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September 30, 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' Post-Hearing Reply Memorandum of Law in Support of Their Arbitration Positions.

As indicated above, this document has been sent to you via electronic mail in PDF form. If you have any questions or concerns regarding these documents, 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. **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.** **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.**	**TC 07 – 112** **TC 07 - 114** **TC 07 - 115** **TC 07 - 116** **PETITIONERS' POST-HEARING REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR ARBITRATION POSITIONS**

COME NOW Kennebec Telephone Company ("Kennebec"), McCook Cooperative Telephone Company, Santel Communications Cooperative, Inc. and West River Cooperative Telephone Company, all rural local exchange carriers ("RLEC") (collectively the "Petitioners"),

and hereby respectfully submit this Reply Memorandum of Law in response to that Brief submitted by Alltel Communications, LLC, f/k/a Alltel Communications, Inc.

ARGUMENT AND ANALYSIS

There is little disagreement between the parties as to the rules that apply to this arbitration proceeding. There is, however, a fundamental disagreement in the application of the FCC's rules and regulations to the actual practice of conducting a FLEC study. What one must keep in mind when analyzing the FLEC process is the guiding principle of reasonableness and whether the process offered and advocated by the Petitioners fits within the parameters set forth by the FCC for the development of a transport and termination rate. To the extent that the process utilized can be deemed reasonable within that framework, the resulting rate itself is acceptable. Therefore, sweeping and conclusory statements that one element of a multi-faceted process is wrong because Alltel "says so" must be set aside.

I. Whether the reciprocal compensation rate for IntraMTA Traffic proposed by the Petitioners is appropriate and reasonable pursuant to 47 U.S.C. § 252(d)(2)?

In its Post-Hearing Brief, Alltel makes 3 primary arguments: (1) Petitioners allegedly failed to forecast demand both far enough into the future and in such an amount as to support their respective proposed networks; (2) Petitioners allegedly failed to accord proper treatment to a switched circuit or DS-0 voice trunk, and (3) Petitioners' switching costs allegedly are not usage sensitive and this Commission should overrule its prior decision on this issue. Simply stated, Alltel's brief is much ado about nothing. The parties and the Commission are to be guided by the FCC's rules and what is ultimately the reasonableness determination contained therein. See, e.g., 47 U.S.C. § 251(c)(2) (providing that the parties to interconnection negotiations or the Commission, if necessary, must agree upon or order "rates, terms, and

conditions that are just, reasonable and nondiscriminatory[.]") 47 C.F.R. § 51.505 (providing for a reasonableness standard for determining forward-looking common costs); 47 U.S.C. § 251(c)(2) (providing that switching costs must be determined on the "basis of a reasonable approximation[.]"); Verizon Penn., Inc. v. Penn. Public Utilities Comm., 380 F.Supp.2d 627, 635 (E.D. Pa. 2005) (holding that transport and termination rates must be just and reasonable). Alltel's proposal to this Commission, however, is guided by what is best for Alltel and nothing more.

A. Petitioners' proposed use of an OC-48 or OC-192 transport system is appropriate and consistent with applicable law.

For its initial point of attack Alltel again argues that there is an inconsistency between the testimony of Nathan Weber and Tim Eklund. Alltel spends multiple pages of its reply railing against the use of an OC-192 and arguing that the Petitioners' projected future demand does not support the use of an OC-192 transport system. Alltel further argues that Petitioners have ignored the Commission's February 2009 Findings of Fact and Conclusions of Law by submitting a proposed FLEC rate which includes the costs of an OC-192 transport system. Specifically, Alltel argues that the Petitioners must have thought they needed to only project demand into the future in order to satisfy this Commission's prior ruling.

There are several critical problems with Alltel's argument as it relates to projected demand and the size of the proposed transport system. From a legal standpoint, Alltel's argument focuses predominantly upon the terms "capacity" and "utilization" and the level thereof. Yet nowhere in the FCC's rules do these terms play any role, let alone a prominent rule. Certainly the concept of an efficient network cannot be ignored, but Alltel has taken the definition of "efficient" and turned it on its head, essentially ignoring the principles contained in Rule 51.505(b)(1). That rule calls for costs to be "measured based on the use of the most

efficient telecommunications technology currently available ***and*** the lowest cost network configuration[.]" This rule requires consideration of both cost and available technology.

