

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT  
OF KENNEBEC TELEPHONE  
COMPANY, INC. AGAINST ALLTEL  
COMMUNICATIONS, INC. FOR  
NONPAYMENT OF TRANSITING  
CHARGES

**TCO8-031**

ALLTEL'S BRIEF IN OPPOSITION  
TO KENNEBEC'S MOTION FOR  
SUMMARY JUDGMENT

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COMES NOW Alltel Communications, LLC ("Alltel") by and through its counsel of record, Talbot J. Wiczorek of Gunderson, Palmer, Nelson & Ashmore, LLP, and hereby submits this Brief in Opposition to Kennebec Telephone Company, Inc's ("Kennebec") Motion for Summary Judgment. This brief is supported by the Affidavit of Ron Williams and Alltel's Objections to Statement of Materials Facts submitted contemporaneously with this Brief.

**PROCEDURAL BACKGROUND**

This matter was initiated through a complaint filed by Kennebec on February 20, 2008. Kennebec's complaint asserted it was due payment for the transiting of telephone calls that originate from Alltel based on two legal theories, implied contract and unjust enrichment.<sup>1</sup>

Alltel responded to the complaint disputing certain facts alleged by Kennebec, raising various defenses and issues as to the legitimacy of the claims. Alltel raised the fact that it is not transiting traffic over the Kennebec network. Rather, Alltel obtains and compensates Qwest for transiting service to deliver calls to the Vivian Telephone Company ("Vivian"). Apparently Qwest delivers that traffic to Kennebec for ultimate delivery to Vivian under an arrangement between Kennebec and Qwest. Thus, any issues with respect to compensation for transiting

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<sup>1</sup> Unjust enrichment is essentially a type of implied contract as opposed to it separate with theory. *See generally First National Bank of Aberdeen v. Jacobs*, 273 N.W.2d 743 (SD 1978).

service that Kennebec may be providing exists between Qwest and Kennebec and not Kennebec and Alltel. *See* Alltel's Response to Complaint, ¶ 7.

Alltel also asserted an affirmative defense that there was no formation of an implied contract as there was no consent or agreement reached between Kennebec and Alltel as to the transiting. *See* Alltel's Response to Complaint, ¶13. As a third defense, Alltel raised the fact that Kennebec as a regulated public utility, can make no lawful claim against Alltel for compensation under a breach of implied contract or unjust enrichment when Kennebec has failed to file a tariff or rate for its services. *See* Alltel's Response to Complaint, ¶ 12.

After the filing of Alltel's Response, Alltel requested that Kennebec specify whether Kennebec is being compensated by Qwest with respect to the traffic. While Kennebec indicated it would respond to Alltel's request, it has not done so and the parties have not completed any discovery in this matter. Kennebec filed a Motion for Summary Judgment on May 12, 2009.

### **FACTUAL BACKGROUND**

The original interconnection agreement between the parties became effective on January 1, 1999. That agreement resulted from a joint negotiation on behalf of numerous RLECs with Western Wireless and culminated in a standard interconnection agreement to be used between Western Wireless and most RLEC carriers. *See* Williams' Aff. ¶ 3. The agreement contained a transiting rate. *Id.* This agreement terminated on January 1, 2003, when a new interconnection agreement between the parties became effective<sup>2</sup>. This subsequent interconnection agreement does not have a transiting rate or transiting terms and conditions. Regardless, however, Kennebec continued to bill Alltel for transiting service and utilize the rate from the terminated

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<sup>2</sup> The subsequent agreement has also expired and the parties are currently in an arbitration on a new agreement. See TC07-114

interconnection agreement. Alltel paid invoices under protest and notified Kennebec of its dispute. *See Williams' Aff.* ¶ 4.

As clearly conveyed in the Response to the Complaint in this matter and has been clearly conveyed to Kennebec over the course of several years, Western Wireless contracted with and compensated Qwest Communications to transit calls to the Vivian exchanges. As it was Qwest that was delivering these calls over the Kennebec network, Western Wireless informed Kennebec they needed to collect the transiting cost from Qwest. *See Williams' Aff.* ¶ 6.

Western Wireless eventually, after being unable to resolve the dispute with Kennebec ceased payments to Kennebec as Western Wireless believed then, as Alltel does now, that transiting charges were not owed by Western Wireless or now, Alltel, to Kennebec. *See Williams' Aff.* ¶¶ 5 and 6.

Western Wireless' and Alltel consistently for several years notified Kennebec that if any party is responsible for any Kennebec transit charges, the party would be Qwest, not Alltel or Western. *See Williams' Aff.* ¶ 7. However, Kennebec refused to respond to the explanation or explain the transiting relationship it has with Qwest. *Id.* After this action was initiated, Alltel asked Kennebec for explanation of its arrangement with Qwest, including whether Qwest is compensating Kennebec with respect to the Alltel originated traffic. Alltel was informed in an e-mail from Kennebec's counsel dated March 10, 2008, that the information would be provided. Kennebec has failed to provide the information and has not denied that it is being compensated by Qwest for the transit service. *See Williams' Aff.* ¶ 9.

