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July 13, 2009

VIA EMAIL TO 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' Response to Alltel's Motion to Compel.

As indicated above, this document has been sent to you via electronic mail in PDF form. 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

IN THE MATTER OF THE PETITIONS FOR ARBITRATION PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996 TO RESOLVE ISSUES RELATED TO THE INTERCONNECTION AGREEMENT WITH ALLTEL, INC.	**DOCKET No.** **TC 07-112** **TC 07-114** **TC 07-115** **TC 07-116**

RESPONSE TO ALLTEL'S MOTION TO COMPEL

This matter is before the Commission upon Alltel's Motion to Compel Responses to Discovery Requests. Kennebec Telephone Company, McCook Cooperative Telephone Company, Santel Communications Cooperative and West River Cooperative Telephone Company (collectively the "Petitioners") respectfully submit this Response to Alltel's Motion.

BACKGROUND

Following the Commission's issuance of Findings of Fact and Conclusions of Law in this matter in on February 27, 2009, the Petitioners revised their FLEC study pursuant to the Commission's directive and submitted those studies, along with pre-filed testimony, in April 2009. Upon request from Alltel, the Petitioners also supplemented their responses to those discovery requests originally served upon them in February 2008. Petitioners also attempted to provide additional supplementation and explanation in the pre-filed testimony submitted in connection with the revised FLEC studies. Alltel thereafter filed a Motion to Compel certain supplemental information from the Petitioners and also served additional discovery requests upon the Petitioners.

Because counsel for the respective parties had little opportunity to discuss any alleged deficiencies in Petitioners' responses before Alltel filed its Motion to Compel, counsel engaged in a number of discussions in attempts to resolve those issues raised by the Motion to Compel.

As evidenced by Alltel's correspondence to this Commission dated July 10, 2009, Alltel narrowed the focus of its previously-filed Motion to Compel to one data request, specifically DR 10. DR 10 requests the following: "Provide copies of all documents upon which you rely to support your answers to all Data Requests." As indicated in its correspondence of July 10, Alltel seeks information relating to "monetary evaluations assigned to switch and processor costs" and has requested bids and source documents used by the Petitioners' expert witnesses.

As the Commission likely recalls, the discovery request at issue was originally served on the Petitioners on February 8, 2008, with responses due on February 29, 2008. Following service of the discovery responses, counsel for Alltel and the Petitioners engaged in a number of conference calls and other discussions to discuss Petitioners' responses. During those discussions, Petitioners did agree to provide some supplementation. Alltel thereafter filed a Motion to Compel on the remaining issues. DR 10 was not an issue at the time of that Motion to Compel; however, similar discovery requests seeking cost information were subjects of the Motion to Compel.

During counsels' discussions regarding the March 2008 Motion to Compel, the undersigned conveyed to Alltel that its expert witnesses were constrained by the existence of four non-disclosure agreements that prohibited disclosure of certain information relating to switch and processor costs. The non-disclosure agreements were entered into between Vantage Point Solutions and the vendors from which cost information was obtained. Petitioners' experts were specifically prohibited from disclosing this information to Alltel or anyone else for that matter. Petitioners' expert witnesses and counsel did, however, engage in multiple conversations with counsel for the various vendors and were ultimately allowed to disclose additional information, subject to the terms of the existing Stipulation and Confidentiality Agreement between the parties. Petitioners thereafter produced information relating to manufacturer of the

various switch components, the specific description of the components and the total cost for all switch components. Petitioners and their expert witnesses, however, were still specifically prohibited from disclosing the unit investment associated with each of the component parts. This was explained to counsel for Alltel and no objection was made.

Following service of the June 2009 Motion to Compel, counsel for Petitioners attempted to make contact with counsel for the vendors whose information is at issue; however, no resolution to this issue has been achieved and Petitioners and their experts are still constrained by the various nondisclosure agreements at this time and are unable to release this additional information.

ARGUMENT AND ANALYSIS

South Dakota's Rules of Civil Procedure set out the scope of discovery, providing that the parties may obtain discovery regarding all relevant matters. SDCL § 15-6-26(b)(1). Relevant matters are those which are "reasonably calculated to lead to the discovery of admissible evidence," and which are not privileged. Id. "No overbroad or "carte blanche" disclosure, unduly burdensome or lacking in specificity, should be allowed." Maynard v. Hereen, 1997 S.D. 60, ¶25, 563 N.W.2d 830, 838 (citing Lopez v. Huntington Autohaus Ltd., 540 N.Y.S.2d 874, 876 (N.Y. App. Div. 1989)). Discovery is subject to limitation, and Rule 26 further provides as follows:

> The frequency or extent of use of the discovery methods set forth in § 15-6-26(a) shall be limited by the court if it determines that:
>
> (A) (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
> (iii) discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.
>
> SDCL § 15-6-26(b)(1)(A).

