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July 23, 2008

**E-Filing**
Patty Van Gerpen
SDPUC
500 East Capitol
Pierre SD 57501

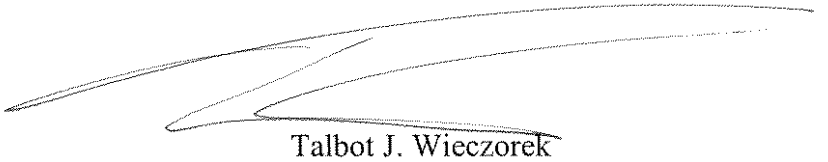
RE: Alltel Alliance Arbitration TC07-111 through TC07-116
GPNA File No. 05925.0042

Dear Ms. Van Gerpen:

Enclosed please find Alltel's Reply Brief in Opposition to Petitioner's Motion to Partially Exclude Testimony of Ron Williams in the above matters.

If you have any questions, please call me.

Sincerely,



Talbot J. Wieczorek

TJW:klw
Enclosure
c: Clients
Service Party list

**BEFORE THE STATE OF SOUTH DAKOTA**

**PUBLIC UTILITIES COMMISSION**

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| IN THE MATTER OF THE PETITION OF ALLIANCE COMMUNICATIONS COOPERATIVE, INC., BERESFORD MUNICIPAL TELEPHONE COMPANY, KENNEBEC TELEPHONE COMPANY, MCCOOK COOPERATIVE TELEPHONE COMPANY, SANTEL COMMUNICATIONS COOPERATIVE, INC., AND WEST RIVER COOPERATIVE TELEPHONE COMPANY FOR ARBITRATION PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996 TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH ALLTEL COMMUNICATIONS, LLC. | Docket Nos.<br>TC 07-111<br>TC 07-112<br>TC 07-113<br>TC 07-114<br>TC 07-115<br>TC 07-116 |

**ALLTEL'S REPLY BRIEF IN OPPOSTION TO PETITIONER'S MOTION TO PARTIALLY EXCLUDE TESTIMONY OF RON WILLIAMS**

## FACTUAL BACKGROUND

On July 7, 2008, Ron Williams submitted pre-filed rebuttal testimony addressing Petitioners' InterMTA studies undertaken in 2004. As part of this testimony, Mr. Williams testified that the Petitioners' studies contained inaccuracies caused by its reliance upon outdated data that was compiled in 2004 before a number of changes to Alltel's system. Among these changes was the divestiture of a number of Alltel's license areas as required by various mergers, as well as changes created by different routing mechanisms. After pointing out the inaccuracies of the Petitioners' studies, Mr. Williams made adjustments to the Petitioners' studies to reflect the changes that had occurred to the Alltel network since Petitioners' expert compiled the data. Mr. Williams did not attempt to develop his own study.

On July 11, 2008, Petitioners filed a motion to partially exclude the Testimony of Ron Williams alleging that Alltel should have supplemented its discovery responses to include information regarding changes to Alltel's system since the completion of Petitioners' Studies.

## ARGUMENT AND ANALYSIS

### 1. The Testimony of Ron Williams Should Not be Excluded

Petitioners advance a number of theories in their argument that the testimony of Ron Williams should be stricken. Chief among these theories is Petitioners' argument that the pre-file testimony of Mr. Williams "interjects new information" into the proceeding at a late stage effectively creating a new study. Petitioners argue that the information utilized by Mr. Williams in his criticism of Petitioner's study should have been provided to Petitioners as a supplement to Alltel's discovery response. Under any theory advanced by Petitioners, Mr. Williams' testimony is proper and thus it should not be excluded.

#### A. Mr. Williams's Testimony Does Not Constitute a New Study as Alleged by Petitioners

Petitioners erroneously characterize Mr. Williams' testimony as a new study "premised upon information never made available to the Petitioners during the discovery process." However, none of Mr. Williams' testimony can be characterized as a new InterMTA study.

Mr. Williams did not purport to conduct a new study, but rather to merely make adjustments to the Petitioners' studies. Mr. Williams merely did this to "eliminate known inaccuracies in the Petitioner data" caused by the study's failure to take into account divestiture of lines post 2004 as well as changes to the primary routing from local to IXC delivery. *Id.*; Ron Williams' testimony, p. 3, lines 8-23. As such, Willaims' testimony is a classic example of rebuttal testimony designed not to create a new study but to point out inaccuracies with the Petitioners' 2004 studies.

Rebuttal evidence is "evidence given to prove, disprove, explain, repel, or contradict the evidence of the adversary party." 75 AmJur2d Trial § 365; *Schrader v. Tjarks*, 94 SDO 923. (defining rebuttal evidence as evidence that which explains, contradicts or refutes the

defendant's evidence.) citing *Farmers U. Grain Term.v. Industrial Elec.*, 365 N.W.2d 275, 277 (Minn. App.1985). Whether to permit the introduction of rebuttal evidence rests within the sound discretion of the trial court. 75 AmJur2d Trial § 366. Factors which are considered when allowing rebuttal testimony include whether the testimony is relevant to the proceeding. *Id.*

Relevancy of rebuttal evidence is determined by virtue of evidence introduced or issues placed in conflict by the adverse party's evidence. 75 AmJur2d Trial § 370. The relevancy of rebuttal evidence is therefore "tested by whether it is justified by the evidence which it is offered to rebut." Petitioner's evidence introduced in the form of the 2004 study would leave that study open to attack presented in the form of rebuttal evidence.

