
NO. A05-1497

State of Minnesota
In Supreme Court

Onvoy, Inc.,

Respondent,

v.

ALLETE, Inc., f/k/a Minnesota Power, Inc.,
f/k/a Minnesota Power & Light Company,

Appellant.

APPELLANT'S BRIEF AND APPENDIX, VOLUME I

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LEGAL ISSUE

I. May a declaratory judgment construe a contract in a manner contradictory to the jury-verdict construction of the same contract?

The Trial Court held: Did not expressly address the issue.

The Court of Appeals held: Did not expressly address the issue.

Most apposite cases:

Butler v. Dowd, 979 F.2d 661, 673 (8th Cir. 1992).

International Wood Processors v. Power Dry, Inc., 593 F. Supp. 710, 736 n. 15 (D.S.C. 1984), *aff'd*, 792 F.2d 416 (4th Cir. 1986).

Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Ass'n, 371 F.2d 263, 271 (7th Cir. 1967).

STATEMENT OF THE CASE

This case arises out of a business transaction between Onvoy, Inc., f/k/a MEAFCO, a Minneapolis-based telecommunications company ("Onvoy") and ALLETE, Inc., f/k/a Minnesota Power, Inc. and f/k/a Minnesota Power & Light Company, an electric utility serving northeast Minnesota. Onvoy leased 430 square feet of building space from Minnesota Power and asserts that by virtue of the lease it is entitled to run conduit and/or fiber optic cables through unleased portions of Minnesota Power's building. The cables are not needed to provide basic electricity or utilities to the leased premises. Rather, Onvoy wants them as part of its commercial enterprise -- to expand its business operations. Minnesota Power maintains that if Onvoy wishes to use additional space belonging to Minnesota Power it must negotiate the terms of such use pursuant to an express contractual agreement addressing the issue.

There are three related agreements between the parties, all of which were professionally drafted by the parties' respective attorneys. In February 1996, Onvoy and Minnesota Power entered into a Fiber License Agreement under which Minnesota Power built a fiber optic "Backbone" line from Hinckley to Duluth and leased 12 dark (unlit) fibers to Onvoy ("Fiber License"). Under the Fiber License, Onvoy paid 50% of the cost of construction of the line, plus pays a monthly rent during the term of the license.

This Fiber License provides expressly that Onvoy may not use Minnesota Power's office space without Minnesota Power's approval:

With MP's prior written consent and in MP's sole discretion, [Onvoy] may utilize specified MP substation and office sites...subject to [Onvoy's] payment of a fee for such use. Such fee and the terms and conditions applicable to [Onvoy's] utilization of any such sites will be set out in a separate agreement between the Parties, including provision for electric service, environmental control, and other amenities, if applicable.

MP Facilities are defined in the agreement as "facilities and property owned or controlled by MP."

The second and third agreements are leases which allow for the use of additional space as contemplated by the Fiber License. Both leases were signed on the same day in April 1996, after the Fiber License Agreement was executed. The lease pertinent to this dispute, the "GOB Lease," grants Onvoy the use of a designated 430 square feet inside the Minnesota Power corporate headquarters, known as the General Office Building at 30 West Superior Street, Duluth (GOB). The text of the GOB Lease specifically states that Onvoy's leased premises total 430 square feet; a diagram attached to the GOB Lease further shows the location and extent of Onvoy's 430 square foot leased premises. The

current dispute is whether the GOB Lease allows Onvoy to use building space outside the designated 430 square feet. In the period leading up to this conflict, Onvoy asserted that it had such rights and attempted to assert them; ALLETE refused to allow the use of additional space absent additional agreement(s).¹

Refusing to negotiate for access rights to the GOB at a market rate, Onvoy commenced the present action against ALLETE alleging ALLETE breached the GOB Lease by refusing requests from Onvoy to run commercial fiber optic cables through the unleased space at ALLETE's GOB.

Onvoy brought four causes of action against ALLETE included (1) breach of the GOB Lease contract, (2) a declaratory judgment interpreting the GOB Lease to allow Onvoy to connect and use unleased GOB space belonging to ALLETE, (3) reformation of the GOB Lease based on an alleged mutual mistake of fact or unilateral mistake of fact coupled with inequitable conduct and (4) unjust enrichment based on the Fiber License Agreement.

ALLETE moved for summary judgment on all claims on the basis that the controlling, plain language of the GOB Lease prohibits Onvoy from using facilities and

¹ The other lease made pursuant to the Fiber License, the "Arrowhead Lease," allowed Onvoy a leasehold interest to the ALLETE's Arrowhead substation location, and granted Onvoy leased premises (land) for it to construct a building. The building in the Arrowhead Lease is owned by Onvoy and the lease expressly provides Onvoy and Onvoy's designees with access to its building. The Arrowhead Lease is not directly involved in the present controversy; however, the Arrowhead Lease and the GOB lease, which both lease space to Onvoy and which were negotiated at the same time, differ in one material way: the Arrowhead Lease expressly allows Onvoy the right to have unrestricted access to its leasehold area, the GOB lease does not. A.62 (§ 12); A.73 (§ 13).

conduit space within the GOB other than the 430 square feet demised to Onvoy under the GOB Lease. The trial court, Judicial Officer Gerald E. Maher, denied ALLETE's Summary Judgment Motion by an Order dated March 16, 2005.

This matter proceeded to a jury trial on April 19, 20, 21, 22, 25 and 26, 2005, at the St. Louis County Courthouse, City of Duluth, County of St. Louis, State of Minnesota. The trial jury answered questions as to the legal breach of contract claim, finding: (1) ALLETE did not breach the GOB Lease by refusing Onvoy use of the unleased portion of ALLETE's GOB, and (2) Onvoy sustained no damages. The trial jury also gave advisory answers as to the equitable reformation claim, which answers provided no basis to grant Onvoy relief on its reformation claim.

By an Order dated May 19, 2005, the Trial Court entered judgment in favor of ALLETE on the breach of contract claim in accordance with the jury's verdict, dismissed the unjust enrichment claim, declined to address the reformation claim, and then granted Onvoy judgment on the declaratory judgment claim by adopting Onvoy's requested findings verbatim.

ALLETE moved the Trial Court for amended Findings of Fact and Conclusions of Law and Judgment pursuant to Minnesota Rule of Civil Procedure 52.02, while Onvoy moved the court for a JNOV. By Order dated July 18, 2005, the Trial Court denied both parties' motions. By a Notice of Appeal and Statement of the Case dated July 26, 2005, ALLETE appealed from the Trial Court's grant of declaratory judgment to Onvoy. Onvoy subsequently filed a notice of review for this matter.