Alltel has turned Rule 51.505(b) into one requiring that the *Petitioners' use* of available technology must be efficient, not that the technology used by the Petitioners must be the most efficient currently available technology.[1] It also equates the definition of "efficient" with, and only with, the least expensive option.[2] These are distinctions worthy of recognition. While Alltel's expert, Mr. Conwell, admitted that efficiency does not require exhaustion of a transport system, it is the ultimate argument advanced by Alltel. See Hearing Transcript, p. 189, lines 22-25; p. 190, lines 1-3; see also p. 1-25; p. 188, lines 1-25; p. 189, lines 1-7; see also Alltel's Post-Hearing Brief at p. 13 ("Conwell stated the Commission could assume forward-looking transport demand to justify the OC-192 transport network as being properly utilized, and thus efficient, some where between 60 and 66 percent utilization."). Alltel's definition of "efficient" is one that requires an exceedingly high level of utilization of the cheapest equipment.

This argument, however, must fail from a practical standpoint. Applying a reasonableness standard, capacity is not the only factor to be looked at in determining what proposed network costs should be included in the FLEC study. Alltel focused primarily on Petitioners' utilization level of the proposed transport systems and, significantly, as it related solely to the level of utilization for voice traffic. The Petitioners' proposed networks were not

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[1] Petitioners have produced ample evidence from Nathan Weber that an OC-192 represents the best of that technology currently available and that technology that is best suited to the Petitioners' needs. See Petitioners' Post-Hearing Memorandum of Law, pp. 12-16 (citing Hearing Transcript, p. 88, lines 1-23; p. 90, lines 1-14; p. 91, lines 14-25; p. 92, lines 1-4).

[2] Alltel's argument in this regard is incorrect. Case law establishes as such. See MCI Worldcom Communications, Inc. v. BellSouth Telecommunications, Inc., 446 F.3d 1164, 1175 (11th Cir. 2006) (holding that no violation of TELRIC occurs if a company uses technology which is not the least expensive so long as that company establishes that it is acting rationally in using that technology and can support use of the same).

constructed for voice traffic alone, nor can they be. Telecommunications is one of the few utilities where multiple services are carried on the same networks. It is impractical, inefficient and arbitrary to require that an RLEC such as these Petitioners propose a FLEC network that pertains only to voice services. See Petitioners' Post-Hearing Memorandum of Law, p. 12.

While Alltel has a point in that the proposed network transport size and costs must correlate to projected demand, Alltel cannot argue that transport system size is dictated by future projections for *voice services only*. In a climate of declining voice demand, this would result in a backward, not forward, looking network. It would require an RLEC to install a network for the future, which would not be sufficient for the present. Certainly this is not what the FCC intended. See AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Co., 349 F.3d 402, 411 (7th Cir. 2003) (holding that "TELRIC requires that the rate reflect the costs of efficient production, not that each ingredient do so independently.").

However, Alltel continues along this path, arguing that because Petitioners' proposed FLEC networks use an OC-192 transport system, Mr. Weber has somehow become the party responsible for forecasting future demand. At the time of the hearing, Mr. Weber testified that Petitioners' demand for all services is more than sufficient to require use of an OC-192 transport system. Alltel now claims that his testimony represents an actual forecast methodology and one which is superior to Tim Eklund's forecast methodology. This is a creative argument, but not an availing one. See Petitioners' Post-Hearing Memorandum of Law at pp. 18-23 (explaining why a forecast period equivalent to the life of the transport equipment at issue is inappropriate under the facts and circumstances of this proceeding). However, Alltel is mixing apples and oranges. Mr. Weber sized the Petitioners' proposed networks based upon his expertise and his expectations of current demand and future known and unknown demand. This is not a forecast.

It is not what should be used to comport with the requirements of 51.511(1)(a) and to calculate the cost per minute used in the FLEC study. Alltel improperly conflates engineering practice with economic theory and practice. Mr. Weber engineered and sized Petitioners' respective networks based upon his industry practice and experience. Id. at p. 12. Mr. Eklund then determined what costs associated with Mr. Weber's proposed network should not be included in the FLEC model and extracted those.[3] He then divided those costs by the total demand, which he forecasted using known trends.