Alltel does not seek to introduce a new theory or study; it is merely taking the opportunity to challenge and discredit Petitioners' studies through the rebuttal testimony of Mr. Williams. It is disingenuous for Petitioners to have submitted their study and now argue that it would be unfairly prejudicial for Alltel to point out the inaccuracies contained within it. If Mr. Williams' rebuttal is stricken Alltel will have been denied the opportunity to confront Petitioners' witness and to present relevant evidence and thereby have been denied due process and a fair and impartial hearing. Any decision in this matter will then be based on an inadequate and inaccurate record. .

**B. Alltel Did Not Fail to Supplement it's Discovery Responses**

Petitioners claim that Alltel should have supplemented its discovery responses to point out post 2004 divestitures as well as changes to primary routing from local to IXC delivery. Alltel submits that it was under no obligation to provide this information to Petitioners until Alltel identified the information and as Petitioner did not specifically ask for such information. Alltel only completed its analysis of Petitioners study as it was preparing its rebuttal testimony

immediately prior to filing it. It can not be expected to know its rebuttal until it has developed its rebuttal.

Additionally, Petitioners' first and second set of interrogatories submitted do not contain **any** questions asking for Alltel to identify changes to the Alltel network, i.e., any divesture of markets or any change in the routing of calls undertaken by Alltel. Had Petitioners requested this information, Alltel would have searched is information and records and provided it during the discovery process. Petitioners argue that their broad requests for InterMTA data, specifically, documents used to prepare a "forward-looking cost study," obligated Alltel to provide them information concerning divestitures and routing. However, again, Alltel did not prepare a cost study but merely is discrediting the study provided by Petitioners.

Petitioners' argument is not supported by South Dakota precedent cited by Petitioner. Petitioner's cite *Kaiser v. University Physicians Clinic*, 2006 SD 95. However, Kaiser does not support Petitioner and it is easily distinguished from the facts of the present case. In *Kaiser*, the South Dakota Supreme Court remanded a case for a new trial after finding the Circuit Court had erred by admitting previously undisclosed exhibits into evidence. However, unlike the present case, the Plaintiffs had served a specific request for production of documents concerning expert witnesses that specifically requested the Defendants produce "(a) a complete copy of each witnesses' files, (b) a copy of all photographs or other images made in reviewing the case, and (c) copies of any and all other documents, records, notes, and written material in possession of expert witnesses in relation to investigation, analysis and opinions in the matter." *Id* at ¶ 16. The expert witness later sought to introduce photographic evidence at trial after indicating in answers to interrogatories that no such information was relied upon by the expert as a basis of his opinion.

In determining whether to bar the admission of evidence for the failure to supplement discovery responses, the *Kaiser* Court noted that when "the substance of the expert witness's testimony is alleged to have changed or expanded beyond the scope of discovery, [the South Dakota Supreme Court's] holdings take into consideration the degree of any such change or expansion." *Kaiser* at ¶ 37. citing *Haberer*, 1996 SD 130 at ¶¶ 21-22.

In *Kaiser*, the offending party attempted to place photographs into evidence that were not provided to the opposition despite a specific request for the production of photographs used by the expert in reviewing the case. By contrast, in the present case, the Petitioners did not ask Alltel to identify changes in Alltel's network either after the compilation Petitioners' 2004 studies or at any other point in time. Petitioners request for information was specifically for InterMTA data used by Alltel in compiling its own survey or studies. As previously discussed, Alltel did not conduct its own survey or study, except for the POI analysis Williams submitted in direct testimony, and the adjustments Mr. Williams made to Petitioners' results based on corrected information do not constitute a study. Had Petitioners requested any information regarding changes to Alltel's network that information would have been provided. However, it is clear from a review of Petitioner's discovery requests that no such request was ever made.

### C. Even if Alltel Had Failed to Supplement it's Discovery Responses, which it did not, then Striking the Testimony of Mr. Williams is Not the Proper Remedy

Even if Petitioners had asked specific questions seeking the network change information, which they did not and had Alltel failed to supplement its discovery responses to include the information that Petitioners challenge striking Mr. Williams' testimony is not the proper remedy. Petitioners principal concern seems to be time. Petitioner argues that learning this information late in this proceeding deprives it of the ability to prepare for hearing. While that is always a risk when rebuttal testimony is due only two weeks for trial is to begin, the proper remedy would be

for petitioner to seek more time. Alltel would not object to more time if that is what Petitioner needs to understand the Williams testimony. It is ironic however that on the one hand Petitioner claims that it has insufficient time or ability to prepare and yet in the same proceeding contends that Mr. Williams testimony is not credible. If the latter is true then Petitioner should not need additional time and should be very comfortable with going to hearing and merely attaching Mr. Williams' testimony on cross examination.

