

Bob Sahr, Chair
Dustin Johnson, Vice-Chair
Gary Hanson, Commissioner

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
www.puc.sd.gov

Capitol Office
(605) 773-3201
(605) 773-3809 fax

Transportation/Warehouse
(605) 773-5280
(605) 773-3225 fax

Consumer Hotline
1-800-332-1782

October 23, 2006

Mr. Talbot J. Wiczorek
Attorney at Law
Gunderson, Palmer, Goodsell & Nelson
P. O. Box 8045
Rapid City, SD 57709-8045

Ms. Darla Pollman Rogers
Attorney at Law
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, SD 57501-0280

Ms. Margo D. Northrup
Attorney at Law
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, SD 57501-0280

Mr. Richard D. Coit
Executive Director and General Counsel
SDTA
P. O. Box 57
Pierre, SD 57501-0057

Re: In the Matter of the Complaint filed by WWC License LLC
against Golden West Telecommunications Cooperative, et al.

Dear Counsel:

Enclosed each of you will find a copy of Staff's Reply Brief in the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Rolayne Ailts Wiest
Staff Attorney

RAW:dk
Enc.

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE COMPLAINT FILED)	STAFF'S REPLY BRIEF
BY WWC LICENSE LLC AGAINST GOLDEN)	
WEST TELECOMMUNICATIONS)	CT05-001
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)	
REGARDING INTERCARRIER BILLINGS)	

Commission Staff ("Staff") submits this reply brief in response to the brief submitted by WWC License LLC ("WWC") and the brief submitted by Golden West Telecommunications Cooperative, Inc. ("GWTC"), 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"), and Kadoka Telephone Company ("Kadoka") (collectively "Golden West Companies"), and the South Dakota Telecommunications Association ("SDTA").

Citations to the hearing transcript will be made as "HT___" and citations to the exhibits will be "WWC Ex. ___" or "GWC Ex. ___". The Public Utilities Commission will be referred to as "Commission." The Reciprocal Interconnection, Transport and Termination Agreements will be referred to as "ICAs" or "Agreements."

BACKGROUND

Commission Staff was informed on October 16th that the parties had settled all of the issues with the exception of the transit issue.¹ Therefore Staff's brief will be confined to this issue only.

¹ The parties also agreed that Staff would have until October 23rd to file its brief.

LEGAL ANALYSIS

I. Transit charges

WWC is seeking the reimbursement of transiting charges that it paid to Golden West Telecommunications Cooperative ("GWTC") for transporting calls to the Custer wire center. Pursuant to the prior Agreement, which was effective January 1, 1999, WWC and GWTC agreed to a transit traffic rate of \$0.0005 per MOU per route mile. WWC Ex. 2, section 7 and page 2 of attached Ex. A. By contrast, the Agreement at issue in this proceeding specifically provides that it "is not intended to establish any terms, conditions or pricing applicable to the provision of any transiting service." WWC Ex. 1, page 1, para. 8.

The transit service is being provided by GWTC from the Rapid City meet point to the Custer exchange. HT 484. The traffic passes through GWTC's Hot Springs wire center to the Custer end office. HT 316. Custer is a Vivian Telephone exchange. HT 490. The transport facilities are needed by WWC to send traffic from its customers to landline end users in the Custer exchange. Although WWC has existing direct connect facilities into the Custer exchange, WWC is only using the direct connect to receive originated landline traffic from the Custer exchange. HT 153, 163-64. When asked why the direct connect is not used for termination, Ron Williams, a WWC witness, responded that the connection is sized for the capacity for traffic *coming to* WWC and so it would have to add capacity in order to use the facility to *terminate* traffic to its customers. HT 184-85.

WWC argues that the transiting charges are part of the reciprocal compensation rates. WWC's witness testified that these costs were included in the negotiated reciprocal compensation rates on the basis that the Golden West Companies represented that their network was an integrated transport network. HT 78. WWC claims that since "the 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.” WWC Brief at 25. WWC asserts that this conclusion is further supported by, what it terms, as the selective billing of transiting. *Id.* at 26. WWC states that Golden West does not charge Qwest or its affiliated companies for this transiting function. HT 834-35. As additional support for its claim, WWC maintains that Vivian is treated as an arm of GWTC instead of as an independent company. WWC points out that Vivian is a subsidiary of GWTC. HT 423. In addition, WWC notes that the companies share employees and the companies have the same 12 members for their boards of directors. HT 557-58. WWC further states that “end users deal exclusively with a company called Golden West.” WWC Brief at 26-27.

Dennis Law, a witness for the Golden West Companies, testified that WWC had paid the bills for transit traffic even after the original agreement (which specifically provided for the billing for transit traffic) had expired. HT 489. Law also noted that after WWC brought up the issue in its amended complaint in September of 2005, WWC continued to use the service and GWTC continued to provide and bill for the service. HT 491. Other wireless carriers are also billed for the service. HT 491. Law further testified that GWTC and Vivian Telephone are separate corporate entities with their assets owned separately. HT 492. Regarding the regulation of the companies, Law stated that each files its own cost study. *Id.* He also stated that each company owns and pays for its own network within its exchange area. HT 509. Although the companies share employees, the employees’ time is allocated separately to the companies. HT 557. He further stated that although the companies market themselves to end users as one company, the companies are treated separately. HT 557. Larry Thompson, a Golden West Companies’ witness, testified that transit service was not included in the reciprocal compensation rates. HT 315-316. He further pointed out that the reciprocal compensation rates are not based on costs. HT 316.

