

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 ALLETE, INC.'S REPLY BRIEF**

---

JOHNSON, KILLEN & SEILER, P.A.

James A. Wade (#113414)

Roy J. Christensen (#0302508)

230 West Superior Street, Suite 800

Duluth, MN 55802

Tel: (218) 722-6331

Fax: (218) 722-3031

LINDQUIST & VENNUM P.L.L.P.

Eric J. Nystrom (#19489X)

Christopher H. Yetka (#241866)

Mark H. Zitzewitz (#289073)

4200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

Tel: (612) 371-3211

Fax: (612) 3207

*Attorneys for Appellant*

*Attorneys for Respondent*

## TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT .....	2
I.    The Jury’s finding that ALLETE did not breach the lease includes a finding that ALLETE’s denials of Onvoy’s demands for unleased space did not breach the lease.....	2
A.    ALLETE allowed “collocation” of other companies within Onvoy’s leased space, but denied Onvoy’s additional demands to use unleased space in the GOB. Thus, the jury’s finding of no breach of contract includes a finding that Onvoy had no right to use unleased space in the GOB.....	5
B.    Evidence establishing that Onvoy incurred no damages has no relevance to the jury’s liability finding that ALLETE did not breach the lease by denying Onvoy use of unleased space. ....	9
C.    ALLETE’s arguments regarding the Fiber License have no effect on the Jury’s determination that ALLETE did not breach the GOB Lease by denying Onvoy use of unleased space. ....	11
D.    The jury expressly found that that Onvoy did not contract to get use of unleased space for interconnection purposes.....	12
II.    The Jury’s Findings are Binding on the Trial Court. ....	14
CONCLUSION .....	15
INDEX TO APPENDIX .....	17

**TABLE OF AUTHORITIES**

**Cases**

Ag Services v. Nielsen, 231 F.3d 726 (10<sup>th</sup> Cir. 2000) ..... 4, 5

Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998)..... 2

Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855, 856 (Minn. 1998) ..... 2

Roske v. Ilykanyics, 45 N.W.2d 769, 776 (1951)..... 14

Wells Construction Company v. Goden Incinerator Company, 217 N.W. 112, 114 (1927) ..... 13

## INTRODUCTION

Onvoy and ALLETE have never disputed, and have always agreed, that ALLETE denied Onvoy use of unleased space in ALLETE's General Office Building ("GOB"). Through its pleadings, trial exhibits, trial witness testimony, arguments of counsel to the jury and appellate briefs, Onvoy has always argued that ALLETE breached its lease contract with Onvoy by refusing to grant Onvoy use of unleased space in ALLETE's GOB. Likewise, ALLETE has always argued that its admitted refusals to grant Onvoy use of unleased space were not a breach of the lease. With this as the sole issue in the liability portion of the breach of contract claim, the jury was asked: Did defendant breach the General Office Building Lease with Plaintiff Onvoy, Inc.? By answering "NO" and affirming that ALLETE had not breached the lease, the jury found that ALLETE had not breached the lease *in any way*.

Now, facing appellate review of the irreconcilable conflict between the jury's findings and the trial court's fatally inconsistent declaratory judgment as to the same central issue, Onvoy misstates the trial evidence to argue that the jury "could have" ignored or rejected the undisputed fact that ALLETE denied Onvoy's demands for unleased space. Specifically, Onvoy hypothesizes that the jury could have found "no breach of contract" on the new assertion that ALLETE never denied Onvoy's demands for unleased space.

Onvoy's characterization of the trial evidence fails to justify the conflict between the jury's verdict and the declaratory judgment given (1) the evidence supporting the undisputed fact that ALLETE denied Onvoy's demands for unleased space, and the jury's

dispositive finding of no breach of contract in light of that undisputed fact; (2) the jury's express findings of fact Nos. 7 and 9 that Onvoy did not contract for the right to use unleased space owned or controlled by ALLETE; and (3) the trial court's express finding on declaratory judgment – drafted by Onvoy and adopted verbatim by the trial court - that ALLETE denied Onvoy's demand for unleased space.

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 a legal issue that is decided by the Supreme Court *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).

