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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: *TC07-114: In the Matter of the Petition of Kennebec 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:

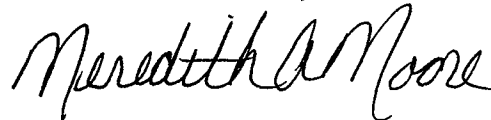
Attached for filing in the above matter, please find the Reply Memorandum of Law in Support of Kennebec Telephone Company's Petition for Arbitration. This is intended as service upon Alltel's representatives via electronic mail.

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**

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**IN THE MATTER OF THE PETITION OF  
KENNEBEC 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 07-114**

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

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Comes Now Kennebec Telephone Company (“Kennebec”) 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.

**ARGUMENT AND ANALYSIS**

**I. Issue 1: (Section 5.0): Is the reciprocal compensation rate for IntraMTA Traffic proposed by Telco appropriate pursuant to 47 U.S.C. § 252(d)(2)?**

In its initial post-hearing submission, Alltel argues that the Petitioner’s rates are improper because “they include nonusage-sensitive switching costs (termination costs), fail to properly calculate transport costs, and are not based on a properly performed forward-looking cost analysis.” Alltel Communications, Inc.’s Brief in Support of Its Positions on Interconnection Terms (“Alltel Brief”), p. 4. Alltel further argues that the reciprocal compensation termination rate component proposed by Petitioner is overstated and includes certain impermissible costs. In organizing its argument, Alltel identified five issues its witness, Craig Conwell, raised when he analyzed the Petitioner’s FLEC model. Accordingly, in organizing its own response to Alltel’s Brief, Petitioner will utilize those issue statements defined by Witness Conwell.

**A. Petitioner’s Switching Termination Rate is Appropriate and Sustainable.**

- 1. What switch investment, by switch category and exchange should be used in the RLEC cost study and what percentage of the switch investments is usage-sensitive and recoverable as part of the reciprocal compensation rate?**

Alltel's argument with regard to the Petitioner's calculation of its switching termination rate mischaracterizes the testimony and evidence. Alltel initially states that "The RLECs essentially argue all switching investment and costs (except a meager five percent for "vertical services") are recoverable from rates assessed to other carriers." See Alltel Brief, p. 7. Conspicuously absent from Alltel's brief is any citation to the record. Such citation is lacking because there is no record evidence to cite. The testimony of Petitioner's Witness, Tim Eklund, establishes that Alltel's argument is without merit. As previously established by the Petitioner, the total reciprocal compensation rate includes both a switching termination and a transport rate. The switching termination rate is achieved by first determining the total forward-looking switch investment, which was based upon the location of the Petitioner's existing wire centers, its total number of current subscribers and its engineering trunking guidelines. See Eklund Direct Testimony, p. 13, lines 16-28; p. 14, lines 1-2. Once the total switch investment is determined, adjustments are made to eliminate those costs which by law must be excluded from the rate. As clearly explained in Eklund's testimony, "20 percent of the total forward-looking switch investment was excluded for the non-traffic sensitive line portion [ ]" and "5 percent of the switch matrix and processor was excluded for their use in the provision of vertical services." Eklund Direct Testimony, p. 14, lines 8-11; see also Hearing Transcript, p. 238, lines 8-10 ("[e]xcluded from the study will be the nonusage sensitive line equipment that was discussed in both Ms. Vanicek and Mr. Weber's testimony."); p. 267, lines 20-24.

Alltel further mischaracterizes Witness Vanicek's testimony regarding the switch that Petitioner identifies in its forward-looking network. Alltel claims that the whole of Petitioner's witness testimony amounts to the following trite phrase: "because a network has to exist to deliver calls, all network components are usage sensitive." Alltel Brief, p. 7. This statement is a gross misstatement of what was a methodical and educated approach to identifying those costs to

be included in the study. See Hearing Transcript, pp. 236-239; 240, lines 1-10. Witness Vanicek’s testimony cannot be viewed in isolation as Alltel suggests. While her testimony does in fact reference the total costs of the Petitioner’s network, it also accounts for those exclusions made by Witness Eklund in the actual creation and application of the Petitioner’s FLEC model. The crux of Witness Vanicek’s testimony is that Alltel cannot exclude from the FLEC model those costs which directly benefit Alltel in the termination of a call. As such, Alltel cannot credibly argue that the costs associated with the Petitioner’s proposed switch are in fact “getting started costs”. See Alltel Brief, p. 8. There is no discussion or contemplation in the FCC’s rules and regulations for “getting started costs”.

