

RICHARD A. CUTLER
KENT R. CUTLER
BRIAN J. DONAHOE *#
STEVEN J. SARBACKER **
JAYNA M. VOSS
MICHAEL D. BORNITZ ‡
TRENT A. SWANSON *
RYAN J. TAYLOR °
KIMBERLY R. WASSINK
MEREDITH A. MOORE
DAVID L. EDWARDS
NATHAN S. SCHOEN †
ONNA B. DOMINIACK #
AMY L. ELLIS ^
NICHOLE MOHNING ROTHS *
WILLIAM D. SIMS @

www.cutlerlawfirm.com

March 21, 2008

JEAN BROCKMUELLER, CPA (Inactive)
BUSINESS MANAGER
*Also licensed to practice
in Minnesota
#Also licensed to practice
in Iowa
‡Also licensed to practice
in Nebraska
+Also licensed to practice
in Missouri
^Also licensed to practice
in Colorado
†Admitted to practice in
United States Tax Court
°Also licensed as a
Certified Public Accountant
* Licensed to practice
in Kansas only
@ Licensed to practice
in Iowa only

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: *TC07-111 through TC07-116*
Alltel Arbitrations

Dear Ms. Van Gerpen:

Enclosed for filing in the above matter, please find Petitioners' Response to Motion to Compel and Postpone Deadlines.

As indicated above, these documents have 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

Meredith A. Moore
For the Firm

MAM/cmc
Attachments
cc: Service List

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

**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.**

DOCKET No. TC 07-114

**RESPONSE TO ALLTEL'S MOTION TO
COMPEL AND POSTPONE DEADLINES**

This matter is before the Commission upon Alltel's Motion to Compel Responses to Discovery Requests. Petitioner Kennebec Telephone Company ("Petitioner") respectfully submits this Response to Alltel's Motion.

FACTUAL BACKGROUND

On December 17, the parties in the above-captioned action agreed to and filed with this Commission a Stipulation for Scheduling Order (the "Scheduling Order"). See Stipulation and Scheduling Order filed December 17, 2007. The Scheduling Order essentially provided for three periods of discovery: initial disclosures related to Petitioner's transport and termination rate, followed by two formal periods of written discovery.

As an initial matter, Petitioner agreed to provide, on or before December 14, 2007, the entirety of the forward-looking economic cost study (the "FLEC Study") and results for transport and termination as it identified in its Petition for Arbitration dated October 19, 2007. Id. at ¶1. On December 13, 2007, Petitioner complied with this request, submitting to Alltel in electronic and hard copy form the FLEC study and supporting work papers. Specifically, Petitioner provided Alltel with a CD containing a FLEC model and Petitioner's specific input data for that model. The CD contained a "User's Guide" which set forth the instructions on how to load the Petitioner's specific data into the FLEC model. The FLEC model contained on the CD was designed in such a way so that the viewing party could identify the inputs used in the FLEC study – an interactive model of sorts. Petitioner also provided to Alltel 62 pages of

documentation which contained the supporting data for the FLEC study and the assumptions that Petitioner's consultants used to develop the FLEC study.

The Scheduling Order provided for the commencement of the first round of discovery on or before December 24, 2007. Alltel did not serve any discovery during the time frame specified for this round of discovery.

On January 6, Alltel counsel contacted Petitioner's counsel with specific questions about the FLEC documentation previously provided in December by Petitioner. Respective counsel engaged in e-mail communications before determining it might be simplest to arrange for a conference call between counsel and the cost consultants for both Petitioner and Alltel. The call was scheduled for and held on January 9, at which time Alltel's cost consultant was able to pose numerous questions about the FLEC study to the consultants who actually designed and performed the study. It is believed that the call was successful.

