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March 17, 2010

E-Filing

Patricia Van Gerpen
SDPUC
500 East Capitol
Pierre SD 57501

RE: Alltel Alliance Arbitration -- TC07-112, TC07-114, TC07-115 and TC07-116
GPNA File No. 05925.0042

Dear Ms. Van Gerpen:

Enclosed for filing please find Alltel's Resistance to the Petitioners' Application for Reconsideration (Public Version) in the above-entitled matters. I am filing a Confidential Version with Exhibit A (marked Confidential) as a separate attachment. By copy of same, counsel have been served.

If you have any questions, please call me. Thank you.

Sincerely,



Talbot J. Wiczorek

TJW:klw

Enclosure

c: Clients
Service Party list via e-mail

BEFORE THE STATE OF SOUTH DAKOTA

PUBLIC UTILITIES COMMISSION

In The Matter Of The Petition Of Kennebec Telephone Company, McCook Cooperative Telephone Company, Santel Communications Cooperative, Inc., and West River Cooperative Telephone Company For Arbitration Pursuant To The Telecommunications Act Of 1996 To Resolve Issues Relating To An Interconnection Agreement With Alltel Communications, LLC))	Docket Nos. TC 07-112 TC 07-114 TC 07-115 TC 07-116
))	PUBLIC VERSION

ALLTEL'S RESISTANCE TO THE PETITIONERS' APPLICATION FOR RECONSIDERATION

COMES NOW, Alltel Communications, LLC (hereinafter "Alltel"), and hereby submits its Resistance to the Petitioners' Application for Reconsideration. Pursuant to A.R.S.D. 20:10:01:29 and 20:10:01:30.01, reconsideration may only be properly granted by the Commission in the limited circumstances where a sufficient reason for reconsideration has been presented. In this instance, Petitioners' Application for Reconsideration is properly denied because a sufficient reason for reconsideration has not been proffered. More specifically, the Commission's determination resulted in a change in the total transport and termination rate consistent with the pre-filed testimony, supporting exhibits, and hearing examinations of W. Craig Conwell. As a result, there is no basis to find that the Commission did not intend or contemplate the practical application of its decision, as asserted by Petitioners.

INTRODUCTION

On January 15, 2010, the Public Utilities Commission (hereinafter "Commission"), entered its Second Decision and Order; and related Findings of Fact and Conclusions of Law. On February 16, 2010, the Petitioners, Kennebec Telephone Company, McCook Cooperative Telephone Company, Santel Communications Cooperative, Inc., and West River Cooperative

Telephone Company (hereinafter collectively “Petitioners”), filed their Application for Reconsideration. Therein, the Petitioners request the Commission reconsider its determination regarding two issues. First, the Petitioners ask that the Commission reconsider its ruling regarding the inclusion of certain outside transport plant costs in the proposed transport rates (hereinafter “transport rate issue”). Second, the Petitioners request that the Commission reconsider its determination regarding the method utilized for the appropriate allocation of costs between switched and special services (hereinafter “allocation methodology issue”). In essence, the Petitioners seek reconsideration of these two issues under the premise that the related Commission decisions result in, “...consequences to the total transport and termination rate which this Commission did not intend...” *See* Petitioners’ Brief in Support of their Application for Reconsideration (Confidential), pp. 4, 5, 6, 15.

Alltel opposes the Petitioners’ Application for Reconsideration. Notably, the Petitioners have not argued that the Commission misapplied the law or that new facts have been discovered. Rather, Petitioners’ sole basis for reconsideration is the Commission did not appreciate or understand the practical implications of its decision. However, this position completely disregards the evidence in the record that apprised the Commission of the resultant impacts. In the absence of a finding from this Commission that it did not understand the consequences of its decision; Petitioners’ Application for Reconsideration is properly denied.

DISCUSSION

The Commission should properly deny a request to reconsider a matter it has previously determined in the absence of a sufficient reason for reconsideration. To illustrate, A.R.S.D. 20:10:01:29, provides,

A party to a proceeding before the commission may apply for a rehearing or reconsideration as to any matter determined by the commission and specified in

the application for the rehearing or reconsideration. The commission may grant reconsideration or rehearing on its own motion or pursuant to a written petition if there appears to be sufficient reason for rehearing or reconsideration.

