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VIA EMAIL TO [PATTY.VANGERPEN@STATE.SD.US](mailto:PATTY.VANGERPEN@STATE.SD.US)

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

RE: *TC07-112 through TC07-116*

Dear Ms. Van Gerpen:

Attached for filing in the above matters, please find Petitioners' Opposition to Alltel Communications, LLC's Petition for Reconsideration. If you have any questions or concerns regarding this document, please do not hesitate to contact me.

Best regards.

Sincerely,

CUTLER & DONAHOE, LLP



Meredith A. Moore  
For the Firm

MAM/cmc  
Attachment  
cc: Service List

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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**IN THE MATTER OF THE PETITION OF  
MCCOOK COOPERATIVE TELEPHONE  
COMPANY FOR ARBITRATION  
PURSUANT TO THE  
TELECOMMUNICATIONS ACT OF 1996  
TO RESOLVE ISSUES RELATING TO  
AN INTERCONNECTION AGREEMENT  
WITH ALLTEL, INC.**

**TC 07 – 112  
TC07 – 113  
TC 07 - 114  
TC 07 - 115  
TC 07 - 116**

**IN THE MATTER OF THE PETITION OF  
BERESFORD MUNICIPAL TELEPHONE  
COMPANY FOR ARBITRATION  
PURSUANT TO THE  
TELECOMMUNICATIONS ACT OF 1996  
TO RESOLVE ISSUES RELATING TO  
AN INTERCONNECTION AGREEMENT  
WITH ALLTEL, INC.**

**IN THE MATTER OF THE PETITION OF  
KENNEBEC TELEPHONE COMPANY  
FOR ARBITRATION PURSUANT TO  
THE TELECOMMUNICATIONS ACT OF  
1996 TO RESOLVE ISSUES RELATING  
TO AN INTERCONNECTION  
AGREEMENT WITH ALLTEL, INC.**

**PETITIONERS' OPPOSITION  
TO ALLTEL  
COMMUNICATIONS, LLC'S  
PETITION FOR RECONSIDERATION**

**IN THE MATTER OF THE PETITION OF  
SANTEL COMMUNICATIONS  
COOPERATIVE, INC. FOR  
ARBITRATION PURSUANT TO THE  
TELECOMMUNICATIONS ACT OF 1996  
TO RESOLVE ISSUES RELATING TO  
AN INTERCONNECTION AGREEMENT  
WITH ALLTEL, INC.**

**IN THE MATTER OF THE PETITION OF  
WEST RIVER COOPERATIVE  
TELEPHONE COMPANY FOR  
ARBITRATION PURSUANT TO THE  
TELECOMMUNICATIONS ACT OF 1996  
TO RESOLVE ISSUES RELATING TO  
AN INTERCONNECTION AGREEMENT  
WITH ALLTEL, INC.**

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COME NOW the Petitioners above-named and respectfully submit this Opposition to Alltel Communications, LLC's ("Alltel") Petition for Reconsideration. For the reasons as set out below, Alltel's Petition is both premature and unsustainable and should therefore be denied.

### **BACKGROUND**

On January 29, 2009, this Commission issued an oral ruling on the following unresolved issues relating to ongoing negotiations between the parties for the development of an interconnection agreement:

- 1. Issue 1 (Section 5.0): Is the reciprocal compensation rate for IntraMTA Traffic proposed by Telco appropriate pursuant to 47 U.S.C. § 252(d)(2)?**
- 2. Issue 2 (Section 7.2.4): What is the appropriate Percent InterMTA Use Factor to be applied to non-IntraMTA traffic exchanged between the parties?**
- 3. Issue 3 (Section 5.0 and Appendix A): What is the appropriate manner by which the minutes of use of IntraMTA Traffic terminated by the parties, one to the other, should be calculated and billed?**
- 6. Issue 6: What is the appropriate definition of IntraMTA and InterMTA Traffic?**
- 7. Issue 7 (Section 3.1.3): Which party can initiate a direct interconnection request?**

Alltel has not applied for reconsideration of the Commission's decision on Issues 3, 6 and 7, but seeks reconsideration of certain aspects or sub-issues related to Issues 1 and 2.