While Alltel again argues that there is a disconnect between the testimony of Messrs. Weber and Eklund, the Petitioners accounted for such in their current FLEC submissions. Contrary to Alltel's assertions, the Petitioners were fully cognizant of this Commission's prior Findings of Fact and the concerns expressed therein. To that end, the Petitioners submitted transport and termination rates to this Commission which are based upon a FLEC model which included the costs of an OC-48 transport system and 24-count fiber. See Hearing Exhibits 86-89. As previously argued, the Petitioners and their expert witnesses adamantly believe that their proposed use of an OC-48 transport system is not entirely realistic given the technology currently available and the total demand for all services which they are expected to currently manage. However, FLEC studies including an OC-48 transport system were proposed so as to bring the projected future demand (projected over a reasonable forecast period so as to achieve a reasonable degree of certainty) in sync with the size of the proposed transport system. See Petitioners' Post Hearing Memorandum of Law at pp. 23; 29-30. The Petitioners' approach is reasonable.

[3] One of the crucial items that Alltel fails to account for in its argument is the demand, such as video, that was removed from the FLEC study for each Petitioner. This demand was removed from the study through the fiber optic cable separations process. See Hearing Transcript, p. 150, lines 3-25; p. 151, lines 1-17.

Alltel's approach is not. Alltel's proposed solutions to sync what it considers an inconsistency between future demand with network size and cost[4] does not comport with the FCC's rules. Alltel must have some basis upon which to substantiate its claims regarding network cost and forecasted demand. However, Alltel's proposal is to use a smaller transport system than what is currently used and to forecast demand based upon the life of the equipment regardless of whether the demand can be forecast with certainty. As previously argued, while appealing, such an approach is dangerous because it lacks certainty. Requiring the Petitioners to forecast demand beyond 2010 results in a decision which is arbitrary and capricious. See Post-Hearing Memorandum of Law, pp. 18-24.[5] Moreover, Alltel's proposed solution is to create a "fill" rate or level. This is an argument regarding capacity – the capacity of fiber optic equipment and the level at which it will be exhausted. Alltel's proposal is a series of assumptions and most certainly not a forecast as required by the FCC. See Alltel's proposed Post-Hearing brief, p. 14 (stating that Conwell used an "assumed fill rate").

[4] Alltel attacks the cost of both the cable/fiber costs and transport electronic. Both topics were previously covered in Petitioners' Post-Hearing Memorandum of Law. See pp. 14; 16, n. 12; 17. However, the cost associated with cable merits some additional discussion in this Reply. The interexchange-fiber optic cable design and allocation is appropriate. Forty-eight count fiber cable is the presumed standard in the industry. See Hearing Exhibit 79, p. 5, lines 16-17; lines 18-19. The costs for cable construction consist predominantly of the labor required to place the cable and the non-fiber components of the cable. See also Petitioners' Post-Hearing Memorandum of Law, p. 17, n. 13. The fiber count within the cable itself makes up but a relatively small portion of the cost. Id. Accordingly, any change in the fiber optic cable size will not result in an appreciable change to the overall cost of construction. Id. Moreover, Alltel fails to account for the cost allocation process. The allocation method utilized comports with standard industry practice. Dark fibers are allocated proportionally based on the usage of lit fibers per the methodology consistently used by NECA. See Hearing Transcript, p. 122, lines 11-14; p. 150, lines 3-25; p. 151, lines 1-12.

[5] As set out in Petitioners' Post-Hearing Memorandum of Law, the results of any forecast "depend crucially on the assumptions made in generating the forecasts, and it is difficult to ascertain the accuracy of these assumptions. Therefore, in general, the further into the future one is forecasting, the less reliable is the resulting forecast." 82 F.C.C.2d 407, 1980 WL 121494, *18. This is why the Petitioners' selected a 5-year forecast period. In addition, there are services which are either new to the Petitioners' network or are currently unknown. There is little to no historical data upon which the Petitioners can perform a trending analysis for non-voice applications multiple years into the future. To do so, injects an element of uncertainty into the study which is not currently present in the Petitioners' FLEC studies.