By a decision dated August 8, 2006, the Court of Appeals denied both ALLETE's and Onvoy's appeals. ALLETE's appeal to this Court followed. Onvoy did not appeal the Court of Appeals decision.

STATEMENT OF THE FACTS

I. Introduction and Party Identification

Appellant ALLETE is a Minnesota corporation headquartered in Duluth, Minnesota. ALLETE is a diversified company whose principal business line is an electric utility. ALLETE was formerly known as Minnesota Power, Inc., and before that as Minnesota Power & Light Company.²

Respondent Onvoy is a Minnesota corporation headquartered in Minneapolis, Minnesota in the business of telecommunications. Onvoy was formerly known as Minnesota Equal Access Network Services (MEANS). Onvoy, while it was known as MEANS, owned a subsidiary known as Minnesota Equal Access Facilities Corporation (MEAFCO). MEAFCO licensed the use of certain fiber optic cables that terminate at the GOB. By a separate agreement, MEAFCO leased spaced in the GOB from ALLETE for use as a telecommunications room.³

² ALLETE is now the party in interest to contracts entered into by Minnesota Power that are involved in this case.

³ MEAFCO and Onvoy merged in July, 2000 with Onvoy as the surviving corporation. Accordingly, references to the name Onvoy are used in this brief to also indicate MEAFCO in documents executed, and events occurring, before July, 2000.

II. ALLETE's Utility Backbone Network

In late 1995 and early 1996, ALLETE constructed a fiber optic network ("Utility Backbone Network") between Hinckley and Duluth, Minnesota. Because ALLETE did not immediately require the full capacity of the Utility Backbone Network, ALLETE offered to license excess capacity on the system to third parties.

ALLETE and Onvoy entered into an Agreement for the License of Fiber Optic Facilities and Services dated February 21, 1996 ("Fiber License") A.1-53. Under the Fiber License, ALLETE granted Onvoy the right to use certain excess capacity of ALLETE's on the Utility Backbone Network to provide telecommunications services. A.6 (§ 2).

The express language of the Fiber License Agreement denies Onvoy the right to locate its equipment or facilities on ALLETE property absent further agreement between the parties and appropriate compensation to ALLETE, as Lessor. "Onvoy extensions may not be constructed on or in MP Facilities..." A.14 (§ 2.4). The Fiber License Agreement explicitly reserves to ALLETE all ownership rights to ALLETE property, including the right to exclude Onvoy from ALLETE property, and states that the "terms and conditions applicable to [Onvoy's] utilization of any such sites will be set out in a separate agreement between the parties...". A.22 (§ 9.2).

The Fiber License Agreement also provides that ALLETE and Onvoy are independent contractors with respect to all matters pertaining to the Fiber License Agreement, and that no agency or joint venture relationship was created between the parties by the Fiber License Agreement. A.38-39 (§ 28.1). Moreover, the Fiber License

Agreement contains a standard integration clause that provides that the "Lease contains the entire agreement between the parties hereto with respect to the subject matter of this Lease. Both ALLETE (as "Lessor") and Onvoy (as "Tenant") acknowledge and agree that they have not relied on any statement, representation, agreement or warranty except as such are set out in this Lease."

III. ALLETE and Onvoy Enter Into a Lease Giving Onvoy Rights to Use 430 Square Feet in ALLETE's General Office Building

By a separate Lease Agreement dated April 10, 1996, ("GOB Lease") ALLETE leased to Onvoy 430 square feet of space in ALLETE's GOB. A.54-70; A.54 (§ 1). The GOB Lease defines the parties' rights and obligations for Onvoy's use of space in the GOB. The GOB Lease defines Onvoy's leased "Premises", and diagrams the exact location of the leased space. There is no provision for Onvoy's use of any conduit, space or facilities in the GOB outside of the Onvoy Leased Premises. Onvoy's leased premises consist of a separate, discrete room with walls, ceiling and a lockable door. A.54(§1["... telecommunications equipment room"]); A.66-68.

The GOB Lease expressly provides that Onvoy may not sublet or assign any portion of the leased space without the prior written consent of ALLETE as Lessor "upon such terms and conditions as Lessor may require." A.62 (§ 12). The GOB Lease provides a narrow exception to the general rule that Onvoy cannot sublet its leased space except at the discretion of ALLETE. That exception is limited to certain subletting of space within Onvoy's Leased Premises:

12. SUBLETTING OR ASSIGNMENT

...

Tenant shall have the right, upon written notice to and consent of Lessor, which consent will not be unreasonably withheld, to allow collocation of [other telecommunications carriers] in Tenant's leased space provided such collocation of telecommunications equipment is for the purpose of interconnecting Tenant's network with the network(s) of the collocated party(ies).

A.62 (§ 12). (emphasis added).

In contrast to the GOB Lease on this point is the separate Lease Agreement between ALLETE and Onvoy, also dated April 10, 1996, wherein ALLETE leased to Onvoy a parcel of land for the construction by Onvoy of a telecommunications building at ALLETE's Arrowhead substation property in southwestern St. Louis County ("Arrowhead Lease"). A.71-77. The Arrowhead Lease does not limit Onvoy to a certain discrete space for collocation with other telecommunications carriers, as is the case in the GOB Lease. Instead, the Arrowhead Lease provides for the collocation of other carrier's equipment anywhere in Onvoy's building that would be built on the Arrowhead leased premises:

Lessee has the right, upon written notice to and consent to Lessor, which consent will not be unreasonably withheld, to allow collocation of telecommunications equipment of [other telecommunications carriers] in Lessee's building located on the Leasehold Premises.

A.73 (§ 13). (emphasis added).

The next sentence of the Arrowhead lease allows Onvoy the right to allow collocating third parties access and egress to the Arrowhead leased premises. This provision included in the Arrowhead Lease and excluded from the GOB Lease, reads:

Subject to the limitation above, Lessee has the right to allow collocated parties to have access to the Leasehold Premises for the purposes described and set for the in Paragraph 12.

A.73 (§ 13). (emphasis added). The Arrowhead Lease deals with a building constructed, owned and used solely by Onvoy. ALLETE has no ownership interest in the building, no equipment or people in the building, and thus grants to Onvoy the right "to allow collocated parties to have access to the Leasehold Premises...".

In contrast, the GOB is ALLETE's corporate and utility headquarters. ALLETE's own highly-sensitive communications equipment is housed in a room immediately adjacent to Onvoy's leased premises. ALLETE has an interest in maintaining the unleased portion of its corporate headquarters as exclusively ALLETE's, with the attendant rights and exclusive use and access. By leasing Onvoy 430 square feet in GOB, ALLETE did not surrender to Onvoy the use and control of any portion of the unleased portion of the building.

