

LAW OFFICES  
**RITER, ROGERS, WATTIER & BROWN, LLP**

Professional & Executive Building  
319 South Coteau Street  
P.O. Box 280  
Pierre, South Dakota 57501-0280  
[www.riterlaw.com](http://www.riterlaw.com)

TELEPHONE  
605-224-5825  
FAX  
605-224-7102

RECEIVED

APR 09 2007

OFFICE OF  
HEARING EXAMINERS

OF COUNSEL:  
Robert D. Hofer  
E. D. Mayer

ROBERT C. RITER, Jr.  
DARLA POLLMAN ROGERS  
JERRY L. WATTIER  
JOHN L. BROWN

MARGO D. NORTHRUP, Associate

April 6, 2007

Ms. Julie Johnson  
Office of Hearing Examiners  
210 E. 4th Street  
Pierre, SD 57501

Re: In the Matter of the Petition of Venture  
Communications Cooperative for Suspension  
or Modification of Local Dialing Parity  
Reciprocal Compensation Obligations  
PUC 7-01

Dear Hearing Officer Johnson:

Enclosed herewith please find original and one copy of  
Venture's Response to Motion to Dismiss with attached Certificate  
of Service.

Thank you.

Very truly yours,

RITER, ROGERS, WATTIER &  
BROWN, LLP

By:



Darla Pollman Rogers

DPR-wb

Enclosures

SOUTH DAKOTA  
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PETITION OF	)	
VENTURE COMMUNICATIONS COOPER-	)	
ERATIVE FOR SUSPENSION OR MODI-	)	PUC 7-01
FICATION OF LOCAL DIALING PARITY	)	
RECIPROCAL COMPENSATION OBLI-	)	
GATIONS	)	

**Venture's Response to Motion to Dismiss**

Venture Communications Cooperative ("Venture") and the South Dakota Telecommunications Association ("SDTA") hereby file this response to Alltel and RCC's Motion to Dismiss in the above-referenced proceeding.

**Facts**

On October 24, 2006, Venture filed a Petition (the "Petition") pursuant to Section 251(f)(2) of the Communications Act of 1934, as amended (the "Act") and SDCL 49-31-80 requesting that the Commission grant a suspension or modification of Section 251(b)(3) and 251(b)(5) of the Act. On November 14, 2006, South Dakota Telecommunications Association ("SDTA") was granted intervention into the docket and on November 20, 2006, Rural Cellular Corporation ("RCC") and Alltel Communications, Inc., ("Alltel") were granted intervention into said docket (hereinafter referred to jointly as "Intervenors"). The Petition was supplemented by Venture on December 5, 2006.

On January 31, 2007, RCC and Alltel filed a Joint Response and Motion to Dismiss. Subsequently, on February 6, 2007, the Commission transferred this docket to the South Dakota Office of Hearing Examiners ("OHE") upon the request of Alltel. The parties then began negotiating a procedural schedule. The parties agreed that the response by Venture would be due on

April 6, 2007. Accordingly, Venture files this Response to the Motion to Dismiss filed by RCC and Alltel.

## **Argument**

### **I. Standard of Review**

The standard of review for a motion to dismiss is the same as the review for a motion for summary judgment: Is the pleader entitled to judgment as a matter of law. Jensen Ranch, Inc. v. Marsden, 440 NW2d 762, 764 (SD 1989). The Court is only authorized to grant said motion “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” SDCL 15-6-56(c). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. Morgan v. Baldwin, 450 NW2d 783, 786 (SD 1990). The burden is on RCC and Alltel to show an absence of any genuine issue of material fact and that they are entitled to a judgment as a matter of law. Wilson v. Great Northern Ry. Co., 83 SD 207, 212, 157 NW2d 19, 21. RCC and Alltel have clearly not met that burden.