Alltel's alternate proposal is to suggest that this Commission throw out the FLEC studies in their entirety and adopt a bill and keep provision. Such a suggestion is ridiculous and offensive. As an initial matter, a review of the 1996 Telecommunications Act yields no evidence that the FCC has ever suggested that a bill and keep scenario should be adopted when the parties cannot agree upon a transport and termination rate. A bill and keep arrangement is typically invoked between parties when the traffic they exchange is evenly balanced such that it makes little sense to bill one another for it. That is not the case here, nor has Alltel provided any evidence that the traffic is in balance. To the contrary, at the time of the original hearing in this matter, Alltel produced evidence that the traffic is *not* in balance. See July 2008 Hearing Transcript, pp. 466, lines 10-13[6]. Alltel should not be allowed to punish the Petitioners through a bill and keep arrangement. To do so would be an abrogation of responsibility of all involved in this proceeding.

Moreover, even without a bill and keep arrangement, Alltel's alterations to the Petitioners' cost studies, including its proposed OC-192 fill rate and DS-0 pricing method, ultimately place the Petitioners in a bill and keep scenario anyway because of the rates which Alltel has proposed. See Petitioners' Post-Hearing Memorandum of Law, p. 30. This does not pass the "straight face" test. The Petitioners cost studies were submitted in good faith and based upon sound evidence and testimony. Alltel simply does not want to pay its fair share. It never has.

[6] Alltel witness, Mr. Ron Williams provided testimony regarding Alltel's proposed use of traffic factors for the purpose of billing the parties' IntraMTA traffic. No factors would be necessary if the traffic exchanged between these parties was roughly in balance.

B. Petitioners accorded proper treatment to a switched circuit or DS-0 voice trunk.

Alltel argues that a DS-0 voice trunk cannot under any circumstances be treated in the same manner as a DS-0 special circuit. While Alltel prefaces its DS-0 argument by stating that there is only one difference between the parties as to the application of the Rate Equivalency method, it is an extremely significant and consequential difference. This is primarily so because it allows Alltel to return to the application of the bandwidth method and an improper allocation of costs. This issue is also far simpler than both parties have likely made it to date. In applying the Rate Equivalency Method, the Petitioners determined the pricing and weighting for DS-0s, DS-1s and DS-3s. All of these circuits were assigned a different weight. While there are both DS-0 voice circuits and DS-0 special circuits, both circuits have the same capacity. They are the same fundamental signal unit; they simply carry different types of traffic. Accordingly, the same weight was applied to both types. Alltel argues that different *services* are provided on the switched vs. special circuits, but that is a red herring and an impermissible distinction because the RLECs can put voice traffic or data on a DS-0 special circuit.

At a higher level, Alltel has provided no cost information to support its claim that a DS-0 special circuit is seven times more expensive than a DS-0 voice circuit. Alltel provides a hypothetical in an attempt to provide support for its contention. However, the hypothetical advanced by Alltel in its brief is inaccurate. Alltel raises a discussion regarding the potential for multiplexing DS-0 voice circuits and DS-0 special circuits on the same DS-1. This is incorrect and misleading. Alltel's argument is based upon the incorrect premise that a sufficient number of DS-1s were included in the transport system so as to carry all voice traffic. Alltel then improperly concludes that there is no need to add DS-0 voice circuits to DS-1 circuits that are

carrying DS-0 special circuits. The fundamental flaw with this conclusion is that DS-0 special circuits are typically added to partially filled DS-1s that carry DS-0 voice circuits.

In Alltel's hypothetical, it refers to a scenario in which there are 300 access lines in an exchange. The Petitioners' FLEC model divides the number of access lines by 5 to obtain an estimate on the number of trunks required in the switch at that exchange. Since the switch has no DS-0 interfaces, the resulting quantity of 60 DS-0 voice trunks was divided by 24 and rounded up to the nearest whole number to determine the number of DS-1 interfaces required in the softswitch. The result in this example is 2.5 DS-1s, which is rounded up to 3 DS-1 interfaces required in the softswitch. Therefore, one, two, or three of the DS-1s being used for voice services may have unused DS-0 channels. Three examples of such an occurrence are identified below:

- 2 DS-1s with 24 DS-0 voice trunks on each; 1 DS-1 with 12 DS-0 voice trunks on each (12 unused DS-0 circuits on the 1 DS-1)
- 1 DS-1 with 24 DS-0 voice trunks; 2 DS-1s with 18 DS-0 voice trunks on each (6 unused DS-0 circuits on each of the 2 DS-1s)
- 3 DS-1s with 20 DS-0 voice trunks on each (4 unused DS-0 circuits on each of the 3 DS-1s)