Onvoy, in its brief, repeatedly concedes that the jury's factual determinations on legal issues are binding on the trial court's determination of equitable issues. Accordingly, it is undisputed that if this Court rejects Onvoy's misstatements of the trial evidence, then, as a matter of law, the trial court's grant of declaratory judgment must be reversed, and judgment entered that Onvoy cannot use unleased space in ALLETE's GOB.

### ARGUMENT

- I. The Jury's finding that ALLETE did not breach the lease includes a finding that ALLETE's denials of Onvoy's demands for unleased space did not breach the lease.**

At pp. 14-16 of its brief, Onvoy claims that there remained a "justiciable controversy" for the District Court to decide on declaratory judgment after the jury returned its verdict. Onvoy claims that "...in this case, there is no way to know the

factual basis for the jury's legal findings." (Onvoy's brief, p. 16). Onvoy's claim is unsupported. As stated in ALLETE's initial brief, we know the jury made the factual finding that the GOB Lease did not grant Onvoy use of unleased space in the GOB when the jury found that ALLETE did not breach the GOB lease contract.

First, we know this because the jury expressly told us the GOB Lease does not grant Onvoy the use of unleased portions of the GOB. In its answers to special verdict questions 7 and 9, the jury expressly stated the GOB Lease did not contain a provision granting Onvoy the use of unleased space, and that this omission was due to the unilateral mistake of Onvoy. (A.137-139). Stated another way, we know through its answers to special verdict questions 7 and 9 that the jury concluded that Onvoy did not contract for the right to use unleased space in the GOB. (A.138-139). Through these answers, the jury's consideration of Onvoy's right to use unleased space in the GOB could not be more clear.

Second, we know this because Onvoy's breach of contract claim was solely premised on the allegation that ALLETE breached the GOB Lease by refusing Onvoy access to unleased space. The record of the case and all evidence in the case -- pleadings, witness testimony, documents, appellate briefs -- shows that ALLETE denied Onvoy's demands for additional space. A. 78-129, 157-240, 286-369, 418-422. Onvoy's breach-of-contract claim was stated in no other way. A. 78-129, 157-240, 286-369, 418-422. Thus, the jury told us the GOB Lease did not grant Onvoy the use of unleased GOB space by finding no breach of contract, and then the jury told us why the GOB Lease did not grant such a right: due to the unilateral mistake of Onvoy.

This central fact, admitted and undisputed, that ALLETE refused Onvoy use of unleased space, left nothing for the District Court to decide on declaratory judgment after the jury returned its verdict of no breach of contract, and renders the jury and Court verdicts irreconcilable. This admitted fact was the source of the dispute; it served as the sole basis of the breach of contract claim, and the sole basis for the declaratory judgment claim. A. 84-86.

If ALLETE had not denied Onvoy access through unleased portions of its general office building, there would have been no reason for Onvoy to initiate a lawsuit, seek damages for not being able to interconnect with third parties in unleased portions of the general office building, and seek a parallel –indeed, identical - declaratory judgment ordering ALLETE to provide cable and/or conduit through unleased areas of the general office building.

Against this backdrop, Onvoy, at pp. 14-20 of its brief, misstates the evidence presented to the jury in an attempt to contradict the undisputed fact that ALLETE denied Onvoy's demands for access to unleased space. Onvoy's particular misstatements are addressed below.<sup>1</sup>

---

<sup>1</sup> The analysis contained in this Reply Brief is consistent with the Federal Court's practical process for applying a jury's earlier determination of legal claims to a judge's later determination of the same issues presented through equitable claims. As stated in Ag Services v. Nielsen, 231 F.3d 726 (10<sup>th</sup> Cir. 2000):

...the analysis in Butler v. Pollard did not purport to determine the precise basis of the jury verdict, and we glean from that case the teaching that such precise inferences are not always necessary for application of issue preclusion. Instead, we examine the possible inferences from the verdict against the findings and conclusions made by the district judge on the equitable claims.