At issue in the instant Motion to Compel are those specific unit investment costs related to the switch and processor used in the Petitioners' proposed network. The total costs, not the specific unit costs, related to those investments were previously provided to Alltel in discovery and have remained unchanged to date. Pursuant to this Commission's Findings of Fact, Conclusions of Law and Order, the Petitioners removed those costs related to CALEA, Web Selfcare and Centrex from the revised FLEC studies. See Commission's Findings of Fact, Conclusions of Law and Order dated February 27, 2009, p. 15. A review of the April 2009 supplemental testimony and exhibits submitted by Nathan Weber establishes that these costs were in fact removed from the current FLEC model. While the unit investment costs could not be revealed, a simple subtraction calculation establishes the difference in those costs originally included in the FLEC study versus those now used.

Alltel's expert witness, Craig Conwell, who recently submitted rebuttal testimony on July 3, 2009, repeatedly complains in his testimony that Petitioners have failed to provide information related to switch and processor costs on numerous occasions. However, this is the first time since Petitioners originally provided information regarding the switch processor costs that Alltel has objected or raised any complaint as to the adequacy of the information previously produced. This request now conveniently comes less than one month before hearing in this matter.

Petitioners' inability to disclose the specific unit investment is not motivated by bad faith or any intent to deprive the Respondent of information. To the contrary, when this issue arose the first time in the context of Alltel's March 2008 Motion to Compel, the Petitioners worked diligently in order to provide them with additional information. The problem, however, is the fact that Petitioners' expert witness is bound by several non-disclosure agreements with those various vendors from which the pricing information for the various switch components was obtained. As explained above, the existence of the non-disclosure agreements was made known

to Alltel. When Petitioners were ordered to produce documents, they worked with counsel for the various vendors to reveal certain information; however, Petitioners were constrained in what they were given permission to release.

At no time following service of this information did Alltel ever object or claim that the information was inadequate to allow its expert witnesses to respond. Under the rules of civil procedure, if followed, Alltel waived its argument to later raise a sufficiency of the evidence objection and should not be allowed to now do so at this late date. This remains true regardless of this Commission's directive in its February 2009 Order.

Moreover, Alltel can obtain pricing information itself based upon that information which has already been provided. Alltel was provided with the vendor name and the product or component description, as well as the total costs for the same, which is more than sufficient information for Alltel to make inquiry as to the specific unit investment for the various switch components. While the Petitioners bear the burden of proof in this proceeding, it is a long-recognized tenet of discovery that one party need not do the work of the other when information is equally available to it. See SDCL § 15-6-26(b)(1)(A)(i).

Finally, it is easily ascertained from the total switching and processor cost that the costs ordered to be removed by this Commission were in fact removed from the network used in the FLEC model. A simple subtraction calculation, which is shown in Nathan Weber's testimony, establishes that the costs of CALEA, Centrex and Web Self-care have in fact been removed. Certainly an expert such as Mr. Conwell who has been involved in testifying in numerous arbitrations proceedings around the country on behalf of Alltel and Verizon is familiar with switch processor and software costs.

Under these circumstances, Alltel's Motion to Compel should be denied. In the alternative, should this Commission order production of the requesting switch investment costs,

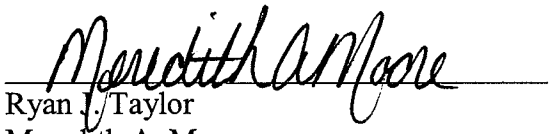
Petitioners respectfully request that they be ordered to disclose only those costs related to the removal of CALEA, Centrex and Web Selfcare. It is already obvious from the testimony recently filed by Alltel's expert witness, Craig Conwell, that Alltel seeks to re-open issues already decided by this Commission, specifically the usage sensitivity of the switch. See Commission's Findings of Fact, Conclusions of Law and Order dated February 27, 2009, ¶¶16 – 18. If Alltel is allowed access to all switch and processor information, it will only confuse the issues before this Commission and make this proceeding an even lengthier one.

CONCLUSION

This matter is not one in which the Petitioners have intentionally withheld either documents or information from the Respondent. Petitioners have provided Alltel with the requested information in their possession and, when documents were not available, approached those vendors with whom non-disclosure agreements existed and made efforts to secure the release of additional information. Petitioners not only identified the vendor, but the product description and the total group cost for the various components. Mr. Nathan Weber provided direct and rebuttal testimony on these subjects and was also subject to cross-examination by Alltel on them. A review of the transcript indicates that there was no issue made of the adequacy of the information then available to Alltel. To suggest Petitioners have been uncooperative in discovery is disingenuous. Months after these efforts were made, Alltel should not be allowed to re-define the scope of the issues in this proceeding and potentially delay again a hearing in this matter which has been ongoing for over two years. Petitioners, therefore, submit that Alltel has more than adequate information available to it and its request for specific unit investment information should be denied. In the alternative, the Petitioners request that if Alltel's Motion is granted, Alltel should only be allowed information relating to the specific costs of CALEA, Centrex and Web Selfcare.

Dated this 13th day of July, 2009.

CUTLER & DONAHOE, LLP
Attorneys at Law



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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 13th day of July, 2009, upon the following:

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