Consistent with that interest, the GOB Lease contains an integration clause that provides that the entire agreement between ALLETE and Onvoy regarding Onvoy's tenancy in ALLETE's GOB is set forth in the GOB Lease, and only as set forth in the GOB Lease. A.64-65 (§ 20).

Pursuant to the "Subletting or Assignment" provision of the GOB Lease, Onvoy requested ALLETE's consent to sublet a portion of Onvoy's leased space to Wisconsin Independent Network ("WIN"). ALLETE and WIN subsequently negotiated an acceptable entrance agreement whereby Onvoy was allowed to interconnect with WIN by running cable through an unleased portion of the GOB. Consistent with the "Subletting

or Assignment” provision of the GOB Lease, the agreement provided for separate compensation to be paid ALLETE for the Onvoy\WIN interconnection. A.280-285. Demands by Onvoy to freely interconnect with third parties through unleased space in the GOB, without compensation to be paid to ALLETE, were denied by ALLETE. A.157-240.

IV. Onvoy Sues ALLETE For Denying It Access to Additional Building Space Outside of the Lease Premises

Refusing to negotiate for commercial access rights to the GOB through unleased area of the building, Onvoy commenced the present action against ALLETE. Onvoy claimed damages of \$11.7 million.

Onvoy's brought four specific causes of action against ALLETE: (1) breach of the GOB Lease contract due to ALLETE denying Onvoy's requests for interconnections (Count I--a legal claim), (2) a declaratory judgment interpreting the GOB Lease to allow the interconnections sought by Onvoy and declaring that ALLETE had breached the GOB Lease by denying Onvoy's requested interconnections (Count II--an equitable claim), (3) reformation of the GOB Lease based on an alleged mutual mistake (Count III--an equitable claim) and (4) unjust enrichment based on the Fiber License Agreement (Count IV--an equitable claim). A.78-129.

Each of Onvoy's claims was based on the theory that ALLETE has improperly denied Onvoy access to, and use of, ALLETE's GOB property outside of Onvoy's leased space. Specifically, Onvoy claimed it should be allowed to establish fiber connections outside of its leased space by going onto and through ALLETE's private property.

Onvoy, in its Amended Complaint, alleged the following predicate facts that formed the basis for each of its claims:

22. For the past several years, Minnesota Power and Enventis have . . . interfered with Onvoy's reasonable attempts to interconnect its telecommunications network with the networks of other telecommunications service providers . . . outside the premises.

24. Minnesota Power and MP Telecom, . . . demanded as a condition of interconnection, that Onvoy pay an . . . monthly recurring charge . . . to run fiber optic communication cable(s) from Onvoy's Premises to a demarcation point located on an exterior wall of the GOB for purposes of interconnecting with other providers' networks.

25. The connecting cable(s) Onvoy desires to install in the common areas in the basement of the GOB, for the purpose of interconnection with other providers outside the GOB, . . .

A.84. (emphasis added).

In its amended Complaint, Onvoy specifically stated its breach of contract (Count I) and its declaratory judgment (Count II) claims, claims that were utterly identical in their factual basis, theory of law, and relief requested. The breach of contract and declaratory judgment claims would decide the same issues. A review of the respective claims shows the mirror-image commonality:

COUNT I - BREACH OF CONTRACT

27. Onvoy realleges paragraphs 1-26.

28. The terms of the Lease unequivocally reference the parties' agreement and understanding that Onvoy would have the unfettered right of access to the premises for the purpose of connecting its telecommunications equipment to the equipment and facilities of other telecommunications service providers.

29. Allowing Onvoy reasonable access to interconnect its telecommunications equipment located within the Premises with the telecommunications equipment of other service providers is an implicit right that runs with Onvoy's interest in the Premises.
30. Minnesota Power and Enventis have wrongfully denied Onvoy access to and use of Onvoy's equipment and facilities in the Premises...
31. Minnesota Power's and Enventis' actions are a breach of the Lease.
32. As a result of Minnesota Power's and Enventis' breach of the Lease, Onvoy has been damaged in an amount in excess of \$50,000.

COUNT II - DECLARATORY JUDGMENT

33. Onvoy realleges paragraphs 1-32.
34. Pursuant to Minn. Stat. Sec. 555.03, "[a] contract may be construed either before or after there has been a breach thereof."
35. Onvoy is entitled to a declaratory judgment pursuant to Minnesota Statutes Chapter 555 declaring the Lease contains an implied covenant granting to Onvoy a right of access to facilities or conduit space sufficient to allow Onvoy to interconnect its telecommunications equipment located in the Premises with the telecommunications equipment of telecommunications service providers located outside the GOB.
36. Onvoy is further entitled to a declaration that Minnesota Power and Enventis have breached the Lease.

A.85-86 (emphasis added). The only material difference between the claims was that the legal claim of breach of contract would be decided by a jury, and the equitable declaratory judgment claim would be submitted to the trial court.

ALLETE moved for summary judgment on all of Onvoy's claims on the basis that the controlling, plain language of the Fiber License and the GOB Lease prohibit Onvoy from using facilities and conduit space within ALLETE's GOB other than the 430 square feet allotted Onvoy under the GOB Lease. The Trial Court denied ALLETE's Summary

Judgment Motion by an Order dated March 16, 2005. A.130-132. The Court denied summary judgment as to Onvoy's breach of contract and declaratory judgment stating that the jury would need to determine the meaning of the GOB Lease subletting provision both as to the breach of contract claim and as a predicate to the Court's determination of the equitable claims:

This Court has looked at the document. As a person of ordinary intelligence, I do not know what it means or what its purpose is. All parties are in the business of technology. The lease involves technology. In such a case there are by necessity 'genuine issues of material fact'..." and legitimate factual disputes over intent and meaning. That has to be determined before alternative claims, merit of equitable claims, or privity issues as to another Defendant can be determined. Plaintiff is going to be allowed to present this case to a jury for its determination.

A.131. (emphasis added). Thus, the Trial Court assigned to the Jury the determination of the parties' rights and obligations under the GOB Lease, and this matter proceeded to a jury trial on April 19, 20, 21, 22, 25 and 26, 2005, at the St. Louis County Courthouse, City of Duluth, County of St. Louis, State of Minnesota.

The trial record unquestionably established that ALLETE denied Onvoy its requested access to unleased space in the GOB. At trial, ALLETE called among its witnesses Ms. Priscilla McNulty, an attorney who represented ALLETE in the drafting of the GOB Lease, and Onvoy called Ms. Ingrid Johnson, an ALLETE attorney responsible for the ongoing administration of the GOB Lease for cross-examination.

