BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF MCCOOK COOPERATIVE TELEPHONE COMPANY FOR ARBITRATION PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996 TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH ALLTEL, INC.	**DOCKET No. TC 07-112** **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PARTIALLY EXCLUDE TESTIMONY OF RON WILLIAMS**

FACTUAL BACKGROUND

On October 19, 2007, Alliance Communications Cooperative filed with this Commission a Petition for arbitration with Alltel of all unresolved issues relating to ongoing negotiations between the parties for the development of an interconnection agreement. Following the initial procedural matters, the parties agreed to and filed with this Commission a Stipulation for Scheduling Order on December 17, 2007 (the "Scheduling Order"). See Stipulation and Scheduling Order filed December 17, 2007. The Scheduling Order essentially provided for three periods of discovery: initial disclosures related to Petitioner's transport and termination rate and interMTA study, followed by two formal periods of written discovery.

The Scheduling Order provided for the commencement of the first round of discovery on or before December 24, 2007. Petitioner served discovery upon Alltel at this time. Specifically, Petitioner posed the following interrogatories to Alltel:

> **Interrogatory No. 2:** Identify by month the total intraMTA MOU originated on the Petitioner's network and terminated on Alltel's network from January 1, 2007 through November 30, 2007.
>
> **Response:** Alltel does not currently gather or otherwise have possession of the requested information.
>
> **Interrogatory No. 3:** Identify by month the total interMTA MOU originated on the Petitioner's network and terminated on Alltel's network from January 1, 2006 through May 31, 2006.

Response: Alltel does not currently gather or otherwise have possession of the requested information.

Interrogatory No. 8: Identify with specificity the interMTA factor that Alltel proposes to use for the measurement of InterMTA traffic. Provide any and all data that supports Alltel's proposed factor.

Response: Alltel, as the responding party without any burden of proof obligation has not yet developed or proposed an appropriate factor for measurement of InterMTA traffic. Alltel has not yet been afforded the requested traffic study or methodology that was used to develop the InterMTA use factor as alleged by Petitioner and Alltel reserves the right to further comment on the issue of InterMTA factors and corresponding rates based upon its review and analysis of any forthcoming studies as well as any supporting documentation provided and the remainder of the discovery information gathered in this proceeding as well as any other publicly available or independently developed information relevant to the issue of the InterMTA factors and rates.

See Affidavit of Counsel, Exhibit A (emphasis added).

The Scheduling Order called for commencement of the second period of discovery on February 8, 2008, with responses thereto due on or before February 29, 2008. Petitioner served a second set of discovery upon Alltel, again seeking information related to any proposals, studies, methodologies or other information that Alltel might have in its possession related to Issue 2, the appropriate interMTA factor for the Petitioner. Specifically, Petitioner propounded to and received from Alltel the following discovery:

Interrogatory No. 6: Identify with specificity the basis for Alltel's statement in ¶17 of its Response that "the InterMTA use factors as proposed by Petitioner and the corresponding access rate for such InterMTA traffic is supported or otherwise appropriate."

Response: Alltel is not aware of any particular circumstance wherein the InterMTA rate must include a statutory or regulatory preference. The imposition of a tariffed or statutory rate on CMRS traffic has not been established to be the only accepted practice. The FCC has indicated that access charges may only be appropriate when an RLECs network used to "transit" a call to a roaming subscriber. *As previously stated, Alltel believes the establishment of InterMTA rates is typically negotiated amount the parties and arrived at through consideration of all open issues resolved.*

Interrogatory No. 7: Please supplement Alltel's answer to Interrogatory No. 8 of Petitioner's Interrogatories and Requests for Production of Documents (First Set).

Response: Alltel does not have any further information with which to supplement its prior response at this time. Alltel has requested information within its discovery requests to further investigate InterMTA use factor and, therefore, does not waive its right to identify further issues with respect to the InterMTA use factors as its review and understanding of Petitioner's studies and disclosed information continues.

Interrogatory No. 8: Does Alltel currently have a process, method or practice by which to measure InterMTA traffic?

Response: Alltel maintains that the use of the parties' negotiated point of interconnection (POI) may be an appropriate measure of InterMTA traffic as it appropriately reflects the individual costs of each party. See Response No. 6 for further information.