Intervenors argue that through its Petition, Venture seeks to “effectively avoid” its dialing parity obligations under Section 252(b)(3) and its reciprocal compensation obligation under Section 251(b)(5). According to Intervenors, “Venture’s request for modification is an attempt to substantially expand and exploit the limited relief available under Section 251(f)(2).” Intervenors further contend that in order to justify a suspension or modification of a LEC’s competitive obligation specific evidence must be offered to sustain a finding that “application of the [com-

petitive] requirements would be likely to cause undue economic burdens beyond the economic burdens associated with efficient competitive entry.”<sup>1</sup>

Intervenors argue that Venture’s request fails because (1) its specific requests for modification of its dialing parity and reciprocal compensation obligations go beyond the scope of relief afforded under Section 251(f)(2); (2) its request for modification of its dialing parity obligation would violate its obligations as an eligible telecommunications carrier (ETC); (3) Venture has failed to prove a significant or undue economic burden beyond the self-interested protection of its monopoly power and market control; and (4) Venture’s request is inconsistent with the public interest in a competitive local exchange market.

As demonstrated herein, Intervenors Motion must be denied because it is wrong on the law and the dispute between the Parties involves genuine issues of material fact.

## **II. Venture’s Requests are not Beyond the Scope of Relief Afforded Under Section 251(f)(2) Request**

Although one of the purposes of the Telecommunications Act of 1996 and the requirements in Section 251 of the Act is to facilitate competition, Congress recognized that a national competition scheme implemented through national rules established by the Federal Communications Commission (FCC) may not be appropriate for rural areas served by rural local exchange carriers (LECs), like Venture. Therefore, Congress established Section 251(f)(2) of the Act, which allows rural LECs to demonstrate the impact of Section 251(b) or (c) requirements and request a suspension or modification of those requirements. Contrary to the argument advanced by Intervenors, the language of 251(f)(2) is very broad. The plain language of Section 251(f)(2)

---

<sup>1</sup> Motion to Dismiss at 3, citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, 16118 (1996) *aff’d in part and vacated in part sub nom.*, *Competitive Telecommunications Ass’n v. FCC*, 117 F3d 1068 (8<sup>th</sup> Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> cir. 1997), *remanded*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed. 2d 835 (1999); Order on Reconsideration. 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. August 18, 1997), (*Local Competition Order*),

places no limitation on the scope of the suspension or modification that can be sought of the requirements in section 251(b) or (c). Indeed, the plain language of Section 251(f)(2) clearly allows a rural LEC to seek a total suspension of any or all of the requirements of Section 251(b) or (c) or a modification of any or all of such requirements as it sees fit.

Moreover, the FCC recognized the broad scope of Section 251(f)(2) in the *Local Competition Order*. In that order, the FCC declined to provide different treatment for small or rural carriers when implementing section 251 of the Act based on its finding that “section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified in particular instances.”<sup>2</sup> Further, in its order implementing 251(b)(3) dialing parity, the FCC noted that certain rural or small LECs are exempt or may seek relief from its rules under Section 251(f).<sup>3</sup>

Intervenors’ contention also is wrong that in order to justify a suspension or modification of a LEC’s competitive obligation specific evidence must be offered to sustain a finding that “application of the [competitive] requirements would be likely to cause undue economic burdens beyond the economic burdens associated with efficient competitive entry.”<sup>4</sup> This language tracks the language in Section 251(f)(2)(A)(ii), which requires the state commission to grant a petition for suspension or modification if it determines that such suspension or modification is necessary “to avoid imposing a requirement that is unduly economically burdensome.” Pursuant to the plain language of Section 251(f)(2), however, this is only one possible showing that the LEC can make to obtain relief. A full reading of the section clearly requires the state commis-

---

<sup>2</sup> *Local Competition Order* at 16119.

