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VIA EMAIL TO PATTY.VANGERPEN@STATE.SD.US

Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
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Pierre, SD 57501-5070

RE: *TC07-113: In the Matter of the Petition of Beresford Municipal Telephone Company for Arbitration Pursuant to the Telecommunications Act of 1996 to Resolve Issues Relating to An Interconnection Agreement with Alltel Communications, Inc.*

Dear Ms. Van Gerpen:

Attached for filing in the above matter, please find the Reply Memorandum of Law in Support of Beresford Municipal Telephone Company's Petition for Arbitration. This is intended as service upon Alltel's representatives via electronic mail.

If you have any questions or concerns regarding these documents, please do not hesitate to contact me.

Best regards.

Sincerely,

CUTLER & DONAHOE, LLP



Meredith A. Moore
For the Firm

MAM/cmc
Attachment
cc: Service List

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

**IN THE MATTER OF THE PETITION OF
BERESFORD MUNICIPAL 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 07-113

**REPLY MEMORANDUM OF LAW IN
SUPPORT OF BERESFORD MUNICIPAL
TELEPHONE COMPANY'S PETITION
FOR ARBITRATION**

Comes Now Beresford Municipal Telephone Company ("Beresford") and hereby respectfully submits this Reply Memorandum of Law in reply to that Brief submitted by Alltel Communications, LLC, f/k/a Alltel Communications, Inc.

I. What is the appropriate Percent InterMTA Use Factor to be applied to non-IntraMTA traffic exchanged between the parties?

The InterMTA issue is of significant importance to Beresford. Moreover, it is because of Beresford's location in respect to South Dakota's MTA boundaries that it has become the subject of special attack by Alltel. Alltel argues that Beresford's position with respect to InterMTA traffic is somehow a veiled argument that it "should be able to charge in-state long-distance for these previously locally rated calls" because of the location of the cell site in Beresford. See Alltel Brief, p. 37. Alltel's remaining arguments on the InterMTA issue remain the same as those for the other Petitioners in the consolidated arbitration hearing. They focus upon the methodology used to develop the factor of measuring InterMTA traffic, the rates to apply to such traffic and whether a net InterMTA factor is appropriate in this case. It has been suggested that the measurement of and compensation for InterMTA traffic exists in a lawless void. This is hardly the case as the FCC has discussed and discarded almost all of the arguments advanced by Alltel on this issue.

A. Alltel is confusing end-user billing constructs with transport and termination constructs.

Alltel defines Beresford as an anomaly. It further makes a curious and flawed argument in analyzing the InterMTA issue as it relates to Beresford. Specifically, Alltel characterizes Beresford's position on the InterMTA as one relating to the rating of calls as either local or long distance. Alltel further requests that this Commission "should make clear that calls to Beresford subscribers from Alltel numbers rated to Beresford should not be treated as anything but local calls subject to reciprocal compensation." Alltel Brief, p. 38. These arguments wholly confuse the issue currently before the Commission.

Alltel has provided no citation to the record for any of its claims that Beresford seeks to rate InterMTA calls as in-state long distance. Simply stated, no such citation can be provided because none can be found. Beresford has never argued that it should be able to charge in-state long distance for InterMTA calls. Alltel is effectively mixing the standards of how a call is rated for end user billing purposes and how a call is treated for purposes of intercarrier compensation. Alltel cites to the First Report and Order at ¶1043: "[T]he new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges." Prior to the issuance of the First Report and Order, there were no transport and termination rules. One of the purposes of the First Report and Order was to establish such rules and that later happened when it was codified as Part 51 of The TeleCommunications Act of 1996. The FCC's rules related to access were already in existence at that time and therefore no further discussion of access rules was necessary. The intent of ¶1043 was to ensure that originating access charges were not billed to CMRS providers. However, Alltel has attempted to translate this in to a prohibition on terminating access as well and has attempted to imply that Beresford was not charging

terminating access prior to the issuance of the First Report and Order. See Hearing Transcript, p. 44, lines 3-22.

Ultimately, the entirety of this argument is irrelevant and unavailing. Transport and termination rates apply to telephone companies. Long distance charges apply to end users. Long distance charges are not access charges; they are charged billed to a local exchange carrier's end user subscribers. As such, Alltel's argument with respect to Beresford is the only nonsensical argument being advanced by the parties on this issue. How Alltel chooses to charge its end users for calls to Beresford has nothing to do with how Beresford charges Alltel for terminating traffic to its network.

