SDITC

South Dakota Independent
Telephone Coalition, Inc.

Richard D. Coit
*Executive Director*
rcsditc@sd.cybernex.net



November 12, 1998

William Bullard, Jr.
Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

RE: Proposed Administrative Rules

Dear Bill:

Enclosed for filing with the Commission are the original and 10 copies of SDITC's Reply Comments on Proposed Administrative Rules.

Please distribute to the Commission and Staff as necessary.

Thank you for your assistance.

Sincerely,

Richard D. Coit
Executive Director and
General Counsel

207 E. Capitol Ave., Ste. 206 • P.O. Box 57 • Pierre, SD 57501 • Ph: 605/224-7629 • Fax 605/224-1637

# REPLY COMMENTS OF THE SOUTH DAKOTA INDEPENDENT TELEPHONE COALITION ("SDITC") ON PROPOSED ADMINISTRATIVE RULES

SDITC, on behalf of its member companies, submits these reply comments in response to comments presented by other parties in this matter and to supplement our initial comments filed herein, dated November 2, 1998.

## I. Chapter 20:10:01, General Rules of Practice.

ARSD § 20:10:01:15.06. Individual's right to appear.

SDITC would agree with concerns expressed by other parties regarding the Commission's proposed revision to ARSD § 20:10:01:15.06. Individuals or entities that are not intervening parties to the proceeding, who offer comment during the hearing process, should be confined to commenting on the specific issues previously noticed by the Commission. Allowing comments which raise other issues for Commission decision would infringe upon the due process rights of other individuals or entities, including parties and non-parties to the proceeding.

## Chapter 20:10:24, Interexchange Carrier and Classification Rules.

ARSD § 20:10:24:04.04. Procedure for suspension or revocation hearing.

As written, the proposed section suggests that the burden is upon the company complained against to show compliance with Commission regulations and establish that its certificate of authority should not be revoked. Such an approach would violate federal and state due process protections. Before the Commission can properly revoke any certified companies right to do business in South Dakota, there must be a sufficient showing of the alleged facts supporting the charge or violation claimed and the burden for this showing must fall on the complaining party.

SDITC urges the Commission to change ARSD § 20:10:24:04.04 by adding at the end of the rule, the following sentence:

> "The burden of proof to establish that the allegations contained in the order to show cause exist, and such allegations warrant the revocation of the certificate of authority, shall be upon the complainant or commission staff."

## III. ARSD Chapter 20:10:32, Local Exchange Service Competition.

ARSD § 20:10:32:01. Definitions.

Dakota Telecommunications Group, Inc. (DTG) in its written comments proposes changes to this section. Specifically, DTG proposes changing the term "alternative local service provider" found in subsection (1) to "competitive local exchange carrier" and proposes deleting the "local service provider" definition found in subsection (3).

SDITC feels that neither of the changes proposed is necessary or proper. Use of the term "alternative local service provider" is a more accurate means of referencing new providers of local exchange services -- those that are not incumbent local providers. The term competitive local exchange carrier could literally be interpreted to reference both new and incumbent local service providers.

The "local service provider" definition should be retained because it is used in subsequent sections within ARSD Chapter 20:10:32, specifically, when the rule provisions are intended to apply to all providers of local exchange services, including "alternative local service providers" and incumbent local service providers.

ARSD § 20:10:32:02. Certificate of authority required to provide local exchange service.

DTG proposes adding to the second sentence of ARSD § 20:10:32:02 the words "that already has a certificate". SDITC does not believe these additional words are necessary to clarify the intent of the rule. Even without this additional language, the rule clearly indicates that no entity can provide local exchange service in an area where it does not have a valid certificate of authority.

SDITC questions whether the words offered by DTG are intended to somehow limit application of ARSD § 20:10:32:02 to only local service providers that are granted a certificate of authority under the new rule provisions.

ARSD § 20:10:32:03. Certificate of authority for local exchange service -- Application requirements.

DTG proposes numerous revisions that would lessen the information required of local service providers in the application process. SDITC objects to the revisions offered, especially, the revisions suggested for subsections (6), (7) and (9). Under the new state statutes, the Commission is required to adopt rules addressing the competitive provisioning of local exchange

services. SDCL § 49-31-76 specifically mandates rules "directed toward preserving and advancing universal service, protecting the public safety and welfare, ensuring the continued quality of service, and safeguarding the rights of affected consumers."