**A. ALLETE allowed “collocation” of other companies within Onvoy’s leased space, but denied Onvoy’s additional demands to use unleased space in the GOB. Thus, the jury’s finding of no breach of contract includes a finding that Onvoy had no right to use unleased space in the GOB.**

The issue presented to the jury was whether Minnesota Power breached the GOB Lease by refusing Onvoy access to unleased portions of the general office building to interconnect with third parties. As Onvoy’s counsel directed the jury in his opening statement:

“And the third aspect of the project was Onvoy’s lease of 430 square feet in Minnesota Power’s general office building. And I’ll tell you, that is a part of this project that forms the crux of this dispute.”

“...Onvoy approached Minnesota Power to tell them we need to bring another fiber into this building. We need the ability to connect some additional carriers, and we have a right to do this under the agreement; and at that time Minnesota Power said no.”

A.412-413.

ALLETE readily acknowledged that it had and continued to deny Onvoy the additional access through unleased portions of the GOB without a separate agreement. ALLETE maintained that the GOB Lease did not grant Onvoy any such right. In ALLETE’s counsel’s opening statement, ALLETE set the issue:

In fact, I think you have heard the judge say, and I think you heard Mr. Nystrom say, what we’re really talking about is the use of space in the GOB building, the general office building outside the 430 square feet. That’s really what we’re talking about. ...

---

Id. at 731-732. In this case, the jury’s broadly stated verdict of “no breach” meant “no breach for any reason”, and therefore the jury’s finding of no breach – coupled with Onvoy’s presentation of its breach of contract claim, which included the undisputed assertion that ALLETE denied Onvoy use of unleased space – left nothing for the trial court to decide on declaratory judgment.

\* \* \*

What they (Onvoy) wanted, the evidence will show, [was] something contracts don't allow, and they want it for free. They don't want to negotiate with it because we have offered. They (Onvoy) want to run a line right through our general office building.

A.414-415. ALLETE's counsel continued:

Minnesota Power allowed certain connections in their space, as they're allowed to do in their sole discretion, and they said no at one point in time and that's why we're here.

A.416-417. So the "crux" of the case according to both Onvoy and ALLETE was whether the GOB Lease granted Onvoy the right to run further optic cables through unleased portions of the GOB building. Specifically, whether paragraph 12 of the GOB Lease grants Onvoy the right to run fiber optic cable through unleased portions of the GOB. The jury said it did not.

Not a single witness who addressed the issue denied that Minnesota Power refused Onvoy's request to run cable through unleased portions of the GOB without a separate agreement and compensation. As pointed out in Onvoy's Brief, Onvoy's Gary Kosin and Onvoy's Chairman Janice Aune both testified that they made requests to be allowed to run fiber on the GOB to establish connections to third parties which were rejected. (Onvoy's Brief, pp. 8-9.)

At pp. 16-17 of its brief, Onvoy attempts to confuse the Court by equating "collocation" of other telecommunication companies *in Onvoy's leased space* (i.e., subletting) with Onvoy's demands to use unleased space in the GOB. Onvoy correctly quotes ALLETE's counsel's argument and testimony that ALLETE never refused Onvoy's request to "collocate" *in Onvoy's leased space*. However, Onvoy does not

inform this Honorable Court that there is an obvious distinction – explained by the trial witnesses and appreciated by the Jury - between ALLETE’s acceptance of other companies “collocating” *in Onvoy’s leased space*, and ALLETE’s denial of Onvoy’s demands to use *unleased space outside of Onvoy’s leased premises*, which was not permitted by the lease.

It is undisputed that ALLETE allowed other companies to “collocate” in Onvoy’s leased space; the argument by ALLETE’s trial counsel James A. Wade and testimony by ALLETE’s in-house counsel Ingrid Johnson quoted by Onvoy clearly establish this fact. It also is undisputed that ALLETE denied certain demands by Onvoy to use space in the GOB outside of Onvoy’s leased space to connect with other companies, such as Bresnan Communications.

Indeed, ALLETE’s in-house counsel Ms. Johnson, when called as a witness for cross-examination by Onvoy readily acknowledged that ALLETE denied Onvoy’s demands to use unleased space in the GOB for purposes of running cable to interface with Bresnan Communications:

Q. (By Mr. Nystrom) ...The third point you are making with Mr. Mahoney (Onvoy’s in-house counsel) is that you’re informing him that Minnesota Power does not intend to allow Bresnan to run fiber optic cable to the Onvoy space in the GOB?