Interrogatory No. 9: If your Answer to Interrogatory No. 7 above is no, state whether Alltel intends to develop or propose an appropriate factor for measurement of InterMTA traffic during the course of this proceeding.

Response: Alltel continues to review the proposed factor, and related studies advanced by Petitioner, and has not yet made a determination of whether it will propose an alternative factor based upon its own subsequent studies or findings, if any. *Alltel will supplement its response as appropriate.*

Alltel has requested information within its discovery requests to further investigate these and other observations and, therefore, does not waive its right to identify further issues with respect to the InterMTA issues as its review and understanding of Petitioner's studies and disclosed information continues. *Alltel will supplement its response as appropriate.*

Interrogatory No. 10: Does Alltel intend to propose a methodology for the measurement of InterMTA traffic? If so, what is that methodology and upon what data and/or rationale is that proposal based?

Response: Development of an appropriate methodology is under consideration by Alltel as it continues to review the InterMTA traffic study information provided by Petitioner. However, at this time, a final determination upon a methodology beyond a preferred negotiated solution has not been made and, therefore, Alltel does not waive its right to identify further issues with respect to the InterMTA methodology as its review and understanding of Petitioner's studies and disclosed information continues. For further information see Response Nos. 6 and 8. Alltel will supplement it s response as appropriate.

Interrogatory No. 11: Does Alltel intend to develop a factor or propose a methodology for the measurement of InterMTA traffic which originates on a landline and terminates to a mobile line?

Response: See Responses Nos. 6, 8 and 10.

Interrogatory No. 12: Does Alltel intend to develop a factor or propose a methodology for the measurement of InterMTA traffic which originates on a mobile line and terminates to a landline?

Response: See Responses Nos. 6, 8 and 10.

Interrogatory No. 13: Identify by month the total InterMTA MOU originated on the Petitioner's network and terminated on Alltel's network from January 1, 2007 through November 30, 2007.

Response: Alltel does not maintain or possess such information.

See Affidavit of Counsel, Exhibit B (emphasis added).

To date, Petitioner has received no supplementation or additional information in response to its discovery requests. However, on July 7, 2008, Ron Williams, on behalf of Alltel, submitted pre-filed rebuttal testimony addressing the subject of Petitioner's proposed InterMTA factor, data and study, using date purportedly gathered by Williams to impugn Petitioner's study and produce his own InterMTA results. None of this data was ever disclosed nor was any excel spreadsheet or other documentation provided with Williams' testimony that would allow the Petitioner to thoroughly review and test Williams' own conclusions. Williams provided testimony as follows:

Q: **IN [LARRY] THOMPSON'S TESTIMONY AND EXHIBITS, THE PETITIONERS PROVIDED THEIR CALCULATIONS OF MOBILE-TO LAND INTERMTA FACTORS. DO YOU CONCUR IN THEIR RESULTS?**

A: No. The Petitioners used data from 2004 and did not account for substantial changes in the network and method that traffic is exchanged between Alltel and each of the Petitioners. Since 2004 Alltel has:

Divested operations in Minnesota to RCC Holdings which were included in the study.

Divested operations in Nebraska to US Cellular which were included in the study.

Modified routing translations in the Sioux Falls switch for traffic terminating to Alliance, Beresford, and West River.

Modified routing translations in the Rapid City switch for traffic terminating to Alliance, Beresford, Kennebec, McCook, Santel, and Venture.

These changes affect both interMTA and intraMTA traffic classifications used in the Petitioner study.

Q: IS THERE ENOUGH DETAIL AVAILABLE IN THE PETITIONER STUDY TO MAKE ADJUSTMENTS THAT REFLECT CURRENT NETWORK CONDITIONS?

A: Yes. The data provided in the last page of Thompson's interMTA Exhibits show the NPANXX of traffic originating from Alltel. By adjusting for traffic that is subject to network changes made since the time of the study, the study results will reflect the currently prevailing traffic exchange conditions using the traffic volumes from 2004.

Q: PLEASE DESCRIBE YOUR ADJUSTMENTS TO THE PETITIONER STUDIES?