It appears that Alltel is suggesting to this Commission that its ruling on the InterMTA issue will have an impact on Beresford's end-users if this Commission were to rule in favor of Beresford and allow its proposed InterMTA factor. This argument is completely false. Beresford is simply following the FCC's guiding principles as set forth in the First Report and Order at ¶1044 with respect to the identification and compensation of InterMTA traffic, which traffic is in fact subject to access. Under these principles, as well as the rules related to transport and termination and access, one cannot ignore the simple fact of where the cell cite is located with respect to the MTA boundary. The common sense argument advocated by Alltel does not obviate the law in this area. If Alltel seeks to somehow change the law through this proceeding, it cannot do so. This is not the proper forum within which to do so

The issue before this Commission is the appropriate methodology to measure InterMTA traffic, the appropriate factor for billing purposes and the appropriate rates for compensation. Alltel has sought to muddy the waters for these issues because it knows that Beresford's InterMTA factor is necessarily high. Petitioner therefore respectfully requests that this

Commission disregard Alltel's requested relief with regard to the rating of Beresford's calls as local and subject to reciprocal compensation.

B. The POI Method proposed by Alltel is not an accurate or appropriate means by which to measure InterMTA traffic.

Alltel recommends the POI analysis as the best method by which to calculate the appropriate InterMTA factor to be used in the parties' interconnection agreement because it "results in a cost causer basis for billing." See Alltel Brief, p. 29. The adoption of such a methodology is problematic on two fronts: (1) identification of traffic and (2) compensation for that traffic. Ultimately, the treatment of and compensation for InterMTA traffic has nothing to do with a cost causation analysis. It does, however, have everything to do with the location of the wireless caller at the beginning of the call. This was the exact concern expressed by the FCC in the First Report and Order at ¶1044, which provides:

CMRS customers may travel from location to location during the course of a single call, which could make it difficult to determine the applicable transport and termination rate or access charge. We recognize that, using current technology, it may be difficult for CMRS providers to determine, in real time, which cell site a mobile customer is connected to, let alone the customer's specific geographic location. This could complicate the computation of traffic flows and the applicability of transport and termination rates, given that in certain cases, the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges. We conclude, however, that it is not necessary for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected. We conclude that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. *For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer.* As an alternative, LECs and CMRS providers the call to determine the location of the mobile caller or called party.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 16017-16018, ¶1044 (1996) (emphasis added).

As noted by the FCC in the above-referenced quote, the location of the wireless caller makes a difference in determining how a call is compensated, whether through transport and termination rates or access charges. See First Report and Order, ¶1044; see also Hearing Transcript, p. 20, lines 12-22. As such, the FCC determined that it is appropriate for companies like the Petitioner to use the location of the initial cell site when a call begins for purposes of conducting a traffic study. The POI method was suggested as an alternative by the FCC, but there is no reason to utilize the alternative in this case given the InterMTA study methodology proposed by the Petitioner. Simply stated, the POI method does not determine the locale of the mobile caller, making it difficult to ensure that the jurisdiction of the call is properly determined so that it can be compensated accordingly.

Alltel suggests that InterMTA calls should not be compensated through access rates because there is no increased cost for terminating an InterMTA call as opposed to an IntraMTA call. As an initial matter, Alltel's argument marks a departure from the parties' prior interconnection agreement, which provided that Petitioner's interstate and intrastate access charges applied to InterMTA traffic. See Davis Direct Testimony, p. 6, lines 13-17; see also Hearing Transcript, p. 21, lines 1-9; p. 476, lines 11-14. More importantly, the argument is contrary to the language from the First Report and Order at ¶1044 as cited above. While Alltel's cost causation analysis may have some initial appeal, it fails to recognize the fundamental distinction in the compensation of this traffic. During discovery in this case, Alltel posed the following Discovery Request to Beresford:

Admit that the cost of transport and termination of a minute of traffic received from Alltel at a given direct point of interconnection does not change if the call is determined to be an IntraMTA call or an InterMTA call.

Petitioner responded with the following:

Deny. The cost standards for transport and termination for IntraMTA traffic are based upon the standards as established in 47 CFR § 51.505. The cost standards for InterMTA calls (access) are established in accordance with Part 69 of the FCC rules for interstate traffic and South Dakota PUC Administrative Rule 20:10:29 for intrastate traffic.

Under the FCC's rules, Alltel's argument must fail because it does not account for the fundamental distinction between the standards for developing reciprocal compensation and access rates. This Commission does have the authority to determine the appropriate methodology by which to measure InterMTA traffic and the Petitioner respectfully submits that the SS7 of Telephone Numbers Method which it proposed accounts for those concerns and principles articulated by the FCC in ¶1044 of the First Report and Order.