Before the three DS-1s that interface to the switch are connected into the transport electronics, the partially filled DS-1s will typically connect to circuit conditioning equipment. This is done so that special circuits can be intermixed with the voice circuits to maximize the fill of each respective DS-1. In this example, regardless of how the DS-0 voice trunks are divided among the 3 DS-1s that interface to the switch, there are approximately 12 DS-0 channels that are unused that can be used for DS-0 special circuits. Therefore, either one, two, or all three of the DS-1s that interface to the switch may need to connect through the circuit conditioning equipment before ultimately interfacing to the transport network. One can only conclude that

Alltel's assertion that a DS-0 special circuit costs seven times more than a DS-0 switch circuit is incorrect and unfounded.

Under either the theoretical analysis or the more technical, cost-based analysis, it was and is reasonable for the Petitioners to accord the same treatment to DS-0 voice and special circuits. The weighting process performed under the Rate Equivalency method does not differentiate between services, it differentiates between the capacity of the circuits. As such, it is reasonable to conclude that the only reason Alltel raises this argument is to ensure that the result of its original bandwidth method remains intact. Accordingly, Alltel's artificial distinction should be rejected and the Petitioners' treatment of circuits accepted.

C. The Commission's February 2009 decision regarding the inclusion of those costs associated with the Switch Processor remains sound.

Alltel continues to argue that the switch processor is not usage sensitive and that the Petitioners have introduced new evidence which corroborates Alltel's argument. In addition to the arguments set forth in its Post-Hearing Brief, Alltel has also filed a Motion to Reconsider in connection with this issue. Alltel has found an argument that is both untimely and not yet ripe at this time.[7] This is a difficult task. In either instance, Alltel's argument must be rejected as both contrary to this Commission's February 2009 Findings of Fact and relevant case law. In fact, this is one area where there is a body of law upon which this Commission can base its prior decision. See WWC License, L.L.C. v. Boyle, 459 F.3d 880, 895 (8th Cir. 2006) (citing 47 C.F.R. § 51.505(a)(2) (identifying forward looking costs as a combination of TELRIC and a "reasonable allocation of forward-looking common costs"); AT&T Communications of Illinois, Inc. v. Illinois

[7] South Dakota's administrative rules allow for the filing of a motion to reconsider. See A.R.S.D. 20:10:01:29. The statute from which this rule derives its authority, SDCL 49-34A-61.1, requires that any party seeking reconsideration file within 30 days after the entry of the order from which it is seeking reconsideration. If Alltel seeks reconsideration oft his Commission's February 2009 Findings of Fact and Conclusions of Law, it is too late. If it seeks reconsideration of whatever decision this Commission may make as a result of the August 2009 hearing, its Motion is premature because there is, as of yet, no new order.

Bell Telephone Co., 349 F.3d 402, 405 (7th Cir. 2003) (allowing for recovery of switch costs associated with forward looking network); 47 C.F.R. § 51.507(c) (providing that: "[c]osts of shared facilities may be apportioned either through usage-sensitive charges or capacity-based flat-rated charges, if the state commission finds that such rates reasonably reflect the costs imposed by the various users."); 47 C.F.R. § 51.509(b) (providing that: "[l]ocal switching costs shall be recovered through a combination of a flat-rated charge for line ports and one or more flat-rated or per-minute usage charges for the switching matrix and for trunk ports.")

The switch processor is a shared resource. Alltel's end users cannot make or terminate calls without it. Therefore, Alltel cannot exclude from the FLEC model those costs which directly benefit Alltel in the termination of a call. Alltel cannot credibly argue that the costs associated with the Petitioner's proposed switch are in fact "getting started costs" or non-usage sensitive costs. There is no discussion or contemplation in the FCC's rules and regulations for such costs. It is not a valid basis for chipping away at the switching costs included in the Petitioner's FLEC model and this is the exact argument that this Commission rejected out of hand in February 2009.