(*emphasis added*). The South Dakota Supreme Court has repeatedly indicated that a motion for reconsideration is, "...an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment." Jensen v. Lincoln County Board of Commissioners, 2006 SD 61, ¶ 23, 718 N.W.2d 606, 614 (*quoting* People ex rel.S.M.D.N., 2004 SD 5, ¶ 7, 674 N.W.2d 516, 517 (*quoting* Breeden v. Nebraska Methodist Hospital, 598 N.W.2d 441, 444 (Neb. 1999))). Based upon the plain language of A.R.S.D. 20:10:01:29, the absence of a sufficient reason supporting reconsideration is fatal to the request. A.R.S.D. 20:10:01:29.

In conjunction with the aforementioned rule, A.R.S.D. 20:10:01:30.01, sets forth legal premises that, if deemed sufficient, may support a proper basis for reconsideration,

An application for a rehearing or reconsideration shall be made only by written petition by a party to the proceeding. The application shall be filed with the commission within 30 days from the issuance of the commission decision or order. An application for rehearing or reconsideration based upon claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the ground of error. An application for rehearing or reconsideration based upon newly discovered evidence, upon facts and circumstances arising subsequent to the hearing, or upon consequences resulting from compliance with the decision or order, shall set forth fully the matters relied upon. The application shall show service on each party to the proceeding.

(*emphasis added*). More succinctly, a sufficient reason for reconsideration can be based upon the following limited situations: (1) erroneous findings of fact or conclusions of law; (2) the discovery of new evidence subsequent to the hearing, or (3) consequences resulting from application of the order. A.R.S.D. 20:10:01:30.01; *See Also* Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc., 2007 SD 31, ¶ 4, 730 N.W.2d 638, 641-42 (remanding for the court to reconsider its decision in light of newly discovered evidence); Estate of Stevenson, 2000 SD 24, ¶ 7, 605 N.W.2d 818, 820 (remanding for reconsideration due to an error in law). In this

instance, the Petitioners have not argued that the Commission misapplied the law or that new facts were discovered subsequent to the hearing. *See* Petitioners' Brief in Support of their Application for Reconsideration (Confidential), p. 6. Rather, the Petitioners rely solely upon their contention that the Commission did not appreciate the practical application of its decision when it issued its January 15, 2010, Second Decision and Order. *Id.*

A. The Commission's decision to extend demand forecast for outside plant cost was reasonable as it was supported by controlling law, the evidence presented, and the Commission understood its decision.

With respect to the transport rate issue, the Petitioners' position is irreconcilable when considered in conjunction with the pre-filed testimony of W. Craig Conwell (hereinafter "Conwell"), Alltel Hearing Exhibit 20, which was attached to Alltel's September 18, 2009 Post Hearing Brief, and the hearing examination of Conwell. The Commission made a proper decision consistent with FCC rules. 47 C.F.R. § 51.511 requires that forward-looking economic costs, including transport outside plant, be divided by total demand projected over a reasonable planning period. Thus, there must be a connection between forward-looking economic costs of these facilities and the projected demand.

The Petitioners had three or more opportunities to project demand and failed to do so. In its decision, the Commission recognized this weakness. In Findings of Fact 15 in its decision, the following conclusion was reached: "The Commission finds that one of the weaknesses in McCook's forecasted demand lies in the fact that McCook continually chose to not forecast demand for a creditable period." Moreover, the Commission noted that the Petitioners "did not forecast transport outside plant costs." Findings of Fact 9. Alltel, therefore, effectively asked, "What is reasonable expected utilization of transport outside plant fibers over a life of twenty or

more years?" Alltel recommended 50% utilization, *see* Conwell July 3, 2009 Prefiled Reply at p. 72, as reasonable utilization.

Rather than forecasting demand that justifies the network, the Petitioners essentially argue the Commission should simply accept the 48-fiber as described without considering demand as a 48-count fiber does not cost that much more than a 24-fiber. *See* Petitioners' Brief, pp. 8 through 10. This ignores the requirements and obligations of the Petitioners under federal law. The issue has always been that the Petitioners failed to project sufficient demand to justify the size of the network. The Commission recognized this issue in its decision and even recognized that the testimony regarding the size of the network conflicted with the testimony of the forecasted demand. *See* Findings of Fact 14.