C. A Net InterMTA factor is neither justified nor appropriate.

Alltel recommends that this Commission adopt a net InterMTA factor on the basis that it is receiving InterMTA calls from the Petitioners. See Alltel Brief, p. 34. In support of its position, Alltel points to the testimony of Witness Davis, stating that "Davis . . . acknowledged that the Commission could provide for an offset to produce a net InterMTA factor." Id. citing Hearing Transcript at p. 40. Without reading the testimony on this issue in its entirety, such a statement by Alltel is tantamount to revisionist history. In fact, Witness Davis was asked the following on cross-examination:

Q: Okay. If the Commission would adopt that and not allow factor billing, what rate would you suggest the Commission should allow Alltel to bill for InterMTA calls it receives?

A: I guess I don't have a position. I mean, I know what our rate is. I don't know what your rate is because you don't have an access rate on file.

Q: Well, would you object to the Commission since - - of the Commission were to adopt a policy where Alltel has to pay your access rate for InterMTA, why shouldn't the Commission make you pay the same access rate or the same rate to deliver InterMTA traffic?

A: They can develop whatever methodology they desire. I'm just saying that there's no access rate on file with the Commission for Alltel traffic.

See Hearing Transcript at p. 40, lines 11-24. Witness Davis was acknowledging this Commission's authority to enact rates; he was not agreeing that Alltel is necessarily entitled to establish a rate for InterMTA traffic.

Ironically, it is with regard to its argument in support of a net InterMTA factor that Alltel for the first time acknowledges a responsibility for all parties to share in the costs of a service so as to ensure that no one party gets a free ride. See Alltel Brief, p. 34. Alltel claims that it should be entitled to symmetrical payments for InterMTA traffic since such symmetry is preferred with regard to reciprocal compensation.¹ While the Petitioner certainly agrees with this statement in principle, the compensation of InterMTA traffic is an area where this statement finds no support in the facts or the law. There are no rules of any which specify symmetrical compensation for InterMTA traffic. That would imply that Alltel's access rate is the same as Petitioner's access rate and, as we know, Alltel does not have an access rate. See Hearing Transcript, p. 476, lines 15-25; p. 477, lines 1-5. Alltel has no access tariff. Alltel cannot claim the benefit of the filed rate doctrine. As such, Alltel wants to take advantage of a rate which the Petitioner has on file, because it has no legal basis or justification to advance its own rate under the existing rule structure. The only way that Alltel can do this is through a net InterMTA factor. Such net treatment effectively allows Alltel an end-run around the rules.

¹ Alltel cites to 47 C.F.R. § 51.711(a) in support of its position for symmetrical rates. However, this statutory provision clearly relates only to reciprocal compensation, providing:

(a) Rates for transport and termination of telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

There is no mention of access anywhere in this provision and Alltel cites to no provision in the law which would allow for application of this principle.

Even with a net InterMTA factor, the only way Alltel receives InterMTA traffic is through a direct connection. See Davis Direct Testimony, pp. 7-8. There is no direct connection between the Petitioner and Alltel. Witness Davis explained both the financial and technical impossibility of Alltel's argument in his Rebuttal Testimony:

If there was [a direct connection], Section 2.1 of Beresford's proposed interconnection agreement clearly provides that InterMTA Traffic is that which is "originated by the End User of one Party and terminated to the End User of the other Party." What Beresford's Agreement does not set forth are the applicable rates that Alltel would charge for terminating InterMTA Traffic. Since Alltel does not have an access tariff, Beresford could not propose using an Alltel access rate. Section 7.2.4 of Beresford's proposed Interconnection Agreement sets forth the access rates that Beresford would charge Alltel for terminating InterMTA Traffic, as those rates established in Beresford's Interstate and Intrastate access tariffs. Alltel, in its proposed Interconnection Agreement, did not propose any language for InterMTA Traffic in the other direction (terminating to Alltel). In fact, the only change in this section proposed by Alltel are the rates that Beresford proposes to charge Alltel for terminating InterMTA Traffic. Alltel had ample opportunity to propose language for the rates it would charge Beresford but did not.

See Davis Rebuttal Testimony, p. 4, lines 10-23. In the absence of a direct connect, Petitioner routes any and all originating InterMTA traffic to a subscribers' preferred Interexchange Carrier ("IXC"). In this instance, there is again no need for a net InterMTA factor. As explained in Davis' Direct Testimony:

Consistent with 47 U.S.C. § 251(g) and 47 C.F.R. § 51.701(b)(1), telecommunications traffic that that is routed and carried by IXCs is subject to interstate or intrastate exchange access and must be charged to and recovered from the IXC that carries the call. Beresford assesses IXCs exchange access charges and the IXC assesses and receives compensation from the subscriber that originated the call. Since it is the IXC that terminates these calls onto the Alltel network, Alltel must seek compensation from the IXC for these InterMTA IXC-terminated calls and not from Beresford.

p. 7, lines 13-20. There is no justification for a net InterMTA factor because there cannot be InterMTA traffic exchanged between Alltel and the Petitioner for those reasons cited above.