Most of the revisions proposed by DTG seem inconsistent with these statutory standards.

ARSD § 20:10:32:06. Rejection of incomplete application – Decision criteria for granting a certificate of authority.

The revisions proposed by DTG to ARSD § 20:10:32:06 are also inconsistent with the statutory standards set forth in SDCL § 49-31-76. Subsections (4), (5), and (7) through (11), which DTG proposes to delete, are particularly important to ensuring that all certified local service providers are capable of delivering reliable, high quality services.

ARSD § 20:10:32:07. Certification subject to commission imposed terms and conditions.

The provisions of ARSD § 20:10:32:07 are entirely consistent with 47 U.S.C. § 253(b) and SDCL § 49-31-71. The state statute, SDCL § 49-31-71, provides specifically that "In granting a certificate of authority to provide local exchange service, the commission may impose terms and conditions, on a competitively neutral basis, that it finds consistent with preserving and advancing universal service, protecting the public safety and welfare, ensuring the continued quality of service, and safeguarding the rights of consumers."

DTG is apparently attempting to limit the terms and conditions imposed on any certificate of authority for local exchange services to only those specifically set forth in the administrative rules. It is SDITC's position that the Commission needs greater flexibility and should not be limited to imposing service terms and conditions through the rulemaking process. Other terms and conditions in addition to those established by rule may be necessary depending on the particular case presented. Commission flexibility to at least consider "additional terms and conditions" is consistent with the general authority given this Commission under 47 U.S.C. § 253(b) and the general authority conferred by SDCL § 49-31-71.

ARSD § 20:10:32:11. Local calling scope for alternative providers.

DTG and AT&T are opposed to ARSD § 20:10:32:11. They suggest by their comments that competing local service providers should have complete discretion to establish their own unique local calling areas.

SDITC believes that if the Commission wishes to maintain the existing extended area service ("EAS") arrangements in South Dakota and maintain the current process for considering further EAS arrangements, the provisions of ARSD § 20:10:32:11 are absolutely essential. The Commission cannot expect incumbent carriers to maintain the existing EAS arrangements nor can it proceed toward requiring any further EAS arrangements, if competing carriers are given the ability to ignore the existing local calling area boundaries and arbitrage the market by offering smaller local calling areas at lower rates to customers not interested in the current EAS.

The provisions of ARSD § 20:10:32 are necessary and reasonable. Competing carriers would not be prevented from offering local calling areas that are larger than existing local calling areas. Also, the provisions do not impose an outright prohibition on the offering of smaller local calling areas by competitors. Competing carriers are given the opportunity to offer a "different" (meaning smaller) local calling area than the incumbent carrier, but must seek Commission approval before doing so. Pursuant to ARSD § 20:10:21:11, a smaller local calling area can be offered if it is shown that it "would not be contrary to universal service, public safety and welfare, quality of service, and consumer rights concerns." These standards referenced in ARSD § 20:10:21:04 are based directly on the language found in SDCL § 49-31-71 and 49-31-76.

ARSD § 20:10:32:11, as proposed, is completely consistent with the language of 49-31-71, which gives the Commission authority to impose "on a competitively neutral basis" any terms and conditions that if finds "consistent with preserving and advancing universal service, protecting the public safety and welfare, ensuring the continued quality of service, and safeguarding the rights of consumers." The rule is competitively neutral because it does not impose on competing carriers any different regulation than is currently imposed on incumbent carriers. Moreover, the rule is necessary to preserve the existing EAS arrangements which provide a valuable benefit to many customers residing within the established local calling areas. If the Commission gives competing carriers the ability to offer any sort of local calling scope without regard to the existing EAS arrangements, the existing arrangements will not be sustainable.

Similar rules designed to preserve existing EAS arrangements in competitive markets have been adopted in other states. The state of Colorado has adopted a rule that is even more restrictive. It reads as follows:

> 723-2-17.3 Local Calling Area Standards. Local calling areas as established by the Commission shall be considered to meet the community of interest standard. Any telecommunications service provider that is granted authority to offer basic

local exchange service in an area included within an exchange for which the Commission has previously established a Local Calling Area shall provide that same calling area to its customers, unless modified by order of the Commission. *Emphasis added.*

ARSD § 20:10:32:12. Prohibition of discrimination.