Conwell explained in his July 27, 2009 Supplemental Rebuttal at pages 23 and 24, why the argument to simply upsize because it was cheaper without reflecting demand inappropriately pushes costs back on companies such as Alltel.

Q. On page five of his testimony, Mr. Weber disagrees that low utilization of cable fibers results in high transport outside plant costs per minute. What is your reply?

A. I do not believe Mr. Weber understands the issue. The cost per fiber in service for 48-fiber cables with [REDACTED] to [REDACTED] fibers in service (as reflected in the RLEC cost studies) is greater than the costs per fiber in service for the same cables when there are 12, 24 or 36 fibers in service. Correspondingly, the transport outside plant costs per minute are higher with only [REDACTED] to [REDACTED] fibers in service versus costs per minute with higher fiber utilization. The RLEC cost studies do not project future demand for cable fibers and thus in some cases reflect only [REDACTED] fibers in service, with at most [REDACTED] fibers in service. If the RLECs projected fiber demand over a reasonable proportion of fiber cable life, one would expect fibers in service to increase, cable costs per fiber in service to decrease, and the transport outside plant costs per minute to decrease. This would result in lower transport rates.

Q. Mr. Weber offered estimates of the change in investment from substituting 24-fiber buried cable for 48-fiber cable. Do you agree with his estimates?

A. I think the purpose of Mr. Weber's estimates of cable investment per foot was to show that the cost of placing 48-fiber cable versus 24-fiber cable is not double, and that the incremental material costs per foot for 48- versus 24-fiber cables are relatively small. There are other cost differences, such as the costs of splicing 48- versus 24-fiber cable that are not reflected in his analysis.

Nevertheless, the more fundamental issue is that no matter how expensive or inexpensive it is to place larger cable, cable sizes should be consistent with projected demand and cable costs should be recovered over projected demand. The RLEC cost studies do not do these things.

Conwell July 27, 2009, Supplemental Rebuttal, pp. 23 and 24 (emphasis added).

Contrary to the statement on page 10 of the Petitioners' Brief that "The only record evidence in support of this proposition is a two sentence statement made by Alltel's witness, Craig Conwell, in his pre-filed testimony," Conwell also described in the July 3, 2009 Prefiled Reply testimony (1) how the RLEC cost studies failed to comply with 47 C.F.R. § 51.511 with respect to transport outside plant costs and (2) the basis for the 50% assumption.

Q. Did the Commission address the allocation of transport outside plant costs to voice traffic?

A. In paragraph 30 of the Order the Commission stated the following:

The next issue regarding transport outside plant costs concerns the allocation of transport costs to voice traffic. Alltel Ex. 2 at 80. The Commission finds that its decision on this issue is the same as its decision regarding the calculation and apportion of demand for transport electronics.

The Commission's statement, in my view, means that a credible forecast of demand for outside plant or interoffice cable fibers is to be prepared, and the forecast is to be consistent with the size of interoffice cable (fibers per cable) in the cost study.

Q. Did the RLECs produce forecasts of interoffice cable demand to substantiate the interoffice cable size reflected in the cost studies?

A. No.

Q. What interoffice cable demand was used in the revised cost studies?

A. Past quantities of fibers in service for transport systems, special purposes and CATV were used. These were the same values as in the original cost studies.

Conwell July 3, 2009 Reply Testimony, p. 72.

Q. How does interoffice cable demand influence transport outside plant costs in the reciprocal compensation rate?

A. Row 26 of Exhibit WCC-S-1 shows percentages of total cable costs attributable to interoffice transport systems. These range from 72.7 to 100 percent, meaning that these percentages of total cable costs are assigned to the transport systems carrying mobile-to-land traffic. The percentages are based on the ratios of past fiber miles used by interoffice

transport systems to total fiber miles used by interoffice transport systems, special purposes and CATV. The percentages are not forward-looking and do not reflect future demand for interoffice cable fibers. The RLECs are, in effect, implying there will be no additional demand for fibers in the future.