## LEGAL ANALYSIS

### A. Legal Standard For Summary Judgment

The basic statutory requirement for summary judgment is the mandate that “the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law”, and this must be shown before summary judgment may be granted. SDCL § 15-6-56(c). The pleadings show that there are several material factual disputes and therefore summary judgment is not appropriate or available.

In cases where one party asserts that an implied contract exists, the question as to whether there is even a contract constitutes a material fact. Whether an implied contract even exists between parties creates a genuine issue of material fact to be determined by a trier of fact based upon evidence and witnesses unless “reasonable minds could not differ.” Balster v. Wipf, 2003 SD 135, ¶ 9, 672 N.W.2d 475, 478. In determining whether reasonable minds could differ, the trier of fact must examine each element necessary to support an implied contract and any questions of fact must be resolved in favor of the non-moving party. Laber v. Kock, 383 N.W.2d 490, 491 (SD 1986)

### B. Kennebec Telephone Has Not Established the Existence Of An Implied Contract And The Motion Should Be Denied.

As recognized in Kennebec’s brief, “[a]n implied contract is one, the existence and terms of which are manifested by conduct.” SDCL § 53-1-3. The elements necessary for a contract are the same for an expressed or implied contract. Those elements are found under SDCL § 53-1-2, which provides as follows:

Elements essential to existence of a contract are:

- (1) Parties capable of contracting;
- (2) Their consent;
- (3) A lawful object; and
- (4) Sufficient cause or consideration.

Whether a contract is expressed or implied, all four elements must be satisfied. Setliff v. Akins, 2000 SD 124, ¶ 24, 616 N.W.2d 878, 880. When reviewing the facts, the facts must be viewed objectively and the totality of the parties' conduct must be evaluated. In re Regennitter, 1999 SD 26, ¶ 12, 589 N.W.2d 920.

The pleadings and even the Kennebec motion provide no basis to reach a conclusion one way or the other regarding the first element. Thus far, there is no basis to reach a conclusion that the first element is satisfied.

Element two is whether there was consent to the agreement. South Dakota law defines "consent" under SDCL § 53-3-1. The pleadings demonstrate that no consent was present. That statute provides as follows:

Consent of the parties to a contract must be:

- (1) Free;
- (2) Mutual; and
- (3) Communicated by each to the other.

Clearly, there has been no free, mutual consent that has been communicated by each to the other. Western Wireless protest Kennebec's billing of transit from 2004 to 2007. *See Williams' Aff.* ¶ 4. Western Wireless also informed Kennebec of the various reasons for its dispute including the lack of agreement between Alltel and Kennebec. *See Williams' Aff.* ¶ 7. Thus, no free or mutual consent was obtained.

Moreover, it is not even Alltel or its predecessor, Western Wireless, that might have requested Kennebec to transit these calls to Vivian. Rather, the facts show Qwest Communications delivered these calls to Kennebec and apparently arranged the calls transit

services to Vivian exchanges. *See Williams' Aff.* ¶ 6. Perhaps Kennebec and Qwest Communications have an agreement; however Alltel is not a party to any such agreement.

The fact that Qwest might be transiting Alltel calls pursuant to an agreement between Qwest and Alltel and that Qwest may be using part of Kennebec's network to do it does not establish consent by Alltel to form a contract between Alltel and Kennebec. Kennebec should have asserted this claim against the party with which it may have an agreement, Qwest. Additionally, if Kennebec is being paid by Qwest, then it is legally improper for Kennebec to be seeking to be compensated twice for the same traffic. It clearly should not be suing or asserting the claim against Alltel.

Additionally, even if Alltel was obligated to compensate Kennebec, which it is not, there has clearly been no agreement, implied or express upon price to be paid. Kennebec has clearly known for years that Western Wireless and Alltel have not agreed to pay for transiting at the rate Kennebec is asserting. The fact that Kennebec transited traffic while the parties attempted to resolve the pending issues does not entitle Kennebec to simply get paid whatever rate it wants. As discussed above, Kennebec has not denied or explained whether Qwest is already compensating it for the traffic or even explain its relationship with Qwest Communications in this regard. *See Williams' Aff.* ¶ 9. Because of these facts, there is no consent and, at the minimum, there are questions of material fact as to whether consent was ever obtained.

Element three, like element one is simply not addressed and there is no basis to conclude that the purpose of contracting is lawful. Clearly, if Qwest is already being compensated by Qwest the purpose is unlawful.

The necessary fourth element to an implied contract is the existence of “sufficient cause or consideration.” SDCL § 53-1-2(4). It is undisputed that Qwest is being paid to deliver this traffic to Vivian. Alltel has already provided consideration for the service it is obtaining. There is therefore no additional consideration for which Alltel is required to pay Kennebec when it is already paying Qwest to deliver this traffic. *See Williams’ Aff.* ¶¶ 6-9. Kennebec, in its brief, does not directly examine the facts as they relate to each required element. Still, it would appear Kennebec’s argument in this case is the calls are being transited so Alltel owes the money. Under the facts thus far presented, there is no showing of consideration received by Alltel.