In support of this argument, Alltel relies up a decision made by the FCC’s Common Carrier Bureau. See Alltel Brief, p. 8, citing Virginia Arbitration Cost Order, 18 FCC Rcd 17722, 17871, 17903, ¶463. This decision is a unique one, both procedurally and factually, and cannot be viewed as dispositive of any issues in this case for several reasons. As an initial matter, the Virginia equivalent of this Commission, the Virginia State Corporation Commission, expressly delegated to the FCC the authority to preside over arbitration proceedings. See Virginia Arbitration Cost Order, 18 FCC Rcd 17722, 17726, ¶¶1-2. The purpose of the proceeding was to define those rates which the incumbent local exchange carrier, Verizon of Virginia, would bill AT&T. Significantly, it was Verizon of Virginia, which proposed the “getting started costs” to which Alltel cites. Id.

The Petitioners have never identified any of the costs associated with its forward-looking and efficient network configuration as “getting started costs” and never proposed to recover its shared switching costs through a “getting started cost” category or rate element. Moreover, the FCC further recognized the following:

The rules specify that an incumbent LEC shall recover local switching costs “through a combination of a flat-rated charge for line ports and one or more flat-

rated or per minute usage charges for the switching matrix and for trunk ports,” and tandem switching costs “through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.”

Id. at 17861, ¶357. As the FCC did in the Virginia arbitration, this Commission too has the flexibility and discretion to determine what costs should be recovered on flat-rate or per minute of use charge. Therefore, there is no requirement that this Commission find as the FCC did.

The remainder of Alltel’s argument on the issue of the switching termination rate, the inclusion of usage sensitive costs, and what costs are necessary to only the termination of Alltel traffic, has already been advanced without success in another arbitration proceeding which was reviewed by the Eighth Circuit Court of Appeals. Petitioner refers this Commission to its Memorandum of Law, pp. 10-15, for its discussion of the inclusion of appropriate usage sensitive components in its FLEC model and the Eighth Circuit’s discussion of the same. See WWC License, L.L.C. v. Boyle, 459 F.3d 880 (8th Cir. 2006)

Alltel’s argument in regard to the components included in the switching rate is not only contrary to the testimony presented by the Petitioner, but is also contrary to the law. Alltel cannot have a second bite out of the apple in a State which is also subject to the review of the Eighth Circuit and bound by its case law. There is ample evidence in the record and authority in the law for this Commission to determine that Petitioner’s switching termination rate is appropriate. Accordingly, for those reasons set forth in the pre-filed testimony, at the arbitration hearing, and in its initial post-hearing Memorandum of Law, Petitioner respectfully requests that this Commission adopt its switching termination rate.

## **2. What switching annual cost factor should be used?**

The second issue identified by Witness Conwell and discussed by Alltel in its brief relates to the switching investment for purposes of developing the switching termination rate. Alltel does not challenge the switching annual cost factors of several of the other Petitioners, but

does challenge the factor used by Kennebec in its model, claiming that it is “exceedingly high” and “improper”. See Alltel Brief, p. 12. It is inappropriate for Alltel to compare Kennebec’s number to that of the other Petitioners in this matter. Each Petitioner’s factors are unique to it and cannot be used to establish that another Petitioner’s proposed factor is somehow inappropriate or inaccurate. The model used by the Petitioner is not comparative not should it have been developed to serve such a purpose. It was designed to use the same principles and constructs for every company. See Hearing Transcript, p. 243, lines 17-25; p. 244, lines 1-3. If this proceeding had involved Kennebec alone, Alltel would not have been able to make direct comparisons. Accordingly, Alltel’s argument is wholly contrary to the legal framework within which the Petitioner’s FLEC model was developed.