Q. Is this consistent with the assumed interoffice cable size in the cost studies?

A. No, the original and revised cost studies assume that all interoffice cables are 48-fiber buried cables. The table below shows the maximum number of fibers in service by RLEC.

See Confidential table in testimony.

The Kennebec and Santel cost studies reflect at most four fibers in service, leaving 44 “dark” fibers. McCook and West River have at most ten and eight fibers, respectively, in service in any section of interoffice cable. This low utilization of cable fibers results in high transport outside plant costs per minute.

Q. Have you corrected the cost studies?

A. Yes. Given the low quantities of fibers in service and the lack of a demand forecast by the RLECs, it is questionable whether [REDACTED] fiber cable is required. One alternative for correcting the cost studies is to reduce the cable size to [REDACTED]-fiber cable, or smaller, consistent with fiber demand. This would lower the outside plant investment and costs, while leaving constant the distribution of costs between the transport system and other uses. RLEC information to compute investments and costs for reduced cable sizes are not available.

Id. at 74.

The alternative is to maintain the assumption of [REDACTED] fiber cable, but to increase demand. This is the approach that I have used. Future demand is assumed to reach [REDACTED] fibers or half the capacity of the [REDACTED] fiber cable. Certainly, if the RLECs assert that [REDACTED] fiber cables are required, it is reasonable to assume future demand of at least [REDACTED] fibers.

For McCook with [REDACTED] miles of interoffice cable this means demand will reach [REDACTED] fiber miles (= [REDACTED] fibers per cable X [REDACTED] miles of cable). Interoffice transport systems, based on McCook’s costs study, will utilize [REDACTED] fiber miles. This represents [REDACTED] percent of total fiber miles in service. The remaining [REDACTED] percent of fiber miles are assumed to be for existing demand of [REDACTED] fiber miles for special purpose and CATV, plus [REDACTED] fiber miles used by others for future growth. Similar percentages are computed for the other three RLECs, and these values are substituted in row 28 of Exhibit WCC-S-2.

Q. Must the RLECs modify the allocation of transport outside plant costs?

A. Yes, the allocations in the revised cost studies fail to comply with the Commission Order and FCC Rules §§51.505(b)(1) and 51.511. [REDACTED] fiber cables are not justified by the demand in the revised cost studies, and the percentage of transport outside

plant costs assigned to switch traffic does not reflect the future demand that supposedly justifies ■ fiber cables.

Id. at 75.

Q. Are the other corrections for transport outside plant similar to those for transport electronics?

A. Yes, the values on rows 29 and 34 of Exhibit WCC-S-2 are the same as those on rows 13 and 21.

Id. at 76.

As a further basis for reconsideration of the transport rate issue, the Petitioners also suggest that the consequence to the total transport and termination rate is not supported by the FCC's rules and regulations. *See* Petitioners' Brief in Support of their Application for Reconsideration (Confidential), p. 11. The Petitioners incorrectly argue that the determination made by the Commission represents a network design that would never be implemented in practice in contravention of 47 C.F.R. § 51.505(b)(1). Again, what the RLECs miss is the fact that they have the burden of showing the projected network is justified for forecast demand. As the Commission clearly recognized in this hearing, the Petitioners' witnesses were inconsistent, leaving this Commission with a conclusion as to how to project actual costs related to the network established by Mr. Weber. *See* Findings of Fact 14. More importantly for the issue the Petitioners are seeking reconsideration, the Petitioners never even forecasted demand in regards to transport outside plant costs. *See* Findings of Fact 9. Therefore, in apportioning the cost of the system over forecast demand, the Commission rightfully looked to the reasonable projections provided by Alltel in its testimony.

Finally, it is incredulous for the Petitioners to argue the Commission did not understand the impact of its decision. Alltel's Hearing Exhibit 20 specifically walked the Commission through the result of adoption of Alltel's position. This exhibit was attached to Alltel's Post

Hearing Brief filed on September 18, 2009, as Exhibit A. Page 7 of that exhibit presents the third main issue regarding forecast to transport outside plant demand.¹ For the Petitioners to now assert that this Commission did not understand how adoption of Alltel's position on this issue would impact rates and, thus, the Commission must reconsider its decision, the Petitioners have to assume the Commission did not read the filed testimony, did not listen at the hearing, never looked at Hearing Exhibit 20, never read any of the briefing or listened to any of the Parties' arguments.