Even if this Commission were to adopt a net InterMTA factor, Alltel's proposed study or methodology is wrong. The InterMTA study advanced by Alltel uses identical numbers to those

used in its proposed IntraMTA study. InterMTA and IntraMTA traffic are measured differently and compensated differently. Alltel is effectively using the same data, but comparing apples to oranges by intermingling traffic compensated by access with traffic compensated by transport and termination rates. The FCC contemplated that this traffic would be compensated differently. To suggest otherwise, as Alltel has done, effectively upsets the compensation structure the FCC established in its rules.

Interestingly, while Alltel wants to take advantage of the Petitioner's filed rates, it also seems to challenge the Petitioner's access rate, claiming that it was not developed for application to InterMTA traffic. This is not the forum in which to challenge the Petitioner's access rate. The time has long passed since Petitioner's access tariff was developed and approved. Therefore, Alltel's argument that a new rate must be developed to address InterMTA traffic cannot be raised at this juncture and further flies in the face of the First Report and Order which specifically indicates that interstate and intrastate access tariffs are to apply to InterMTA traffic. See First Report and Order, ¶1044.

Alltel's proposed net InterMTA factor and analysis are inappropriate, incorrect and the results wholly implausible. Accordingly, the Petitioner respectfully requests that this Commission adopt its proposed InterMTA language and its use of the SS7 methodology.

II. Issue7. (Section 3.1.3) Which party can initiate a direct interconnection request?

Based upon the submission of pre-filed testimony and the testimony at the hearing itself, it appeared that Issue 7 had been fully resolved. However, based upon the manner in which Alltel addressed this issue in its Brief, further clarification of the Petitioner's position is necessary. As indicated by Alltel, it has withdrawn its proposed language regarding two-way interconnection facilities for Section 3.1.3. What remains at issue are the points of interconnection ("POIs") at which Alltel may interconnect with the Petitioner.

Petitioner identified technically feasible points of direct interconnection in Appendix B to its proposed interconnection agreement. Petitioner identified its technically feasible POI as its exchange of Beresford.

Alltel has proposed the following POIs for direct interconnection for Alltel originated traffic:

1. Any RLEC meet point with SDN;
2. Any RLEC meet point with Qwest Tandem switch;
3. Any RLEC end office; and
4. Any mutually agreed upon location.

See Alltel Brief, p. 42. Alltel also identified the following POI locations for the Petitioner's originated traffic:

1. Alltel meet point with SDN tandem switch;
2. Alltel meet point with Qwest tandem switch;
3. Alltel MSC; and
4. Any mutually agreed upon location.

Id.

All of Alltel's proposed POIs, save one, are at points outside of the Petitioner's network. Alltel relies upon 47 U.S.C. § 251(c)(2)² to support its claim that it may interconnect at any technically feasible point on an *RLEC's* network. However, this is an inappropriate reading of

² Section 251(c)(2) provides the following with regard to a local exchange carrier's obligation to interconnect:

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

the rule. Section 251(c)(2) applies to incumbent local exchange carriers, not rural local exchange carriers. The distinction in this particular instance is significant in that the Petitioner, as an ILEC has an obligation only to interconnect within its network. The attendant FCC rule to that cited by Alltel is 47 C.F.R. § 51.305(a)(2), which provides that an incumbent LEC provide “for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network at any technically feasible point within the incumbent LEC’s network.” See Davis Rebuttal Testimony, p. 18.

The significance associated with the establishment of the POIs has a direct bearing on the financial obligations of the parties. Alltel is effectively seeking to have the Petitioner bear those costs for transporting traffic from its network to a point on Alltel’s network (Alltel MSC). Even if Alltel orders DS-1s for purposes of carrying traffic to its network, if the POI is not within the ILEC network, the Petitioner is financially responsible for obtaining facilities to get it to the POI.

Alltel’s proposed language for Appendix B to the parties’ interconnection agreement is unsupported by law and seeks to impose a greater financial obligation upon the Petitioner than allowed by the very rules which Alltel cites. Therefore, the Petitioner requests that this Commission adopt its proposed language for Appendix B and find that the Petitioner is not required to interconnect outside of its network.


CONCLUSION

Petitioner recognizes that its InterMTA issue is at, first blush, more complicated than that of the other Petitioners. However, a review of the law establishes that Beresford is only seeking compensation for that InterMTA traffic for which it is entitled. There has been no argument presented by Alltel which justifies abandonment of the law and wholly separate and unique treatment for Beresford’s InterMTA factor. Such a position is without support in the law and would not be sustainable upon review. Petitioner therefore respectfully requests that this Commission

adopt its proposed SS7 methodology for the measurement of InterMTA traffic, and its definitions for purposes of measuring both types of traffic at issue in this proceeding.

Dated this 24th day of October, 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 24th day of October, 2008, upon the following:

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