

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF)
VENTURE COMMUNICATIONS COOPER-)
ERATIVE FOR SUSPENSION OR MODI-) DOCKET NO. TC06-181
FICATION OF LOCAL DIALING PARITY)
RECIPROCAL COMPENSATION OBLI-)
GATIONS)

**Opposition to Request of Alltel Communications, Inc.
To Use the Office of Hearing Examiners**

Venture Communications Cooperative (“Venture”) and South Dakota Telecommunications Association (“SDTA”) hereby oppose the Request of Alltel Communications, Inc. (“Alltel”) to utilize the South Dakota Office of Hearing Examiners (“OHE”) for the above-referenced proceeding.

Facts

On October 24, 2006, Venture filed a Petition pursuant to Section 251(f)(2) of the Communications Act of 1934, as amended (the “Act”) and SDCL 49-31-80 requesting that the Commission grant a suspension or modification of Section 251(b)(3) and 251(b)(5) of the Act. Rural Cellular Corporation (“RCC”) and Alltel filed Motions to Intervene. On December 4th, 2006 the interventions were granted by the South Dakota Public Utilities Commission (“Commission”). Neither party has filed a formal response to the Petition. On January 12, 2007, Alltel filed a Request to use the OHE pursuant to SDCL §1-26-18.3 with supporting Affidavit of Ron Williams. The supporting Affidavit of Ron Williams states generally that the relief requested will result in an increased cost to Alltel to exceed \$2,500. Venture and SDTA oppose this request.

Argument

1. **The Petition for Suspension or Modification of Local Dialing Parity and Reciprocal Compensation Obligations (“Petition”) is not a Contested Case Pursuant to SDCL 1-26-18.3.**

The request by Alltel was filed pursuant to SDCL 1-26-18.3, which applies to a “contested case”, if the amount in controversy exceeds \$2,500, or if a property right may be terminated. A “contested case” is defined in SDCL 1-26-1(2) as follows:

(2) "Contested case," a proceeding, including rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but the term does not include the proceedings relating to rule making other than rate-making, proceedings related to inmate disciplinary matters as defined in § 1-15-20, or student academic or disciplinary proceedings under the jurisdiction of the Board of Regents or complaints brought by students attending institutions controlled by the Board of Regents about their residency classification under §§ 13-53-23 to 13-53-41, inclusive;

South Dakota case law states that the term “contested case” as used in SDCL 1-26-1(2) means an adjudicatory hearing as opposed to a quasi-legislative or rule making proceeding. Union Carbide Corporation v. South Dakota State Conservation Commission, 308 NW2d 753, 757 (SD 1981) An administrative action is “Adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect”. Id at 756 (citing Wood County Bank v. Camp, 348 F.Supp. 1321, 1325 (D.D.C. 1972), vacated and remanded without opinion, 489 F.2d 1273 (D.C.App.1973); Hanig v. City of Winner, 2005 SD 10, ¶ 11, 692 NW2d 202, 206

The Petition requesting Suspension and Modification is not adjudicatory in nature. The Suspension and Modification has a quasi-legislative or rule-making character which is designed

to promulgate policy-type rules or standards and involves general facts affecting overall groups. They affect the rights of individuals in the abstract. 73 CJS Public Administrative Law and Procedure 17.

The Courts have held that there are two principal characteristics which distinguish rulemaking from adjudication. Primarily, adjudication resolves disputes among specific individuals in specific cases. Rulemaking affects the rights of broad classes of unspecified individuals. United States v. Florida E. Coast Ry., 410 U.S. 224, 244-45, 93 S Ct. 810, 820-821, 35 L.Ed.2d 223 (1973); Ford Motor Co. v. FTC., 673 F.2d 1008, 1010 (9th Cir. 1981) cert. denied 459 U.S. 999, 103 S. Ct 358, 74 L.Ed.2d 394 (1982)

Second, adjudications involve concrete disputes and have an immediate effect on specific individuals. Rulemaking is prospective and has a definitive effect on individuals only after the rule subsequently is applied. The legal consequences are applied only for the future. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216-17, 109 S. Ct. 468, 476, 102 L.Ed.2d 493 (1988).

Section 251 (f)(2) and SDCL 49-31-81 set forth the factors a State commission must consider in order to determine whether to grant a petition for suspension or modification.