<sup>3</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Second Report and Order and Memorandum Opinion and Order*, 11 RCC Rcd 19392 (1996), *vacated in part, People of California v. FCC*, 124 F.3d 934, 943 (1997), *rev’d in part, and remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 US 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

<sup>4</sup> Motion at 3.

sion to grant the LEC's petition if it is consistent with the public interest, convenience, and necessity and if any one of three showings is made concerning economic impact, economic burden or technical infeasibility. The FCC admitted as much when it denied a motion for stay filed by the Rural Telephone Coalition (RTC), in which the RTC asked the FCC to stay its interpretation of "unduly economically burdensome" for purposes of Section 251(f)(1) and 251(f)(2). In its order, the FCC clarified that in interpreting the phrase "unduly economically burdensome," the FCC "did not thereby intend to limit LECs' rights to seek suspension or modifications by other means provided in section 251(f)(2)."<sup>5</sup>

Moreover, on appeal, the U.S. Court of Appeals for the Eighth Circuit vacated the FCC's rule defining "unduly economically burdensome." According to the Court, the FCC's interpretation that "unduly economically burdensome" means "undue economic burden beyond the economic burden that is typically associated with efficient competitive entry," frustrates the congressional policy underlying the statute. The Court further stated:

There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in § 251(b) or § 251(c). Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily-granted exemption from doing so should continue unless the state commission found all three prerequisites for terminating the exemption, or determined that all prerequisites for suspension or modification were met in order to grant an ILEC affirmative relief. It is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission. The FCC's elimination from that assessment of the 'economic burden that is typically associated with efficient competitive entry' substantially alters the requirement Congress established. By limiting the phrase 'unduly economically burdensome' to exclude economic burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. We have found no indication that Congress intended such a cramped reading of the phrase. If Congress had wanted the state commissions to consider only that economic burden which is in excess of the burden ordinarily imposed on a small or rural

---

<sup>5</sup> In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 20166, 20173 (1996).

ILEC by a competitor's requested efficient entry, it could easily have said so. Instead, its chosen language looks to the whole of the economic burden the request imposes, not just a discrete part.<sup>6</sup>

Accordingly, Intervenor's arguments that Section 251(f)(2) is narrow in focus and that Venture's request goes beyond 251(f)(2) is wrong and must be rejected.

### III. Venture's Dialing Parity Request Does not Violate its Obligations as an ETC

Intervenors argue that Venture's petition with respect to dialing parity must be dismissed because Venture has an independent obligation as an ETC to provide local calling. According to Intervenor, Venture's request "that it not be required to provide local calling, must be dismissed given Venture's independent obligation to provide local calling as an Eligible Telecommunications Carrier ("ETC") within the State of South Dakota."<sup>7</sup> As an initial matter, if Venture's Petition is granted Venture still will provide local calling to its customers. In fact, Venture's Petition makes clear that Venture will provide local calling in the same manner as it is provided today.<sup>8</sup> Venture's Petition seeks only to prevent an expansion of the local calling that Venture provides to its customers today.

In addition, although the FCC has listed local service as one of the services that an ETC must provide, neither the Act nor the FCC's rules require a specific amount of local calling. Further, the South Dakota Public Utilities Commission (South Dakota Commission) in designating Venture as an ETC did not require any specific amount of local calling. Accordingly, even if its

---

<sup>6</sup> *Iowa Utilities Bd. v. FCC*, 219 F.3d 744, 761 (8<sup>th</sup> Cir. 2000)(*reversed in part on other grounds, Verizon Communications v. FCC*, 535 U.S. 467 (2002)). Even though the Court vacated FCC rule sections 51.405(a), (c), and (d) concerning the economic burden requirement, these rules remain in the Code of Federal Regulations. Venture notes that with respect to section 51.405(a), ACS of Alaska asked the FCC to amend section 51.405 to reflect the decision of the Court concerning the allocation of the burden of proof in rural exemption cases under section 251(f)(1). The FCC denied ACS' request for rulemaking finding that it was unnecessary in light of the Court's decision, which is binding on the FCC. *ACS of Alaska, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc. Petition to Amend Section 51.405 of the Commission's Rules to Implement the Eighth Circuit's Decision in Iowa Utilities Board v. FCC Regarding the Burden of Proof in Rural Exemption Cases Under Section 251(f)(1) of the Communications Act*, CC Docket No. 96-98, Order, 16 FCC Rcd 15672 (2001).