Specifically, Alltel takes issue with the debt to equity ratio utilized for Kennebec, arguing that Kennebec has assumed no debt and 100 percent equity, thereby causing Kennebec’s cost of capital to be too high. Alltel’s argument is simply wrong. Kennebec used the FCC’s authorized rate-of-return of 11.25% on net investment. See Eklund Rebuttal Testimony, p. 8, lines 14-26; p. 9, lines 1-16 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, and *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185; First Report and Order, FCC 96-325 (“Local Competition Order”) (Released August 8, 1998, at ¶702); see also Hearing Transcript, p. 235, lines 14-21. In arriving at its authorized rate-of-return, the FCC used a capital structure consisting of 44.2% debt. Id. There is no basis for Alltel’s argument that Kennebec has assumed no debt in the costs included in its model is without basis.

Alltel further argues that Kennebec’s capital cost factor should be reduced because it failed to take into account the effects of deferred income taxes. This statement is also contrary to

record evidence. Witness Eklund explained that the FLEC study used a federal tax rate of 34% for Kennebec. See Eklund Direct Testimony, p. 15, lines 18-19. He further explained that it was and is inappropriate to include the effects of deferred taxes in the FLEC study because the purpose of the study is to develop a factor based upon the full life of Kennebec's proposed plant. See Eklund Rebuttal Testimony, p. 9, lines 17-22; p. 10, lines 1-2.

Alltel recommends that this Commission essentially place a cap on the cost factors that Kennebec can use. It arrives at this "cap" figure by analyzing the cost factors of the other Petitioners. Again, it is not appropriate to average numbers from other companies and input that into the model as representative of Kennebec. Therefore, the figures which Alltel recommends should be used by this Commission in establishing Kennebec's annual capital cost factor are without a rational basis in the record and are not supported by law and should therefore not be used in place of actual, substantiated company specific financial information from Kennebec itself. Any suggestion by Alltel that it can allocate another company's direct expense factor to Kennebec simply because it believes Kennebec's factor is too high in comparison with another Petitioner is impermissible. It further leads to the notion that there never needs to be a proceeding such as the one at hand. It suggests that the cost factors of all RLECs in South Dakota should be aggregated together and then input into a model so as to arrive at an identical rate for all. While such a method may have been used in the context of other rates, it is not appropriate in the context of transport and termination and it was not the intent of the FCC in articulating standards for the development of a transport and termination rate.

**3. Issue 1.4: The annual minutes per voice trunk should be established consistent with FCC Benchmark Rule 47 C.F.R. § 51.513(c)(4).**

Petitioner calculated its total demand based upon minutes of use available to it at the time that the FLEC study at issue was performed and then made necessary adjustments to that demand to account for changes likely to occur in the future. See Hearing Transcript, p. 259, lines 20-24;

p. 260, lines 4-16; p. 261, lines 12-18. Alltel has suggested that the demand utilized by the Petitioner does not comport with the FCC recommended efficiency benchmark set forth in 47 C.F.R. § 51.513. Section 51.513 established certain proxies for use in determining forward-looking economic costs and shared transmission facilities between tandem switches and end offices. See Alltel Brief at p. 14. Alltel, through Witness Conwell's testimony, put forth the argument that an efficiency benchmark of 9,000 minutes per month per voice circuit should be used for purposes of determining annual minutes of use for application to the FLEC model.

Alltel's use of this regulation is puzzling. Section 51.513 has been vacated by both the United States Supreme Court and the Eighth Circuit. See Iowa Util. Bd. v. Federal Communications Comm'n, 120 F.3d 753 (8th Cir. 1997) aff'd in part, rev'd in part, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999); see also Iowa Util. Bd., et al., v. Federal Communications Comm'n, 219 F.3d 744 (8th Cir. 2000). The case originally came before the Eighth Circuit upon petitions for review of the FCC's First Report and Order filed by various incumbent local exchange carriers. One of a number of issues raised in the petitions was the validity of the proxies established in the rule cited by Alltel.

In analyzing the validity of the proxy rules, the Eighth Circuit detailed the history and purpose of this particular regulation, noting that proxy prices were established for use by a state commission in determining interconnection and network element charges, wholesale rates, and the rates for termination and transport. Id. State commissions, however, were only to use the proxy prices if they did not use a proposed cost study. Id. The Eighth Circuit therefore determined that the proxy prices could not stand. An appeal to the United States Supreme Court was filed thereafter.

