

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
ALLTEL'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT BASED UPON LACK
OF SUBJECT MATTER JURISDICTION

INTRODUCTION

COMES NOW Alltel Communications, LLC (hereinafter "Alltel") by and through its counsel of record, Talbot J. Wiczorek of Gunderson, Palmer, Nelson & Ashmore, LLP, and hereby submits this Brief in Support of Alltel's Motion for Summary Judgment Based Upon Lack of Subject Matter Jurisdiction. The South Dakota Public Utilities Commission's (hereinafter "Commission") jurisdictional authority is expressly limited to the powers conferred upon it by statute. The Commission does not have subject matter jurisdiction over this transiting charge dispute because it has not been afforded the statutory authority to adjudicate claims for implied contract or unjust enrichment. Furthermore, while Alltel steadfastly maintains Kennebec Telephone Company, Inc.'s ("Kennebec"), claims lack merit; resolution contrary to Alltel's position would place the Commission in a position where it would be required to determine the appropriate rate for transiting services. However, the Commission lacks jurisdiction to determine transiting rates because Kennebec is exempt from Commission rate regulation pursuant to S.D.C.L. § 41-39-5.1. Therefore, Kennebec's Complaint is properly dismissed as this Commission lacks subject matter jurisdiction over the issues raised therein.

A Statement of Material Facts has been filed simultaneously and is incorporated herein through this reference. Citations to the same will appear as "SMF ¶ __."

BACKGROUND

Alltel and Kennebec entered into an Interconnection Agreement on January 1, 1999, which contained a transiting rate of \$.0005 per mile. See SMF ¶ 1. The 1999 Agreement was terminated upon the January 1, 2003, adoption of a new Interconnection Agreement between the parties. Id. at ¶ 2. The 2003 Agreement did not discuss transiting services nor did it provide a rate for transiting. Id. at ¶ 3.

The transiting rate contained in the 1999 Agreement reflected a standard rate that was negotiated for all ILECs by a representative of SDTA and other individuals. Id. at ¶ 4. This rate was not reached based upon an assessment of actual networks. Id. at ¶ 5. Rather, it was merely a standard rate for all carriers. Id. Consequently, Alltel and Kennebec entered into negotiations for a network appropriate transiting rate upon the termination of the 1999 Agreement. Id. at ¶ 6. These negotiations did not yield a rate for transiting or an agreement between the parties that addressed transiting.

Alltel began protesting Kennebec's continued assessment of the 1999 transiting rate in 2004. Id. at ¶ 7. Additionally, Alltel informed Kennebec it had reached an agreement to compensate Qwest Communications for transiting the subject calls and therefore any charges assessed by Kennebec should be collected from Qwest. Id. at ¶ 8. In 2007, Alltel ceased payment of the contested charges because the parties had not reached an agreement on the rate, the parties had not entered into an agreement regarding transiting, and the charges remained properly assessed against Qwest instead of Alltel. Id. at ¶ 9.

Kennebec subsequently filed a Complaint with the Commission on February 20, 2008, contending it was due payment for transiting telephone calls from Alltel. Id. at ¶ 10. In particular, Kennebec brought claims for Breach of Implied Contract and Unjust Enrichment. Id.

On May 12, 2009, Kennebec filed a Motion for Summary Judgment on its implied contract claim. Although the Commission denied Kennebec's Motion, it indicated in the related Order,

The Commission finds that it has jurisdiction over the matter pursuant to SDCL Chapters 1-26, 49-13, and 49-31.

Id. at ¶ 11. Alltel now files the pending Motion to Dismiss for Lack of Subject Matter Jurisdiction.