Additionally, although trial courts have broad discretion to exclude evidence as a sanction in response to the failure by a party to supplement their answers to interrogatories, this remedy is one courts chose not to exercise absent evidence of willful or dishonest conduct. Wright & Miller, 8 Civ2d 2050 citing *Mills v. Des Arc Convalescent Home*, 872 F.2d 823, 826 (8th Cir. 1989)(stating the use of an undisclosed witness should seldom be barred unless bad faith is involved."); *Murphy v. Magnolia Electric Power Association*, 639 F.2d 232, 235 (5th Cir. 1981)(finding that despite the fact that a party breached its duty to supplement its answers to interrogatories, it was reversible error to refuse to allow an expert to testify as rebuttal witness, in view of absence of prejudice to the defendant and essential nature of evidence involved); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3rd Cir. 1978)(noting the exclusion of evidence is a drastic sanction, which must pass strict case law test to be upheld).

Similarly, South Dakota courts have been hesitant to expel evidence as a penalty for failing to supplement discovery responses. The three areas of concern noted by the Supreme Court when addressing the penalty for failure to supplement discovery include (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 was disclosed in the discovery process. Papke v. Herbert, 2007 SD

87 at ¶ 56 citing *Kaiser v. University Physicians Clinic*, 2006 SD 95. When determining the penalty to apply for a party's failure to "seasonably supplement" discovery regarding witnesses and the substance of their testimony, the Supreme Court has focused on the existence or lack of bad conduct. *Kaiser v. University Physicians Clinic*, 2006 SD 95 at ¶ 35.

The severity of the sanctions handed down for failure to supplement discovery responses "must be tempered with consideration of the equities." *Schrader v. Tjarks*, 522 N.W.2d 205 citing *Magbuhat v. Kovarik*, 382 N.W.2d 43, 45 (S.D. 1986) quoting *Chittenden & Eastman Co. v. Smith,* 286 N.W.2d 314, 316-17 (S.D.1979). Less drastic sanctions "should be employed before sanctions are imposed which hinder a party's day in court and thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts." *Id.* citing *Chittenden* at 316.

Petitioners have provided no evidence of bad faith on the part of Alltel. They have provided no evidence that Alltel willfully withheld any information. The information provided in the form of Mr. Williams' rebuttal testimony pertains to a crucial issue, namely the accuracy of Petitioners' studies. In this situation, no bad faith can exist where there is no clear interrogatory seeking this information. The rebuttal testimony simply brings into light accuracies contained in Petitioners' studies. Certainly, Petitioners could have submitted the studies early in the discovery process and asked Alltel to comment on any inaccuracies Alltel saw in the studies at that point. By holding the studies until its direct testimony rather than asking questions about it in discovery, Petitioners can not now claim surprise at the rebuttal testimony.

The exclusion of Mr. Williams' testimony would have a substantial effect on Alltel's case by preventing it from offering rebuttal testimony pointing out the inaccuracies in the study.

Thus, even if Alltel did fail to supplement discovery responses, which Alltel vigorously denies, striking testimony is not the proper remedy.

## CONCLUSION

At no time did Alltel withhold information from Petitioners by failing to supplement their discovery responses. Petitioners have misguidedly characterized Mr. Williams' rebuttal testimony as a new study when in fact it is classic rebuttal testimony designed to "contradict the evidence of the adversary party" by explanation of a study riddled with inaccuracies. *Schrader v. Tjarks*, 94 SDO 923. Alltel is well within its rights to do so under South Dakota law. Additionally, during discovery Petitioners could have requested the information they now claim was withheld from them. However, it is apparent upon review of Petitioner's written discovery that they never requested information relating to changes in Alltel's network, instead confining their discovery requests to information relating to InterMTA studies conducted by Alltel, none of which were every undertaken.

Dated this 23 day of July, 2008.

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**BEFORE THE PUBLIC UTILITIES COMMISSION**
**OF THE STATE OF SOUTH DAKOTA**

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| IN THE MATTER OF THE PETITION OF ALLIANCE COMMUNICATIONS COOPERATIVE, INC., BERESFORD MUNICIPAL TELEPHONE COMPANY, MCCOOK COOPERATIVE TELEPHONE COMPANY, SANTEL COMMUNICATIONS COOPERATIVE, INC., AND WEST RIVER COOPERATIVE TELEPHONE COMPANY FOR ARBITRATION PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996 TO RESOLVE ISSUES RELATING TO AN INTERCONNECTION AGREEMENT WITH ALLTEL COMMUNICATIONS, LLC. | Docket Nos.<br>TC 07-111<br>TC 07-112<br>TC 07-113<br>TC 07-114<br>TC 07-115<br>TC 07-116 |

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25 day of July, 2008, a true and correct copy of ALLTEL'S REPLY BRIEF IN OPPOSTION TO PETITIONER'S MOTION TO PARTIALLY EXCLUDE TESTIMONY OF RON WILLIAMS was sent electronically to:

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