A. I will...I agree with the second part of your sentence, yes, that is what I am telling him.”

Q. That Bresnan is not going to be allowed to run cable?

A. Yes, correct.

\*\*\*

Q. Were there other concerns that [ALLETE] had about running that cable - - that cable being the Bresnan cable into the GOB Onvoy space?

\*\*\*

A. Yes.

\*\*\*

Q. Alerting him to those concerns would have allowed the two companies to work the issue out, wouldn't it?

A. He was - - by this letter he was being adequately alerted to the fact that we did not consent to that installation or use of our facilities.

A.418-419 (discussing Trial Exhibit No. 61; A.420-421).

Ms. Johnson correctly testified that Wisconsin Independent Network ("WIN") was the only company that Onvoy ever requested be permitted to co-locate *in Onvoy's leased space* and that WIN was allowed to do so by ALLETE as a matter of course under the explicit lease language allowing collocation in the lease space. However, to use unleased space – space that Onvoy had no contractual right to use – WIN was required to negotiate a separate Facilities Access Agreement with ALLETE. Onvoy quotes testimony containing this obvious distinction at p. 17 of its brief, but does not explain to this Court that this distinction is fatal to Onvoy's argument. The decisive colloquy by Onvoy's counsel and Ms. Johnson was as follows:

Q: (By Mr. Nystrom) And was that connection subsequently - - was that collocation in the leased space subsequently allowed?

A: Not only was the collocation approved by Minnesota Power, Minnesota Power then negotiated this Facilities Entrance - - or I believe we called it a Facilities Access Agreement - - ...to then have fiber access into the lease space.

A.422 (emphasis added).

Onvoy requested collocation of WIN and was granted that collocation by ALLETE as a matter of contractual right under the lease. Onvoy and WIN were required to separately negotiate to run line through unleased portions of the GOB, as no such right existed under the lease, and ALLETE could and would deny use of unleased space without a separate agreement.

Onvoy's misstatement of the clear distinction between "collocation" *in Onvoy's leased premises* (expressly allowed by the lease) and use of *unleased space outside of Onvoy's leased premises* (expressly prohibited by the lease) creates no genuine issues of material fact to contradict the central, undisputed facts of the case: ALLETE denied Onvoy's demands for unleased space, and the jury therefore determined the GOB Lease did not contain a provision granting Onvoy the right to use unleased space in the GOB when the jury found that ALLETE did not breach its contract with Onvoy in any way.

**B. Evidence establishing that Onvoy incurred no damages has no relevance to the jury's liability finding that ALLETE did not breach the lease by denying Onvoy use of unleased space.**

At pp. 17-19 of its brief, Onvoy mistakenly claimed that because ALLETE argued that Onvoy met its budget, had used its fiber optic cable lines to full capacity, and generally received the benefit of its bargain with ALLETE, the jury could have found this as a basis for no breach. None of these arguments had anything to do with liability or whether there was a breach of contract; these were damage arguments. Minnesota law has long provided for the jury to receive distinct instructions separating the ultimate question of liability from a question to determine damages. Indeed, in this case, the jury's special verdict form specifically required the jury to consider the issues of liability

and damages separately, and the Jury answered both questions separately in ALLETE'S favor:

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

A. 133. (emphasis added).

Contrary to Onvoy's theories, the jury was not instructed that there was no breach if Onvoy met its budget projections, used its lines to capacity and thereafter received the benefit of the bargain as alleged by Onvoy. Quite to the contrary, the jury was instructed on the breach of contract issue by the trial judge as follows:

All right. In this case you're instructed that the general office building lease is a contract; and we're talking about breach of contract. I'll tell you that a contract is breached when there is a failure without legal justification to perform a substantial part of the contract. This breach occurs when one party fails to carry out part of the contract that requires immediate performance, or fails to carry out a term of the contract by preventing or hindering the term from being completed.

A.423.

Clearly, the instructions on the breach of contract law did not address using the lines to capacity, benefit of the bargain or budget projections. Those arguments went directly to the damages issue and the reformation claim and had nothing to do with the

liability issue. The contract as written and as construed by ALLETE was fair to both parties.

