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October 9, 2009

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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, Inc.'s Petition for Reconsideration (Switching Costs).

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**

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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  
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' OPPOSITION  
TO ALLTEL  
COMMUNICATIONS, INC.'S  
PETITION FOR RECONSIDERATION  
(SWITCHING COSTS)**

**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, Inc.'s ("Alltel") Motion for Reconsideration dated September 18, 2009. For the reasons set forth below, Alltel's Petition should be denied.

## BACKGROUND

On February 27, 2009, the Commission issued its Findings of Fact and Conclusions of Law in the above matters.<sup>1</sup> In its Findings and Conclusions, the Commission discussed what network costs were appropriately includable in the Petitioners' respective FLEC studies. Two Findings addressed the inclusion of certain switching costs in the FLEC study. Specifically, the Commission found as follows:

Finding of Fact 16: With respect to switching costs, two related issues raised by Alltel regarded what switch investment, by switch category and exchange, should be included in [Petitioner's] cost study and what percentage of the switch investment is usage sensitive and recoverable. Alltel Ex. 2 at 26-31. Alltel claimed that McCook had included switch investment and costs that are not usage sensitive, and therefore, not recoverable. Alltel claimed that the "getting started" costs of the switch are not usage sensitive because [Petitioner's] switches will not exceed capacity. *Id.* at 41-46. Alltel stated that the portions of switch investments that are usage sensitive are the trunk card investment per line. *Id.* at 45. In addition, Alltel stated that certain items should be excluded because the items are not necessary for the termination of a call and are therefore not usage sensitive. Alltel Ex. 3 at 9-12. [Petitioner] claimed that the costs are includable and usage sensitive because a switch is sized for usage and must be capable of future demand. Tr. at 88.

Finding of Fact 17: The Commission finds that, with the exception of a few costs attributable to certain components of the switch, the switch investment as set forth by [Petitioner] was properly included in its cost study. Alltel's claim that "getting started" costs of the switch should be excluded would have the effect of excluding a number of costs of the switch that are usage sensitive and properly recovered through reciprocal compensation rates. The Commission finds that switches are, of necessity, sized for usage and that the FCC rules specifically contemplate that switching costs may be recovered through per minute usage charges. See 47 C.F.R. § 51.509.

Alltel's Motion for Reconsideration is based upon the premise that the Petitioners, through their revised FLEC studies, submitted new evidence establishing that the switch

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<sup>1</sup> Petitioners cite to the Findings of Fact and Conclusions of Law issued in Docket TC 07-112, *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.* The Findings of Fact and Conclusions of Law referenced in Alltel's Motion for Reconsideration are identical for all of the Petitioners.

processor is not in fact usage sensitive. Alltel's claim regarding usage sensitivity fails for the same reason it failed at the time of the initial hearing in this matter.

## **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.

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

Alltel has failed to demonstrate that any new evidence justifies reconsideration of this Commission's February 27, 2009 Findings of Fact and Conclusions of Law. To the contrary, the Findings with which Alltel takes issue, Findings of Fact 16 and 17, are supported by substantial evidence in the record, as well as enduring principles of law. For the reasons as set forth below, there is simply no reason for this Commission to reconsider its ruling.

Findings of Fact ¶¶16-20 addressed the Petitioners' proposed switching rate and the costs included therein. A review of how the switching termination is arrived at in the first place is instructive. The switching termination rate is achieved by first determining the total forward-looking switch investment, which is based upon the location of the Petitioner's existing wire

centers, its total number of current subscribers and its engineering trunking guidelines. See Hearing Exhibits Exhibit 46-49, p. 13, lines 16-28; p. 14, lines 1-2. Once the total switch investment is determined, adjustments are made to eliminate those costs which by law must be excluded from the rate.<sup>2</sup>

Following the initial hearing and oral argument in this matter, this Commission determined that the Petitioners' switching investment, with the exception of three investments, was properly includable in the proposed FLEC study. The Commission ordered that the Petitioners rerun the FLEC model without the costs associated with Web Self-Care, Centrex and CALEA. See Finding of Fact, ¶18. The Commission did not order any other changes to be made to the Petitioners' switching investment.

The Commission also directed the Petitioners to project future demand. See Findings of Fact and Conclusions of Law, p. 15. The Petitioners projected demand from 2006 through 2010. The trending analysis for that time period established that demand for voice services is declining. This decline is the new evidence to which Alltel now cites. This decline in voice demand, however, does not necessitate a change in this Commission's February Findings of Fact. There is ample evidence in the record to establish that the switch is usage sensitive and its costs are properly includable in the Petitioners' FLEC study.

Alltel argues that the decrease in future voice or switched demand should have produced a corresponding decrease in costs. Because there was no such decrease in costs, Alltel argues

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<sup>2</sup> In the case of these Petitioners, "20 percent of the total forward-looking switch investment was excluded for the non-traffic sensitive line portion [ ]" and "5 percent of the switch matrix and processor was excluded for their use in the provision of vertical services." Id. at p. 14, lines 8-11; see also Hearing Transcript, p. 238, lines 8-10 ("[e]xcluded from the study will be the non-usage sensitive line equipment that was discussed in both Ms. Vanicek and Mr. Weber's testimony."); p. 267, lines 20-24. Pursuant to the Commission's Findings of Fact and Conclusions of Law, the costs associated with Web Self-Care, Centrex and CALEA have also been removed from the total switching costs included in the Petitioners' revised FLEC studies. See Hearing Exhibit 78, p. 3, lines 7-10; Hearing Exhibit 79, p. 4, lines 1-25, p. 5, lines 1-11; Transcript p. 15, lines 14-25; p. 17, lines 8-25, p. 18-19, p. 20, line 1. As such, the remaining costs included in the Petitioners' revised FLEC studies are usage sensitive.