On appeal, the FCC made certain statements regarding the use and relevance of the proxy prices, specifically noting that they were "designed for a past period in which no cost studies



could have been made available to the state commissions.” Id. (quoting AT&T Corp v. Iowa Util. Bd., 525 U.S. 366 (1999)). On remand to the Eighth Circuit, the FCC attempted to revive the proxy prices, arguing that a state may elect to use the proxy prices if it so chose to do so. The Eighth Circuit did not find this argument compelling and determined the proxies infringed upon the role of a state commission to establish rates. Moreover, it conflicted with 47 C.F.R. § 51.503(b), which states that the rates of an RLEC “shall be established’ using either TELRIC or the proxy prices.” Id. As such, the “FCC does not have jurisdiction to set the actual prices for the state commissions to use. Setting specific prices goes beyond the FCC’s authority to design a pricing methodology and intrudes on the states’ right to set the actual rates pursuant to § 252(c)(2).” Most significantly, “[t]he proxy prices are also infirm because they rely on the hypothetical most efficient carrier rationale which we have found to be violative of the Act[.]” Id. Using this reasoning, the Eighth Circuit vacated Section 51.513. As such it is not good law and simply cannot be relied upon by Alltel in support of its argument. Without this statute and the proxies contained therein, Alltel has no basis to dispute the demand used by the Petitioner in its FLEC study. See also Eklund Rebuttal Testimony, p. 22; p. 27.

Alltel further argues that another benchmark, that of HAI 5.0a, may be appropriate. Alltel’s argument in support of use of this benchmark is equally unpersuasive. As explained by Witness Eklund, the HAI 5.0a model is typically utilized by large Regional Bell Operating Companies (“RBOCs”). See Eklund Rebuttal Testimony, p. 24, lines 4-14. Accordingly, the minutes of use proposed in such a model are in no way reflective of the quantity of minutes that the Petitioner carriers over its network and would only serve to inappropriately reduce the Petitioner’s rate. Id.

The Petitioner has established through valid evidence that its proposed switching rates include appropriate usage-sensitive costs and are based upon valid demand calculations. Alltel’s

proposed adjustments to the switching rate are designed to artificially drive down the Petitioner's rate and should not be accepted.

**B. Petitioner's Transport Rate is Appropriate and Sustainable.**

In analyzing Petitioner's proposed transport rate, Alltel focuses upon the proposed network design, arguing that it is unjustifiably large and expensive. Alltel also attacks the minutes of use calculations used by the Petitioner in its FLEC model, claiming that Petitioner has failed to use projected minutes of demand. In making these arguments, Alltel again mischaracterizes the testimony offered at the time of the hearing, using certain statements in isolation to others or simply misconstruing them. Alltel also seems to make the argument that the study at issue is simply too old.

In its analysis of the Petitioner's transport rate, Alltel defined the following questions and issue statements:

**Alltel Issue 2.1: What Transport electronics base, line and tributary investments can be included in the RLEC cost study?**

**Alltel Issues 2.2 through 2.4: Forward-looking economic cost per unit for transport should be based on DS-1 equivalent circuits as the RLECs' path method disproportionately charges voice traffic for transport.**

**Alltel Issue 2.4: The annual cost factor for transport electronics should be capped at a reasonable percent.**

**Alltel Issue 2.6: The annual minutes per voice trunk should be recalculated to meet efficient network standards and benchmarks.**

**Alltel Issue 2.7: The forward-looking economic costs per minute of transport electronics should be calculated as described above and cost per minutes determined.**

**Alltel Issue 3.1: Interoffice mileage to be used by the RLEC Cost study should not exceed existing mileage of interoffice cable routes used to transport Alltel traffic.**

**Alltel Issue 3.2: The outside plant annual cost factors should be capped at a reasonable level.**

**Alltel Issue 3.3: Transport outside plan cost calculations should also use DS-1 equivalent circuits to avoid over allocating costs to voice traffic and ensuring that the cost causer of the needs for larger networks pays a proportional share.**

**Alltel Issue 3.4: The annual minutes per voice trunk should reflect an efficient network.**

As an initial matter, both parties agree that the FCC's rules and regulations require the use of an efficient and forward-looking network. The parties' disagreement stems from the specific network proposed by the Petitioner. As previously stated by the Petitioner, all of the costs identified in its proposed network must be shown to be associated with the most efficient and cost effective technology currently available so as to prove that the resulting proposed network is cost efficient. Alltel, however, appears to be mixing the standards articulated by the FCC, arguing that the Petitioner is required to show that its proposed network design must be supported by future demand. No where, even in Alltel's statement of the law on pages 4 through 6 of its brief, can it find support for the proposition that there must be forward looking demand to justify the proposed network transport system.

