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Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre SD 57501-5070

RE: IN THE MATTER OF THE PETITION OF VENTURE COMMUNICATIONS
COOPERATIVE FOR SUSPENSION OR MODIFICATION OF LOCAL DIALING
PARITY RECIPROCAL COMPENSATION OBLIGATIONS
SDPUC Docket File Number TC 06-181
GPGN File No. 5925.060651

Dear Ms. Van Gerpen:

Enclosed for filing please find Alltel's Communications, Inc.'s Reply to Venture's and SDTA's Opposition to Request of Alltel to Use the Office of Hearing Examiners in the above-entitled matter. By copy of same, counsel have been served electronically and via U.S. mail.

Sincerely,



Talbot J. Wieczorek

TJW:klw

Enclosure

c: Darla Rogers/Margo Northrup
Ben Dickens/Mary Sisak
Rich Coit
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Clients

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF
VENTURE COMMUNICATIONS COOPERATIVE
FOR SUSPENSION OR MODIFICATION OF
LOCAL DIALING PARITY RECIPROCAL
COMPENSATION OBLIGATIONS

DOCKET No. TC06-181

**ALLTEL COMMUNICATIONS, INC.'s REPLY TO OPPOSITION TO REQUEST OF
ALLTEL TO USE THE OFFICE OF HEARING EXAMINERS**

WWC License, LLC, a wholly-owned subsidiary of Alltel Communications, Inc.
(hereinafter "Alltel"), by and through its attorneys of record, Talbot J. Wieczorek and the law firm of Gunderson, Palmer, Goodsell & Nelson, LLP and Stephen B. Rowell of Alltel Communications, Inc., hereby file this Reply to Venture Communications Cooperative's (hereinafter "Venture") Opposition to Alltel's Request to Use the Office of Hearing Examiners.¹ Alltel's request is properly granted for several reasons. First, contrary to Venture's position, a petition for suspension or modification is a contested case and not a rule making proceeding. As such, it is properly submitted to the Officer of Hearing Examiners pursuant to S.D.C.L. § 1-26-18.3. Second, pursuant to S.D.C.L. § 1-26-17, Alltel's request was timely filed. Finally, as this Commission has previously found, federal law does not preempt S.D.C.L. § 1-26-18.3.

¹ RCC Minnesota joins in this brief.

DISCUSSION

I. **Contrary To Venture's Position, Both The Pertinent Definitions And Procedural Requirements Demonstrate Venture's Petition For Suspension Or Modification Is a Contested Case That Is Properly Referred To The Office Of Hearing Examiners.**

A review of the definitions and applicable procedures for contested cases and rules demonstrates Venture's petition for suspension or modification is a contested case and not a rule making procedure. In re South Dakota Real Estate Commission, 484 N.W.2d 123, 124 (S.D. 1992)(reviewing definitions and procedures to ascertain whether a real estate licensure proceeding is a contested case). To illustrate, S.D.C.L. § 1-26-1(2), defines a contested case as follows:

"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; ...

(emphasis added). Procedurally, the parties in a contested case are afforded a right to a hearing. S.D.C.L. § 1-26-17. Other parties whose pecuniary interests may be affected by an agency's order in a contested case are afforded an opportunity to intervene. S.D.C.L. § 1-26-17.1. A hearing with various evidentiary requirements is provided for the involved parties. S.D.C.L. § 1-26-19 *et seq*; *See also* In the Matter of the Application of Union Carbide Corp., 308 N.W.2d 753, 758 (S.D. 1981). Ultimately, the agency provides a decision regarding the legal rights, duties or privileges of a party. S.D.C.L. § 1-26-25.

Conversely, a much different procedure applies to rule making proceedings. First, a rule is defined as,

“Rule,” each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

- (a) Statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public;
- (b) Declaratory rules issued pursuant to § 1-26-15;
- (c) Official opinions issued by the attorney general pursuant to § 1-11-1;
- (d) Executive orders issued by the Governor;
- (e) Student matters under the jurisdiction of the Board of Regents;
- (f) Actions of the railroad board pursuant to § 1-44-28;
- (g) Inmate disciplinary matters as defined in § 1-15-20;
- (h) Internal control procedures adopted by the Gaming Commission pursuant to § 42-7B-25.1;
- (i) Policies governing specific state fair premiums, awards, entry, and exhibit requirements adopted by the State Fair Commission pursuant to § 1-21-10;
- (j) Lending procedures and programs of the South Dakota Housing Development Authority; ...