Ms. Johnson testified that ALLETE repeatedly denied Onvoy's repeated demands to freely use space in ALLETE's GOB outside of Onvoy's leased space. A.216-240. Both Ms. McNulty and Ms. Johnson testified that Onvoy did not have a right to use space

in ALLETE's GOB outside of Onvoy's specified leased premises --Onvoy's 430 square feet of leased space. A.216-279. Ms. McNulty and Ms. Johnson testified that Onvoy was required by the plain language of the GOB Lease and the Fiber License to obtain ALLETE's approval, and enter into a separate agreement with ALLETE with separate compensation to be paid to ALLETE, to use space in ALLETE's GOB outside of Onvoy's leased premises. A.216-279.

Mr. Gary Kosin (Director of Engineering,), Ms. Janice Aune (Onvoy's CEO), and Mr. Howard Juul (former operations director of Onvoy) each testified that Onvoy repeatedly demanded that ALLETE grant Onvoy free use of unleased portions of the GOB. Mr. Kosin, Ms. Aune and Mr. Juul further testified that ALLETE repeatedly denied Onvoy such use. A.157-215.

Thus the issue was framed for the jury: Did ALLETE breach the contract by refusing Onvoy's demand to run conduit/fiber optic cable through unleased portions of the GOB. The jury answered: ALLETE's denials were not a breach of contract.

V. The Trial Jury Finds No Breach of Lease

The trial jury completed a Special Verdict Form answering questions as to legal breach of contract claim and providing advisory answers as to equitable claims:

1. Did Defendant Minnesota Power, Inc. breach the General Office Building Lease with Plaintiff Onvoy, Inc.?

Answer: YES _____ NO X

Regardless of how you answered Question No. 1, please answer Question No. 2.

2. What amount of money, if any, will fairly and adequately compensate Plaintiff Onvoy, Inc. for breach of the General Office Building Lease?

\$ Ø ZERO

Proceed to answer Question No. 7, if, and only if, your answer to Question No. 1 was "NO." If you answered Question No. 1 with "YES," then proceed to Question No. 11.

7. Before entering into the General Office Building Lease did Plaintiff Onvoy, Inc. and Defendant Minnesota Power, Inc. have a valid agreement that Plaintiff Onvoy, Inc. would use the General Office Building space for the collocation of equipment in order to interconnect Plaintiff Onvoy, Inc.'s network with other telecommunications carriers' networks by running cable through the General Office Building and outside of Plaintiff Onvoy, Inc.'s leased space?

Answer: YES X NO _____

If you answered "YES" to Question No. 7, then answer Question No. 8. If you answered "NO" to Question No. 7, then answer Question No. 11.

8. Did the General Office Building Lease between Plaintiff Onvoy, Inc. and Defendant Minnesota Power, Inc. fail to express this earlier agreement because of a mutual mistake by Plaintiff Onvoy, Inc. and Defendant Minnesota Power, Inc.?

Answer: YES _____ NO X

If you answered "YES" to Question No. 8, then answer Question No. 11. If you answered "NO" to Question No. 8, then answer Question No. 9.

9. Did the General Office Building Lease between Plaintiff Onvoy, Inc. and Defendant Minnesota Power, Inc. fail to express this earlier agreement because of a unilateral mistake by Plaintiff Onvoy, Inc.?

Answer: YES X NO _____

If you answered "YES" to Question No. 9, then answer Question No. 10. If you answered "NO" to Question No. 9, then answer Question No. 11.

10. Was Plaintiff Onvoy, Inc.'s unilateral mistake accompanied by inequitable conduct by Defendant Minnesota Power, Inc.?

Answer: YES _____ NO X _____

A.133-140.

The jury found that ALLETE did not breach the contract (Finding 1). The jury also found that Onvoy suffered no damages (Finding 2). A.133. In short, in deciding the breach of contract claim, the jury found the GOB Lease did not allow Onvoy the right to use GOB space outside the 430 square feet, and that ALLETE did not breach the contract by refusing Onvoy such use.

Onvoy's reformation claim was based on the theory that Onvoy had an agreement with ALLETE prior to execution of the GOB Lease that Onvoy could use space in the GOB outside of Onvoy's leased premises to run cables to Onvoy's leased premises, and that this prior agreement was not included in the GOB Lease due to (1) a mutual mistake by Onvoy and ALLETE, or (2) by a unilateral mistake of Onvoy coupled with inequitable conduct by ALLETE.⁴ The jury found that ALLETE and Onvoy did at one point have such an agreement prior to entering into the GOB Lease, but the GOB Lease did not contain the agreement. (Finding 7). A.137. The jury rejected the first basis of Onvoy's equitable reformation claim-that the omission of the agreement granting

⁴ Under Minnesota law a Court will reform a written contract only if the party seeking reformation proves by clear and convincing evidence (1) an antecedent agreement to which the contract can be reformed; and (2) mutual mistake or unilateral mistake of the party seeking reformation together with inequitable conduct of the other party. Garrick v. Northland Ins. Co., 460 N.W.2d 920, 94 (Minn. Ct. App. 1990). The jury's verdict form mirrored these elements.

Onvoy the use of unleased space in the GOB from the GOB Lease was due to a mutual mistake. (Finding 8). A.134.

Next, the jury found that the failure of the Lease to give Onvoy rights to use unleased space in the GOB was due to a unilateral mistake by Onvoy (Finding 9), and that there was no inequitable conduct by ALLETE accompanying Onvoy's mistake (Finding 10). A.135. Accordingly, in providing advisory answers as to the reformation claim, (Findings 7 and 9) the jury concluded that the GOB Lease did not give Onvoy the right to use unleased space in the GOB.

VI. The Trial Court Court's Findings of Fact on Declaratory Judgment are Irreconcilable with the Jury's Verdict.

Despite the jury's verdict, Onvoy sought an equitable declaratory judgment as to the meaning of the GOB lease and a declaration that ALLETE had breached the GOB lease. Onvoy also sought equitable remedies of reformation based on mutual mistake of fact or a unilateral mistake coupled with misconduct by ALLETE, and unjust enrichment. By an Order dated May 19, 2005, the Trial Court ruled as to these equitable claims. A.141-146. In its Findings, the Trial Court stated it would "order judgment on the legal claims in accordance with the verdict." As part of its findings, the Trial Court specifically found that ALLETE denied Onvoy's requests to use unleased space in ALLETE's GOB. A.143-144.

