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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

BEFORE THE SOUTH DAKOTA
OFFICE OF HEARING EXAMINERS

| In the Matter of the Petitions of Armour Independent Telephone Company, Bridgewater-Canistota Telephone Company, Golden West Telecommunications Cooperative, Inc., Kadoka Telephone Company, Sioux Valley Telephone Company, Union Telephone Company, and Vivian Telephone Company (collectively the "Golden West Companies") for Arbitration Pursuant to the Telecommunications Act of 1996 to Resolve Issues Relating to Interconnection Agreements with WWC License L.L.C. ("Western Wireless"). | Docket Nos. |
|---|-------------|
| | TC06-036 |
| | TC06-037 |
| | TC06-038 |
| | TC06-039 |
| | TC06-040 |
| | TC06-041 |
| | TC06-042 |

MOTION TO DISMISS ARBITRATION PETITION AND RESPONSE TO PETITIONERS' MOTION TO DISMISS CERTAIN ISSUES RAISED BY WESTERN WIRELESS

WWC License L.L.C. (Alltel) hereby files this Motion to Dismiss Arbitration Petition and Response to Petitioners' Motion to Dismiss Certain Issues Raised by Western Wireless.

MOTION TO DISMISS ARBITRATION PETITIONS

1. On August 1, 2006, Armour Independent Telephone Company and the other petitioners identified in the style of this matter (collectively, the Petitioners) filed their Motion to Dismiss Certain Issues Raised by Western Wireless (Petitioners' Motion). Petitioners' Motion generally argues that any issues that the parties did not negotiate prior to the filing of the Petitions may not be the subject of arbitration. In support, Petitioners cite Section 252 of the Telecommunications Act of 1996 (the Act) and certain cases that applied Section 252 of the Act. The Petitioners cited two cases that it relies upon for its premise of dismissal. These cases are Coserve Ltd Liability Corp. v. Southwestern Bell Telephone Co., 350 F.3d 42 (5th Cir. 2003) and US West Communications v. Minnesota Public Utilities Commission, 55 F.Supp.2d 968(d) (Minnesota 1999). See page 8 of Petitioners' Memorandum. Both cases hereinafter referred to jointly as "Cited Cases." Apparently, Petitioners contend that arbitration may be conducted only with

respect to issues on which the parties had active discussions and communications in which they attempted to reach a resolution and agreement of those issues. If Petitioners are correct in their characterization of the law, then the Petitions, this proceeding and all issues herein must be dismissed because as reflected in the Petitions and Alltel's Response, the Parties simply did not engage in that level of discussion with respect to any aspect of an interconnection arrangement in connection with the request that preceded this proceeding. (see paragraphs 7 to 11 of the Petitions and paragraphs 6 to 9 of the Response.

2. Alltel initiated what it intended to be negotiations by sending Petitioners the requests for negotiations dated October 21, 2005 that are attached to the Petitions as Exhibit C (the Requests). As reflected in the Petitions and the Response, some communications were exchanged between the parties following the Requests but no substantive negotiation occurred before the expiration of the initial last date for initiating arbitration. Because the Parties had not negotiated but merely identified some areas of interest by that date, the Parties agreed to extend the date for negotiations by letter dated March 29, 2006. Unfortunately, no substantive conversations regarding interconnection arrangements occurred following the extension. While both parties made overtures, suggested negotiations, contacted the other and raised some topics for discussion, they simply did not negotiate as Petitioners contend is required prior to the filing of the Petitions. The affidavits attached to Petitioners' Motion provide nothing to support a different conclusion. The affidavits merely assert that the affiants were involved in the "negotiations" but do not identify a single "negotiation" that occurred between the parties.

3. The lack of any meaningful dialog between the parties in which they attempted or intended to reach agreement on any issues, while disappointing, should not be surprising. The parties were and are involved in other proceedings where they are trying to resolve disagreements under their former interconnection agreement. The hearings in that proceeding

were conducted during the time when the parties should have been negotiating the terms of a new agreement.