All of the issue statements identified above illustrate Alltel's proposed use of the bandwidth method. In addressing its defined issue statements, Alltel claims the testimony offered by Petitioner's witnesses, specifically Witnesses Weber and Eklund, is incongruous. However, there is nothing contradictory about this argument. Any contradictions, and Petitioner submits there are none, are caused by Alltel's application of its proposed bandwidth method to the testimony. Square pegs will not fit in round holes. Moreover, while Alltel claims that the method it proposes is the DS-1 Equivalent method, the change in name is insignificant because the application of the method is the same. See Hearing Transcript, p. 258, lines 21-24.

Petitioner believes it has adequately addressed Alltel's argument regarding both the efficiency and cost effectiveness of Petitioner's forward-looking network and its proposed demand in its initial Memorandum of Law. See pp. 6-16 (discussing forward-looking design in

the context of TELRIC). Therefore, in the interests of not repeating its previous arguments, Petitioner respectfully refers the Commission to pages 7 through 10 of its Memorandum of Law for a discussion of its proposed network, pages 15 through 16 for a discussion of projected demand, and pages 17 through 19 for a discussion of the path versus bandwidth methodology. It should be noted again, however, that Alltel's arguments in support of its issues enumerated 2.6<sup>1</sup>, 2.7<sup>2</sup> and 3.4<sup>3</sup>, must fail because they are premised upon faulty law, namely 47 C.F.R. § 51.513. See pp. 6-8 *supra*.

The *effect* of Alltel's argument, however, does bear repeating. The effect is to prohibit the Petitioner from utilizing equipment which is modern, commonly deployed for similarly situated rural local exchange carriers, efficient and forward-looking, if it cannot absolutely exhaust the capacity of that equipment. Such an effect is not consistent with the FCC's articulation of the TELRIC standard. As ably pointed out in the Brief submitted by Commission Staff,

The current equipment configuration the Petitioners are using at the moment, whether or not it meets current capacity or not, is not relevant in the long-run. Forward looking, long-run costs can only be estimated, but reconfiguration would be more likely under an efficiency requirement. The forward cost of reconfigurations of Petitioner's equipment has been fairly accounted for in their study and testimony.

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<sup>1</sup> Alltel identified Issue 2.6 as: "The annual minutes per voice trunk should be recalculated to meet efficient network standards and benchmarks." In support of this conclusion Alltel relies upon those arguments and authority it cited in Issue 1.4, p. 14, of its Brief. Alltel again requests that this Commission use the benchmarks or proxies set out in 47 C.F.R. § 51.513 to recalculate the minutes per voice trunk. The proxies cannot be used because they have been expressly abrogated by the Eighth Circuit. Therefore Alltel's argument on this issue is without merit and should be rejected.

<sup>2</sup> Alltel identified Issue 2.7 as: "The forward-looking economic costs per minute of transport electronics should be calculated as described above and cost per minutes determined." Again, Alltel suggests that the forward-looking cost per minute of transport electronics should be calculated using the proxies set forth in abrogated rule 47 C.F.R. § 51.513. See Alltel Brief, p. 24. Alltel's argument on this issue must also be rejected.

<sup>3</sup> Alltel identified Issue 3.4 as: "The annual minutes per voice trunk should reflect an efficient network." In support of this argument Alltel again relies upon abrogated rule 47 C.F.R. § 51.513 in arguing that the "annual minutes for voice trunk should be calculated based on efficient network finding and the transport outside costs attributable to DS-1 voice traffic divided over the adjusted annual minutes per voice trunk." See Alltel Brief, p. 26. Alltel's argument on this issue must also fail.