The court denied Onvoy's equitable unjust enrichment claim concluding that to allow such a claim to prevail "would constitute an end-around attack on the jury's findings." A.142. The jury findings 7, 8 and 9 of no mutual mistake and a unilateral

mistake without inequitable behavior by ALLETE advised against reformation. The Trial Court elected not to address the reformation claim. A.134-135.

Inexplicably, after upholding the jury's verdict as to the breach of contract claim, rejecting the unjust enrichment claim, and not addressing the reformation claim the Trial Court then adopted, verbatim, certain findings of fact and conclusions of law prepared by Onvoy, holding:

. . . based on the agreements between Onvoy and Allete, Onvoy is entitled to a right of access to facilities or conduit space sufficient to allow Onvoy to interconnect its telecommunications equipment located in its lease space within the GOB with the telecommunications equipment of third party telecommunications service providers, without requiring Onvoy or collocated third parties to enter into separate agreements with ALLETE or make financial payments to ALLETE or its wholly owned subsidiary, Enventis Telecom, Inc.

A.144 (§ 19); A.153. (emphasis added). The Trial Court then entered a declaratory judgment that under the lease, Onvoy is entitled to a right of access to facilities or conduit space outside Onvoy's leased premises "...without requiring Onvoy or collocated third parties to enter into separate agreements with ALLETE or make financial payments to ALLETE..." A.145 (§ 19).

These findings by the Trial Court stand in direct contradiction to the jury findings that ALLETE did not breach the GOB Lease by refusing Onvoy the very same access (Finding 1) and that the right claimed by Onvoy to use space in the GOB outside of Onvoy's "leased premises" did not exist in the Lease due to a unilateral mistake by Onvoy (Findings 7, 9).

VII. The Court of Appeals Could Not Harmonize the Trial Court's Declaratory Judgment with the Trial Jury's Verdict Without Arbitrarily Ignoring the Undisputed Record of the Case and the Trial Court's Own Findings.

ALLETE asked the Court of Appeals to reverse the Trial Court Judge's grant of declaratory judgment and enter judgment construing the GOB Lease in accordance with the plain language of the GOB Lease and consistent with the jury's verdict--namely, Onvoy cannot use space in ALLETE's GOB outside of the 430 square feet allotted Onvoy by the GOB Lease. Onvoy's appeal challenged the Trial Court's denial of Onvoy's motion for judgment notwithstanding the verdict or a new trial. Both appeals were denied.

In deciding ALLETE's appeal, the Court of Appeals based its decision on an erroneous interpretation of the jury's finding that ALLETE did not breach the Lease. The Court of Appeals suggested that the jury could have concluded that ALLETE did not deny Onvoy the use of space in ALLETE's GOB outside Onvoy's leased premises:

The finding [of no breach of contract by ALLETE] does not indicate whether the jury determined that (a) the lease prohibited Onvoy's use of additional physical space or (b) the lease permitted such use, but ALLETE had not refused such use, so it had not breached the contract.

A.404. (Court of Appeals Decision, p. 6). (clarification supplied).

The Court of Appeals recognized that the Trial Court, in granting the declaratory judgment, made findings of fact that ALLETE had refused to allow Onvoy to use space in ALLETE's GOB outside of Onvoy's leased space. A.404. That finding, fully supported by pleadings and evidence, shows that ALLETE had refused Onvoy use of unleased space, and that the jury's verdict and the Trial Court's declaratory judgment

directly contradict each other.⁵ Instead of properly resolving the matter by reversing the declaratory judgment, the Court of Appeals elected, without any citation to law or the factual record, to "*disregard*" the Trial Court's finding that ALLETE had refused to allow Onvoy use of space in the GOB outside of Onvoy's leased space:

Although the district court found a past refusal by ALLETE to allow Onvoy to run fiber-optic cable to the exterior of the building, this finding was not a condition of its declaratory judgment decision that the GOB lease allowed such use. **If we disregard that finding, the jury's and the district court's decisions are reconcilable.**

A.404 (Court of Appeals Decision, p. 6) (emphasis supplied).

There is no evidence to support the Court of Appeals suggestion that ALLETE had not denied Onvoy additional space. The fundamental record of the case and all evidence in the case-pleadings, witness testimony, documents-shows that ALLETE had denied Onvoy additional space. A.78-129, A.157-240, A.286-369. The only reasonable reading of the jury's finding of "no breach of contract" is that the jury found that ALLETE'S denial of additional space in the GOB to Onvoy was not a breach of contract. The Court of Appeals could not harmonize the stark, basic contradiction between the jury's verdict and the Trial Court's declaratory judgment; it could not reconcile the irreconcilable. ALLETE's refusal to grant Onvoy additional space in the GOB was what the case was about.

⁵ Onvoy's brief to the Court of Appeals repeatedly stated that there was no dispute that ALLETE had denied Onvoy's demands for unleased space. A.318-369.

ALLETE's appeal to this Court followed. Onvoy did not appeal the Court of Appeals' decision to affirm the Trial Court's denial of Onvoy's motions for JNOV or a new trial.

STANDARD OF REVIEW

When judgment is granted based on the application of law to undisputed facts, the result is a legal conclusion, which the appellate courts review *de novo*. Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855, 856 (Minn.1998). Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn.1998). In this case, the undisputed facts are that the declaratory judgment entered by the Trial Court conflicts with the jury's earlier findings of fact. Resolution of this conflict is decided by the Supreme Court *de novo*.⁶

ARGUMENT

- I. The Trial Court erred by granting Onvoy's declaratory judgment claim because the Trial Jury decided that ALLETE did not breach the GOB Lease and that the GOB Lease did not give Onvoy the right to use space in ALLETE's GOB outside of Onvoy's 430 square feet of leased space.**

In a breach of contract case, the jury must necessarily construe the terms of the contract--here, the GOB Lease--to determine whether or not the contract has been breached. After hearing six (6) days of trial testimony, the jury unanimously found that ALLETE did not breach the GOB lease by denying Onvoy use of property in ALLETE's GOB beyond Onvoy's leased space. (Finding 1). The jury did not award any damages to

⁶The Court of Appeals did not state if it was applying this or any other standard of review when electing to ignore the trial court's finding that ALLETE had denied Onvoy use of space outside of the leased premises.

Onvoy on the breach of contract claim. (Finding 2). A.133. The breach of contract claim was identical in every material way to the declaratory judgment claim.

