the state of South Dakota. The petition was designated Docket TC02-176.

During the pendency of the arbitration proceeding, the parties were able to negotiate the Agreement and the Commission entered an order dismissing and closing Docket TC02-176 on February 25, 2004. The Agreement between WWC and Golden West Telecommunications Coop., Inc., was identical between WWC and each company affiliated with Golden West. Each separate contract was approved by the Commission pursuant to 47 U.S.C. § 252(e) during the ensuing months of 2004.

The language at 7.2.3 was generally negotiated between Ron Williams, on behalf of WWC, and the South Dakota Telecommunications Association (hereinafter "SDTA") on behalf of the Golden West companies and other Rural Local Exchange Carriers. Golden West and SDTA have asserted that WWC breached a clause in the Agreement by failing to develop a mutually agreed upon traffic study and by failing to negotiate the traffic study in good faith. Answer and Counterclaim at ¶ 33. Golden West anticipates that the interMTA factor would be higher than the three percent (3%) rate set in the Agreement, and settles upon a factor of 12.64%. *Id.* at ¶ 34. Applying this factor, Golden West believes a payment shortfall of $12,869 resulted on a monthly basis prior to July 1, 2004, and believes a higher shortfall occurred after July 1,

2004. *Id.* at ¶ 35. Golden West has requested judgment in an amount which represents the underpayment resulting from the alleged improper and unadjusted interMTA factor. *Id.* at 10. Essentially, Golden West believes it and each of its companies are entitled to a new interMTA use factor to be retroactively applied to January 1, 2003, and is requesting the Commission establish the appropriate traffic study, set a new interMTA use factor for the parties and allow retroactive application of the new factor.

The Agreement specifically requires the traffic study be "mutually agreed" upon. The Golden West companies and SDTA acknowledged that there has been no mutual agreement of what type of traffic studies to use. Regarding the negotiations, WWC disputes Golden West's contention it has not negotiated in good faith since WWC has expended tens of thousands of dollars in an attempt to come up with a traffic study. Regardless, for the purposes of this motion for summary judgment, it will be shown in the legal analysis that even if this allegation were true, no enforceable claim exists.

**Issue**

This Motion for Partial Summary Judgment in this case presents the following issue:

1. Is the clause in Section 7.2.3 of the Agreement, which obligates the parties proceed in good faith to reach a mutually agreed upon traffic study analysis necessary to develop the interMTA use factor, unenforceable as a matter of law?

   ANSWER: Section 7.2.3 is an unenforceable "agree to agree" provision which, pursuant to South Dakota law, creates no enforceable contractual right.

**Legal Standard**

This motion is brought pursuant to SDCL § 1-26-18(1). Upon a proper motion of a party, this administrative body may dispose of any defense or claim under the familiar summary judgment standard:

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 a party is entitled to a judgment as a matter of law[.]

*Id.*

**Argument and Authority**

**1. Section 7.2.3 is an Unenforceable Agree to Agree clause**

In South Dakota, "[a]n action for breach of contract requires proof of an enforceable promise, its breach, and damages." *McKie v. Huntley*, 620 N.W.2d 599, 603 (S.D. 2000). If the undisputed facts fail to establish the required elements to support a cause of action, disposition by summary judgment is proper. *Id.* Partial summary judgment in this matter is appropriate on the breach of contract allegations of the Golden West companies based upon Section 7.2.3 of the Agreement because this particular clause is unenforceable as a matter of law.

WWC and Golden West decided to adjust the interMTA use factor, after the execution of the contract and after completion of a mutually agreeable traffic study analysis. They agreed to work together to develop a second agreement which the parties anticipated would result in a new applicable interMTA use factor replacing the agreed upon three percent (3%) use factor. Unfortunately, the parties were not able to reach any agreement on the method, manner, and terms through which the traffic study analysis should be conducted. This development, however, does not entitle Golden West to recover for an alleged breach of "agree to agree" clause of Section 7.2.3 in an action before the PUC because this entire clause, including the requirement to proceed in good faith, is an unenforceable "agreement to agree" under South Dakota law.