The Scheduling Order called for commencement of the second period of discovery on February 8, 2008. At that time, Alltel served upon Petitioner Interrogatories and Requests for Production of Documents. The discovery requests totaled fifty-eight in number. The Scheduling Order called for service of responses on or before February 29, 2008. On February 29, Petitioner responded to the majority of Alltel's requests and, admittedly, objected to and refused to provide information for certain others which either requested irrelevant information or requested information which would impose an undue burden upon Petitioner. Shortly thereafter, on March 7, 2008, Alltel's counsel requested a conference call with Petitioner's counsel to discuss the discovery responses. A call was agreed to for March 11. The morning of March 11, Alltel provided to Petitioner's counsel a ten-page document designed to facilitate discussion during the conference call. See attached Confidential Exhibit A. A call was held that morning, but because the majority of the questions addressed in the ten-page document required the assistance of

Petitioner's consultants, another call was scheduled for March 14 to allow time for Petitioner's consultants to review and respond to the specific questions of Alltel. During the "review" period, it was noted that Alltel was doing more than simply asking for clarification of certain questions; it was asking for new and additional information. Despite this fact, Petitioner responded to the majority of the new questions and provided this information to Alltel and its cost consultant at the time of the March 14 conference call.

At the time of the March 14 call, Petitioner agreed to provide supplemental responses to Discovery Requests 11, 12 and 20, which are the subject of Alltel's Motion to Compel. Petitioner initially responded to all of these requests, as evidenced by Exhibit A to Alltel's Motion, but did agree to provide supplemental information. Petitioner's consultants are currently working on compiling the requested information.

Also at the time of the March 14 call, Petitioner agreed to speak with its consultants again about responses to DR 22, 24, 34 and 35, which Petitioner originally objected to on the basis of relevance. Following numerous conversations with Petitioner's cost consultants, it was determined that the information which Alltel requested is not relevant to this matter, is not readily available to the Petitioner itself or its cost consultants and would impose an undue burden on Petitioner to compile at this point in time. Accordingly, this information was conveyed to Alltel and Alltel filed its Motion to Compel seeking to compel responses and delay the deadline for the service of its direct pre-filed testimony.

Under the facts and circumstances of this matter, Petitioner believes that it has more than adequately complied with Alltel's discovery requests and that Alltel is effectively seeking to delay this proceeding and impose an additional burden on Petitioner to impugn its own FLEC study and the resulting transport and termination rate.

ANALYSIS AND AUTHORITY

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).

In this particular case, Petitioner recognizes that it does bear the burden of proof in establishing that its proposed rates for transport and termination are fair, reasonable and supportable. *See* 47 C.F.R. § 51.503(e). Specifically, 47 C.F.R. § 51.503 provides in relevant part:

- (a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.
- (b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509, and shall be established, at the election of the state commission—
 - (1) Pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511[.]

Title 47 of the Code of Federal Regulation, Section 51.505 relates to the overarching considerations that should be part of the FLEC study and what types of costs can and cannot be considered in the study. Specifically, 47 C.F.R. § 51.505 provides in relevant part:

- (b) Total element long-run incremental cost. The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.
 - (1) Efficient network configuration. The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

. . . .

- (d) Factors that may not be considered. The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:
 - (1) Embedded costs. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts;
 - (2) Retail costs. Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in § 51.609;
 - (3) Opportunity costs. Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carriers that purchase elements; and
 - (4) Revenues to subsidize other services. Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

In its Motion to Compel, Alltel has requested that the Commission order Petitioner to respond to the following requests:

Provide your current or most recent measure of interoffice trunk utilization (annual MOU/trunk) and the supporting work papers used to compute the measure.

For each special circuit bandwidth, describe the proportion of OC-192 equipment capacity consumed by one circuit of each bandwidth. Provide capacity consumption separately for common equipment and plug-ins. (For example, a DS0 special circuit may consume 1/(24 X % engineering fill) of a DS1, a DS1 may consume 1/(84 X % engineering fill) of an OC3 plug-in; and, an OC3 plug-in may require one slot on the OC-192 common equipment. Likewise, an OC3 special circuit may require one OC3 plug-in and consume one slot of common equipment.)

Provide the current or most recent average quantity of trunks or DS0 circuits per DS1. Provide source data and supporting calculations.