Further, the Jury also explicitly found that the GOB Lease did not entitle Onvoy to use space in the GOB beyond Onvoy's leased 430 square foot space. (Findings 7, 9). Consequently, Onvoy has no right to use space in the GOB outside of Onvoy's leased 430 square foot space without a separate agreement with ALLETE and compensation paid to ALLETE. The Trial Court did not grant Onvoy its requested JNOV as to the jury's findings 1, 7 and 9. A.147-148.

Against this backdrop, the Trial Court erred as a matter of law by adopting Onvoy's proposed findings for declaratory judgment that are directly contrary to the jury's findings. The Trial Court Judge erred as a matter of law because there was nothing left for him to decide on the equitable declaratory judgment claim, as the trial court was bound by the jury's findings.

The Court of Appeals could not harmonize the Trial Court's declaratory judgment that the GOB Lease gave Onvoy the right to use unleased space in the GOB with the Jury's finding that ALLETE did not breach the GOB Lease by denying Onvoy the same use without resorting to ignoring the total evidence in the record that ALLETE had denied Onvoy's demands for unleased space, including an express finding by the Trial Court on declaratory judgment that ALLETE had denied Onvoy's demand for unleased space. No evidence existed to support the Court of Appeals decision. The issue that the Court of Appeals failed to decide by "ignoring" the evidence of conflict between the jury

and judge in this case is clear: are jury factual determinations on legal issues binding on the trial court's determinations of equitable issues?

Although no Minnesota case addresses the issue, a review of other jurisdictions reveals a clear consensus: When legal and equitable issues turn on the same operative facts, the jury must decide the legal issue first; the jury's factual determinations then bind the trial court in its determination of the parallel equitable issue. Zions First Nat. Bank v. Rocky Mountain Irr., Inc., 795 P.2d 658 (Utah 1990); C & S Real Estate Services, Inc. v. Massengale, 290 S.C. 299, 350 S.E.2d 1991 (South Carolina 1986); Golden West Baseball Co. v. City of Anaheim, 25 Cal App. 4th 11, 31 Cal. Rptr. 2d 378 (California 1994); Republic Financial Corp v. Mize, 1983 OK 107, 682 P.2d 207 (Okla. 1983); Forrest v. Fuchs, 126 Misc. 2d 8, 481 N.Y.S.2d 250 (New York 1984).

The State Courts of Utah, California, New York, South Carolina and Oklahoma have addressed the issue of conflict between a jury's determination of legal claims and a judge's determination of an equitable claim, and have adhered to the rule that the jury's factual determinations on legal issues bind trial courts on determinations of parallel equitable issues. These State Courts have principally applied the rule on the basis that the constitutions of the respective states each contain a right to "trial by jury" that guarantee litigants the right to have a jury finally determine their rights in "actions at law" – such as breach of contract claims. See, Zions First Nat. Bank v. Rocky Mountain Irr., Inc., 795 P.2d 658, (Utah 1990); C & S Real Estate Services, Inc. v. Massengale, 290 S.C. 299, 350 S.E.2d 1991 (South Carolina 1986); Golden West Baseball Co. v. City of Anaheim, 25 Cal App. 4th 11, 31 Cal. Rptr. 2d 378 (California 1994); Republic Financial Corp v.

Mize, 1983 OK 107, 682 P.2d 207 (Okla. 1983); Forrest v. Fuchs, 126 Misc. 2d 8, 481 N.Y.S.2d 250 (New York 1984).

The Constitution of the State of Minnesota contains a provision guaranteeing litigants a right to trial by jury in actions at law, including breach of contract claims:

4. Trial by jury

Sec. 4. The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.

MINNESOTA CONSTITUTION, Art. 1, Section 4. Minnesota ought to join with New York, California, Oklahoma, Utah and South Carolina in holding that a litigant's state constitutional right to a trial by jury for actions at law means that when legal and equitable issues are tried together, the jury's determination of factual issues on legal claims necessarily controls the judge's later determination of equitable claims governed by the same factual issues.⁷

The rule of law that the trial judge must follow the jury's earlier decision on identical or parallel legal claims in the same action when considering equitable claims is the overwhelming majority rule in the Federal Courts. Federal Courts often hear cases that include both legal claims first tried to a jury, and equitable claims created by federal law that are submitted to the trial judge after the jury's verdict. Federal Courts have written extensively in support of applying the rule.

⁷ Not at issue is whether ALLETE and Onvoy had the right to a jury trial for this matter. Prior to trial, the trial judge expressly assigned to a jury determination of "legitimate factual disputes over intent and meaning" of the GOB Lease. A. 131. Accordingly, Sonenstahl v. L.E.L.S., Inc., 372 N.W.2d 1 (Minn. App. 1985), and the decisions cited therein, (affirming denials of jury trial requests for actions that were primarily equitable in nature) is not applicable to the present case, where a jury trial was held, and the case was primarily legal in nature.

The Courts of Appeal for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh, District of Columbia and Federal Circuits have explicitly adopted the rule. See Troy v. Bay State Computer Group, 141 F.3d 378, 380-381 (1st Cir. 1998); Maryland Cas. Co. v. Rosen, 445 F.2d 1012, 1014 (2nd Cir. 1971); Roebuck v. Drexel University, 852 F.2d 715, 726 (3rd Cir. 1988); International Wood Processors v. Power Dry, Inc., 593 F. Supp. 710, 736 n. 15 (D.S.C. 1984), *aff'd*, 792 F.2d 416 (4th Cir. 1986); Ward v. Texas Employment Comm'n, 823 F.2d 907, 908-909 (5th Cir. 1987); Moltan Co. v. Eagle-Picher Indus., 55 F.3d 1171, 1174-1175 (6th Cir. 1995); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 843-845, certiorari denied, 99 S.Ct. 1267, 440 U.S. 930, 59 L.Ed.2d 486 (7th Cir. 1978); Nilssen v. Motorola, Inc. 255 F.3d 410, 413-414 (7th Cir. 2001) ("When legal and equitable theories are joined in one suit, the jury's resolution of questions common to the two branches controls."); York Center Park Dist. v. Krilich, 40 F.3d 205, 208 (7th Cir. 1994) (The jury verdict finding that the defendant had not authorized the trespass committed by another precluded the judge from making a contrary finding in resolving a related claim); Todd v. Ortho Biotech, Inc., 138 F.3d 733, 738 (8th Cir. 1998); Williams v. Valentec Kisco, Inc., 964 F.2d 723, 730-731, certiorari denied, 113 S.Ct. 635, 506 U.S. 1014, 121 L.Ed.2d 566 (8th Cir. 1992); Neufeld v. Searle Labs, 884 F.2d 335, 341 (8th Cir. 1989) Ways v. City of Lincoln, 871 F.2d 750, 755-756 (8th Cir. 1989) Garza v. City of Omaha, 814 F.2d 553, 557 (8th Cir. 1987); Los Angeles Police Protective League v. Gates, 995 F.2d 1469, 1472-1475 (9th Cir. 1993) Ag Services v. Nielsen, 231 F.3d 726, (10th Cir. 2000); Butler v. Pollard, 800 F.2d 223 (10th Cir. 1986) Bangert Bros. Constr. Co. v. Kiewit Western Co., 310 F.3d 1278, 1298-1301