A: The adjustments to Petitioner studies necessary to remove inconsistencies with current conditions are reflected in Exhibit RW5. The complete data from each Petitioner InterMTA Exhibit was replicated in my exhibit. A column was added to identify the line item volume of traffic adjustment and the revised value for that line item. Other columns were added to identify the wireless switch originating traffic and the routing associated with traffic from that switch to each Petitioner. Changes from 2004 conditions are highlighted. For example, traffic excluded from the study as a result of Alltel's divestiture of certain Minnesota operations to FCC Holdings is highlighted showing 'RCC' as the switch and 'N/A' (not applicable), since traffic originating from RCC is not applicable to a study of Alltel traffic. A similar notation is made for certain Nebraska operations divested to USCellular ('USCC'). A change in the 'Current Routing' column indicates whether the primary routing has changed from local to 'IXC' (interexchange carrier). In addition, a correction was made to the Alliance data set to remove duplicate data reported by Petitioner as interMTA traffic in two categories ('DSnotinSD') and ('DENinSD')

Q: CAN YOU SUMMARIZE THE ADJUSTED RESULTS OF THE PETITIONER STUDIES?

A: Yes. The table below shows, for each Petitioner, the original study result and the result incorporating my adjustments.

Petitioner	Initial Result	Adjusted Result
Alliance Communications	7.76%	2.7%
Beresford Municipal	70.72%	11.6%
Kennebec Telephone	11.64%	2.1%
McCook Cooperative	5.2%	3.2%
SanTel [sic]	9.3%	5.2%
West River Cooperative	26.6%	4.4%

Q: DO YOU BELIEVE THE ADJUSTED RESULTS OF THE PETITIONER STUDIES REFLECT AN ACCURATE FACTOR FOR INTERMTA COMPENSATION.

A: No, but these results eliminate known inaccuracies in the Petition data and provide guidance on a more accurate ceiling for a ration of Alltel traffic terminating to Petitioners that may be interMTA in nature.

See Affidavit of Counsel, Exhibit 3, Ron Williams' testimony, p. 2, lines 11-27; p. 3, lines 2-24; p.4, lines 1-7.

This testimony is prejudicial, unreliable, unfounded and should not be permitted to be introduced in this proceeding. To do so contravenes basic principles of statutory and common law related to the discovery process and would license a party which claims it has no burden of proof under the applicable Federal and State rules and regulations to proffer whatever evidence it chooses to conjure up in attempts to distort and discredit the opposing party's information. Accordingly, Petitioner respectfully requests that this Commission strike or exclude Williams' testimony from the arbitration proceeding scheduled to commence on July 29, 2008.

ARGUMENT AND ANALYSIS

1. A Portion of Ron Williams' Testimony as it Relates to Issue 2 is Properly Excludable Under Established Principles of Law.

Ron Williams' testimony, specifically page 2, lines 11-27; page 3, lines 2-24; page 4, lines 1-7, should be excluded for a number of reasons, not the least of which is that it improperly interjects new information into this proceeding at a very late stage, which places the Petitioner in

an untenable and prejudiced position. A party's failure to adhere to the basic rules of civil procedure can result in a number of sanctions, including exclusion of certain testimony and evidence. As set forth below, exclusion of portions of Ron Williams' testimony is the appropriate sanction under the circumstances of this proceeding.

A. Alltel Failed to Supplement its Discovery Responses and Should not be Allowed to Introduce New Information at This Stage of the Proceedings.

In the instant case, Alltel has had numerous opportunities to provide comment on the Petitioner's traffic study or propose its own study. Despite ample opportunity during discovery, Alltel did not do so and cannot now advance new theories and studies which are premised upon information never made available to the Petitioners during the discovery process. As the Supreme Court of South Dakota has repeatedly held:

> [...] the purpose of pretrial discovery is to allow the parties to obtain the fullest possible knowledge of the issues and facts before trial. Therefore, a litigant is under a duty to seasonably supplement its responses with respect to any question directly addressed to...the subject matter on which [the litigant or any of his witnesses] is expected to testify, and the substance of this testimony.

Papke v. Harbert, M.D., 2007 S.D. 87, ¶ 55, 738 N.W.2d 510, 529 (quoting SDCL § 15-6-26(e)(1)); Kaiser v. Univ. Physicians Clinic, 2006 S.D. 95, 724 N.W.2d 186.