See Staff’s Brief dated October 10, 2008, p. 3, Issue 1, ¶1. Furthermore, the overarching effect of Alltel’s argument is again as Staff pointed out: “Using short-run marginal cost theory as proposed by Alltel places the overwhelming burden of present and future cost on the Petitioners with a significant ‘free rider’ effect available to Alltel.” See Staff’s Brief, p. 3, Issue 1, ¶2.

**C. Petitioner’s proposed transport and termination rate is more than adequately supported by the record.**

Some concern was expressed both at the time of the hearing and in Staff’s Brief that the study utilized by the Petitioner is either too old or “older than preferred”. See Staff’s Brief, p. 3, Issue 1, ¶3. It is important to note that while the FLEC study used by the Petitioner was completed in 2007 for use during negotiations between the parties to this arbitration, it is not somehow rendered obsolete or less accurate because of the passage of time. See Hearing Transcript, p. 285, line 25, p. 286, lines 1-9. While the demand used was based upon 2006 minutes of use, the other cost factors input into the model would have been no different had they been inserted into the model in January 2007 or December of 2007. Moreover, if an obligation were imposed upon the Petitioner to re-run the FLEC study multiple times during the pendency of an administrative proceeding, it would result in a vicious cycle. Each time the study would be re-run, it would need to be disclosed to the other party, which would then desire time to examine the study and submit discovery requests based on that study. The cost, both in terms of finances, time and resources, would be significant and unduly burdensome. It also suggests that the FLEC model is not inherently forward-looking in its approach. If the FCC had intended that a FLEC study be re-run, it certainly could have provided as such in its rules.

Equally burdensome is the request for relief sought by Alltel in regard to the proposed rates. Alltel did not perform its own cost study, but rather analyzed the Petitioner’s, inserting its own figures which are either not supported by the law or clearly abrogated by it. Alltel has asked this Commission to use the adjustments it made to the FLEC model or to require the

RLECs to rerun the study. Specifically Alltel has stated: “The RLECs should identify the specific changes to be made to the studies, and Alltel should have the opportunity to confer on these changes and provide feedback to the RLECs and the Commission.” See Alltel Brief, p. 28. Petitioner submits that re-running the study is not necessary as its proposed rates have been adequately substantiated by the record. However, if this Commission were to decide that any adjustments should be made to the study, Alltel’s suggestion that it be allowed to confer in regard to any change would effectively create a never-ending process, which ultimately benefits only Alltel as Alltel will be able to continue to avoid any obligation to compensate the Petitioner for traffic currently traversing the Petitioner’s network. Accordingly, Petitioner again respectfully requests that Petitioner’s proposed rate be adopted.

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

Alltel’s arguments on this issue focus on 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. 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 Kennebec:

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.



**B. 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.<sup>4</sup> 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.

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 Kennebec'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 Kennebec'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, Kennebec could not propose using an Alltel access rate. Section 7.2.4 of Kennebec's proposed Interconnection Agreement sets forth the access rates that Kennebec would charge Alltel for terminating InterMTA Traffic,

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<sup>4</sup> 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.

as those rates established in Kennebec'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 Kennebec proposes to charge Alltel for terminating InterMTA Traffic. Alltel had ample opportunity to propose language for the rates it would charge Kennebec 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. Kennebec 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 Kennebec.

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.

**III. Issue 7. (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 Kennebec.

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)<sup>5</sup> 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 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.

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<sup>5</sup> 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 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 the complexity of those issues which it has placed before this Commission. Of paramount importance is the Petitioner's proposed transport and termination rate. Petitioner recognizes that no study can be unassailable. The test is whether any attacks levied at the study in issue are intended to reflect the spirit and letter of the FCC's principles or whether they are simply intended to reduce the Petitioner's rate so as to achieve a greater profit margin for another. In this proceeding, the adjustments which Alltel proposes be made to the Petitioner's rate result in a rate of less than \$.005. This rate simply does not comport with reality. Petitioner did not take its obligations for the development of a forward-looking economic cost study lightly. It submitted evidence in support of its proposed rate which it believes establishes that the rate is just and reasonable and compliant with those rules promulgated by the FCC. Petitioner therefore respectfully requests that this Commission adopt its proposed transport and termination rate. Petitioner further 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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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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