In context, the Trial Judge instructed the jury to determine whether the general office building lease, a contract, had been breached by Minnesota Power's preventing or hindering one or more terms from being completed, i.e. refusing to allow Onvoy to run fiber optic lines through unleased portions of the general office building. With respect to the damage question, the trial court gave an altogether separate damage instruction. (See A.423-424.)

Onvoy's mistaken claims as to damages at pp. 17-19 of its brief create no genuine issues of material fact to contradict the central, undisputed facts of the case: ALLETE denied Onvoy's demands for unleased space, and the jury therefore determined the GOB Lease did not contain a provision granting Onvoy the right to use unleased space in the GOB when the jury found that ALLETE did not breach its contract with Onvoy in any way.

**C. ALLETE's arguments regarding the Fiber License have no effect on the Jury's determination that ALLETE did not breach the GOB Lease by denying Onvoy use of unleased space.**

At pp. 18-19 of its brief, Onvoy suggests that somehow ALLETE's argument that Onvoy's right to use portions of the GOB Lease was controlled by the Fiber Lease may have negated the jury's need to interpret the GOB Lease. This makes no sense, particularly in light of the trial court's specific reference to the GOB Lease in its instructions (quoted in part I.B of this brief) and whether it was breached.

While the Fiber Lease expressly precludes Onvoy from extending lines through ALLETE's property without ALLETE's written consent and prohibits Onvoy from using ALLETE facilities without ALLETE's written consent, additional compensation, and at Minnesota Power's sole discretion, Onvoy claimed that the GOB Lease granted Onvoy use of unleased space in the GOB. In short, the fiber license prohibitions, Onvoy argued, were circumvented by paragraph 12 of the GOB Lease. Thus, the Court's instructions and charge to the jury, and the special verdict form, referred only to the general office building lease. A.423; A.133-135.

The jury, by finding ALLETE did not breach the contract, necessarily found the GOB Lease did not grant Onvoy the use of unleased space as they claimed. Whether or not the jury relied on the license agreement prohibitions from using ALLETE's is entirely immaterial, for the Jury was still faced with the task of interpreting the GOB Lease in completing the special verdict form.

Onvoy's mistaken claims as to the Fiber License agreement at pp. 18-19 of its brief create no genuine issues of material fact to contradict the central, undisputed facts of the case.

**D. The jury expressly found that that Onvoy did not contract to get use of unleased space for interconnection purposes.**

At p. 22 of its brief, Onvoy falsely claims that "the trial court's declaration that Onvoy should be allowed to interconnect was supported by one of the factual findings of the jury." Onvoy is wrong. The jury found that although there was a pre-contract "agreement" to allow access (Finding No. 7; A.138), the GOB Lease *failed to express*

*this earlier agreement* due to a unilateral mistake by Onvoy. (Finding No. 9; A.139.) Accordingly, the Jury explicitly found that Onvoy had no contractual right to use unleased space in ALLETE's GOB.

Minnesota law has long held that not all "agreements" are contracts. Indeed, few "agreements" rise to the status of a "contract" that confers on the parties contractually enforceable rights and responsibilities to each other. As this Court has said:

There may have been an 'agreement' or 'understanding' that plaintiff would get the building subcontract, but the issue is not as to 'agreement' or 'understanding' but as to the making of a contract. Even though all of the terms are agreed upon, finally – and yet there is no intention, by even one of the parties to be bound contractually until something more is done, e.g., the preparation and signing of a formal document to evidence the agreement – there is complete agreement but no contract.

Wells Construction Company v. Goden Incinerator Company, 217 N.W. 112, 114 (1927).

The final expression of the negotiations and agreements about use of the GOB was encompassed in the written lease, which contained a classic integration clause to eliminate any confusion about prior verbal agreements or understandings. Thus, consistent with its finding of no breach of contract the jury explained that there was no breach of contract because the contract did not contain a provision allowing Onvoy to use unleased portions of the GOB, and it did not contain this provision due to a unilateral mistake of Onvoy. The jury could not have been more clear that Onvoy had no contractual right to use unleased space in the GOB.

In summary, Onvoy' claims at pp. 14-20 of its brief create no genuine issues of material fact that could contradict the central, undisputed facts of the case.