South Dakota, as well as other jurisdictions, treats these types of contractual provisions unfavorably. In *Estate of Fisher v. Fisher*, 645 N.W.2d 841 (S.D. 2002) and *Deadwood Lodge No. 508, etc. v. Albert*, 319 N.W.2d 823 (S.D. 1982), the Supreme Court of South Dakota specifically refused to enforce similar "agreements to agree" clauses found in disputed contracts. These cases provide clear precedent resolving this current claim.

In *Fisher*, Donald Fisher sued his brother arguing that he, Donald, had a "first-chance-to buy" land purchased by his brother from their parents under a contract for deed. *Fisher*, 645 N.W.2d at 842. The disputed contractual provision provided that "Donald O. Fisher ... shall have the first chance to buy the above-described property, *at a price to be agreed upon between the said Dean D. Fisher and Donald Fisher[.]*" *Id.* at 847 (emphasis added). The Court stated that such "agreement to agree" provisions do not "fix an enforceable obligation." *Id.* These types of clauses are "indefinite, vague, and uncertain." *Id.* Before a clause in a contract is enforceable, the terms "must be sufficiently definite to enable a court to give it an exact meaning." *Id. Fisher* determined that the trial court could not force the parties to agree to the price of the land and, further, that it is not the function of courts to fix prices for the parties. *Id.*

*Fisher* relies extensively upon *Albert. Albert* involved a dispute over the rental rate during the renewal period of a lease. *Albert*, 319 N.W.2d at 824. In *Albert*, the lease provided that the parties agreed to negotiate "a mutually acceptable monthly rental." *Id.* at 826. The parties could not agree upon the monthly rate, litigation followed, and the appellant asked the Court to establish a reasonable rent based upon current market conditions. *Id.* at 825. The trial court rejected the argument, because "it is not a function of the courts to fix the terms of a lease for the contracting parties." *Id. at* 825-826. The Court reiterated an earlier holding, stating:

> If it appears that any of the terms of the future lease are left open to be settled by future negotiation between the lessor and lessee ""there is no complete agreement; the minds of the parties have not fully met; and, until they have, no court will undertake to give effect to those stipulations that have been settled, or to make an agreement for the parties respecting those matters that have been left unsettled.'"

*Id. at* 826 (*quoting Engle v. Heier*, 173 N.W.2d 454, 456 (S.D. 1970)). Similar to the disputed clause in *Fisher*, the failure of the contract to include sufficiently definite terms precluded the Court from giving meaning to the terms and from enforcing this option-to-renew provision of the agreement. *Id.*

Other jurisdictions have similarly refused to enforce agreements to agree provisions. In

*First National Bank of Maryland v. Burton, Parsons & Co., Inc.*, 470 A.2d 822 (Md. Ct. Spec. App. 1984), an employee sued an employer under an employment contract for royalties. *Id.* at 826. The disputed contract included a provision which allowed the parties to negotiate a subsequent agreement addressing royalties for inventions and formulas developed which proved capable of commercial development. *Id.* at 827. The court recognized that an agreement to negotiate upon terms and conditions not yet decided is ordinarily unenforceable. *Id.* at 828. "'Neither a court nor a jury is authorized to guess what values [the parties] might have placed upon all the factors which were left for their consideration[.]'" *Id.* (*quoting Fremon v. W.A. Sheaffer Pen Co.*, 209 F.2d 627 (8th Cir. 1954)). The court relied upon a well-known contract treatise:

> Although a promise may be sufficiently definite when it contains an option given to the promissor or promissee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such promise.

*Id.* (*quoting Williston, A Treatise on the Law of Contracts* § 45 (3d ed. 1957)). The court noted that the overwhelming weight of authority supported a conclusion that courts could not enforce agreements to negotiate contracts. *Id.* at 829.

The clause in Section 7.2.3 of the Agreement is arguably distinguishable from the disputed provisions in *Fisher*, *Albert*, and *Burton* only because it obligates the parties to the Agreement to proceed in good faith. Golden West relies upon this requirement to support its counterclaim. This distinguishing fact, however, is of no consequence because the obligation to negotiate in good faith suffers from the same shortcomings as an "agreement to agree" and is similarly unenforceable. As *Burton* noted, "[a]n agreement to negotiate in good faith is even more vague than an agreement to agree." *Burton*, 470 A.2d at 828 (*quoting Candid Productions, Inc. v. International Skating Union*, 530 F.Supp. 1330 (S.D.N.Y. 1982)).