(emphasis added). Procedurally, a copy of a proposed rule must be served upon the departmental secretary, bureau commissioner, or constitutional officer of the department to which it is attached. S.D.C.L. § 1-26-4(1). Fifteen days after this service, the director must be served with a copy of any publication described in 1-26-6.6, a copy of the fiscal note described in § 1-26-4.2, a copy of the impact statement on small business described in § 1-26-2.1, and a copy of the notice of hearing. S.D.C.L. § 1-26-4(2). The agency must also provide all interested persons an opportunity to submit data, opinions or argument. S.D.C.L. § 1-26-4(4). After considering the same, the director is then to submit all changes to the rule to the agency. S.D.C.L. § 1-26-4(7). In addition, the Interim Rules Review Committee may require an agency to hold public hearings on the rule. S.D.C.L. § 1-26-4.7.

Tellingly, the procedures that govern rule making proceedings have not been utilized to date with respect to Venture's petition for suspension or modification. Specifically, there is no proposed rule that has been served as required by S.D.C.L. § 1-26-4(1). No publications, fiscal notes, or small business impact statements have been provided as required under S.D.C.L. § 1-26-4(2). It is doubtful that Venture actually contends that the Interim Rules Review Committee has any authority to participate in this action as allowed under S.D.C.L. § 1-26-4(7). Moreover, the definition of rule does not even apply to the exemption Venture seeks. It is plainly not requesting an implementation, interpretation, or prescription of law, policy, procedure, or practice requirements of an agency. Therefore, Venture has set forth no definitional or procedural basis to suggest that this action is properly considered a rule making proceeding.

Rather, under the above, it is apparent that Venture's petition for suspension or modification is a contested case. Therein, Venture is seeking a determination of its legal rights to a suspension or modification of its obligations set forth under Sections 251(b)(3) and 251(b)(5) of the Telecommunications Act. As such, Venture's petition satisfies the definition of a contested case. Moulton v. S.D., 412 N.W.2d 487, 494 (S.D. 1987); In the Matter of the Application of Union Carbide Corp., 308 N.W.2d at 757 (noting that an adjudicative hearing in which the "legal rights, duties, or privileges of a party" are determined is a contested case). In addition, the determination of Venture's legal rights has the potential to have a significant adverse pecuniary impact upon Alltel. As a result, consistent with the procedure for a contested case, Alltel filed a petition, which this Commission granted, to intervene pursuant to S.D.C.L. § 1-26-17.1.

Venture's petition for suspension or modification is a contested case. It satisfies the definition of a contested case. S.D.C.L. § 1-26-1(2). It has been handled to date as a contested

case. Moreover, even if this Commission concludes that Alltel is not in an adversarial position to Venture, adversarial parties are not a pre-requisite to a contested case. To the contrary, the South Dakota Supreme Court has held, in the very authority upon which Venture relies for its position, that an adversarial party is not necessary for a contested case. In the Matter of the Application of Union Carbide Corp., 308 N.W.2d at 758. Plainly, Venture's petition for suspension or modification is a contested case. As a result, Alltel has properly exercised its right to have this contested case heard by the Office of Hearing Examiners. Under the authority set forth in S.D.C.L. § 1-26-18.3, Alltel respectfully requests the Commission refer Venture's petition.

II. Alltel's Request To Use The Office Of Hearing Examiners Is Timely As The Statutory Time Frame To File The Same Has Not Yet Even Been Triggered.

South Dakota Codified Law § 1-26-17(7), delineates the time frame in which a petition to refer a matter to the Office of Hearing Examiners must be filed. It states,

A statement that if the amount in controversy exceeds two thousand dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request to the agency no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17;...

S.D.C.L. § 1-26-17(7). Notably, the Commission has not yet filed a notice of hearing relevant to its petition for suspension or modification. As such, the statutory time frame in which a request to refer to the Office of Hearing Examiners has not yet been triggered. Id. Rather, Alltel pre-filed its petition for referral before it was obligated under statute to do the same. As a result, Venture's position regarding timeliness is without merit.²

² As an aside, while Venture filed its petition for suspension or modification on October 24, 2006, it did not actually file the exhibits referenced therein until December. Arguably, the 180 days that this Commission has to act upon this petition, pursuant to 251(f)(2), should not begin to run until the complete petition, including all exhibits, is filed for the Commission's consideration. Furthermore, Alltel did not file its request to refer until January because it was in negotiations with Venture to set a schedule to apply to this action. As the parties were unable to even agree to a schedule, the relevant request to refer was filed.

