BEFORE THE STATE OF SOUTH DAKOTA

PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of Cheyenne River Sioux Tribe Telephone Authority for Arbitration Pursuant to the Telecommunications Act of 1996 to Resolve Issues Relating to an Interconnection Agreement with Alltel Communications, Inc.	)))))	**Docket Nos. TC 08-122** **BRIEF IN SUPPORT OF MOTION TO STRIKE**

COMES NOW, Alltel Communications, LLC, d/b/a Alltel Communications, Inc. and its attorney of record, Talbot J. Wieczorek of Gunderson, Palmer, Nelson & Ashmore, LLC, and submits this brief in support of the motion to strike filed herewith.

SUMMARY OF CASE

This matter comes before this Commission as the result of Cheyenne River Sioux Tribe Telephone Authority's ("CRST") Petition for Arbitration, filed October 21, 2008, ("Petition"). Attached to CRST's Petition is the Interconnection Agreement ("IA") that Alltel proposed to CRST, and an IA that CRST claims to have proposed to Alltel, Exhibit A and Exhibit B, respectively. Petition at ¶ 3. However, Exhibit B is a new proposal of CRST that was not previously part of negotiations.

Ron Williams, Alltel's Director of Intercarrier Relations, in early October of 2007, attended a meeting at CRST's offices to discuss an IA between the companies. *See* Affidavit of Ron Williams at ¶ 2. Also in attendance were J.D. Williams, as well as other CRST representatives. *Id.* During the meeting, the parties discussed modifying their existing IA and issues both parties had with the existing IA. Id. at ¶¶ 2-3. The parties agreed to work from the existing IA and suggest modifications. To that end, when Williams returned to his office, working from the old IA, he prepared a redline proposal and provided it to CRST. Id. at ¶ 3. Alltel did not receive any counter IA from CRST. *Id.* at ¶¶ 4, 5 and 6.

On October 21, 2008, CRST filed its Petition for Arbitration. CRST purports that the IA attached to the Petition as Exhibit B was provided to Alltel. Petition, ¶ 3. However, Alltel had not received any record until it received Exhibit B served upon Ron Williams with the Petition. See Williams' Affidavit at ¶¶ 5 and 6. Further, requests by Alltel counsel to provide information showing that the new open issues raised by CRST's proposed IA had been raised in negotiations has not been answered See Exhibit 1, letter dated March 13, 2009 attached. CRST claims that this Commission has jurisdiction to arbitrate issues as they arise from both Exhibit A and Exhibit B. Petition, ¶ 3-4. This is simply not the case.

Pursuant to 47 U.S.C.A. § 252(b)(1), this Commission's jurisdiction to arbitrate is limited to "open issues" as the new issues raised by CRST Petition, Exhibit B, were not negotiated, the issues cannot be raised as open issues in the a petition for arbitration. As Exhibit B was not the subject of mutual negotiations. Alltel could not have negotiated the issues raised in Exhibit B as it did not receive the same until it was served with CRST's Petition in October of 2008. Exhibit A, ¶ 9.

The new definitional section of Exhibit B alone presents several new issues, even though the definitions in Alltel's IA carry forward definitions that have been in the parties' previous agreements for the last several years. *See* CRST Petition, Exhibit B. One only needs to lay the two Interconnection Agreements side-by-side to see there are numerous differences, not only in format, but in language. Having to go through the differences, line-by-line to determine every open issue created by the proposed new agreement from CRST will be a long drawn out and tedious process but will be necessitated if CRST is allowed to propose an IA with new terms at the time of filing a Petition. Negotiations are supposed to narrow the issues prior to arbitration. Arbitration is not designed to start the drafting of an IA from scratch.

LEGAL ARGUMENT

According to the Fifth Circuit, "[o]nly issues voluntarily negotiated by the parties pursuant to § 252(a) are subject to the compulsory arbitration provision." *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 484 (5th Cir.2003).

In *Coserv*, Southwestern Bell (the incumbent local exchange carrier, "ILEC") and Coserv (the competitive local exchange carrier, "CLEC") engaged in voluntary negotiations pursuant to 47 U.S.C. §251. *Id.* at 486. ILEC refused to negotiate issues relating to compensated access, no Interconnection Agreement ("IA") was reached, and pursuant to 47 U.S.C. § 252 CLEC filed a petition for arbitration with the Public Utility Commission ("PUC"). *Id.* The PUC did not arbitrate the compensated access issues. *Id.*

The PUC reasoned the compensated access issues were not within the scope of issues it had jurisdiction to arbitrate. *Id.* CLEC brought an action in federal district court to challenge the PUC's determination that it did not have jurisdiction. The district court agreed with the PUC and granted summary judgment for ILEC. *Id.* CLEC appealed to the Fifth Circuit and it affirmed the district court, but on alternative grounds. In its petition for arbitration, CLEC had claimed there were issues relating to compensated access that remained open. *Id.* The Fifth Circuit stated that "[c]ompensated access was **not a mutually agreed upon subject of voluntary negotiation** between [ILEC] and [CLEC]. [W]e find this a sufficient basis for the PUC's denial of jurisdiction." *Id.* at 487. (emphasis added).

Here. CRST has filed a petition which contains an *entirely new* IA. Exhibit A, ¶ 9. The provisions in Exhibit B pertain to issues that were not brought up during voluntary negotiations *at all*. *Id.* "The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations." *Coserv*, 350 F.3d at 487. In footnote 15, the *Coserv* court points out that its holding is in line with other courts that have reviewed the "open issues" question. *See U.S. West Comm., Inc. v. Minnesota*

Public Utilities Commission, 55 F.Supp.2d 968 (D.Minn.1999) (holding that "open issues" are limited to those that were the subject of voluntary negotiations). *See also MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 298 F.3d 1269 (11th Cir.2002) (rejecting a district court's conclusion that the compulsory arbitration provision was so broad as to include any issue raised by the petitioning party). CRST should not be allowed to arbitrate the new issues that Exhibit B, their entirely new IA, will raise.