Courts have refused to enforce such provisions. In *Yan's Video, Inc. v. Hong Kong TV Video Programs, Inc.*, 133 A.D.2d 575 (N.Y. App. Div. 1987), the parties agreed to negotiate in good faith a renewal of a contract, but upon terms which were also to be negotiated. *Id.* at 576. The court determined that the plaintiffs had failed to demonstrate that they possessed an enforceable contractual right because the agreement of intent to negotiate the renewal in good faith was nothing more than an agreement to agree. *Id.* at 578. The holding of another case from the same jurisdiction is similar: "A promise to negotiate in good faith is a mere promise to agree, which is insufficiently definite to be enforceable either by imposition of damages or by the extraordinary remedy of specific performance." *McGee & Gelman v. Park View Equities, Inc.*, 187 A.D.2d 1012, 1013 (N.Y. App. Div. 1993)(citations omitted).

This clause in Section 7.2.3, that Golden West relies upon for its claim, suffers from the same vagueness and indefiniteness as the disputed contracts in *Fisher, Albert, Burton*, and the other cited authority. This provision provides that the interMTA use factor would be adjusted after the parties undertook good faith efforts and mutually agreed to a traffic study analysis. The parties, however, reserved for the future the most essential element of the provision, the method and manner by which the traffic study analysis would be conducted. This portion of Section 7.2.3 is, therefore, not sufficiently definite and is unenforceable. It is impossible for the law to affix any obligation to such a promise. *Burton*, 470 A.2d at 828. There simply is no guarantee that WWC and Golden West ever would have reached any agreement concerning the traffic study analysis.

The obligation to proceed in good faith suffers from the same vagueness and indefiniteness as the agreement to mutually agree to the traffic study analysis. Even assuming, for the sake of argument, that the parties did not negotiate the terms of the traffic study analysis in good faith, this fact is of no real consequence under the facts and circumstances of this situation. Without any specified conditions regarding the method and manner in which the

parties would develop the traffic study analysis, Golden West and WWC could have made every possible effort to reach an agreement and yet never reached an agreement on how to determine the interMTA use factor. The promise is not enforceable, does not support Golden West's argument for recovery, and cannot save Golden West's claims from disposition on summary judgment.

Arguably, the value of land (*Fisher*) and the rental amount in a lease (*Albert*) are terms within the context of contractual disputes that could be determined fairly easily by considering fair market value and current market rates. Yet, the Supreme Court of South Dakota refused to set the prices for the parties when they agreed to determine those specific terms at a later time. Issues related to a traffic study analysis, in comparison, as well as the resolution of the nebulous concept of good faith, are matters significantly more complex than market value and market rates. Given that the Supreme Court of South Dakota has determined as a matter of law that courts cannot decide fairly simple matters such as price and rental rates in similar situations when the parties "agree to agree," this Commission must similarly refrain from trying to decide the terms for the parties.

**Conclusion**

A viable breach of contract action requires an enforceable promise. As WWC has established, Section 7.2.3, as a matter of law, includes unenforceable promises which are too vague and indefinite to support a breach of contract cause of action. Golden West's claims based upon Section 7.2.3, which requests the Commission decide upon an appropriate traffic study, set the interMTA use factor for the parties, and apply the factor retroactively, must be dismissed. WWC respectfully requests the Commission enter partial summary judgment in its favor on this issue.

Dated this 6 day of January, 2006.

WWC LICENSE LLC

By: _____
Talbot J. Wieczorek
Its: Attorney

WWC License LLC, hereby affirms that the statement of facts above are accurate to the best of its knowledge.

WWC LICENSE LLC

By: _____
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 6 day of January, 2006, a true and correct copy of **WWC License, LLC's Motion For Partial Summary Judgment** and **Brief in Support of Motion for Partial Summary Judgment** was sent via fax and by first-class, U.S. Mail, postage paid to:

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