<sup>7</sup> Motion at 4.

<sup>8</sup> Petition at 17.

Petition is granted, Venture would not be in violation of its ETC designation or ineligible to be designated an ETC.

However, even if a grant of the Petition would make Venture ineligible for ETC status, this still would not be sufficient to dismiss Venture's Petition. In fact, pursuant to Section 214(e)(4) of the Act, the South Dakota Commission must permit Venture to relinquish its ETC designation if it so chooses because more than one carrier has been designated as an ETC in Venture's service territory.

Accordingly, Venture will not be precluded from being designated an ETC if its Petition is granted and, in any event, there is no requirement that Venture retain its ETC designation in order for its 251(f) Petition to be granted.

#### **IV. Venture's Petition is not a Request for Modification of Section 251(a)(1)**

Intervenors argue that Venture's dialing parity request is an attempt "to avoid its Section 251(a) indirect interconnection obligation and associated expenses." Intervenors argue that because Venture cannot request a suspension or modification of Section 251(a), this aspect of its Petition must be dismissed.

Intervenors are wrong. The FCC has found that the obligations found in Section 251(a)(1) refer only to the physical linking of networks. According to the FCC, Section 251(a)(1) does not require a telecommunications carrier to transport and terminate another carrier's traffic, nor does Section 251(a) require the exchange of traffic.<sup>9</sup> As demonstrated in the

---

<sup>9</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed. 2d 835 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. August 18, 1997), (*Local Competition Order*), at para. 997.

Petition, Venture currently is interconnected with various carriers, including Alltel, and grant of its Petition will not change that. Further, Venture does not ask the Commission to modify or suspend its obligation to interconnect with any carrier in its Petition. Accordingly, Venture's request for modification of dialing parity obligations cannot be classified as a request for suspension of Section 251(a).

Venture notes that wireless carrier Western Wireless, which was acquired by Intervenor Alltel, recently participated in a case before the U.S. Court of Appeals for the Eighth Circuit, in which it argued that a LEC has a duty to provide Section 251(b)(3) local dialing parity even though the LEC "would have to incur transport costs or make new technical arrangements to physically route the locally dialed call outside the [LECs] network..."<sup>10</sup> The Court agreed, even though it acknowledged that by requiring the LEC to extend local dialing parity to Alltel's customers who possess locally rated numbers, the LEC would be required to bear the associated expense. The Court found, however, that the LEC did not petition for relief from its 251(b)(3) duties under the exemption provisions of Section 251(f)(2) and, therefore, resolution of the issue required only an interpretation of the statute. Further, finding no exception in the statutory language of Section 251(b), the Court found that factual issues, such as the cost of implementing dialing parity or technical feasibility, were not material.

Heeding the words of the Court, Venture has sought a Section 251(f)(2) modification of the local dialing parity obligation in order to present the specific factual issues associated with the provision of local dialing parity to wireless carriers. There can be no doubt that the Court has

---

<sup>10</sup> WWC License, L.L.C. v. Pub. Serv. Comm'n., 459 F. 3d 880, 887 (8<sup>th</sup> Cir. 2006).

indicated that LECs have the ability to request such relief in connection with transport obligations associated with dialing parity.

## **V. Venture Can Request a Modification of the Reciprocal Compensation Requirement**

### **A. Intervenor's Contention concerning Sections 51.701, 51.703(b) and 51.711 is Wrong**

Intervenors argue that the Commission cannot suspend Venture's reciprocal compensation obligation because the FCC's rules concerning reciprocal compensation, Section 51.701, 51.703(b) and 51.711, were grounded in the FCC's authority under Section 332 of the Act, which "would not be affected by a Commission order suspending Section 251(b) obligations."<sup>11</sup> Intervenors base this statement on the decision of the Eighth Circuit Court of Appeals which permitted these rules to remain in effect as applied to CMRS providers finding that sections 2(b) and 332(c) granted the FCC authority to issue such rules, while vacating the rules as they applied to other carriers.<sup>12</sup> Because the Eighth Circuit found separate authority under sections 2(b) and 332(c) for the rules, Intervenors argue, in essence, that even if Venture obtains a suspension or modification of Section 251(b)(5), it will be of no avail because Venture still would be required to comply with FCC rule sections 51.701, 51.703(b) and 51.711.