LEGAL ANALYSIS

A. Standard of Review

Summary judgment is appropriate if there are no disputes as to any material facts and the moving party is entitled to judgment as a matter of law. S.D.C.L. § 15-6-56. The burden of proof rests upon the moving party and the evidence must be viewed in a light most favorable to the non-moving party. Wulf v. Senst et al., 2003 SD 105, ¶ 17, 669 NW2d 135, 141 (*citing* Production Credit Ass'n. v. Wynne, 474 NW2d 735 (S.D.1991); Klatt v. Continental Ins. Co., 409 NW2d 366 (S.D.1987); Wilson v. Great Northern Railway Co., 157 N.W.2d 19 (S.D.1968)). Summary judgment is not a "disfavored procedural shortcut," but a legitimate method of resolving legal claims where no material factual disputes are present. Accounts Management, Inc. v. Litchfield, 1998 SD 24, ¶4, 576 NW2d 233, 234 (*quoting* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)).

"The moving party must demonstrate the absence of any genuine issue of material fact and show entitlement to judgment on the merits as a matter of law." Groseth Intern., Inc. v. Tenneco, Inc., 410 NW2d 159, 164 (SD 1987). "The nonmoving party must present specific facts showing that a genuine, material issue for trial exists." Ruane v. Murray, 380 NW2d 362, 364 (SD 1986). Although summary judgment is to be awarded only when reasonable doubts

regarding the existence of a genuine issue of material fact have been resolved against the movant, summary judgment is appropriate when there is no genuine issue of fact. Id.

B. Legal Argument.

“Subject matter jurisdiction is ‘[j]urisdiction over the nature of the case and the type of relief sought....’” Barnes v. Matzner, 2003 SD 42, ¶ 10, 661 N.W.2d 372, 375 (*quoting* Black’s Law Dictionary, 857, 7th ed. 1999). Subject matter jurisdiction is conferred either constitutionally or statutorily, and may not be acquired through the conduct of the parties. Id. (*citing* Freeman v. Sadlier, 1998 SD 114, ¶ 10, 586 N.W.2d 171, 173). Challenges to subject matter jurisdiction are not governed by time limitations, and consequently may be raised at any time. Id.

“The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute.” O’Toole v. Board of Trustees of the S.D. Retirement System, 2002 SD 77, ¶ 15, 648 N.W.2d 342, 346 (*citing* Johnson v. Kolman, 412 N.W.2d 109, 112 (S.D. 1987) (*citing* Springville Com. Sch. Dist. v. Iowa Dept. of Pub. Inst., 109 N.W.2d 213 (Iowa 1961); Montana Bd. Of Nat. Res. & Con. v. Montana Power Co., 536 P.2d 758 (Mont. 1975); 2 Am.Jur.2d *Administrative Law* § 328)). “Furthermore, ‘[an administrative agency] may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void.’” Id. (*quoting* Montana Bd. Of Nat. Res. & Con., 536 P.2d at 762 (*quoting* 73 CJS *Public Administrative Bodies and Procedures* § 116)). More specifically,

An agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction.

Id. (*citing* Lee v. Div. of Fla. Land Sales & Condominimums, 474 So.2d 282, 284 (Fla.App.5 Dist. 1985)).

Bearing these principles in mind, the South Dakota Supreme Court has held that the Commission lacks the authority to interpret or enforce a contract between a consumer and a rural electric cooperative. In re Northwestern Public Service Co., 1997 SD 35, ¶ 30, 560 N.W.2d 925, 930. In In re northwestern Public Service Co., Hub City sought permission to obtain electricity from Northern Electric Cooperative (hereinafter “NEC”) as a result of a more favorable rate offering than that from its existing supplier. Id. at ¶ 1. The Commission concluded that the switch was justified by “a significant change in circumstances....” Id. at ¶ 10. The Commission’s decision was reversed by the circuit court. Id. at ¶ 11. On appeal, the South Dakota Supreme Court was afforded the opportunity to consider whether the PUC had the authority to interpret and enforce the contract between Hub City and its existing electricity supplier. Id.