South Dakota's rules of discovery further provide that failure to comply with the duty to supplement discovery as set out in SDCL § 15-6-26(e)(1), without substantial justification, results in exclusion of the evidence at trial. SDCL § 15-6-37(c)(1) provides as follows:

> A party that without substantial justification fails to disclose information required by 15-6-26(e)(1), or to amend a prior response to discovery as required by 15-6-26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorneys' fees, caused by the failure, these sanctions may include any of the actions authorized under 15-6-

> 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

SDCL § 15-6-37(c). See also Papke, 2007 S.D. 87 at ¶55, 738 N.W.2d at 529, ("Under SDCL § 15-6-37(b), sanctions may be imposed by a court for a party's failure to supplement responses [to discovery requests] (one sanction identified is to exclude the proffered testimony)"); Schrader v. Tjarks, 522 N.W.2d 205, 210 (S.D. 1994) (holding that "[t]rial courts are authorized under SDCL § 15-6-37(b)(2)(B) to prohibit the disobedient party, who fails to comply with the discovery rules, from introducing designated matters into evidence.").

As outlined above, Alltel indicated on numerous occasions that it would supplement its responses to certain interrogatories. It did not do so. It had even more reason and opportunity to be able to do so given that this proceeding was delayed for an additional period of time in order for the Petitioner to comply with this Commission's Order compelling the disclosure of further discovery information. No further information from Alltel was forthcoming during this additional time.

Because the time for discovery has passed, Alltel's submission of certain portions of Williams' testimony is in clear contravention of the parties' Scheduling Order, as well as Alltel's duty to seasonably supplement its discovery responses and leaves Petitioner without sufficient opportunity to fully explore Williams' testimony through discovery. Furthermore, the deprivation of any meaningful opportunity to explore Williams' testimony deprives Petitioner of a full and fair opportunity to fully prepare its own experts for hearing and to cross-examine Williams on this subject matter. Surely, such actions that constitute the deprivation of Petitioner's right to conduct discovery cannot be condoned by this Commission.

B. Williams' Testimony is Unduly Prejudicial Under the Circumstances.

SDCL § 19-12-3 permits the exclusion of potentially relevant evidence on grounds of prejudice, confusion or waste of time. Specifically, the statute provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In this case, Williams has advanced what amounts to a new interMTA study. While such testimony may appear relevant and probative of Issue 2 on its face, Williams has failed to disclose any of the data upon which he relies. Because the time for discovery has passed, Petitioner has no mechanism by which to test the little information which Williams did provide nor does it have the ability to test Williams' ultimate conclusions. Most significantly, under the current time constraints with the hearing scheduled to commence in approximately two weeks, Petitioner is deprived of an opportunity to disprove Williams' conclusions or to or re-test its own study in light of Williams' statements. Petitioner is simply left with Williams' unsupported conclusion that his study is somehow better than that of the Petitioner.

As recently discussed in Papke v. Harbert, 738 N.W.2d 510, 527-529 (S.D. 2007), such untimely disclosures of new and unsupported information naturally result in an unfair trial. The South Dakota Supreme Court expounded further on this issue in the case of Kaiser v. Univ. Physicians Clinic, 2006 S.D. 95, ¶56, 724 N.W.2d 186.

> We noted three areas of concern: (1) the time element and whether there was bad faith by the party required to supplement; (2) whether the expert testimony or evidence pertained to a crucial issue; and (3) whether the expert testimony differed substantially from what was disclosed in the discovery process. *Id.* ¶ 35 (citations omitted). We also recognized that SDCL 15-6-26(e) is modeled after Federal Rule 26(e) and focused on certain federal cases, which "have found reversible error when testimony is admitted without prior disclosure pursuant to Rule 26." *Id.* ¶ 38 (citing *Smith v. Ford Motor Co.*, 626 F.2d 784, 794 (10th Cir.1980)) (citing *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir.1977); *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir.1978); *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449 (2d Cir.1975)). The remedy, according to those federal cases, was to

exclude the proffered evidence when a party failed to seasonably supplement. *Id.* ¶ 39 (citations omitted).