**Issue 1 (Section 5.0): Is the reciprocal compensation rate for IntraMTA Traffic proposed by Telco appropriate pursuant to 47 U.S.C. § 252(d)(2)?**

With respect to Issue 1, Alltel challenges only the Commission's finding or supposed lack thereof as it relates to the use of the rate equivalency method and the rate equivalency

between DS0s and DS-1s. Specifically, Alltel challenges Findings of Fact 25 through 27<sup>1</sup>, which provide:

Finding of Fact 25: Alltel opposed the use of the path method claiming that it over-allocated transport electronics investment to voice trunks causing the transport electronics cost per minute to be too high. Alltel Ex. 2 at 58. Alltel advocated the use of a DS-1 equivalent method. Alltel Ex. 4 at 35. Under the DS-1 equivalent method, DS-0 voice trunks are converted to a DS-1 level by taking the total DS-0 voice trunks and dividing by 24. Alltel Ex. 9. As explained *supra*, a DS-1 is equivalent to 24 DS-0s. McCook opposed the DS-1 equivalent method asserting that under the rationale of a DS-1 equivalent method, the rate for a DS-1 would be 24 times higher than the rate of a DS-0. Pet. Ex. 50 at 19. The rate of a DS-3 would be 28 times higher than the rate of a DS-1 or 672 times higher than a DS-0. *Id.* Such rates would likely significantly reduce demand for DS-1s and DS-3s. *Id.* at 20-21. Alltel recognized the validity of this argument, but only for DS-3s, by stating in its brief that the cost of a DS-3 circuit is not 28 times that of a DS-1. Alltel Brief at 23. Alltel agreed to express DS-3 circuits as equivalent to seven DS-1 circuits. *Id.*

Finding of Fact 26: A third method is the rate equivalency method. McCook explained this method as where costs are allocated based on the ratio of retail rates for the various services provisioned on a particular cable route. Pet. Ex. 56 at 21.

Finding of Fact 27: The Commission finds that the path method proposed by McCook results in a disproportionate amount of costs being allocated to voice circuits. The path method would allocate the same investment and costs to a DS-0 voice circuit as it allocates to a DS-1 special circuit, even though a DS-1 is equivalent to 24 DS-0s. The Commission finds the DS-1 equivalent method poses a similar problem, only in reverse, but disproportionately allocating costs to special circuits and under-allocating to voice circuits. Thus, the DS-1 equivalent method incorrectly implies that a DS-0 has the same costs as a DS-1. The Commission finds that instead of choosing between two flawed methods, either of which would result in improper allocation of costs to the various services, *the rate equivalency method should be used because it reflects a better balance regarding cost incurrence of the various functions than does either of the parties' proposed methods of allocations.* Thus, the Commission requires that McCook revise and refile its cost study to reflect a rate equivalency method as the basis for the assignment of transport costs.

(emphasis added).

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<sup>1</sup> The Findings of Fact and Conclusions of Law referenced herein are taken from Docket TC07-112 involving McCook Cooperative Telephone Company. Alltel cites to this same pleading in its Petition for Reconsideration and supporting Brief.

Alltel posits that the Commission's Findings and Conclusions are silent with regard to the exact details of the rate equivalency method. Therefore, Alltel requests that the Commission reconsider its findings so as to affirmatively state that 24 DS-0s should be considered at the equivalent of 1 DS-1. In the alternative, Alltel seeks additional guidance from the Commission as to how this issue should be analyzed. See Alltel's Petition for Reconsideration, p. 2.

**Issue 2 (Section 7.2.4): What is the appropriate Percent InterMTA Use Factor to be applied to non-IntraMTA traffic exchanged between the parties?**

With respect to Issue 2, Alltel requests that this Commission reconsider those findings contained in Findings of Fact 40 and 41. Finding of Fact 40 states:

McCook claimed that when Alltel made changes to the SS7 study, Alltel only accounted for the changes in the Alltel network that could have potentially decreased the factor and ignored other change that would have tended to increase the factor. Tr. at 340-41. McCook further stated that "the interMTA factor tends to increase with time as the wireless carrier network becomes larger. As the wireless carriers networks expand, they interconnect their switches with Intermachine Trunks (IMTs). These IMTs are used to transport calls over larger and larger geographic areas so that the calls can be delivered to the landline customer without having to use an IXC for the delivery. This results in a higher interMTA factor." Pet. Ex. 57 at 6.

