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July 31, 2009

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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' Objection and Opposition to Alltel's Motion to Submit Admitted Facts Into the Record.

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 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
TC 07 - 114
TC 07 - 115
TC 07 - 116**

**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.**

**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.**

**PETITIONERS' OBJECTION AND
OPPOSITION TO ALLTEL
COMMUNICATIONS, LLC'S
MOTION TO SUBMIT ADMITTED
FACTS INTO THE RECROD**

**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.**

COME NOW the Petitioners in the above-referenced matter and hereby submit the following Objection and Opposition to Alltel's Motion to Submit Admitted Facts Into the Record, which was filed with this Commission on July 27, 2009.

BACKGROUND AND ANALYSIS

In its Motion, Alltel seeks to admit certain answers given by the Petitioners in response to Alltel's Second Set of Interrogatories and Request for Production of Documents (the "Alltel Discovery Requests"), which were served on Petitioners on June 8, 2009. According to the language used in the pleading, the Alltel Discovery Requests were served upon Petitioners pursuant to A.R.S.D. 20:10:01:22.01, SDCL §§ 15-6-33 and 15-6-34.

The administrative rule cited by Alltel in its June 8, 2009 discovery requests, A.R.S.D. 20:10:01:22.01, simply indicates that discovery may be served upon a party in a proceeding such as this one.¹ The other referenced statutes allow for the service of interrogatories and requests for production of documents, respectively.² Notably, Alltel's discovery requests were not

¹ Administrative Rule of South Dakota 20:10:01:22.01 provides:

A party may obtain discovery from another party without commission approval. The commission at its discretion, either upon its own motion or for good cause shown by a party to a proceeding, may issue an order to compel discovery. The taking and use of discovery shall be in the same manner as in the circuit courts of this state.

² South Dakota Codified Law § 15-6-33 provides in relevant part:

Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

South Dakota Codified Law § 15-6-34(a) provides in relevant part:

Any party may serve on any other party a request

- (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from

served in accordance with SDCL § 15-6-36(a) nor is that statute referenced anywhere in the pleading.³

which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of § 15-6-26(b) and which are in the possession, custody or control of the party upon whom the request is served; or

³ South Dakota Codified Law § 15-6-36(a) provides:

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of § 15-6-26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. *The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.* An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to provisions of § 15-6-37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it

The lack of reference to the appropriate statute is significant in this case for several reasons. The requests at issue in this case were not truly requests for admission as Alltel failed to use a formal request for admission. While at first blush this argument may seem to be an elevation of form over substance, the lack of specific and appropriate statutory reference and formal request are important in light of the purpose of a true request for admission and the ramifications for a party if that party fails to answer the requests for admission. Unlike interrogatories and requests for production, if a response and/or objection or qualification are not made to a specific request for admission within 30 days, a failure to respond is deemed an admission. No such harsh penalty accompanies other discovery requests. Moreover, the statute specifically provides that a party upon which a request for admission is served may admit, deny or otherwise qualify its response to the request. See fn. 3, SDCL § 15-6-36(a) (italicized language).

What Alltel effectively does through its Motion is an improper combination of the statutes addressing a formal request for admission (which Alltel did not make) with the statutes which allow a court or administrative body to take judicial notice of certain facts. Chapter 19-10 of the South Dakota Rules of Civil Procedure governs the rules of judicial notice. As clearly set forth in SDCL § 19-10-2:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either

(1) generally known within the territorial jurisdiction of the trial court or

shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of § 15-6-37(a)(4) apply to the award of expenses incurred in relation to the motion.

(emphasis added).

- (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The subsequent statutes allow for a party to be heard upon the propriety of taking judicial notice of certain facts. See SDCL § 19-10-5.

Alltel's requests for admission in this matter relate to the capacity required by the Petitioners for voice traffic. The manner in which the information is requested and the information requested is somewhat misleading. While one of the remaining issues before this Commission, although not specifically demarcated as such, is whether the Petitioners' proposed networks are appropriated sized. Alltel focuses primarily on what transport system will accommodate the Petitioners' needs for voice traffic. However, this is not the only issue in this case given that it has already been established at the time of the initial hearing in this matter that the Petitioners clearly use their network for services besides voice traffic. Nor is the issue before this Commission so narrow. Accordingly, these are not the type of facts of which a court would take judicial notice.

Additionally, the Petitioners did posit objections to the Alltel Discovery Requests and provide qualification in their responses, which were made without waiving objection. Alltel argues that such objections are invalid; however, that is not Alltel's decision to make. Moreover, the facts are not entirely uncontested and the relevancy of the information is certainly at issue in this proceeding given the parameters of the issues remaining before this Commission.

Even if the Petitioners' objections to the Alltel Discovery Requests are deemed invalid or improper, that does not allow Alltel to use these admissions to conclusively establish certain facts. Notably, upon review of South Dakota case law on this subject, Petitioners could not locate any law which addressed the permissibility of the relief sought by Alltel in its Motion; nor is there a statute that specifically allows for it. While Alltel specifically references SDCL § 15-

6-36(b), that statute does not state that the facts are admitted into the record in the form of an exhibit, simply that a party must apply to a court for relief from an admission previously made.⁴

While the purpose of a request for admission is to narrow the issues for trial, the purpose is not to enter a one-sided presentation of facts into the record. Alltel may certainly use the information provided in discovery for purposes of cross-examination of the Petitioners' witnesses. There is nothing in the law that prevents such use of the information. Alltel, however, should not be rewarded with the introduction of an exhibit which does not present the "whole story" of this proceeding.

CONCLUSION

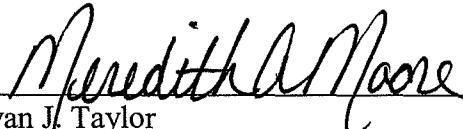
In the absence of the required formality and an outright admission, no court would allow the Petitioners' responses to be used as substantive evidence in the form of an exhibit. Alltel is not deprived of using the information it referenced in its Motion through cross-examination or through testimony of its own expert. Alltel sustains no prejudice if its Motion is denied. Under the facts and circumstances of this case, the Petitioners, so as to ensure a complete and undistorted record, respectfully request that this Commission deny Alltel's Motion to Submit Admitted Facts Into the Record.

⁴ South Dakota Codified Law § 15-6-36(b) provides:

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of § 15-6-16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

Dated this 31st 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 31st day of July, 2009, upon the following:

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