As an initial matter, the Supreme Court reversed the Eighth Circuit's reasoning concerning pricing rules, which included sections 51.701, 51.703(b) and 51.711 of the FCC's rules.<sup>13</sup> Moreover, Intervenors' contention is not supported by the FCC's discussion of the relationship between section 251 and section 332(c) in the *Local Competition Order* and by its discussion of

---

<sup>11</sup> Motion at 8.

<sup>12</sup> *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997) (subsequent history omitted).

<sup>13</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

the ability of small, rural carriers to obtain relief from its order and rules through the Section 251(f)(2) process.

Rule sections 51.701, 51.703(b) and 51.711 were promulgated as a result of the FCC's analysis of section 251(b)(5) in the *Local Competition Order*. In that order, the FCC found that LECs "are obligated, pursuant to section 251(b)(5) ... to enter into reciprocal compensation arrangements with all CMRS providers ... for the transport and termination of traffic on each other's networks."<sup>14</sup> Further, in its discussion on the jurisdictional authority for regulation of LEC-CMRS interconnection rates, the FCC rejected the argument that sections 332 and 201 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates.<sup>15</sup> According to the FCC:

Sections 251, 252, 332 and 201 are designed to achieve the common goal of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable, and fair. It is consistent with the broad authority of these provisions to hold that we may apply sections 251 and 252 to LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time.<sup>16</sup>

Accordingly, it is clear from the *Local Competition Order* that the FCC implemented its reciprocal compensation rules based on its interpretation of Section 251(b)(5) and not based on an interpretation of Section 332. Further, it is clear that the FCC has not defined "the precise extent" of its jurisdiction under Section 332.

A complete reading of the *Local Competition Order* also shows that the FCC understood section 251(f) as providing a mechanism for rural LECs to obtain relief from its decisions made

---

<sup>14</sup> *Local Competition Order*, 11 FCC Rcd at 15997.

<sup>15</sup> *Id.* at 16005.

<sup>16</sup> *Id.* at 16005 (emphasis added).

in, and the rules that resulted from, the *Local Competition Order*. This is clear from the discussion of section 251(f) in the *Local Competition Order*, in which the FCC declined to provide different treatment for small or rural carriers based on its finding that “section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified in particular instances.”<sup>17</sup>

**B. Intervenor’s Contentions Concerning Symmetrical Compensation are Wrong**

For the same reason, Intervenor’s contention that Venture’s request with respect to symmetrical reciprocal compensation is beyond the scope of Section 251(f)(2) also must fail. The plain language of Section 251(f)(2) contains no such limitation. Moreover, in responding to objections by rural LECs to the symmetrical compensation rate requirement, the FCC noted that eligible small, rural LECs “may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.”<sup>18</sup> Accordingly, contrary to Intervenor’s assertion, the FCC has interpreted Section 251(f)(2) as allowing a request for suspension or modification of the symmetrical compensation requirement.

Intervenor’s remaining objections must be denied because they do not meet the standard required for grant of a motion to dismiss. These objections include Intervenor’s contention that Venture’s Petition with respect to symmetrical compensation is speculative and that Venture has provided no affirmative support for its position. Venture’s petition with respect to symmetrical compensation is not speculative. Venture has provided adequate support at this stage of the proceedings for its request for a suspension with respect to symmetrical compensation. In its Petition, Venture states that symmetrical reciprocal compensation would have a significant adverse economic impact on users of telecommunications services generally because it would increase

---

<sup>17</sup> *Id.* at 16119.