Provide the current or most recent average quantity of switched lines per common transport trunk or DS0 circuit.

As outlined by the applicable provisions of the FCC rules set forth above, none of this information is necessary for the development of Petitioner's FLEC study nor is it required. It is clear that the questions seek either current embedded costs, which per FCC rules cannot be included in a cost study, or seek information which would require Petitioner to re-run its entire FLEC study.

The permissible scope of discovery is broad, but not unlimited. It is clear both from Alltel's discovery requests and Exhibit A that it believes Petitioner's FLEC study is significantly flawed. Alltel has every right to test the reasonableness and the supportability of Petitioner's proposed transport and termination rates. However, to state that the questions above are designed to explore "the reasonableness of the FLEC model" is wholly disingenuous. See Alltel's Motion at p. 7. Petitioner has no obligation to make Alltel's case for it. Moreover, Alltel has ample opportunity through its own cost experts to argue that Petitioner's FLEC study may not comport with FLEC requirements. It can do so through its own direct testimony, rebuttal testimony and cross-examination of the Petitioner's experts. Allowing Alltel to compel discovery of certain of its

requests opens up the process to significant potential abuse and further imposes upon a Petitioner a much greater burden than what was ever contemplated by the FCC in the promulgation of its rules and regulations.

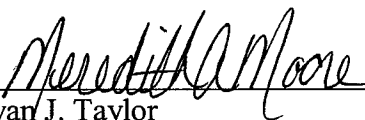
Finally, allowing Alltel to significantly delay the deadline for filing its expert testimony jeopardizes the hearing dates in this matter which are currently scheduled for April 22-25. If those hearing dates are delayed it will result in significant in prejudice to the Petitioner as Alltel is currently not paying Petitioner for transport and termination of traffic.

CONCLUSION

From the outset of this arbitration proceeding, Petitioner has provided Alltel with the information it has requested and has demonstrated willingness to engage in discussion with Alltel to discuss the FLEC information provided by Petitioner and its reasons for not providing certain information. Alltel has had ample opportunity to conduct discovery in this case and Petitioner has made every good faith effort to provide Alltel with the information it has requested, as well as additional information which Alltel was not entitled to under the very Scheduling Order originally agreed to by the parties in this matter. The information Alltel has requested in its Motion to Compel is neither relevant nor readily available and, accordingly, Petitioner requests that this Commission deny Alltel's Motion to Compel.

Dated this 21st day of March, 2008.

CUTLER & DONAHOE, LLP
Attorneys at Law



Ryan J. Taylor
Meredith A. Moore
100 North Phillips Ave, 9th Floor
Sioux Falls, SD 57104-6725
Telephone: (605) 335-4950
Facsimile: (605) 335-4961
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 21st day of March, 2008, upon the following:

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
patty.vangerpen@state.sd.us
Telephone: 605-773-3201

Ms. Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
kara.semmler@state.sd.us
Telephone: 605-773-3201

Mr. Keith Senger
Staff Analyst
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
keith.senger@state.sd.us
Telephone: 605-773-3201

Mr. Talbot J. Wiczorek
Gunderson, Palmer, Goodsell
& Nelson, LLP
PO Box 8045
Rapid City SD 57709
tjw@gpgn.com
Telephone: 605-342-1078

Mr. Ron Williams
Alltel Communications, Inc.
3650 131st Avenue S.E.
Bellevue, WA 98006
ron.williams@alltel.com

Mr. Stephen B. Rowell
Mailstop 1269 B5-F11-C
One Allied Drive
Little Rock, AR 72202
Stephen.B.Rowell@alltel.com

CUTLER & DONAHOE, LLP
Attorneys at Law

A handwritten signature in cursive script that reads "Meredith A. Moore". The signature is written in black ink and is positioned above a horizontal line.

Ryan J. Taylor

Meredith A. Moore

100 North Phillips Avenue, 9th Floor

Sioux Falls, SD 57104-6725

Telephone: (605) 335-4950

meredithm@cutlerlawfirm.com