The FCC's stance on what constitutes "open issues" is in line with the Fifth Circuit. In an FCC arbitration proceeding between WorldCom and Verizon, Worldcom filed a negotiated amendment to the IA at issue. *In the Matter of Petition of Worldcom, Inc.*, 20 F.C.C.R. 5279, 5294, ¶ 44 (2005). Verizon filed a motion to strike the negotiated amendment, which was granted. *Id.* at 5295, ¶ 45. The FCC stated it appeared the negotiated amendment related to negotiations that were separate from those in the IA at issue (meaning separate from those negotiations that pertained to the IA at issue), and therefore **the negotiated amendment did not contain open issues** to be arbitrated by the FCC. *Id.* at 5296, ¶ 47-8. "Because the open issues [preempted by the FCC from the Virginia Commission] did not include the Worldcom Negotiated Agreement Filing, we find that this filing does not fall within the ambit of the matters over which the Commission retains jurisdiction." *Id.* ¶ 48.

The issues that arise out of the *new* CRST IA, Exhibit B, are not within the jurisdiction of the South Dakota PUC. The South Dakota PUC has jurisdiction to arbitrate "open issues." 47 U.S.C.A. § 252(b)(1). CRST's new IA, Exhibit B, contains issues that are not "open issues" as the issues were not voluntarily negotiated. Exhibit A, ¶ 9. As such, Exhibit B should be stricken from the record and not subjected to compulsory arbitration. *Coserv*, 350 F.3d at 484. The South Dakota PUC *does* have jurisdiction over open issues that arise from Exhibit A, the IA that Alltel and CRST actually negotiated over. The issues in areas that were open are clearly delineated by the existence of strike-through and revisions. The IA that was provided by Alltel

to CRST attempted to deal with all issues raised in the discussions. Absent the parties mutually agreeing to different language as part of a settlement, the open issues are limited to those contained in Petition Exhibit A.

CONCLUSION

For the reasons set forth above, CRST should not be allowed to arbitrate new issues raised in Exhibit B, the entirely new Interconnection Agreement that was filed with CRST's petition for arbitration. This Commission should find that the open issues subject to arbitration are those that were the subject of voluntary negotiations, and that the issues raised in Exhibit B were not the subject of voluntary negotiations between Alltel and CRST. As such, this Commission should strike CRST's new Interconnection Agreement, Exhibit B, and only arbitrate those issues over which it has jurisdiction; the issues that arose from the only Interconnection Agreement voluntarily negotiated over, the Interconnection Agreement that was proposed by Alltel, Petition Exhibit A.

Dated this 8th day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify on June 8th, 2009, a true and correct copy of the BRIEF IN SUPPORT OF MOTION TO STRIKE was served electronically upon the following individuals:

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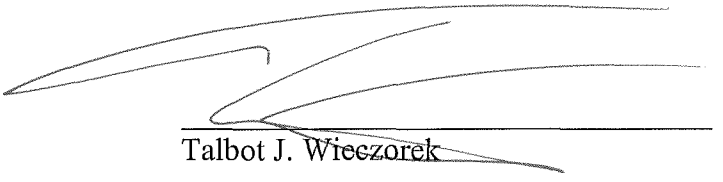

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March 13, 2009

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RE: Alltel Communications, Inc.
In the Matter of the Petition of CRST for Arbitration
TC08-122 GPNA File No. 05925.0050

Dear Ms. Rogers:

You may recall that Alltel raised in its response to the Petition for Arbitration in the CRST matter that Petition Exhibit B, the Interconnection Agreement as proposed by CRST, was never provided to Alltel during negotiations. Exhibit A was provided by Alltel to CRST but no alternative agreement was proposed.

I discussed this issue with Mr. Williams. He recalls when he met with JD and other representatives from CRST originally regarding a new agreement, he was told there was a desire by CRST to simply use the old agreement and modify from that agreement. From these conversations, Alltel produced Exhibit A to the petition.

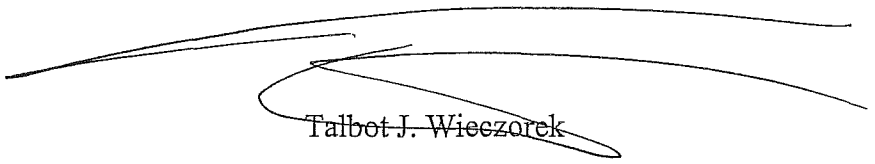
In preparing testimony, it has become evident that there are numerous differences between these agreements. Technically, each difference has to be decided by the Commission. This will cause incredibly lengthy testimony if we cannot get beyond some of the language differences.

Moreover, I am concerned that Exhibit B, having not been presented to Alltel prior to filing the Petition, essentially raises issues that were not subject to negotiation. It has always been my understanding that arbitration is reserved for issues that were brought up in negotiations and the parties were not allowed to bring up new issues once they file for arbitration. Therefore, I would like you to provide me any documentation your client might have showing that all these language issues were raised with Alltel during the course of negotiation. That might help me to

EXHIBIT 1

cut through some of these language differences and it is also necessary to prevent me from feeling obligated to file a motion to exclude issues raised by the differences in the language.

Sincerely,



Talbot J. Wieczorek

TJW:klw
C: Client
Karen Cremer