<sup>18</sup> *Local Competition Order* at 16041-16042.

Venture's reciprocal compensation expense.<sup>19</sup> Support for Venture's request for suspension because of significant adverse economic impact to Venture's customers if Venture must provide symmetrical reciprocal compensation to Alltel is found in Venture's comparison of switching costs for wireless carriers on a per minute basis with switching costs for rural wireline carriers. Switching costs for rural wireline carriers such as Venture are higher not only because rural wireline switches serve much smaller geographic areas, but also because South Dakota law imposes additional network requirements on wireline carriers for survivable ring networks.<sup>20</sup> There can be no dispute that this is the case, as both assertions are a matter of public record. Venture supplemented this portion of its Petition with an estimate of the harm attributable to the symmetrical compensation requirement.<sup>21</sup>

The standard for review of a Motion to Dismiss allows the Court to grant said motion only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It is premature to consider Intervenors' objections to Venture's Petition. Discovery in this case is not yet complete, so there are no depositions, answers to interrogatories, admissions, or affidavits on file. As demonstrated above, the Petition of Venture, as supplemented, is sufficient to defeat Intervenors' Motion to Dismiss because it clearly demonstrates that there are genuine issues of material fact in this proceeding that must be adjudicated at a hearing on the merits of the Petition.

#### **VI. Intervenors' Motion with Respect to the Public Interest must be Denied**

As their final argument, Intervenors contend that Venture's Petition must be dismissed or denied because it "lacks the support necessary under 47 U.S.C. §251(f)(2) and because such a

---

<sup>19</sup> Petition at 14.

<sup>20</sup> Petition at 15.

<sup>21</sup> Confidential Exhibit A, Paragraph I, Venture's Supplement to Petition.

broad request is inconsistent with the public interest in a competitive local exchange market.”<sup>22</sup> In support of its position, Intervenors argue that Venture makes “entirely self-interested and unsupported assumptions related to distant POIs, traffic levels and number of competitors.”<sup>23</sup> According to Intervenors, “[e]ach assumption is clearly speculative and most deviate from historical experience.”<sup>24</sup> Then, inexplicably, Intervenors attempt to introduce evidence concerning the negotiation between the Parties that led to the filing of an arbitration petition, which is a separate proceeding.<sup>25</sup>

Intervenors also argue that Venture’s public interest showing is not sufficient to meet the 251(f)(2) requirement. According to Intervenors, “Venture’s analysis of the public interest is no more than a restatement of its assumed effect on its bottom line and the assumed or hypothetical increase in costs to its subscribers.” Intervenors’ remaining statements are, for the most part, an attempt to introduce evidence concerning Intervenors’ position and the alleged affect of Venture’s Petition.<sup>26</sup>

In sum, Intervenors’ believe the facts presented by Venture to support its Petition are not sufficient to meet its burden under 251(f)(2); they dispute the facts presented by Venture; and they believe there are other facts that would refute Venture’s position. Rather than support Intervenors’ Motion, these arguments make clear that there are genuine issues of material fact between the Parties. A motion to dismiss can be granted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there

---

<sup>22</sup> Motion at 10-11.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.*

<sup>25</sup> See, Intervenors’ arguments on page 11 concerning Alltel’s demands in the interconnection negotiation and Venture’s alleged response and motives.

<sup>26</sup> See, Intervenors’ statements concerning other means to recover cost increases (at 12); whether or not cost increases will be paid by end users (at 12); whether the requested relief would result in end-users being required to pay toll charges (at 13); the alleged consequences of Venture’s petition (at 13-14); whether grant of the Petition will impact the ability of CMRS providers to compete (at 14); and the alleged motives of Venture to eliminate competition (at 14).

is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” SDCL 15-6-56(c). Moreover, [a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. Morgan v. Baldwin, 450 NW2d 783, 786 (SD 1990). In light of the information presented in Venture’s Petition and cost studies, it cannot be argued seriously that Venture has not presented facts to support its position. And, since those facts must be viewed in favor of Venture, Intervenor’s Motion must be denied.

