

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT  
OF KENNEBEC TELEPHONE COMPANY,  
INC. AGAINST ALLTEL  
COMMUNICATIONS, INC. FOR  
NONPAYMENT OF TRANSITING  
CHARGES

TC08-031

**OPPOSITION TO ALLTEL'S MOTION  
FOR SUMMARY JUDGMENT**

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COMES NOW Complainant/Plaintiff Kennebec Telephone Company, Inc. ("Kennebec Telephone"), by and through its undersigned counsel of record, and submits its Opposition to Alltel's Motion for Summary Judgment.

**INTRODUCTION**

Nearly two years after this action was filed and after briefing the merits of this action in response to a prior motion for summary judgment, Alltel has now challenged the jurisdiction of this Commission to hear the dispute between the parties. Although a legitimate challenge to subject matter jurisdiction is never untimely, Alltel's challenge is disingenuous and not supported by the law or facts. Rather, this current motion for summary judgment is a delay tactic, designed only to push this matter further down the road without Alltel having to pay charges it had previously admitted liability for by paying for transiting services. As such, Alltel's motion should be denied in order to allow this matter to be heard on the merits.

**BACKGROUND FACTS**

In January 1999, the parties entered into an interconnection agreement through which Kennebec agreed to transit traffic for Alltel, f/k/a WWC License, LLC, at an agreed upon rate per minute of use per route mile. See Complaint at ¶4; Alltel's Answer to Complaint dated March 21, 2008 ("Alltel Answer") at ¶4; Affidavit of Rod Bowar at ¶¶2, 3 ("Bowar Aff."). The Agreement set the applicable rate for transit traffic at .0005. Id. Alltel, then WWC License, paid

the applicable charges billed to it pursuant to this agreement. Id. at ¶1; see also Complaint at ¶5; Bowar Aff. at ¶4. The 1999 Agreement was effective until the parties executed a new interconnection agreement which became effective as of January 1, 2003. See Complaint at ¶4; Alltel Answer at ¶4; Bowar Aff. at ¶5. That interconnection agreement did not set forth the terms of any transiting services. See Complaint at ¶4; Bowar Aff. at ¶6.

In the spring of 2004, Kennebec Telephone, through its agents, entered into negotiations with Alltel for the development of an agreement to govern the terms, conditions and pricing applicable to the provisioning of transiting services. See Complaint at ¶5; Bowar Aff. at ¶7. Based upon these negotiations, Kennebec Telephone continued to provide transiting services for Alltel at a rate of \$.0005 per minute of use per route mile and Alltel continued to pay Kennebec for transiting services. See Complaint at ¶6; Bowar Aff. at ¶8. Until recently, Kennebec Telephone continued to provide Alltel with transiting service from its central office in Presho, South Dakota, where it transits the traffic to a meet point with Golden West Telecommunications Cooperative, Inc., along the White River. See Complaint at ¶¶8, 9; Alltel Answer at ¶ 6; Bowar Aff. at ¶¶8-10. There are direct interconnects available to Alltel in Kennebec's exchange; however, Alltel has chosen not to use these interconnects and therefore a transiting charge is applicable and appropriate. See Bowar Aff. at ¶9.

In approximately April 2007, Alltel ceased paying Kennebec Telephone for transiting services and since that time has made no payments to date, despite repeated requests. See Complaint at ¶¶8, 9; Alltel Answer at ¶6; Bowar Aff. at ¶10. Kennebec Telephone seeks payment of transiting charges billed to, but not paid by, Alltel, Inc. from April 2007 to date. In addition to Kennebec's right to payment, Alltel has challenged the rate at which transiting services were billed. Both issues are squarely within this Commission's authority to determine and therefore, Alltel's motion should be denied.

## LEGAL ANALYSIS

Normally, when considering a motion for summary judgment, the moving party bears the burden of showing that he is entitled to summary judgment, and all inferences which can be reasonably drawn from the facts must be resolved in favor of the nonmoving party. Morgan v. Baldwin, 450 N.W.2d 783, 785 (S.D. 1990). However, this motion is merely styled as a motion for summary judgment, presumably because Alltel believes the Commission needs to make a factual finding that Kennebec is an independent telephone company serving less than fifty thousand local exchange subscribers.