In analyzing this issue, the court noted that two types of electrical utilities were involved in the case. NEC was a rural electric cooperative, and the existing supplier was a public utility. Id. at ¶ 28. It indicated that under S.D.C.L. Chp. 49-34A, the Commission had different authority over each type of utility. Id. More specifically, the court found, “...while the PUC has authority over the NEC for determining whether its service is adequate or to make territorial assignments, it has no authority over NEC with regard to rates (SDCL 49-34A-6 to 49-34A-26 inclusive).” Id. at ¶ 28.

Additionally, the court considered the Commission’s general authority over electric utilities as set forth in S.D.C.L. § 49-34A-4. Id. at ¶ 29. It stated, “Even though this statute only applies to the PUC’s relationship with public utilities, not rural cooperatives, it does not include contract interpretation as an authority or power of the PUC.” Id. It then stated, “The PUC is not a court, and cannot exercise purely judicial functions.” Id. (citing Application of Dakota

Transportation, Inc., 291 N.W.589, 594 (S.D. 1940). In further support, it relied upon the following,

As a general rule, administrative agencies, boards, and commissions cannot consider, or adjudicate, contractual rights and obligations between parties. Hence they cannot pass on the validity of, or enforce, nor can administrative agencies, boards, or commissions change or annul contracts, except where they have been granted power by organic or valid statutory enactment to do so.

Id. (citing Williams Electric Coop. v. Montana-Dakota Util. Co., 79 N.W.2d 508, 517 (N.D. 1956)(*emphasis added*). The court as a consequence held that the Commission exceeded its statutory authority by interpreting and enforcing the subject contract. Id.; See Also In re Application of the City of White, 294 N.W.2d 433, 435 (S.D. 1980)(holding the Commission did not have jurisdiction to determine compensation due, if any, under service contracts); Williams Elec. Coop., Inc., 79 N.W.2d at 518 (upholding NDPUC determination that it did not have jurisdiction to consider the construction, interpretation, and enforcement of private contracts).

A similar analysis applies to the claims presently pending before the Commission. While S.D.C.L. § 49-31-4, provides the Commission the authority to determine and approve rates for telecommunications services, S.D.C.L. § 49-31-5.1 exempts certain entities from such regulation. It provides,

Telecommunications cooperatives organized pursuant to chapters 47-15 to 47-20, inclusive, municipal telephone systems operated pursuant to chapter 9-41, and independent telephone companies serving less than fifty thousand local exchange subscribers are not subject to chapter 49-11, §§ 49-31-1.1 to 49-31-1.4, inclusive, 49-31-3.1 to 49-31-4.1, inclusive, 49-31-4.3, 49-31-5, and 49-31-6, 49-31-12, to 49-31-12.5, inclusive, and 49-31-44 to 49-31-46, inclusive.

However, any cooperative, municipality, or independent telecommunications company may elect to have its rate regulated by the commission and be subject to commission regulation for its emerging and noncompetitive telecommunications services. The election to be regulated shall be made by filing with the commission a certified copy of the resolution of the board of directors or the municipal governing body. Commission regulation shall become effective thirty days after receipt of the resolution by the commission.

S.D.C.L. § 49-31-5.1 (*emphasis added*). Kennebec is an independent telephone company serving less than fifty thousand local exchange subscribers. SMF ¶ 12. Upon information and belief, Kennebec did not elect to voluntarily submit itself to Commission rate regulation. SMF ¶ 13. Therefore, Kennebec is exempt from Commission regulation over rates. S.D.C.L. § 49-31-5.1; In the Matter of the Public Utilities Commission Declaratory Ruling (F-3436), 364 N.W.2d 124, 128 (S.D. 1985)(finding that the legislature intended to exempt "...small independent telephone systems from rate regulation...").