**VII. Conclusion**

Based on the foregoing, RCC and Alltel have not met their burden to show an absence of any genuine issue of material fact and that they are entitled to a judgment as a matter of law. Wilson v. Great Northern Ry. Co., 83 SD 207, 212, 157 NW2d 19, 21. Accordingly, RCC and Alltel’s Motion must be denied in all respects.

Dated this 6<sup>th</sup> day of April, 2007.

Respectfully submitted,

Venture Communications Cooperative

By: Darla Pollman Rogers  
Darla Pollman Rogers  
Margo Northrup  
**Riter, Rogers, Wattier & Brown, LLP**  
319 South Coteau Street  
Pierre, SD 57501  
Tel. 605-224-5825  
Fax: 605-224-5825

and

**Blooston, Mordkofsky, Dickens,  
Duffy & Prendergast, LLP**  
Benjamin H. Dickens, Jr.  
Mary J. Sisak

2120 L St., NW Suite 300  
Washington, D.C. 20037  
Tel. 202-659-0830  
Fax. 202-828-5568

Attorneys for Venture Communications  
Cooperative, Inc.

Richard Coit  
**SDTA**  
320 E. Capitol  
Pierre, SD 57501  
Tel. 605-224-7629  
Fax. 605-224-1637

Attorney for South Dakota  
Telecommunications Association

### **Certificate of Service**

I hereby certify that on the 6<sup>th</sup> day of April, 2007, a true and correct copy of Venture's Response to the Motion to Dismiss was served electronically upon:

Talbot Wieczorek  
Gunderson, Palmer, Goodsell &  
Nelson, LLP  
440 Mt. Rushmore Road  
Rapid City, SD 57709  
E-mail: [tjw@gpgnlaw.com](mailto:tjw@gpgnlaw.com)

Benjamin H. Dickens, Jr.  
Mary J. Sisak  
Blooston, Mordkofsky, Dickens &  
Prendergast, LLP  
2120 L Street, NW, Suite 300  
Washington, DC 20037  
E-mail: [bhd@bloostonlaw.com](mailto:bhd@bloostonlaw.com)  
E-mail: [mjs@bloostonlaw.com](mailto:mjs@bloostonlaw.com)

Kara Van Bockern  
SDPUC Staff Counsel  
500 East Capitol  
Pierre, SD 57501  
E-mail: [Kara.VanBockern@st.sd.us](mailto:Kara.VanBockern@st.sd.us)

Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Comm.  
500 East Capitol  
Pierre, SD 57501  
[pattv.vangerpen@state.sd.us](mailto:pattv.vangerpen@state.sd.us)

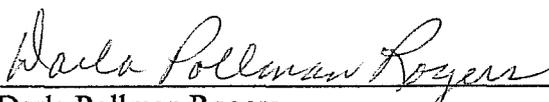
Rolayne Ailts Wiest  
Commission Counsel  
South Dakota Public Utilities Comm.  
500 East Capitol  
Pierre, SD 57501  
[rolayne.wiest@state.sd.us](mailto:rolayne.wiest@state.sd.us)

Harlan Best  
Staff Analyst  
South Dakota Public Utilities Comm.  
500 East Capitol  
Pierre, SD 57501  
[harlan.best@state.sd.us](mailto:harlan.best@state.sd.us)

Stephen B. Rowell  
Alltel Communications  
PO Box 2177  
Little Rock AR 72202  
[stephen.b.rowell@alltel.com](mailto:stephen.b.rowell@alltel.com)

Sean R. Simpson  
Alltel Communications  
2000 Technology Drive  
Mankato, MN 56001  
[sean.simpson@alltel.com](mailto:sean.simpson@alltel.com)

Richard D. Coit  
Executive Director & General Counsel  
SDTA  
PO Box 57  
Pierre, SD 57501-0057  
[richcoit@sdtasonline.com](mailto:richcoit@sdtasonline.com)

---

Darla Pollman Rogers