Alltel now argues that because the Petitioners' voice demand is declining the switch processor cannot possibly be usage sensitive. Therefore, Alltel argues that as demand decreases, the Petitioners must carve out a portion of the cost of the processor. This is not possible. If one carves out part of the processor for decreasing future demand, one will never have a processor in place that will meet the current demand level. Again, this is not a reasonable interpretation of applicable law.

The fact remains that the cost of shared facilities *shall* be shared in a manner that apportions costs among all users. See 47 U.S.C. §51.507(c). This rule has clearly been

interpreted in such a manner as to allow the recovery of costs through either per minute usage charges or flat rate charges. See 47 C.F.R. § 51.509(b). Alltel's argument flies in the face of the FCC's rules, which allow the cost of shared facilities to be recovered in a manner that efficiently apportions costs among users, including through usage-sensitive charges. Alltel simply does not want to pay for the costs of shared facilities and its argument should be rejected.

CONCLUSION

As is well established by reviewing courts, the decisions of a governmental agency, such as this Commission, as to the application of federal law are reviewed *de novo* or anew. See Qwest Corp. v. Minnesota Pub. Utilities Comm'n, 427 F.3d 1061, 1064 (8th Cir.2005); Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 339 F.3d 428, 433 (6th Cir.2003). The reviewing court must, however, recognize "the state commission's superior technical expertise" and review any "factual determinations under the arbitrary and capricious standard." See Qwest, 427 F.3d at 1064; Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc., 323 F.3d 348, 354 (6th Cir.2003).

As the arbitrating body[8], this Commission is tasked with a significant undertaking: to determine the proper application of federal law to the evidence in the record. It needs to find evidence in the record which supports its decisions. It cannot rely upon argument or unsubstantiated facts. It can rely upon reasonable inferences drawn from both law and fact. What the Petitioners have presented to this Commission is a well-reasoned and reasonable FLEC

[8] The Telecommunications Act specifically authorizes state commissions to act either as arbitrating or mediating bodies. Inherent in this vested authority is the responsibility that the Commission must resolve any open issues in accordance with the "regulations prescribed by the [FCC] pursuant to section 251, section 252(c)(1)[.]" AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 384, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). As the arbitrating body, this Commission has the authority to consider testimony from all parties involved and determine which testimony and evidence is worthy of greater weight. The Commission also has the authority to specifically instruct the parties on certain issues or sub-issues if it believes that the proffered rates and method from which those rates are derived do not comport with the Sections 251 and 252. See Verizon Pennsylvania, Inc. v. Pennsylvania Public Utility Commission, 380 F.Supp.2d 627, 657 (E.D. Pa. 2005).

model. No model is unassailable. Yet the totality of Alltel's argument is not reasonable. While there may be appeal to certain suggestions, resolutions or arguments, one need only look to the end result to see that the logical extension of those resolutions to know that the totality of Alltel's argument requires the Petitioners to put in place a forward-looking network today that will not even handle the demand currently in place. This is a haphazard and non-sensical argument.

Alltel consistently argues that what it has done is better than what the Petitioners have done. However, this is not the standard. "Better" does not necessarily comport with the standards identified in the Act. What Alltel has done is to operate well outside the applicable rules and to come up with its own assumptions, some of which are not even based upon fact, and apply those to the Petitioners' FLEC studies. The adjustments which Alltel seeks to make to the Petitioner's rate result in a rate of less than $.005. This cannot possibly be anything but arbitration and capricious. Petitioner therefore respectfully requests that this Commission adopt its proposed transport and termination rate.

Dated this 30th day of September, 2009.

CUTLER & DONAHOE, LLP
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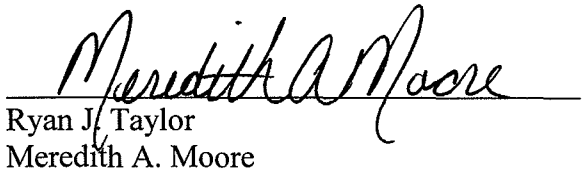

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 30th day of September, 2009, upon the following:

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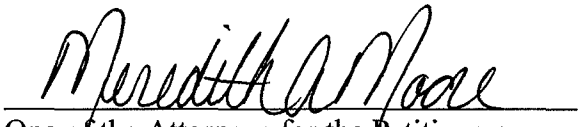

One of the Attorneys for the Petitioners