SDITC opposes DTG's request to eliminate ARSD § 20:10:32:12. Many of the rules addressing local service competition deal with the service obligations imposed on local service providers. The provisions of ARSD § 20:10:32:12, which prohibit unjust and unreasonable discrimination, bring further emphasis to and supplement these service obligation provisions.

ARSD § 20:10:32:16. Rural service area – Additional service obligations.

Without proposing any revisions to ARSD § 20:10:32:16, DTG contends that "the rule is inappropriate, despite federal law authority to impose it." DTG also mentions that the "rule should mean that the competitive entrant will be given eligible telecommunications carrier status for the service area affected . . .."

As DTG concedes in its comments, the provisions of ARSD § 20:10:32:16 are consistent with federal law. 47 U.S.C. § 253(f) specifically gives states the ability to "require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service." Further, our state legislature has specifically mandated the implementation of this "rural market" safeguard. SDCL § 49-31-73 provides in pertinent part that "if the applicant proposes to provide any local exchange service in the service area of a rural telephone company, the applicant is required to satisfy the service obligations of an eligible telecommunications carrier as set forth in 47 U.S.C. § 214(e)(1) as of January 1, 1998, within a geographic area as determined by the Commission." *Emphasis added.*

DTG challenges the rural safeguard that is specifically provided for under the federal law and mandated under the state law. Contrary to the views of DTG, both federal and state legislatures have recognized that in order to preserve universal service in rural service areas, all local service providers must carry a minimum set of service obligations. The provisions of 47 U.S.C. § 253(f), in conjunction with 47 U.S.C. § 214(e)(1), and also SDCL § 49-31-73 identify these minimum service obligations. The provisions are specifically intended to prevent competitors from merely "cherry picking" customers in rural markets.

ARSD § 20:10:32:16, as proposed, is consistent with both the state and federal law. It also offers some needed clarification by identifying specifically the time period by which alternative local service providers must meet the service obligations imposed.

DTG argues that ARSD § 20:10:32:16 should be interpreted to mean that all competitive entrants in a rural service area will be granted eligible telecommunications carrier ("ETC") status. This position also has no support in either the federal or state law. In fact, it is in direct conflict with the relevant federal and state provisions. In general, 47 U.S.C. § 214(e)(2) permits designation of more than one ETC for a service area. For rural service areas, however, an exception is established. Before more than one ETC can be designated "for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest." SDCL § 49-31-78, the state statute addressing Commission designation of ETCs, includes similar language stating that "[t]he commission may not in an area served by a rural telephone company designate more than one eligible telecommunications carrier absent a finding that the additional designation would be in the public interest." Accordingly, a presumption is established by the federal and state law that only one ETC should be designated in rural telephone company service areas. An additional ETC can only be designated in rural service areas if an affirmative finding is made that it would be in the public interest.

DTG's interpretation of ARSD § 20:10:32:16 ignores this "public interest" standard applicable to additional ETC designations in rural service areas. Whether or not ETC service obligations are imposed as a rural safeguard, to prevent "cherry-picking" by competitors in rural service areas, is one issue. Whether or not additional carriers should be granted ETC status in rural service areas is a different issue and is an issue that requires the Commission to conduct a "public interest" review. The fact that all local service providers, as a condition to providing their services in a rural service area, must meet the ETC service obligations referenced in 47 U.S.C. § 214(e)(1) does not mean they should all receive ETC status. The ETC designation issue, inasmuch as it determines eligibility for universal service funding, requires a thorough review and involves different concerns.

ARSD § 20:10:32:17. Good faith offering requirement.

DTG proposes to delete the last sentence of ARSD § 20:10:32:17 which would require alternative providers to provide their services "in a manner that ensures continued reliable access to quality local exchange services."

SDITC opposes any change to the rule. The language in the last sentence of the rule will help to ensure that competing carriers in rural areas act "in good faith" toward meeting the ETC service obligations imposed by SDCL § 49-31-73 and ARSD § 20:10:32:16. The language would prevent a carrier from purposely offering a less than quality service to certain customers or a class of customers as a means of skirting the imposed service obligations.