The real issue raised by Alltel is not factual in nature, rather it is a question of law about whether the Commission has the authority to even make factual decisions and orders in this case. In other words, Alltel has challenged whether the Commission has “the power to hear and determine the causes of a general class of cases to which a particular case belongs...[.]” O’Toole v. SD Retirement System, 2002 SD 77, ¶10, 648 N.W.2d 342, 345 (citing 2 AmJur 2d *Administrative Law* § 274 (1994)).

Analysis of this issue is far simpler than it seems at first glance. Alltel admits as much in its own Statement of Material Facts. As this Commission is well aware, Kennebec previously filed a Motion for Summary Judgment in this matter. At that time, the Commission heard the parties’ arguments as to whether a contract existed between Alltel and Kennebec for the compensation of services provided to Alltel by Kennebec. At no time during the argument of Kennebec’s motion did Alltel challenge the jurisdiction of this Commission. More significantly, the Commission, which has the authority to raise any issues it identifies of its own volition, did not question whether it had the authority to exercise subject matter jurisdiction over this matter. In fact, the Commission’s finding in its Order denying Kennebec’s Motion for Summary Judgment specifically stated the following:

The Commission finds that it has jurisdiction over the matter pursuant to SDCL Chapters 1-26, 49-13, and 49-31.

See June 30, 2009 Order Denying Motion for Summary Judgment; Statement of Material Facts, ¶11. Until now, Alltel never objected, either formally or informally, to the Commission's assertion of jurisdiction. While a party never waives its right to challenge subject matter jurisdiction, Alltel's attempt to do so at this late juncture does not make procedural sense as jurisdictional issues are typically dealt with at the outset of a complaint process or as soon as facts are discovered which give reason to question a reviewing body's jurisdiction.

Kennebec brought a complaint against Alltel for failure to pay charges associated with transit traffic. Distilled to its essence, the act of transiting traffic is an intrastate telecommunications service. Alltel paid those charges for four years, and ceased all payment as of April 2007. There is no question that Kennebec has transited traffic across its lines. Alltel's only dispute is over who should pay, and more importantly, what rate should be paid for that traffic. See Alltel's Brief in Opposition to Kennebec's Motion for Summary Judgment. Both of these issues are areas that this Commission addresses on a regular basis. In fact, rate making is an area of the law addressed only by this Commission; hence, it is the *only* proper body to hear this portion of the dispute. The question of who should pay is similarly within the Commission's authority to decide.<sup>1</sup>

“The regulatory scheme of telecommunications services specifically grants PUC authority and jurisdiction over intrastate facilities. Cheyenne River Sioux Tribe Tel. Auth. v.

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<sup>1</sup> It should be noted that this Commission decided a very similar, if not identical, question in In the Matter of WWC License LLC against Golden West Telecommunications Cooperative, Inc. et al., docket # CT05-001. In that case Alltel argued that because the parties' 1999 interconnection agreement did contain a transiting rate, and the 2004 interconnection agreement did not do so, the transiting function was clearly intended to be covered by the reciprocal compensation rate contained in the 2004 agreement. Commission Staff rejected this argument, recommending that the Commission find the existence of an implied contract between the parties for the services provided to WWC by Golden West. See Staff's Reply Brief dated October 23, 2006. It does not appear from the docket that WWC License ever challenged the jurisdiction of the Commission to review the transiting matter, despite the fact that Golden West, according to Commission records, is also a telecommunications carrier with fewer than 50,000 lines.

Public Util. Comm., 1999 SD 60, ¶ 21, 595 N.W.2d 604, 609 (citing 47 USC §152(b)). “The authority of PUC is extensive and crucial to the overall regulatory scheme.” Id. The Commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation and the authority to determine and approve rates. Id.; SDCL §§ 49-31-3 & 49-31-4; see also SDCL §§ 49-1-2, 49-13-1.1, 49-13-4, 49-13-9 and 49-31-81 (providing that both individuals and other entities may apply to the commission for relief and/or the handling of appropriate matters).