Finding of Fact 41 states:

The Commission recognizes that networks change over time. However, in order for the Commission to accept revisions to the SS7 study based on network changes, those revisions must take into account all of the changes of the network, not just the ones advantageous to one party. The Commission finds that Alltel has failed to provide sufficient evidence that its changes to McCook's SS7 study should be accepted. McCook presented evidence that demonstrated that the Alltel revisions failed to account for all of the NXXs that were added as part of the Alltel acquisitions. Pet. Exs. 72, 73. Thus, the Commission rejects Alltel's proposed revisions and accepts the results of McCook's SS7 study.

Alltel's request for reconsideration is based upon its belief that the evidence it presented through its pre-filed and live testimony conclusively established that its proposed interMTA factors were correct. See Alltel's Petition for Reconsideration, p. 2.

Alltel further requested that this Commission reconsider Findings of Fact 44 and 45.

Finding of Fact 44 states:

The next issue impacting the InterMTA Use Factor is whether land-to-mobile interMTA traffic should be offset against mobile-to-land traffic. Alltel has calculated a net factor by determining the traffic factor of land-to-mobile calls. Alltel's net factor for McCook is 2.1%. Alltel Ex. 7 at 8. McCook stated netting is not needed because Alltel sends an almost *de minimus* amount of interMTA traffic. Tr. at 328.

Finding of Fact 45 states:

As found above, the Commission has determined that interMTA traffic is subject to McCook's intrastate and interstate switched access rates. If Alltel were allowed to "net" its traffic against McCook's interMTA traffic, in effect, Alltel would be receiving McCook's interstate or interstate switched access rates for Alltel's interMTA traffic. Alltel did not propose an interMTA rate based on its own costs. Alltel further stated it is barred from filing for access rates and that it has never performed an intrastate or interstate cost study for its wireless business. Tr. at 476-77. Thus, the Commission rejects Alltel's request for a net factor that would allow Alltel to receive McCook's switched access rates.

Alltel's request for reconsideration as it relates to these findings is based upon its prior argument that a "net" billing of the parties' interMTA traffic is appropriate because it prevents what Alltel terms "asymmetrical compensation". See Alltel's Petition for Reconsideration, p. 3.

In each of these instances, Alltel has failed to articulate sufficient reason to justify a re-examination of the facts as adduced at the time of the hearing in this matter, let alone a new decision over-turning its Findings of Fact and Conclusions of Law.

## **ARGUMENT AND ANALYSIS**

### **1. Legal Standard.**

Administrative Rules 20:10:01:29 through 20:10:01:30:02 set forth this Commission's procedure for reconsideration. Specifically, 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). A.R.S.D. 20:10:01:30:01 provides in relevant part:

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.

In its Petition and supporting Brief, Alltel points to no newly discovered evidence, but rather reiterates its previously submitted and rejected arguments on several of the issues.

**2. Alltel has failed to establish sufficient reason to support reconsideration or rehearing.**

Alltel has failed to demonstrate that this Commission ignored facts or law in reaching its January 29, 2009 decision. To the contrary, the extensive Findings of Fact and Conclusions of Law prepared by this Commission are wholly supported by the facts presented to this Commission through the submission of pre-filed and live testimony and are further supported by the relevant law. For the reasons as set forth below, there is simply no sufficient reason for this Commission to reconsider its ruling.

**A. Issue 1: Rate Equivalency Method: Alltel's request for reconsideration on this issue is premature.**

Alltel's request for reconsideration of a subset of Issue 1, specifically the ratio of DS-0s to DS-1s, cannot properly be characterized as a request for reconsideration. In fact, Alltel's request for reconsideration of this issue is not only premature, but also a thinly veiled attempt to color issues relating to the rate equivalency method which have not yet been put before this Commission. As such, any attempt to somehow set the parameters of a study not yet presented to this Commission is inappropriate.