B. The Commission's decision as to the allocation methodology was based on the testimony of Weber and Conwell and the Commission understood impact of their decision.

The Petitioners' argument that the Commission did not comprehend the resultant impact of its decision regarding the allocation methodology is likewise unsupported by the record. Contrary to the Petitioners' position, the record contains evidence that without question supports the Commission's decision.

Additionally, the Petitioners erroneously suggest that reconsideration of the allocation methodology issue is proper because the Commission's determination is not supported by the FCC's rules and regulations. *See* Petitioners' Brief in Support of their Application for Reconsideration, p. 5. Tellingly, the Petitioners fail to provide any argument to suggest that the allocation methodology contravenes any particular FCC rule or regulation. *See Generally Id.* at pp. 13-15. Instead, the Petitioners suggest without any supporting authority, that the Commission's determination is improper because it does not mirror the methodology adopted by the National Exchange Carrier Association. *See* Petitioners' Brief in Support of their Application for Reconsideration, p. 14. This Commission is in no way bound to adopt a

¹ For the ease of referral, Hearing Exhibit 20, which is the same as Exhibit A to Alltel's Post Hearing Brief of September 18, 2009, is attached hereto as Exhibit A. The Exhibit is Confidential.

methodology that is utilized by the National Exchange Carrier Association. The mere adoption of a non-binding methodology by that association fails to provide a sufficient basis to support reconsideration.

Petitioners also argue that there were no facts to support the Commission's decision. Contrary to this, the Commission reviewed how to apportion voice trunks and provided the factual analysis in Findings of Fact 21 through 24 of its decision. The Commission relied on Petitioners' own witness's estimates in coming up with the percentage of voice trunks to be treated as DS-0 special circuits versus the percentage bundled by the switch to a DS-1 level before leaving the switch. *See* Findings of Fact 22. It appears that the Petitioners are essentially arguing the Commission should reverse course all the way back to its original decision and now simply adopt their bandwidth method.

The argument made by the Petitioners that the Commission failed to understand the resulting transport rate of its decision is also flawed. *See* Petitioners' Brief, p. 14. Again, as noted in the discussion above on outside transport, the resulting rates can be seen in Alltel Hearing Exhibit 20 that was also attached as Exhibit A to Alltel's Post Hearing Brief and is attached again here as Exhibit A. Page 5 shows the issue of allocation of voice trunks and page 6 provides an illustrated example. Moreover, the calculations are replete throughout the record of the prefiled testimony. Conwell July 3, 2009, pp. 61 – 69 and Conwell July 27, 2009, pp. 7 – 14. Certainly, after the examples given in the prefiled testimony, the hearing testimony, and receipt of Alltel Exhibit 20, the Commission understood the decision's result.

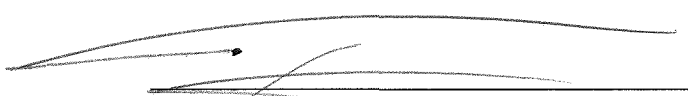
The Petitioners bear the burden of establishing the Commission "misapprehended" or "misunderstood" facts that resulted in an "unintended consequence" sufficient to warrant reconsideration. The record before the Commission contravenes the Petitioners' allegation that

the Commission did not comprehend the practical application of its decision. As a result, the Petitioners have failed to submit to the Commission a sufficient reason to support reconsideration. Therefore, the Petitioners Application for Reconsideration is properly denied under A.R.S.D. 20:10:01:29 and 20:10:01:30.01.

CONCLUSION

Based upon the aforementioned arguments and authorities, Alltel Communications, LLC, respectfully requests the Commission enter an Order denying Petitioners' Application for Reconsideration. Denial is appropriate because the Petitioners have failed to provide the Commission sufficient reason for reconsideration as required under A.R.S.D. 20:10:01:29.

Dated this 17th day of March, 2010.



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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2010, a true and correct copy of **ALLTEL'S RESISTANCE TO THE PETITIONERS' APPLICATION FOR RECONSIDERATION (PUBLIC VERSION)** was sent electronically to:

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