In Staff's opinion, the language of the ICA does not support WWC's contention that the transit service was included as part of the negotiated reciprocal compensation rate. The ICA explicitly states that it was "not intended to establish any terms, conditions or pricing applicable to the provision of any transiting service." Given this language, the obvious interpretation of this provision is that transit services were *excluded* from the Agreements, not *included* as part of the reciprocal compensation rates. Moreover, WWC's claim that transit services were included in the reciprocal compensation rates is undermined by the clear terms of the ICA which states that the rates were not based on a cost study. See WWC Ex. 1, p. 2.

With respect to WWC's issue of "selective" billing, the record reflects that Qwest is not assessed transit charges because the Qwest traffic is toll traffic subject to access charges. HT 579. Vivian is paying compensation in the form of fixed rates for the transport. HT 559, 560. Moreover, GWTC charges transiting charges to other wireless carriers in addition to WWC. HT 491.

Further, Staff does not believe that the relationship between GWTC and Vivian supports the argument that "the transport of the call from where the Parties connect to the end users is part of the transport cost calculated in deriving the reciprocal compensation rates." See WWC Brief at 27. First of all, GWTC and Vivian are separate companies that entered into separate agreements with WWC. GWTC is a cooperative and Vivian is a private corporation. HT 581. The companies have separate cost studies and study areas. HT 558.

WWC's citation to the *Glanzer* case does not support its position in this case. See *Glanzer v. St. Joseph Indian School*, 438 N.W. 2d 204 (S.D. 1989). In *Glanzer*, the court analyzed whether liability for the acts of one corporation could be placed upon a related entity based on the instrumentality exception to the rule of corporate separateness. *Id.* at 206. Under the instrumentality exception a parent corporation is liable for the acts of its subsidiary when "(1) the parent controls the subsidiary to such a degree as to render the latter the mere

instrumentality of the former; and (2) adherence to the rule of corporate separateness would produce injustices and inequities.” *Id.* at 207. WWC has made no showing that Vivian operates as a mere instrumentality of GWTC. In addition to whether the companies have common directors and officers and own the capital stocks of the subsidiary, *Glanzer* notes many other factors that can be looked at in order to find instrumentality. Some of those other factors include whether the subsidiary has grossly inadequate capital, whether the formal legal requirements of the subsidiary are not observed, and whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation. *Glanzer*, 438 N.W. 2d at 207. The facts presented at the hearing certainly gave no indication that these factors were present.

Staff would further point out that even if instrumentality is found, the Commission must then “consider whether retention of corporate separateness would produce injustices and inequitable consequences.” *Id.* This requires a showing that “the wrong alleged is a result of fraudulent, unjust or illegal acts.” *Id.* The evidence does not support a finding that the Golden West Companies engaged in any fraudulent, unjust, or illegal acts when it charged WWC for a transit service.

If the Commission finds that GWTC is providing a transit service and it is not part of the transport covered by the ICA, the question then becomes whether GWTC should be allowed compensation for the transit service absent any written agreement between GWTC and WWC. The Golden West Companies assert that WWC is liable for transiting charges assessed based on an implied contract between the parties.

South Dakota law describes an implied contract as one where “the existence and terms of which are manifested by conduct.” SDCL 53-1-3. The South Dakota Supreme Court has stated that:

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.”

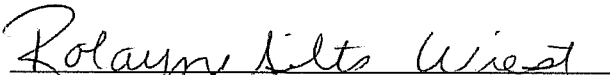
Mahan v. Mahan, 121 N.W.2d 367, 369 (S.D. 1963). The Court further stated that “[t]he pertinent inquiry is whether the facts and circumstances properly evaluated permit an inference that services were rendered in expectance by one of receiving and the other of making compensation.” *Id.* at 369. The Commission must look to the “totality of the parties’ conduct to learn whether an implied contract can be found.” *Setliff v. Akins*, 616 N.W.2d 878, 885 (S.D. 2000).

In this case, a review of the conduct of the parties leads Staff to the conclusion that an implied contract was created. The record shows that WWC received a benefit from the transit services. Although WWC has a direct connect to the Custer exchange, it continues to use the transit service provided by GWTC. When asked whether WWC wanted the traffic to continue to use this route, Williams replied that the path is an economical path to deliver the traffic. WWC paid for these services each month. Although Williams stated that he believed that this transit service was included in the reciprocal compensation rates, this belief is at odds with the conduct of the parties wherein GWTC billed each month, on a separate billing statement, for the services and WWC paid for such services. As the South Dakota Supreme Court has stated, “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.*” *Id.* (emphasis added). Looking at the terms of the ICA which excluded transit and the conduct of the parties wherein GWTC carried the traffic and WWC paid for that service, Staff’s position is that WWC is not entitled to reimbursement of the payments it made to GWTC for the provisioning of transit services.

CONCLUSION

Staff respectfully requests that the Commission find that WWC is not entitled to receive a refund for payments made to GWTC for transit services.

Dated at Pierre, South Dakota, this 23rd day of October, 2006



Rolayne Ailts Wiest
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201

CERTIFICATE OF SERVICE


I hereby certify that copies of Staff's Reply Brief were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 23rd day of October, 2006.

Mr. Talbot J. Wieczorek
Attorney at Law
Gunderson, Palmer, Goodsell & Nelson
P. O. Box 8045
Rapid City, SD 57709-8045

Ms. Darla Pollman Rogers
Attorney at Law
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, SD 57501-0280

Ms. Margo D. Northrup
Attorney at Law
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, SD 57501-0280

Mr. Richard D. Coit
Executive Director and General Counsel
SDTA
P. O. Box 57
Pierre, SD 57501-0057



Rolayne Ailts Wiest
Staff Attorney
South Dakota Public Utilities Commission