Additionally, while Kennebec is also exempt from S.D.C.L. § 49-31-5, this statute outlines the general authority held by the Commission over telecommunications services. It states,

The commission may regulate the business of providing telecommunication service and may promulgate rules pursuant to chapter 1-26 concerning:

- (1) Requirements for telecommunications companies to maintain and make available to the public and the commission records and utility tariffs;
- (2) Requirements for telecommunications companies to provide information to customers regarding credit, deposits, services, refunds and billing rights;
- (3) Requirements that telecommunications companies must follow regarding procedures for billing customers;
- (4) Procedures and requirements for handling billing disputes, service interruptions, payment plans and refunds;
- (5) Standards and procedures for telecommunications companies to follow to ensure nondiscriminatory credit policies;
- (6) Procedures, requirements and record-keeping guidelines regarding deposit policies;
- (7) Procedures, requirements and record-keeping guidelines regarding customer refunds;
- (8) Policies for telecommunications companies to follow regarding refusal of telephone service to the public;
- (9) Policies for telecommunications companies to follow regarding disconnection of customer service;
- (10) Registration procedures, service requirements, billing practices and maximum service charges for alternative operator services in South Dakota;

- (11) Procedures and requirements for classification and reclassification proceedings;
- (12) Standards, procedures and requirements regarding the telecommunications utility investigation fund;
- (13) Application and notice procedures for the construction of telecommunications facilities; and
- (14) Requirements for filing and noticing tariff changes.

S.D.C.L. § 49-31-5. Similar to S.D.C.L. § 49-34A-4, S.D.C.L. § 49-31-5, likewise does not include contract interpretation or awarding equitable remedies as authorities or powers of the Commission. *Id.*; *See Also Qwest Corp. v. The Minnesota Public Utilities Commission*, 427 F.3d 1061, 1065-66 (8th Cir. 2005)(finding under Minnesota statutes that the MPUC lacked the authority to order remedial relief). Therefore, it is proper for the Commission to conclude that it is without authority to adjudicate the issues raised by Kennebec's Complaint.

Finally, the statutory language upon which the Commission relied when it denoted that it had jurisdiction over this matter is not sufficient to overcome the above analysis. To illustrate, Chapter 1-26, also known as the South Dakota Administrative Procedures Act, addresses the promulgation of administrative rules and the appeals process of an administrative decision. *Argus Leader v. Hagen*, 2007 SD 96, ¶19, 739 N.W.2d 475, 481. Chapter 49-13 enables the Commission to investigate complaints against common carriers. *State ex rel. Johnson v. Public Utilities*, 381 N.W.2d 226, 232 (S.D. 1986). However, neither Chapter provides the Commission authority to interpret the purported implied contract or to award equitable remedies. As delineated above, Chapter 49-31, likewise does not provide the Commission jurisdiction over the existing transiting charge dispute. Consequently, summary disposition of the pending matter is appropriate as the Commission lacks subject matter jurisdiction.

CONCLUSION

Based upon the aforementioned arguments and authorities, Alltel respectfully requests that this Commission summarily dismiss Kennebec's Complaint as the Commission lacks subject matter jurisdiction over the issues raised therein.

Dated this 15 day of January, 2010.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP



Talbot J. Wiczorek
Attorneys for Alltel Communications, LLC
440 Mt. Rushmore Road
P.O. Box 8045
Rapid City, SD 57709
606-342-1078
Fax: 605-342-0480

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15 day of January, 2010, I served a true and correct copy of Alltel's Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction electronically to:

MS KARA SEMMLER
STAFF ATTORNEY
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION
500 EAST CAPITOL
PIERRE SD 57501
kara.semmler@state.sd.us

MR DAVID JACOBSON
STAFF ANALYST
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION
500 EAST CAPITOL
PIERRE SD 57501
david.jacobson@state.sd.us

MS MEREDITH A MOORE
RYAN TAYLOR
ATTORNEY AT LAW
CUTLER & DONAHOE LLP
100 NORTH PHILLIPS AVENUE 9TH FLOOR
SIOUX FALLS SD 57104-6725
meredithm@cutlerlawfirm.com
ryant@cutlerlawfirm.com



Falbot J. Wiczorek