In many of the cases in which this issue has been raised before the South Dakota Supreme Court, the parties have had the opportunity to take depositions of the witnesses identified as having knowledge. In certain instances, the Supreme Court noted that any prejudice caused by late disclosure could be cured by a continuance or extension of discovery. However, notably absent from the process utilized in Commission hearings is the opportunity to depose the witnesses who will present testimony at the time of hearing. As such, it is even more important that the parties adhere to discovery deadlines and disclose any and all information so that all parties can adequately prepare for hearing. "The purpose of SDCL 15-6-26(e) is to provide all parties the opportunity to know the facts before trial." Kaiser, 2006 S.D. 95 at ¶ 31, 724 N.W.2d at 194. The protective nature of the statute is intended to ensure a fair trial for all parties. Williams' untimely testimony as to an ultimate issue in this proceeding is unfairly prejudicial.

C. Williams' Proffered Testimony in Regard to Issue 2 is not Reliable.

Even if this Commission believes that Alltel's failure to supplement its discovery responses is not sanctionable by exclusion, Williams' testimony as it relates to Alltel's purported interMTA study, is not reliable. Under established South Dakota law, a court or agency must determine "'that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" In re Dokken, 2000 S.D. 9, ¶40, 604 N.W.2d 487, 498 (2000) (quoting State v. Moeller, 1996 S.D. 60, ¶52, 548 N.W.2d 465, 479). The court or agency must insure that the expert's opinion is based upon "more than subjective belief or unsupported speculation . . . . Proposed testimony must be supported by appropriate validation--i.e., 'good grounds,' based on what is known." Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 590 (1993). Expert testimony is reliable where it has "a traceable, analytical basis in objective fact . . . ." Bragdon v.

Abbott, 524 U.S. 624, 653, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (citing General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)). While Petitioner does not attempt to challenge Williams on *Daubert* grounds or claim that he is not qualified to testify in this case, the aforementioned statements are instructive to this Commission's overall analysis of this testimony.

Williams' own testimonial admissions illustrate the fallacy of his logic and purported study. As an initial matter, Williams states that he believes that he understands the methodology employed by Petitioner's engineer, Larry Thompson. See Affidavit of Counsel, Exhibit C, page 2, lines 4-5. Williams moves on to testify that there have been changes in the Alltel network that change the results of Petitioner's study. Williams, however, provides no supporting documentation, no time frame in which these supposed changes occurred and no foundational elements upon which Petition can rely to test the veracity, accuracy and integrity of Alltel's statements. Incredibly, Williams himself even admits that the results that he proposes are not accurate. See Affidavit of Counsel, Exhibit C, p. 4, lines 3-7. There is simply no data produced by Alltel that can be tested. As such, there is no evidence upon which Williams can properly base his conclusions, and such testimony cannot possibly be relied upon by this Commission as dispositive of the issue before it. If Alltel seeks to cross-examine Mr. Thompson about the interMTA study and methodology employed therein, Alltel certain has the right to do so. Alltel, however, cannot hide behind information which it discloses at the eleventh hour which it even admits is not necessarily reliable.

Without the benefit of a review of the information upon which Williams relied, to reach the conclusions that Williams has in regard to his interMTA "study", one must engage in significant speculation and assumption about matters totally unsupported in this record.

CONCLUSION

That portion of Williams' testimony set forth at the outset of this submission should not be admitted at the time of the hearing in this matter on several grounds. The information and opinions contained therein were not properly disclosed which thereby prejudices the Petitioner. Further, Williams' testimony and purported study are ultimately unreliable, unfounded and constitute improper opinion evidence. What little information Williams does offer fails to identify with specificity any data or other information which may be used to establish the veracity of the opinion presented. Accordingly, Petitioner submits that the only appropriate remedy is the exclusion of that portion of Williams' testimony as there is simply no way in which the Petitioner can appropriately investigate or rebut his testimony.

Dated this 11th day of July, 2008.

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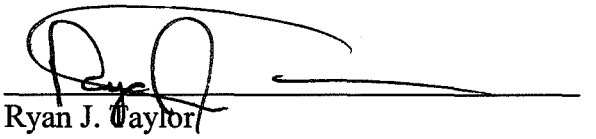

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CERTIFICATE OF SERVICE

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