A local exchange carrier...may petition a State commission for a suspension or modification of the application of a requirement...of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary--

- (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
 - (ii) to avoid imposing a requirement that is unduly economically burdensome; or
 - (iii) to avoid imposing a requirement that is technically infeasible; and
- (B) is consistent with the public interest, convenience, and necessity.

“Significant adverse economic impact on users of telecommunications services generally” fits squarely into the quasi legislative, rule-making authority of the Commission. A determination of “public interest, convenience, and necessity” are policy-type decisions affecting telecommunications users generally. The Communications Act, with the FCC, set the rules for Section 251 interconnection and 251(b) dialing parity and reciprocal compensation and 251(f) allows the State commissions to modify those rules for rural ILECs that make the required showing. This clearly fits the definition of rule making or quasi-legislative as opposed to adjudicatory. Furthermore, although Alltel and RCC have been granted intervention, they will be potentially impacted only after the Commission determines if Venture’s obligations are suspended or modified. This is not a dispute by Venture, Alltel and RCC. The rules that will govern Venture’s provision of dialing parity and reciprocal compensation will apply to all telecommunications carriers.

Courts throughout the United States have determined when Public Utilities Commissions are acting in a legislative or quasi-legislative capacity when making their rulings. In Minnesota, the Courts have stated that an agency is exercising a legislative as opposed to a quasi-judicial function when it “balances cost and noncost factors and makes choices among public policy alternatives.” Qwest’s Wholesale Service Quality Standards, 68 NW2d 58 (Minn.App. 2004) citing Arvig Tel.Co. v. Northwestern Bell Tel. Co., 270 NW2d 111,116 (Minn. 1978) Courts have also found that granting a certificate of public convenience is a legislative function. Aizen vs. Pennsylvania Public Utility Commission, 60 A.2d 443 (Pa. Super. 1948); Application of Schmunk, 65 NW 2d 386 (1954). The commission is authorized to determine when and to what extent an existing utility actually engaged in rendering a public service shall be protected from

competition, or to what extent competition may be necessary to secure adequate service to the public.

The current docket is analogous to these types of proceedings. The Commission will not be called upon to adjudicate the disputes between Alltel, RCC and Venture with regard to an interconnection agreement. Rather, this docket requires the Commission to “balance cost and noncost factors and make choices among public policy alternatives.” That is a quasi-legislative function that does not fall within the definition of a contested case, and is thus not subject to transfer pursuant to SDCL 1-26-18.3

2. Alltel should not be allowed to make this request due to the timing of the request.

Section 251(f)(2) provides that “[t]he State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition.” The Petition was filed on October 24, 2006. Alltel’s request for transfer to the OHE was not filed until January 12, 2007—nearly 90 days after the filing of the Petition. Even if Alltel had a right to transfer this case to OHE, which “right” Venture and SDTA vehemently argue Alltel does not have, Alltel is estopped from attempting to assert such claimed right because of the untimeliness of the request. Transfer of a case after one-half of the permitted time to act upon a suspension or modification petition has elapsed results in a miscarriage of justice.

3. SDCL 1-26-18.3 is preempted by federal law and the Commission has incorrectly interpreted the provisions of SDCL 1-26-18.3, without giving affect to other related statutes in 1-26D and the Commission’s obligations in Chapter 49-31.

This issue is not a new issue for this Commission. Alltel has filed a request to transfer two arbitration dockets to the OHE recently. (TC06-159, TC06-036-42) SDTA and the Local Exchange Carriers, including Venture, in those cases filed resistance to the requests but the request was ultimately granted by the Commission. The Orders filed by the Commission state

that “The Commission finds that SDCL 1-26-18.3, in conjunction with SDCL Chapter 1-26D, gives Alltel (WCC) the right to use the OHE.” (Attachment B-D)

SDTA and the Local Exchange Carriers involved consistently have disagreed with the ruling by the Commission, but the parties chose not to appeal the determinations made by the Commission in those cases. Instead of regurgitating those arguments, Venture and SDTA will summarize the remaining arguments which have been made on those previous occasions for the purpose of making a record for possible appeal. The arguments are also formally incorporated by this reference and the August 16, 2006 letter filed by Rich Coit of SDTA is attached to this brief as Attachment A and is likewise incorporated herein by this reference.