## **II. The Jury's Findings are Binding on the Trial Court.**

Onvoy, on page 23 argues that the jury's advisory findings are not binding. This is not true. ALLETE is entitled to a jury determination of the intent and construction of the lease. In making this argument, Onvoy argues that Interrogatories 7-10 on the Special Verdict Form relate to Onvoy's reformation claim "and the jury's thoughts on the reasons for any failure of the GOB Lease to express a prior agreement on interconnection." (Appellant Brief, p. 23.) The flaw in Onvoy's argument rests with the fact that the jury's special verdict questions presented the same factual issues as were decided by the Court in its incongruous findings and declaratory judgment.

The first verdict finding of no breach found that the GOB Lease did not allow Onvoy the right of interconnection outside of the GOB space. Indeed, as conceded by Onvoy, the Special Verdict Form specifically stated that questions 7-10 are only to be answered if the jury found no breach of contract. (Onvoy's Brief, p. 23-24.) Thus, it is apparent that one would only need an explanation of why the GOB Lease did not contain an agreement authorizing Onvoy to use unleased space if the absence of such a right was determined by the first special verdict.

As it turns out, the jury told us the reason the GOB Lease did not provide an agreement granting Onvoy the right of access through unleased space it was due to a unilateral mistake by Onvoy, which was not accompanied by any inequitable conduct by ALLETE. Consequently, the jury's findings are binding on the trial court's declaratory judgment, for "The existence and terms of the contract are both questions for the jury." See Roske v. Ilykanyics, 45 N.W.2d 769, 776 (1951). Similarly, under Rule 38.01 of the

Minnesota Rules of Civil Procedure, in actions for the recovery of money only, or of specific real or personal property, the issues of fact shall be tried by a jury, unless a jury trial is waived or references ordered. Thus, the issues in this case were properly tried to a jury and determined by the jury. Unfortunately, the trial court took it upon itself to enter an inappropriate declaratory judgment with findings contrary to those of the jury.

At the time the Special Verdict Form was crafted, the Court and parties understood that the jury's answer to the breach of contract question, Special Verdict Number One, would tell us whether the GOB Lease granted Onvoy the right to run fiber through unleased portions of the GOB as it claimed or whether the GOB Lease did not provide such a grant as ALLETE argued, as it was then, and is now, an undisputed fact that ALLETE denied Onvoy's demands for unleased space. Accordingly, at the time the special verdict was crafted, it was understood that only if it was determined that there was no breach would it be necessary to determine why the GOB Lease did not grant Onvoy that right.

The inescapable truth which the Court of Appeals improperly ignored was that Onvoy demanded access, ALLETE refused it and the jury concluded there was no such right. Thus, the trial court's declaratory judgment and the jury's findings of fact are irreconcilable and because ALLETE is entitled to a jury determination the declaratory judgment must be reversed.

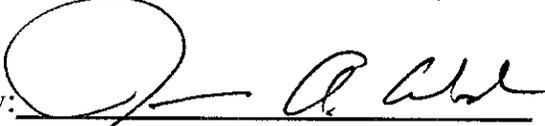
### CONCLUSION

Onvoy and ALLETE disputed whether the GOB Lease entitled Onvoy access through unleased space in the GOB for Onvoy to run fiber optic cables through. Onvoy

maintained that the GOB Lease did allow such usage and that ALLETE breached the GOB Lease by denying them this right. ALLETE maintained that the GOB Lease did not authorize Onvoy the right of access through area of the GOB outside of the 430 square feet leasehold premises and that ALLETE did not breach the contract by refusing Onvoy access without a separate agreement. The matter was fairly submitted to a jury which determined that the GOB Lease was not breached by the admitted, undisputed fact that ALLETE denied Onvoy access without a separate agreement. The trial courts' findings of fact and declaratory judgment are irreconcilably conflicted with the jury findings of fact and therefore must be reversed.

Dated: December 21, 2006

**JOHNSON, KILLEN & SEILER, P.A.**

By: 

JAMES A. WADE #113414  
ROY J. CHRISTENSEN #0302508  
230 W. Superior Street, Suite 800  
Duluth, Minnesota 55802  
Telephone: (218) 722-6331  
*Attorneys for Appellant ALLETE, Inc.*

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).