In its February 27, 2009 Findings of Fact and Conclusions of Law, the Commission analyzed the Petitioners' FLEC study and the method used in that study for the allocation of costs. The Commission was presented with the question of whether it should accept the path method proposed by the Petitioners or the bandwidth method proposed by Alltel. While the Petitioners' did reference a third alternative for the allocation of costs, specifically the rate equivalency method, specific evidence and testimony were not presented in support of this method. Rather only a working definition of that method was provided: the rate equivalency method is "where costs are allocated based on the ratio of retail rates for the various services provisioned on a particular cable route." See Finding of Fact No. 25 (citation omitted). It was the Commission's determination that neither the Petitioners' proposed Path Method nor Alltel's proposed DS-1 Equivalency or Bandwidth method resulted in a proper allocation of costs that necessitated the re-running of the FLEC so as to account for the application of the rate equivalency method. While the Petitioners still believe the path method is also an appropriate cost allocation method, there is no law or fact that the Commission ignored in reaching its decision as to cost allocation.

At this juncture, counsel for the Petitioners and Alltel are working together to identify a procedural schedule under which the parties will submit testimony and evidence in support of their respective positions. Under these circumstances, it is not appropriate to preemptively establish the parameters of the Petitioners' study. Again, no specific testimony or evidence of the rate equivalency method and its cost allocation was offered prior to or at the time of the hearing because the FLEC study was not performed using this cost allocation. The record has yet to be supplemented with the revised FLEC study.

Alltel's request is an improper attempt to define the Petitioner's amended study before it has even been presented, thereby allowing Alltel an opportunity to manipulate numbers before

the Commission's analysis of the revised study and supporting testimony even begins. It is for this Commission to determine whether the evidence proffered by the Petitioners in support of the revised FLEC study supports its conclusions. Accordingly, Petitioners respectfully request that the Commission wait until it has the study before it, along with the explanatory testimony, so that it may properly analyze the evidence and determine what, if any, parameters need to be established for the same. Much like it did in its initial Findings of Fact and Conclusions of Law, the Commission can again evaluate the evidence, credibility of the witnesses and test the Petitioners' study so as to make its final determination as to the appropriate reciprocal compensation rate.

To characterize Alltel's request for a determination of the comparison between DS-0s and DS-1s as a request for reconsideration is a misnomer. This Commission cannot reconsider something for which it did not receive evidence in the first place. What Alltel seeks is an opportunity to preemptively establish the standard by which Petitioner's revised study must be considered. This is not the intent or purpose of the rules and law as it relates to reconsideration.

**B. Issue 2: InterMTA Use Factor: The Commission properly rejected Alltel's proposed interMTA factors.**

Alltel's request for reconsideration of this issue is based upon its belief that the evidence does not support the Commission's conclusion that the Petitioners may use those interMTA Use Factors which they presented in their testimony. Alltel instead argues that the Commission ignored certain facts presented through Alltel's testimony. However, Alltel's argument misses the mark.

It is clear from the record in these arbitrations that this Commission had available to it a significant amount of testimony and evidence on the interMTA issue. It is well established that the finder of fact has the authority to judge the credibility of the witnesses and evidence

presented and determine whether the weight to be given to that testimony and evidence. See State v. Jensen, 579 N.W.2d 613, 622-23 (S.D. 1998) (citing Lewton v. McCauley, 460 N.W.2d 728, 732 (S.D. 1990) and (Nicolaus v. Deming, 81 S.D. 626, 139 N.W.2d 875 (1966)). The mere fact that an expert or lay witness reaches a particular conclusion does not require that the fact finder must accept that conclusion. Id. This is exactly what the Commission did in its Findings of Fact and Conclusions of Law. As evidenced by Findings of Fact 39 through 41, it is clear that the Commission acknowledged Alltel’s argument with regard to the Petitioners’ proposed interMTA factor and the changes in Alltel’s network since the time of the Petitioners’ SS7 analysis. See finding of Fact No. 39 (noting that changes in the network were attributable to “divestitures and acquisitions, cell site rehomings, and changes implementing MTA routing in its switch translations group.”). The Commission further explained that Alltel presented evidence of only those changes which were advantageous to its position and failed to present sufficient evidence that its changes to the Petitioners’ SS7 studies should be accepted. Id. at Finding of Fact No. 41.