As noted above, the Supreme Court has stated in situations where one asserts an implied contract that the mere “existence of an implied contract between parties creates a genuine issue of material fact to be decided by the jury.” Van De Walle & Assoc., LLC v. Buseman, 2003 SD 70, ¶10, 665 N.W.2d 87. The only way to overcome the conclusion that an implied contract in and of itself creates a genuine issue of material fact making summary judgment inappropriate is to show that reasonable minds cannot differ based on the undisputed material facts. *Id.* In concluding that summary judgment was appropriate in the Van De Walle case, the Supreme Court specifically found that the person who received architectural services had failed to “1) contest the bills; 2) instruct Van De Walle to cease performance; or 3) inform Van De Walle that someone else was responsible for the bills and have him forward them elsewhere.” *Id.*, at 2003 SD 70, ¶12, 665 N.W.2d 88. If the defendant in Van De Walle had done any of these things, the Supreme Court would have overruled the finding of an implied contract through a summary judgment motion any of these actions would have shown that the defendant did not acquiesce to the services being provided with an expectation of payment from the defendant. *Id.*

In this case, it is undisputed that Alltel objected to the billings both as to whether Alltel owes anything and as to willingness to even pay the rate as proposed by Kennebec. Furthermore, Alltel informed Kennebec that Alltel believes someone else would be responsible for the bills. Western Wireless and then Alltel identified that party as Qwest Communications. Either of these occurrences alone disputes the finding of an implied contract. Taken together, the motion for summary judgment must be rejected as there exists genuine issues of material fact.

**C. Kennebec's Reliance On The Commission's Decision Arising Out Of In The Matter Of The Complaint By WWC License, LLC Against Golden West Telecommunications Cooperative, Inc. et al, CT05-001, Is Misplaced As The Factual Circumstances Of That Case Are Significantly Different Than The Facts As Alleged And Existing In This Matter**

Kennebec cites to a previous decision of this Commission that resulted in Docket No. CT05-001, In The Matter Of The Complaint By WWC License, LLC Against Golden West Telecommunications Cooperative, Inc. et al, (hereinafter referred to as "WWC Complaint against GW").<sup>3</sup> The facts of that case and decision are significantly different than those that exist here. The transiting issue in that case concerned transiting by Golden West to a Vivian exchange. One of the arguments asserted by WWC in that case dealt with whether the reciprocal compensation agreement between Golden West companies and WWC would include transiting within the Golden West network and whether that network included a wholly owned subsidiary such as Vivian. *See Williams' Aff.* ¶ 14. That question does not exist here.

Furthermore, it appears in that case, the Commission relied on the fact that WWC did not pay the bills under protest and then sought a refund. In this case, Western Wireless began

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<sup>3</sup> The Commission did not issue a written decision on the transiting issue. Rather, the motion made by the Commission can be found in the Minutes for the November 28, 2006 meeting. The Commission's motion does not specifically give the legal reason for the Commission's conclusion, though an argument made by the Golden West companies in that case was an implied contract argument.



disputing the bills in 2004 and having received no resolution to the issues, in 2007 it stopped paying the bills it does not owe. *See Williams' Aff.* ¶¶ 4-7.

Also, in the previous case, there was not a question of a third-party transiting provider being involved. In the WWC complaint against Golden West, Alltel was delivering calls to the Golden West network. The question was whether Golden West constituted a transiting carrier for purposes of delivering the final calls to Vivian. *See Williams' Aff.* ¶ 14. Conversely, in this situation, Qwest is the transiting carrier that is being paid by Alltel to deliver calls to the Vivian exchange. Kennebec is essentially asserting it has the right to bill Alltel for transiting, even though Alltel has already paid Qwest. The WWC complaint against Golden West is factually distinguishable on numerous counts. Reliance on that case is inappropriate for this circumstance.

Finally, the Commission did not decide the transiting issue in the WWC complaint against Golden West through a motion for summary judgment. Rather, the issue was determined based on an extensive hearing record and post hearing briefs. *See WWC's Reply Brief* regarding transiting issue, dated October 26, 2006 and *Staff's Brief* regarding transiting issue, dated October 23, 2006 in Docket CT 05-001.

## CONCLUSION

Questions of material fact exist that need to be resolved before considering a finding of an implied contract. Furthermore, the parties should be allowed discovery to flesh out the issues before a motion for summary judgment should be considered.

Therefore, Alltel respectfully requests that this Commission deny the motion for summary judgment and reserve ruling on any question regarding the existence of an implied contract until completion of discovery and submission of evidence at a hearing.

Dated this  7  day of June, 2009.

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   1   day of June, 2009, I served a true and correct copy of Alltel's Brief in Opposition to Kennebec's Motion for Summary Judgment and the Affidavit of Ron Williams electronically to:

MS KARA SEMMLER  
STAFF ATTORNEY  
SOUTH DAKOTA PUBLIC UTILITIES  
COMMISSION  
500 EAST CAPITOL  
PIERRE SD 57501  
[kara.semmler@state.sd.us](mailto: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](mailto: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](mailto:meredithm@cutlerlawfirm.com)  
[ryant@cutlerlawfirm.com](mailto:ryant@cutlerlawfirm.com)

  
Talbot J. Wiczorek