ARSD § 20:10:32:20. Failure to meet service obligations – Grounds for revocation of certificate.

DTG asks the Commission to delete ARSD § 20:10:32:20 in its entirety.

SDITC opposes the deletion of or any change to the rule. As already noted, the rural safeguard provided for under SDCL § 49-31-73 and ARSD § 20:10:32:16 is very important to preserving universal service in rural areas. Enforcement of the safeguard will likely be difficult. There must be some penalty mechanism in place to force compliance.

ARSD § 20:10:32:38. Rural exemption from negotiation and interconnection requirements.

DTG asks the Commission to delete all of the language in ARSD § 20:10:32:38 which serves to define what constitutes a "bona fide request" for purposes of the rural exemption review process set forth in SDCL § 49-31-79.

DTG's objections relate more to the process for reviewing the rural exemption that is plainly established under SDCL § 49-31-79 and offer no basis for deleting any part of the rule.

SDITC believes the rule provisions are completely reasonable. All of the information required is information which the requesting carrier should possess if it seriously intends to enter the market and commence providing local exchange services. Further, the rule only requires that the requesting carrier provide its "best reasonable estimate" of the information listed.

Given the substantial rights that may be affected through the rural exemption review process, SDITC believes the Commission must in this process establish some standards concerning the type of information that should be included in any rural interconnection request. Such standards are necessary to give some assurance that any request for interconnection, services or network elements received by a rural telephone company is in fact a "bona fide" request. No rural telephone company exemption should be terminated prematurely through

review proceedings that are unnecessary given the requesting carrier's actual intentions. Also, rural telephone companies should not have to bear the expense associated with unnecessary or unsupported exemption review proceedings.

ARSD § 20:10:32:43. Designation of eligible telecommunications carriers.

Both DTG and AT&T object to the last sentence of ARSD § 20:10:32:44 which provides that the Commission "in reviewing any proposed additional eligible telecommunications carrier designation within an area served by a rural telephone company shall not find it to be in the public interest if the provider requesting such designation is not offering its services coextensive with the rural telephone company's service area."

SDITC would point out that the above language which DTG and AT&T propose to delete is consistent with the Federal Telecommunications Act, the Federal-State Joint Board recommendations set forth in FCC 96J-3, CC Docket No. 96-45, *Recommended Decision*, (In the Matter of the Federal-State Joint Board on Universal Service), released November 8, 1996, and the findings of the FCC in the same docket FCC 97-157, *Report and Order*, released May 8, 1997.

The Act, the Joint Board recommendations, and the FCC findings all envision that state commissions will establish the same service area for ETC purposes for a rural telephone company and any competing local exchange carrier. The disputed language in ARSD § 20:10:32:43 is consistent with the federal law and clarifies that it would not be in the public interest in designating any additional ETC in a rural service area to establish different ETC service areas.

The importance of establishing the same service area for both rural telephone companies and competitive carriers was expressly identified by the Joint Board and the FCC.[1] In particular, both expressed a concern that, if a rural telephone company and a competitive ETC had different ETC service areas, it could result in undesirable "cream skimming" by the competitor.

It should be noted that ARSD § 20:10:32:43 does not require that the service areas of rural telephone companies and competing carriers be identical for all purposes. It only requires that any competing carrier which seeks ETC status meet the ETC service obligations over the same area. The rule effectively provides that the competing carrier shall qualify for ETC status on the same basis as the rural telephone company. Keeping ETC service areas the same is

[1] FCC 96J-3, Recommended Decision, par. 172, and FCC 97-157, Report and Order, par. 189.

especially important because, under the current FCC rules, competing carriers granted ETC status are to receive universal service funding based on the incumbent carrier's universal service costs.[2]

ARSD § 20:10:32:46. Determining the applicable service area.

DTG has proposed an additional sentence for inclusion in ARSD § 20:10:32:46.

SDITC opposes the new language offered. It is clearly contrary to the federal law, which as noted above, does not permit the establishment of different ETC service areas between incumbent and competitive carriers.

Dated this 12th day of November, 1998.

Respectfully submitted,

Richard D. Coit
Executive Director and General Counsel

[2] 47 C.F.R. §54.307(a)(1).