Alltel’s argument that this Commission lacks authority to make contract determinations constitutes an incorrect and nonsensical interpretation of the statutory authority granted to the Commission. Whether Kennebec is an “independent telephone company serving less than fifty thousand local exchange subscribers” under SDCL § 49-31-5.1 is irrelevant to the determination of the Commission’s authority here. Even for a telecommunications company that meets the definition of § 49-31-5.1, it is still subject to sections that are not listed as exclusions in § 49-31-5.1. Therefore, regardless of whether Kennebec is subject to SDCL § 49-31-5.1, it is still regulated by the Commission, including regulation of or Commission intervention regarding transiting services. See Public Utilities Commission Declaratory Ruling (F-3436), 364 N.W.2d 124, 128 (S.D. 1985) (“by leaving the statutes standing as to regulation, interconnection of lines, and issuance of public necessity and convenience certificates, [the legislature] intended cooperatives, municipalities, and small independent telephone systems to be so regulated and subject to those statutes. (SDCL 49-31-2, **49-31-3**, 49-31-15, and 49-31-20).”) (emphasis added).

As mentioned in the case above, conspicuously absent from the above-referenced sections is SDCL § 49-31-3. That section reads in part:

The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies. The commission may exercise powers necessary to properly supervise and control such companies.

SDCL § 49-31-3; see also In re US West Communications, Inc., 2000 SD 140, ¶22, 618 N.W.2d 847, 852 (“the PUC has general statutory authority to supervise and control telecommunications companies.”). The South Dakota Supreme Court has determined that the underlying basis for this regulation is to protect the public interest:

Public service commissions are generally empowered to, and are created with the intention that they should regulate public utilities insofar as the powers and operations of such utilities affect the public interest and welfare.

Id. (quoting Northwestern Bell Telephone Co. v. Chicago & NW Transportation, 245 NW2d 639, 642 (SD 1976)).

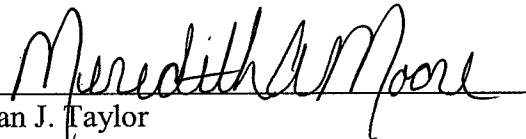
There is no doubt that both Kennebec and Alltel are “telecommunications companies” within the meaning of this section. See SDCL § 49-31-1(28) (providing in part, “any person or municipal corporation owning, operating, reselling, managing, or controlling in whole or in part, any telecommunications line, system, or exchange in this state, directly or indirectly, for public use.”). There is also no doubt that transiting traffic and charges associated with that service are “not otherwise regulated by federal law or regulation.” See 47 U.S.C. §§ 251, 252. Therefore, any disputes involving transiting traffic are wholly within the broad purview of this Commission’s jurisdiction.

Not only does this Commission have the authority to decide the dispute between Kennebec and Alltel, it must exercise this authority to prevent Alltel from unjustly taking advantage of Kennebec. Alltel has the ability to directly connect with facilities necessary to route its calls. However, Alltel chose not to connect directly, but rather transit its traffic through lines owned by Kennebec, presumably to gain a price advantage. Alltel now seeks to avoid

paying any charges to Kennebec for the services it has received under the guise of arguing that the Commission is without authority to regulate Kennebec. Alltel's argument leads to an absurd result whereby it gains the benefit of Kennebec's services, without paying for them, while Kennebec is left without the ability bring a challenge to this unjust action to the very administrative body charged with regulating common carriers and intrastate services. The public interest and welfare is not served by forcing small companies, like Kennebec, to bear the cost of transiting traffic so that major companies like Alltel can bolster their balance sheets. The authority of the Commission to decide this matter cannot be challenged and such an unjust result cannot be tolerated.

Dated in Sioux Falls, South Dakota, this 1<sup>st</sup> day of February, 2010.

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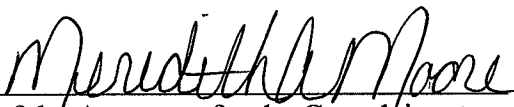
#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent electronically to the following on this 1<sup>st</sup> day of February, 2010:

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