4. Petitioners' argument for dismissal, to the extent it has merit, is applicable to the Petitions and this proceeding in general rather than individual issues. For example, Petitioners argue that Alltel's proposed interconnection agreement attached to the Response should be dismissed, arguing it is not an open issue and that it was not the subject of the parties' negotiations. However, Petitioners' Motion also demonstrates that their proposed agreements attached to the Petitions suffer the same malady. Petitioners argue that their proposed agreements were "the subject of negotiations between the parties." (Petitioners' Memorandum in support of Motion to Dismiss, page 6). A contention denied by Alltel. However, Petitioners also admit that they had no dialog with Alltel regarding that proposed agreement. Petitioners therefore contend that the parties did not have a single substantive conversation with respect to the terms of that proposed agreement and therefore no negotiation occurred with respect to Petitioners' proposed agreement and arbitration is not proper. Again, while the parties each made overtures, neither side engaged or took the time to engage in negotiations. This is not a case of bad faith negotiation by either party, and neither party has alleged such, but rather this is simply a case of failure of the parties to negotiate. While Alltel advised in its Response that the arbitration is premature due to lack of negotiations between the parties, Response paragraph 9, it was willing and felt it appropriate to proceed with the arbitration as long as all issues would be arbitrated. However, because Petitioners now seek to limit Alltel's rights in this matter and exclude issues that are critical to any prospective interconnection arrangement, it is necessary for Alltel to now ask that the Petitions be dismissed.

5. Attached hereto is the affidavit of Mr. Ron L. Williams, Vice President Interconnection Services for Alltel, in which he verifies the factual statements of this pleading.

RESPONSE TO MOTION TO DISMISS CERTAIN ISSUES

6. Paragraphs 1 through 5 are incorporated herein by reference.
7. Petitioners rely on Section 252 of the Act to argue that certain issues identified by Alltel in the Response must be dismissed, arguing they are not open issues and that they were not negotiated by the parties. As demonstrated above however, because no agreement was reached among the parties on any issues or topics due to the parties' failure to conduct any meaningful negotiations, all issues are open, unresolved and must be arbitrated or alternatively no issues may be arbitrated as there was no negotiation of such issues and the above motion should be granted.
8. Section 252 of the Act does not expressly proscribe that issues not negotiated may not be arbitrated. Section 252(a), quoted in Petitioners' Motion, concerns agreements that are reached through negotiation. That is clearly not the case in this instance and therefore, contrary to Petitioners' argument, Section 252(a) provides this Commission no guidance in determining Petitioners' Motion.
9. Section 252(b) of the Act, also cited in Petitioners' Motion, similarly provides no express guidance on Petitioners' Motion. This Section allows either party to seek arbitration of any "open issue". It does not define open issues and only limits arbitration to issues raised in the petition and any response. Because the parties did not have substantive negotiations on any issues, did not reach agreement on anything, then all issues are open and unresolved and may be arbitrated if they are identified in the Petition or Response.
10. As discussed above, Petitioners also rely on certain judicial proceedings, the Cited Cases, however, their reliance is based on their misinterpretation or misapplication of the holdings of those decisions. The Cited Cases concerned attempts by a party to force a Section 252 arbitration with respect to a non-Section 251 issue. *See Coserve*, 350 F.3d 482 at 487.

“Where the parties are voluntarily included in negotiation issues other than those duties required by an ILEC by Section 251(b) and (c) those issues are subject to compulsory arbitration.” An “arbitrator is not limited by the terms of Section 251(b) and (c).” *Id.* Any issue brought up in the negotiations not resolved can be arbitrated. The obligations under 251(b) and (c) can be subject to compulsory arbitration. *Id.* See also US West Communications, Inc. v. Minnesota Public Utilities Commission, 55 F.Supp. 968(d) (Minnesota 1999). Both courts held that a non-Section 251 issue may not be raised in an arbitration unless it was negotiated between the parties. In other words a Section 252 arbitration could not be expanded unless the parties had agreed to such. Again, these cases do not square with Petitioners’ argument that because Section 251 issues were not actively discussed between the parties then they can not be arbitrated between the parties. If the Cited Cases can be extended to support Petitioners’ Motion, then, as discussed above, on the facts of the present matter, the Petitions and this arbitration must be dismissed because the parties had no meaningful dialog on the issues or alternatively, all aspects of Petitioners’ proposed interconnection agreement are disputed and open because Alltel did not agree to any aspect of Petitioners’ proposed agreement. Therefore, either Petitioners’ arbitration should be dismissed entirely or all issues remain open.

11. Because neither party can identify any agreed issues that resulted from the communications between the parties prior to the filing of the arbitration, in responding to the Petition, Alltel attempted to provide some order and limit to this arbitration. Alltel reviewed the Petitions and Petitioners proposed interconnection agreement and narrowed the list of open issues to those issues with which it could not agree and needed arbitration. This approach was intended to provide the Commission and the Parties a manageable list of issues. Subsequent to filing its Response, Alltel has also identified two additional issues, which it listed as open, but which it now is willing to withdraw and therefore resolve. Issue 1 sub-issue with respect to Alltel

establishing its own costs based rate (Response paragraph 16) and Issue 14 (Response paragraph 38) with respect to requiring Petitioners to provide resale of their resale services , are issues upon which Alltel no longer desires arbitration and can be considered resolved. All other issues identified in the Petition and the Response are open and should be resolved or alternatively the Petition should be dismissed.

