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OCT 31 2006

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

October 31, 2006

Hand-Delivered

Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

Re: In the Matter of the Petition of Venture Communications
Cooperative for Arbitration Pursuant to the Telecommunications
Act of 1996 to Resolve Issues Relating to an Interconnection
Agreement with Alltel Communications, Inc.
SDPUC Docket No. TC 06-159

Dear Ms. Van Gerpen:

Enclosed for filing please find Venture Communications Cooperative's Opposition to Request of Alltel Communications, Inc. To Use the Office of Hearing Examiners in the above-referenced matter.

Sincerely yours,



Darla Pollman Rogers

DPR/mdb
Enclosure

cc: Talbot J. Wieczorek
Rich Coit
Kara Van Bockern
Ben H. Dickens, Jr.
Mary J. Sisak

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

RECEIVED

OCT 31 2006

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)
VENTURE COMMUNICATIONS COOP-)
ERATIVE FOR THE ARBITRATION)
PURSUANT TO TELECOMMUNI-)
CATIONS ACT OF 1996 TO RESOLVE)
ISSUES RELATING TO AN INTER-)
CONNECTION AGREEMENT WITH)
ALLTEL COMMUNICATIONS INC.)

DOCKET NO. TC06-159

**Opposition to Request of Alltel Communications, Inc.
To Use the Office of Hearing Examiners**

Venture Communications Cooperative (“Venture”) hereby opposes the Request of Alltel Communications, Inc. (“Alltel”) to utilize the South Dakota Office of Hearing Examiners for the arbitration of the interconnection agreement at issue in this proceeding.

Argument

1. Alltel’s Request is deficient on its face.

On October 27, 2006, Alltel filed a Request to Use Office of Hearing Examiners Pursuant to SDCL § 1-26-18.3. Said Request provides in pertinent part as follows:

WWC License LLC¹, by and through its attorneys of record . . . pursuant to SDCL § 1-26-18.3 hereby request that the above-entitled contested case be directed to the Office of Hearing Examiners and the Office of Hearing Examiners hear this contested case.

SDCL §1-26-18.3 sets forth initial criteria that must be met in order for a case to be transferred to the Office of Hearing Examiners. The statute provides that transfer is

¹ On October 10, 2006, Alltel filed its Response to Venture’s Petition for Arbitration. In the current Request to Use Office of Hearing Examiners, the moving party is WWC License L.L.C. rather than Alltel. Other than this direct quote from the Request, WWC License L.L.C. will be referred to as Alltel throughout this Opposition.

appropriate only “if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated.”²

Alltel’s Request is deficient on its face because it fails to demonstrate that its request meets the statutory criteria. That burden is on the requesting party. Because the Request is deficient and Alltel has failed to meet the threshold requirements for transfer, Alltel’s Request should be denied.

**2. The Office of Hearing Examiners is not authorized under
the Communications Act to Arbitrate Agreements
Pursuant to Section 252 of the Act.**

Congress has enacted a comprehensive statutory scheme providing for the negotiation and arbitration of interconnection agreements between incumbent local exchange carriers and requesting telecommunications carriers. 47 U.S.C. § 252 establishes specific procedures for the arbitration and approval of interconnection agreements by State commissions. 47 U.S.C. § 252(b)(1) provides that the requesting carrier or any other party to the negotiation “may petition a State commission to arbitrate any open issues.” 47 U.S.C. § 252(b)(4) sets forth the actions available to State commissions. In fact, 47 U.S.C. § 252 is replete with references to State commissions and their authority and duty to arbitrate interconnection agreements between parties when negotiations fail.

Under the Federal Telecommunications Act (“the Act”), the term “State commission” is defined as follows:

² SDCL § 1-26-18.3 provides:

In any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17.

The term “State commission” means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers. 47 U.S.C. § 153(41).

In the state of South Dakota, it is this Commission that meets the Act’s definition of State commission, not the Office of Hearing Examiners. “The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.” SDCL § 49-31-3. The Commission has supervision over all rates or charges of telecommunications services, and of intrastate access charges of cooperatives, municipalities, and companies serving less than 50,000 subscribers. See SDCL §§ 49-31-4; 49-31-5.1; 49-31-15; and 49-31-19.

Because Federal law, not South Dakota law controls this issue, SDCL § 1-26-18.3 is clearly preempted by federal law. Federal law preempts state law in several situations: (1) where Congress has specifically stated that state law is expressly preempted; (2) when federal law “creates a scheme of federal regulation so pervasive that the only reasonable inference is that it meant to displace the states (field preemption);” and (3) when state law and federal law conflict (conflict preemption). See *Sheesley v. Cessna Aircraft Co.*, 2006 D.S.D. 6, ¶75 (citing *Davenport v. Farmers Ins. Group*, 378 F.3d 839, 842 (8th Cir. 2004)). “Congressional intent is the touchstone for determining the preemptive effect of a statute.” *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 886 (8th Cir. 2005). Congress specifically requires that a *State commission* act upon the arbitration of interconnection agreements, and this Commission’s administrative rules are in accord. See generally 47 U.S.C. § 252; see also A.R.S.D. 20:10:32:32 through 20:10:32:35. Furthermore, it is the State commission that is required to approve the final interconnection agreement adopted

by arbitration. See 47 U.S.C. § 252(e). Referral of this case to the Office of Hearing Examiners would be in direct conflict with federal law.

To utilize SDCL § 1-26-18.3 to usurp this Commission's authority as it relates to interconnection agreements unquestionably conflicts with federal law and was simply not contemplated by the South Dakota legislature. Accordingly, SDCL § 1-26-18.3 is preempted to the extent it conflicts with established federal law.

Conclusion

Alltel's Request that this case be transferred to the Office of Hearing Examiners is deficient on its face because it fails to meet the statutory criteria for transfer as articulated in SDCL § 1-26-18.3. Therefore, the Request should be denied.

The Telecommunications Act of 1996, read together with Chapter 49 of the South Dakota Code, and the South Dakota administrative rules, establish the clear and controlling intention of Congress to delegate authority to this Commission to oversee the arbitration and approval of interconnection agreements. Such a comprehensive scheme cannot be ignored nor can it be subjugated to SDCL § 1-26-18.3. Alltel's proposed reading of this statute is clearly inconsistent with established federal law and, accordingly, to the extent that it conflicts with this Commission's federally mandated authority, it must be deemed to be preempted.

For all of the reasons set forth herein, Venture respectfully requests that this Commission deny the Request of Alltel to transfer this matter to the Office of Hearing Examiners for all further hearings and proceedings.

Dated this 30th day of October, 2006.

Respectfully submitted,

Venture Communications Cooperative

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CERTIFICATE OF SERVICE

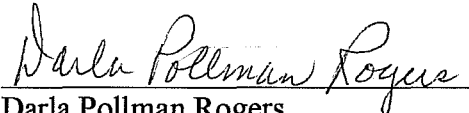
I hereby certify that on the 30th day of October 2006, a true and correct copy of Venture's Opposition to Request of Alltel Communications, Inc. to Use the Office of Hearing Examiners was served by email, and that on the 31st day of October, 2006, a true and correct copy of same was mailed by first-class, U.S. Mail, postage prepaid, to:

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