III. Contrary To Venture's Argument, Federal Law Does Not Preempt SDCL § 1-26-18.3, Because The Federal And State Statutory Schemes Do Not Conflict.

This Commission has already been afforded an opportunity to consider the preemption argument, Venture now sets forth, on two separate occasions. (TC06-159, TC06-036-42). In both instances, this Commission concluded there was no basis to find federal preemption of S.D.C.L. § 1-26-18.3. However, for the benefit of the Commission, Alltel again provides its position regarding the same below.

The South Dakota Supreme Court has articulated the preemption doctrine as follows:

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid. The ways in which federal law may pre-empt state law are well established and in the first instances turn on congressional intent.

Dakota Systems, Inc. v. Viken, 2005 SD 27, ¶ 25, 694 N.W.2d 23, 33 (*quoting Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604-05, 111 S.Ct. 2476, 2481-82 (1991)). In analyzing congressional intent, the Eighth Circuit has set forth three distinct circumstances under which preemption may be found,

- (1) ...when Congress expressly forbids state regulation (express preemption);
- (2) when it 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 a law enacted by it directly conflicts with state law (conflict preemption).

Wuebker v. Wilbur-Ellis Co., 418 F.3d 883, 886 (8th Cir. 2005)(*citing English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)). Venture has not raised an argument under the first two prongs. As a result, Venture's claim of preemption fails unless it demonstrates conflict preemption. Id.

The federal statutory scheme set forth in § 252 does not conflict with SDCL § 1-26-18.3. To the contrary, federal law expressly authorizes this Commission to delegate arbitration

responsibilities. To illustrate, Federal law provides “a State commission” authority, “...to arbitrate any open issues.” 47 U.S.C. § 252(b). Notably, the applicable definition of “State commission” demonstrates that the FCC expressly granted State commissions authority to delegate the arbitration responsibilities set forth under § 252.

Specifically, 47 C.F.R. § 51.5 defines “State commission” as follows,

State commission. A 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. As referenced in this part, this term may include the Commission if it assumes responsibility for a proceeding or matter, pursuant to section 252(e)(5) of the Act of § 51.320. *This term shall also include any person or persons to whom the state commission has delegated its authority under sections 251 and 252 of the Act and this part.*

(emphasis added). Under this express language, a State commission consists of its board, officials, and any individuals to which the commission delegated responsibilities. *Id.* Therefore, while § 252 provides “State commissions” the authority to arbitrate any open issues, the FCC contemplated those commissions to include individuals to whom responsibilities were delegated. *Id.* As a result, this federal statutory scheme acknowledges this Commission’s right to delegate certain responsibilities it maintains under §§ 251 and 252, including arbitration responsibilities. As such, the applicable federal authority is consistent with the statutory right in contested cases to have the matter heard by the Office of Hearing Examiners under SDCL § 1-26-18.3.

The above definition of “State commission” renders Venture’s preemption argument wholly without merit. The argument is without merit because federal law expressly contemplates delegation of the responsibilities set forth under § 252. As such, there is no conflict between the applicable federal and state laws; and as a result no preemption. Therefore, there is no basis for this Commission to conclude that SDCL § 1-26-18.3 is preempted by federal law.


Finally, SDCL Chapter 1-26D, the Office of Hearing Examiners' chapter, specifically provides that the Hearing Examiner does not render the final decision. Rather, the Hearing Examiner's proposed decision and findings of fact and conclusions of law are presented to the agency, here the Commission, who "may accept, reject or modify those findings, conclusions and decisions." SDCL 1-26D-6. Because of this, the Commission is the final deciding entity under state law and federal law. Thus, on its face, Venture's argument lacks merit.

CONCLUSION

For the reasons set forth above, the Commission should grant the Request to Use the *Office of Hearing Examiners* and immediately refer this matter to the Office of Hearing Examiners.

Dated this 3^o day of January, 2007.

**Attorneys for Alltel Communications, Inc.
and RCC Minnesota**




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CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of January 2007, a true and correct copy of **Alltel Communication, Inc.'s Reply To Opposition To Request Of Alltel To Use The Office Of Hearing Examiners** was sent electronically and by first-class, U.S. Mail, postage paid to:

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Talbot J. Wieczorek