12. Some of the issues identified by Alltel are natural and logical aspects of Alltel's response to the Petitioners' position on issues. For example, Issue 13, with respect to Alltel requesting that the agreement confirm it is allowed to charge tandem switching when Petitioners charge such, is merely a more detailed explanation that Alltel is demanding symmetrical reciprocal compensation to which Alltel is entitled. If the issue is not arbitrated, the parties will simply be agreeing to disagree later when the agreement is implemented. Petitioners should be aware of this issue and can not claim lack of notice.

13. Similarly, the Issue 1 sub-issue with respect to Alltel requesting that the agreement confirm it is entitled to bill reciprocally for interMTA traffic is a logical and not surprising request because Petitioners and Alltel are involved in other proceedings with respect to interMTA traffic billing and this again is merely asking for reciprocal treatment and payment of compensation for services it provides and for which it is due. Additionally, the question of interMTA factor, rate and maintenance was specifically raised in an email to the Golden West Companies' representative. If the question of interMTA factors and rates are open for the traffic delivered to Golden West, it only logically follows that there is consideration of the same factors and rates and delivering of the same traffic by the Golden West Companies to Alltel. This follows closely with how reciprocal compensation had been calculated in prior interconnection agreements between the parties where the reciprocal compensation rate was calculated for traffic delivered to the Golden West Companies and a credit against that bill was given to Alltel for

traffic delivered by the Golden West Companies to Alltel. Again, not addressing this issue will merely leave the parties agreeing to disagree later when the agreement is implemented.

14. Petitioners refusal to allow access to its selective routers for the purpose of provision of 911 is an issue that needs no response. It is undeniably a public interest issue about which the Commission should raise on its own even if Alltel had not. Providing reliable, fast and efficient 911 access is something about which the parties should never disagree.

WHEREFORE, for the foregoing reasons, the Petition should be dismissed and this proceeding closed, or alternatively full arbitration of all issues identified in the Petition and the Response, except as amended above to delete two issues, should proceed expeditiously in order to provide some certainty and an end to the disputes between the parties.

Dated this 25 day of August, 2006.

**Attorneys for Alltel Communications, Inc.
WWC License LLC:**



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CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of August, 2006, I sent electronically and by first-class mail, postage prepaid, a true and correct copy **MOTION TO DISMISS ARBITRATION PETITION AND RESPONSE TO PETITIONERS' MOTION TO DISMISS CERTAIN ISSUES RAISED BY WESTERN WIRELESS** to:

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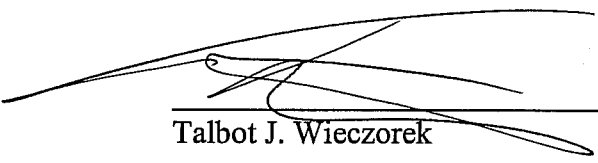
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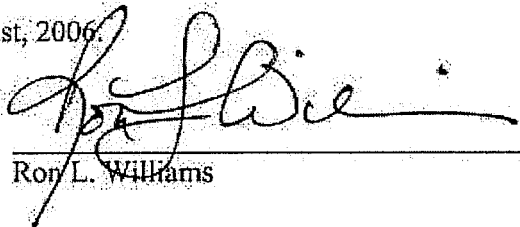
Talbot J. Wiczorek

STATE OF WASHINGTON)
)
COUNTY OF KING)

Ron L. Williams, being first duly sworn upon oath, deposes and states as follows:

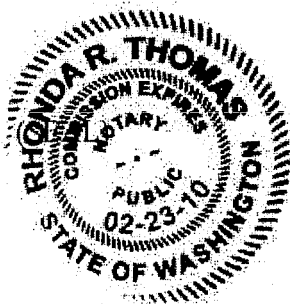
1. I am Vice President-Interconnection Services for Alltel Communications, Inc. and as such I supervise all interconnection negotiations by Alltel and its subsidiaries. All communications between Alltel and the Golden West Companies with respect to interconnection that are now the subject of South Dakota Public Utility Commission Docket Nos. TC06-036 to TC06-042 were under my supervision or by me and I therefore have personal knowledge of such communications between the Alltel and the Golden West Companies.
2. I have read the Motion to Dismiss and Response to Motion to Dismiss to which this affidavit is attached. I am familiar with the facts stated therein and agree that the facts stated in such document are true and correct.

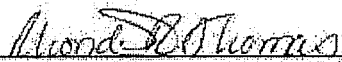
Dated this 22nd day of August, 2006.



Ron L. Williams

Subscribed and sworn to before me this 22nd day of August, 2006.





Notary Public, State of washington
My commission expires: 2/23/10