(10th Cir. 2002) (The court is bound by the jury's determination of a factual issue common to both legal and equitable claims); C & W Leasing, Inc. v. Orix Credit Alliance, 1992, 957 F.2d 815, 821 (11th Cir. 1992); Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1097- 1098 (11th Cir. 1987); Dybczak v. Tuskegee Institute, 737 F.2d 1524, 1526-1527, certiorari denied 1985, 105 S.Ct. 1180, 469 U.S. 1211, 84 L.Ed.2d 328 (11th Cir. 1984) . ("It is well settled that where claims at law and in equity are joined and the legal claims are tried separately by a jury, the jury's verdict operates as a finding of fact binding on the trial court in its determination of the equitable claims"). Lincoln v. Board of Regents of Univ. System of Ga., 697 F.2d 928, 934-935 (11th Cir. 1983) (When a party has the right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim"). Kolstad v. American Dental Assn., 108 F.3d 1431, 1439-1440 (D.C. Cir. 1997); Cabinet Vision v. Cabinetware, 129 F.3d 595, 599-601 (Fed. Cir. 1997);

The Federal Courts' rationale for the rule rests on several grounds, including (1) the litigant's right to a jury trial, as embodied by the Seventh Amendment to the U.S. Constitution; (2) the doctrines of collateral estoppel and law of the case as to the earlier jury verdict finally deciding issues; (3) an "election of remedy" principle that a judge may overturn a jury's decision only through a properly entered judgment notwithstanding the verdict (i.e. JNOV); (4) judicial deference for jury decision making; (5) judicial economy; and (6) saving the judicial system from embarrassment and criticism resulting from inconsistent results in the same case. The collateral estoppel and right to jury trial

rationales are the reasons most frequently cited by the Federal Courts for application of the rule.

The collateral estoppel rationale for the rule is stated fully in Butler v. Dowd, 979 F.2d 661, 673 (8th Cir. 1992):

In this case, there was no actual controversy left to resolve through declaratory relief when that issue was submitted to the district court. The plaintiffs' only requested declaratory relief mirrored what the jury was told it must find in order to hold the defendant liable. The jury verdict, therefore, amounts to an implicit declaration of the same things that plaintiffs are requesting in their motion for declaratory relief....Once the jury's verdict was reached, declaratory relief could not change or clarify any legal relationship between plaintiffs and defendant. See International Wood Processors v. Power Dry, Inc., 593 F. Supp. 710, 736 n. 15 (D.S.C. 1984), *aff'd*, 792 F.2d 416 (4th Cir. 1986) ("Granting declaratory relief would serve no useful purpose at this stage because the legal obligations of the parties have been clarified by the jury's resolution of the legal claims."). Therefore, the issue is moot and neither this court nor the district court has jurisdiction to grant declaratory relief.

Id. at 673; See also Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Ass'n, 371 F.2d 263, 271 (7th Cir. 1967) (When ruling on equitable claims, the court is bound by the jury's relevant findings on the legal claims); Maryland Cas. Co. v. Rosen, 445 F.2d 1012, 1014 (2nd Cir. 1971); Troy, 141 F.3d at 380-381 (1st Cir. 1998) (Jury verdict awarding \$15,000 backpay for gender discrimination under Massachusetts law precluded judge from awarding more--\$90,000--under Title VII; "the judge is normally bound by earlier jury findings in the same case on common issues....This is not a constitutional rule, but one of economy similar to collateral estoppel").

The rationale for applying the rule that the Seventh Amendment right to a jury trial precludes overruling a jury's findings on a declaratory judgment was discussed at length in Ag Services v. Nielsen, 231 F.3d 726 (10th Cir. 2000). In that case, after the jury returned a verdict for the defendant on the legal claims, the district judge disregarded their findings and entered judgment for the plaintiff on the equitable claims. The judge thought the verdict was clearly erroneous. The Court of Appeals ruled that the Seventh Amendment to the U.S. Constitution required the judge either to set aside the verdict--which he did not do--or to be precluded by the jury findings. The Court of Appeals specifically held that although it was not possible to identify the precise basis for the jury verdict, any rational basis would defeat the equitable claims. See also Los Angeles Police Protective League v. Gates, 995 F.2d 1469, 1472-1475 (9th Cir. 1993)(The Seventh Amendment prohibits reexamination of any fact found by a jury. The judge trying equitable claims is bound by the jury's resolution of common fact issues in the same case).

The "election of remedy" rationale for applying a rule that a judge may overturn a jury's decision only through a properly entered judgment notwithstanding the verdict was well stated in Ward v. Texas Employment Comm'n, 823 F.2d 907 (5th Cir. 1987):

When a party has the right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim. It may be that the cited Supreme Court authority does not squarely compel the holding italicized above, but it comes near to doing so indeed. The rule is a commonsense one; and we adopt it for our Circuit: it is hardly thinkable, as a practical matter, that a trial judge would let stand a jury finding on an issue when he had full power to set it aside, yet himself find the issue to the contrary on the same evidence.

Id., 908-909. (emphasis added).

For all of the rationales stated above, The State of Minnesota ought to formally adopt the same majority rule of law, and enter judgment striking the district court's irreconcilable declaratory judgment in this matter.

In this case, as in the cases cited above, the issues decided by the jury in finding no breach of contract mirror the issues presented by the declaratory judgment claim. Further, in this case the Judicial Officer was not privy to any evidence the jury did not hear that could justify a decision contrary to the jury's findings. In Snider v. Consolidation Coal Co., 973 F.2d 555, 558-560, certiorari denied, 113 S.Ct. 981, 506 U.S. 1054, 122 L.Ed.2d 134 (7th Cir. 1992) the Court upheld a Judge's determinations of equitable claims that conflicted with the trial jury's determination of legal claims on the basis that the Judge heard evidence on the equitable claims--certain expert testimony admissible as to an equitable claim that was excluded from the jury's consideration--that justified a departure from the jury's findings by the "better informed" Judge. There is no basis in this case to claim that the trial judge had a better or even different vantage point than the jury to evaluate the evidence in the case to arrive at a "better" conclusion. The jury and the Trial Court Judicial Officer heard identical evidence at trial. The decisions of the jury and Trial Court Judicial Officer cannot be harmonized on the record of this case.