that those costs which it has identified as the “getting started costs” cannot be usage sensitive.<sup>3</sup> This argument assumes too much. A decline in future switched demand does not change the fact that a switch processor is a required investment for calls to be placed between the subscribers of Alltel and the respective Petitioners. See Exhibit 80, p. 11. Because both parties need it, the switch processor is necessarily a shared component in the switch. The FCC rules require that the costs associated with shared facilities shall be efficiently apportioned among users. See 47 U.S.C. §51.507(c). Alltel’s proposal to carve out certain costs would effectively shift the costs associated with the Petitioners’ proposed networks to all other users, despite the fact that Alltel uses the Petitioners’ respective switching networks and Alltel’s end users could not complete a call without them. See Hearing Exhibit 11, p. 8, lines 11-25.<sup>4</sup>

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<sup>3</sup> The concept of “getting started costs” was introduced by Alltel during the first hearing. In support of its argument, Alltel relied upon a decision made by the FCC’s Common Carrier Bureau in the Virginia Arbitration Cost Order, 18 FCC Rcd 17722, 17871, 17903, ¶463. While not cited in Alltel’s current motion, Alltel continues to rely upon it. The Virginia proceeding involved a dispute over rates between Verizon of Virginia and AT&T. Verizon of Virginia, the incumbent local exchange carrier, was the party which proposed the concept of “getting started costs.” Id. at 18 FCC Rcd 17722, 17726, ¶¶1-2. Notably, since the inception of these proceedings, the Petitioners have never identified any of the costs associated with their respective switching networks as “getting started costs.” They have never proposed to recover shared switching costs through a “getting started cost” category or rate element. Most significantly, the FCC further recognized the following:

The rules specify that an incumbent LEC shall recover local switching costs “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,” and tandem switching costs “through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.”

Id. at 17861, ¶357. The law provides this Commission with discretion to do as it has done in these arbitration proceedings. The Virginia case did not carry weight at the time of the initial hearing and it should not do so now.

<sup>4</sup> Petitioners’ witness Sue Vanicek testified as follows:

The FCC rules require that the costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users. Mr. Conwell is suggesting that others, for example consumers subscribing to basic local exchange service and interexchange carriers that provide long-distance service, should be required to pay for the use of the switch processor, while wireless carriers such as Alltel should not. Such a pricing regime, that is, requiring consumers and long-distance carriers to pay for the switch processor while not requiring Alltel to do so, would not efficiently apportion costs among users. If Alltel was not required to pay for the use of the switch processor, it would encourage Alltel to maximize its termination to the RLECs, as Alltel would likely receive revenues from its end users for doing so, while not incurring termination costs for the use of switch components.

Hearing Exhibit 11, p. 8, lines 11-25.

Additionally, the Petitioners' proposed switch is still sized for usage and is, therefore, usage sensitive and includable in the switching investment used in the FLEC study. During the August 2009 hearing, Mr. Weber discussed the factors that educated his sizing of the Petitioners' proposed switching networks. Specifically, Mr. Weber explained that: "The switch was designed off of usage-sensitive basis of the number of concurrent call attempts it could handle, not necessarily minutes of use. So while minutes of use may decline, that's not indicative of the requirements for the concurrent call attempts." See Hearing Transcript, p. 69, lines 3-10.

Most significantly, the law has not changed. Switching costs may be recovered through per minute usage charges. See Exhibit 80, p. 11 (citing 47 C.F.R. § 51.509; Finding of Fact, ¶17); see also 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"); 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[.]")).

Finally, Alltel's argument has not changed. While it claims that its request is based upon the submission of new evidence into the record by the Petitioners, one need only look to the July 2008 hearing to realize this is not the case. At the time of the July 2008 hearing, Alltel argued, and the Petitioners did not dispute, that demand for switched traffic is declining. See Finding of Fact, ¶22. Alltel essentially argued that the 'getting started' components of the switch are not usage sensitive because the Petitioners will not exceed the capacity of their switches. See Finding of Fact, ¶16. The Commission rejected this argument. Nothing has truly changed. If the Commission rejected the exhaustion argument initially, it must reject it again.

## CONCLUSION

A party seeking reconsideration must present facts which are sufficient to establish that this Commission overlooked, misapprehended, misunderstood, or ignored law or facts, or was presented with new evidence such to justify a new ruling. The reconsideration process, however, is not intended to give another party multiple bites of the apple. Under the fact and circumstances of these proceedings, the suggestion that somehow a certain percentage or portion of costs can be equated to the decline in demand and then removed from the costs includable in the FLEC study simply does not make sense. Alltel has not met its burden to establish that there are facts sufficient to merit review of, much less overturn, this Commission's February 27, 2009 ruling on the issue of the inclusion of certain switching costs in the Petitioners' FLEC studies. As such, Petitioners respectfully request that this Commission deny Petitioners' Motion for Reconsideration and uphold their proposed switching rates as reasonable and compliant with FCC rules.

Dated this 9th day of October, 2009.

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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 9th day of October, 2009, upon the following:

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One of the Attorneys for the Petitioners