Alltel’s current argument in support of its request for reconsideration is simply a selective regurgitation of those facts and argument already presented to the Commission. Again, Alltel has not demonstrated that the Commission overlooked, ignored or failed to properly analyze certain facts. Under the Commission’s rules, this is not sufficient reason to justify reconsideration.

**C. Issue 2: Net InterMTA Factors: The Commission properly determined that Alltel should not be permitted to “net” its traffic against the Petitioner’s interMTA traffic.**

Alltel also requests reconsideration of another subset of Issue 2, specifically whether it should be allowed to offset the Petitioner’s interMTA traffic with its own purported interMTA traffic. In its Findings and Conclusions, this Commission determined that a “net” interMTA

factor was and is not appropriate. As noted by the Commission, there are not only factual considerations which support this decision, but also policy considerations.

The Commission determined that interMTA traffic should be billed at the Petitioners' intrastate and interstate switched access rates. See Finding of Fact No. 45. Allowing Alltel to "net" its traffic factor against [Petitioner's] interMTA traffic, in effect, [would allow Alltel to receive Petitioner's] intrastate or interstate switched access rates for Alltel's interMTA traffic." Id. Because Alltel did not propose its own interMTA rate based upon its own costs, Alltel should not be given the benefit of Petitioners' switched access rates which they were required to develop through a process which necessitated expenditures of significant time, effort and money. Such netting would effectively allow Alltel to achieve a windfall. While Alltel will obviously argue that it is the converse which is true and that it is Petitioner which actually receives a windfall by not compensating Alltel for its supposed interMTA traffic, this argument cannot stand in light of the facts and the law.

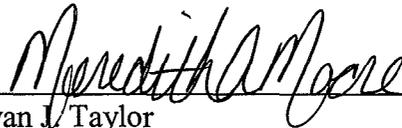
The record evidence establishes that Alltel sends only a *de minimus* amount of interMTA traffic to the Petitioner. See Finding of Fact no. 44 (citing Hearing Transcript at p. 328). Moreover, while Alltel argues that it is not required to conduct an independent study of what its termination costs may be, this does not justify the converse finding that Alltel is therefore allowed to take advantage of something which it did nothing to create. The Commission took these facts into consideration when weighing the policy implications inherent in this issue, ultimately concluding that Alltel had not established a compelling reason to justify a netting of interMTA traffic. Much like the Petitioner bears the burden of proof on those issues which it seeks to establish, Alltel is not exonerated from such a burden. Alltel, therefore, has again failed to articulate sufficient facts to justify reconsideration of the Commission's decision as it relates to this sub-issue.

## CONCLUSION

The process of reconsideration in this instance is much different than that in a typical court context. In these arbitrations, this Commission has had the opportunity to review pre-filed direct and rebuttal testimony, live testimony, post-hearing briefs and post-hearing oral argument. The record in this case is substantial and the Commission has had ample opportunity, more so than in a court context, to review significant amounts of testimony and evidence. Accordingly, a party seeking reconsideration must present facts which are sufficient to establish that this Commission overlooked, misapprehended, misunderstood or ignored law or facts. Based on the record established to date and the thorough Findings of Fact and Conclusions of Law promulgated by this Commission, Alltel has failed in its burden. Accordingly, the Petitioners respectfully request that this Commission deny Alltel's request for reconsideration.

Dated this 14th day of April, 2009.

CUTLER & DONAHOE, LLP  
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**CERTIFICATE OF SERVICE**

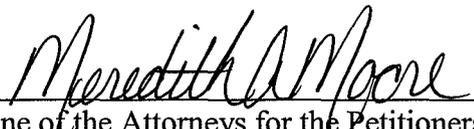
The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 14th day of April, 2009, upon the following:

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