A contrary rule of law would allow a trial judge to tacitly overrule earlier jury findings on legal claims that contain the same issues as equitable claims assigned to the Court's later determination. The Federal Courts have had the unique opportunity, based

on their special jurisdiction of certain federal causes of action containing both legal equitable remedies, to hear a great number and wide variety of cases wherein legal and equitable claims are tried together. For the extensive, compelling reasons cited above, the Federal Courts have held that a jury's earlier determination of issues on legal causes of action controls a judge's later determination of the same issues presented through equitable causes of action.

Moreover, the state courts of New York, California, Oklahoma, Utah and South Carolina have also adhered to the rule on the basis that the rule is mandated by sections of their state constitutions guaranteeing the right to a jury trial-Minnesota's Constitution contains such a right, and it is appropriate for Minnesota to give this right substantive meaning by making a jury's determinations of fact binding on parallel claims decided by trial courts. A contrary rule would deprive the "right to a jury trial" of its substantive meaning-a jury would hear cases, but would not finally decide issues.

This Honorable Court should adopt this well-considered logic as the rule of law in Minnesota, and hold that the Trial Court erred as a matter of law, by deciding the declaratory judgment claim after the jury had made its Findings 1, 7 and 9, and find that the grant of declaratory judgment to Onvoy as to the same subjects previously decided by the jury's verdict in ALLETE's favor was clearly erroneous. This Honorable Court must reverse the Trial Court Judicial Officer's grant of declaratory judgment as a matter of law, and enter judgment construing the GOB Lease in accordance with the plain language of the GOB Lease and Fiber License Agreement, and consistent with the jury's verdict on

Findings 1, 7 and 9-that is, Onvoy cannot use space in ALLETE's GOB outside of the 430 square feet allotted Onvoy by the GOB Lease.

Finally, even if this Court does not think it necessary to adopt the suggested rule as a universally applicable rule of law in Minnesota, this Court should, on the undeniable record of this case, apply the rule to this case to reverse the Trial Court Judicial Officer's declaratory judgment, reject the Court of Appeals' impossible interpretation of the irreconcilable conflict between the jury's verdict and the declaratory judgment, and enter judgment that Onvoy cannot use space in ALLETE's GOB outside of the 430 square feet allotted Onvoy by the GOB Lease.

The Court of Appeals ignored the undisputed evidence in the record of Onvoy's standing demands to ALLETE to allow use of space in the GOB outside of Onvoy's leased space, and ALLETE's standing denials of those demands. Both parties' pleadings, witness testimony, documents entered into evidence, arguments of counsel, and, as noted above, *appellate briefs* unanimously agreed that ALLETE had refused Onvoy use of additional physical space without a negotiated additional agreement. A.78-129, A.157-240, A.286-369. This unanimous agreement as to the undisputed evidence was stated in Onvoy's brief to the Court of Appeals:

C. Allete's Breach of the GOB Lease.

Despite the parties' understanding of the intent and purpose of the GOB Lease, there is no dispute that Allete repeatedly refused to consent to Onvoy's request to interconnect with third parties from its GOB space

Allete does not dispute that it has refused Onvoy's requests to establish interconnections. Instead, Ms. Johnson testified that, based on her readings of the GOB Lease, Onvoy must enter separate entrance facilities agreements with Allete...

A.334-335.

B. Onvoy Conclusively Established that Allete Breached the GOB Lease by Refusing to Allow Onvoy to Exercise its Right to Collocate with Third Party Carriers' Networks for the Purposes of Interconnecting.

Allete's refusal to allow Onvoy to exercise the right of interconnection was also established by un rebutted evidence. Mr. Kosin testified to the numerous denials by Allete of Onvoy's requests to establish interconnections by running cable outside of its leased space. That testimony is substantiated by documentary evidence. Allete called no witnesses to rebut Mr. Kosin's testimony. Indeed, Allete did not deny that it refused Onvoy's requests for interconnection with Bresnan and WIN...

Because the contractual right to establish physical connections to third parties was conclusively established and Allete's denial of Onvoy's attempts to exercise that right was unchallenged, the verdict of no breach cannot stand...

A.360-361. (citations omitted).

The Court of Appeals' impossible interpretation of the jury's verdict did not explain how it could "ignore," under the law, the Trial Court Judicial Officer's finding of fact that expressly noted that ALLETE had denied Onvoy additional space in ALLETE'S GOB. A.143-144. The Court of Appeals' impossible interpretation of the jury's verdict did not explain why if ALLETE had not denied Onvoy the use of additional space in ALLETE's GOB, why Onvoy needed and brought a declaratory judgment to get that same use, why it sought \$11.7 million in damages for past denied access, and why there was any lawsuit at all. Had ALLETE not denied Onvoy, a lawsuit never would have been commenced; had ALLETE not denied Onvoy, Onvoy would not have had standing to commence a lawsuit. ALLETE's denial of Onvoy's demands to use unleased space was the solitary reason for the lawsuit.

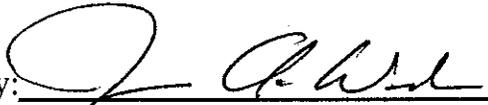
After six (6) days of trial, the jury determined the ultimate issue in the case by finding that ALLETE did not breach its contract with Onvoy by denying Onvoy unleased space. This Court should honor the jury's determination of the ultimate issue in this case, the identical issue contested on declaratory judgment, and reverse the declaratory judgment.

CONCLUSION

For all the foregoing reasons, appellant ALLETE respectfully requests this Court to reverse the Trial Court Judicial Officer's grant of declaratory judgment and enter judgment construing the GOB Lease in accordance with the plain language of the GOB Lease and consistent with the jury's verdict--that is, Onvoy cannot use space in ALLETE's GOB outside of the 430 square feet allotted Onvoy by the GOB Lease.

Dated: November 13, 2006

JOHNSON, KILLEN & SEILER, P.A.

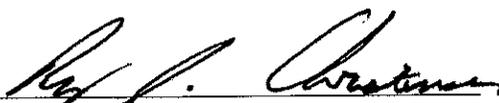
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**Certificate of Compliance with
Rule of Civil Appellate Procedure 132.01, Subd. 3.**

I certify that the word count of this brief is 9,825. In preparing this Certificate, I have relied on the Microsoft Word program, the word processing software used to prepare the brief. The brief complies with the typeface requirements of Rule 132.01.

Dated: November 13, 2006



Roy J. Christensen, Esq.

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).