Basically, the previous position of SDTA and the LECs is that SDCL 1-26-18.3 is preempted by federal law and the Commission, in interpreting the provisions of SDCL 1-26-18.3, has not given proper consideration to other related statutes in SDCL 1-26D or given proper consideration to the Commission’s obligations in SDCL 49-31. Venture and SDTA still maintain that position, even in the other two dockets, which were arbitration dockets. Preemption in the current docket, which requires this Commission to make a public interest determination, is even clearer. Congress has enacted a comprehensive statutory scheme which allows the Commission to grant modifications or suspension of the interconnection requirements set forth in federal law. 47 U.S.C. § 251 establishes specific procedures and criteria the Commission must use when determining whether a suspension is warranted.

Venture’s Petition has been filed pursuant to SDCL 49-31-80 which grants the Commission the authority to grant a suspension or modification of any of the interconnection or other requirements set forth in federal law. The state law is consistent with 47 U.S.C. 251(f)(2), which states that the State Commission shall act upon any petition filed under this paragraph

within 180 days after receiving the petition. Pending such action, the State Commission may suspend enforcement of the requirements to which the petition applies with respect to the petitioning carrier.

Under the Federal Telecommunications Act (“the Act”), the term “State commission” is defined as follows:

The term “State commission” means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers. 47 U.S.C. § 153(41).

In the state of South Dakota, it is this Commission that meets the Act’s definition of State commission, not the OHE. “The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.” SDCL § 49-31-3. The Commission has supervision over all rates or charges of telecommunications services, and of intrastate access charges of cooperatives, municipalities, and companies serving less than 50,000 subscribers. See SDCL §§ 49-31-4; 49-31-5.1; 49-31-15; and 49-31-19.

Because Federal law, not South Dakota law controls this issue, SDCL § 1-26-18.3 is clearly preempted by federal law. Federal law preempts state law in several situations: (1) where Congress has specifically stated that state law is expressly preempted; (2) when federal law “creates a scheme of federal regulation so pervasive that the only reasonable inference is that it meant to displace the states (field preemption);” and (3) when state law and federal law conflict (conflict preemption). See Sheesley v. Cessna Aircraft Co., 2006 D.S.D. 6, ¶75 (citing Davenport v. Farmers Ins. Group, 378 F.3d 839, 842 (8th Cir. 2004). “Congressional intent is the touchstone for determining the preemptive effect of a statute.” Wuebker v. Wilbur-Ellis Co., 418 F.3d 883, 886 (8th Cir. 2005). Congress specifically requires that a *State commission* act upon the

suspension or modification petition, and this Commission's administrative rules are in accord. See generally 47 U.S.C. § 251; see also A.R.S.D. 20:10:32. Furthermore, it is the State commission that is required to balance the appropriate factors to determine if a suspension or modification is warranted. Referral of this case to the OHE would be in direct conflict with federal law.

To utilize SDCL 1-26-18.3 to usurp this Commission's authority as it relates to a company's request for suspension or modification unquestionably conflicts with federal law and was simply not contemplated by the South Dakota legislature. Accordingly, SDCL § 1-26-18.3 is preempted to the extent it conflicts with established federal law.

Conclusion

Alltel's Request that this case be transferred to the OHE fails to meet the statutory criteria for transfer as articulated in SDCL 1-26-18.3. This is not a contested case as defined by the statute. Therefore, the Request should be denied. Alltel's Request is also untimely. Venture would be unduly prejudiced by a removal at this point due to the short time period left in which the Commission has to act on the Petition.


The Telecommunications Act of 1996, read together with Chapter 49 of the South Dakota Code, and the South Dakota administrative rules, establishes the clear and controlling intention of Congress to delegate authority to this Commission to oversee suspension or modification of the federal rules. Such a comprehensive scheme cannot be ignored nor can it be subjugated to SDCL 1-26-18.3. Alltel's proposed reading of this statute is clearly inconsistent with state law and established federal law and, accordingly, to the extent that it conflicts with this Commission's federally mandated authority, it must be deemed to be preempted.

For all of the reasons set forth herein, Venture respectfully requests that this Commission deny the Request of Alltel to transfer this matter to the OHE for all further hearings and proceedings.

Dated this 26 day of January, 2007.

Respectfully submitted,

Venture Communications Cooperative

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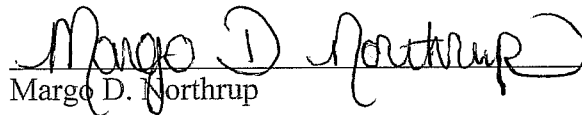
Certificate of Service

I hereby certify that on the 26 day of January, 2007, a true and correct copy of Venture's Opposition to Request of Alltel Communications, Inc. to Use the Office of Hearing Examiners was served electronically upon:

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