

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

**RESPONSE TO ALLTEL'S  
STATEMENT OF MATERIAL FACTS**

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COMES NOW Kennebec Telephone Company, Inc. and submits the following response to Alltel Communications, Inc.'s Statement of Material Facts in Support of Motion for Summary Judgment Based Upon Lack of Subject Matter Jurisdiction.

1. Alltel and Kennebec Telephone Company, Inc., (hereinafter "Kennebec") entered into an Interconnection Agreement on January 1, 1999, which contained a transiting rate of \$.0005 per mile. See Exhibit A, May 5, 2009, Affidavit of Rod Bowar at ¶¶2, 3 ("Bowar Aff.").

**RESPONSE: Undisputed.**

2. The 1999 Agreement was terminated upon the January 1, 2003, adoption of a new Interconnection Agreement between the parties. Id. at ¶5.

**RESPONSE: Undisputed.**

3. The 2003 Agreement did not discuss transiting services nor did it provide a rate for transiting.

**RESPONSE: Undisputed.**

4. The transiting rate contained in the 1999 Agreement reflected a standard rate that was negotiated for all ILECs by a representative of SDTA and other individuals. See Exhibit B, May 20, 2009, Affidavit of Ron Williams at ¶3 ("Williams Aff.").

**RESPONSE: Undisputed.**

5. This rate was not reached based upon an assessment of actual networks. Id. Rather, it was merely a standard rate for all carriers. Id.

**RESPONSE: Undisputed.**

6. Alltel and Kennebec entered into negotiations for a network appropriate transiting rate upon the termination of the 1999 Agreement. See Bowar Aff. at ¶7.

**RESPONSE: Undisputed.**

7. Alltel began protesting Kennebec's continued assessment of the 1999 transiting rate in 2004. See Williams Aff. at ¶4.

**OBJECTION AND RESPONSE: Kennebec objects to the inclusion of this purported fact as material to the issue of jurisdiction. Without waiving this objection, Kennebec objects to the statement on the basis that Kennebec never received, nor has Alltel produced, any written notice or verbal notice of dispute from Alltel. Alltel continued to make payment in conformance with the invoices billed to it.**

8. Alltel informed Kennebec it had reached an agreement to compensate Qwest Communications for transiting the subject calls and therefore any charges assessed by Kennebec should be collected from Qwest. Id. at ¶6.

**OBJECTION AND RESPONSE: Kennebec objects to the inclusion of this purported fact as material to the issue of jurisdiction. Without waiving this objection, Kennebec objects to the statement on the basis that Kennebec never received, nor has Alltel produced in spite of requests to do so, any written notice or verbal notice of Alltel's purported agreement with Qwest Communications. Moreover, even assuming *arguendo* that such a contract does exist between Qwest and Alltel, Kennebec was not a party to it, and Qwest cannot contract away the rights to Kennebec's network.**

9. In 2007, Alltel ceased payment of the contested charges because the parties had not reached an agreement on the rate, the parties had not entered into an agreement regarding transiting, and the charges remained properly assessed against Qwest instead of Alltel. Id. at ¶7.

**OBJECTION AND RESPONSE: Kennebec objects to the inclusion of this purported fact as material to the issue of jurisdiction. Without waiving this objection, this statement is disputed. Kennebec objects to the statement on the basis that Kennebec never received, nor has Alltel produced in spite of requests to do so, any written notice or verbal notice of Alltel's purported agreement with Qwest Communications. Moreover, even assuming *arguendo* that such a contract does exist between Qwest and Alltel, Kennebec was not a party to it, and Qwest cannot contract away the rights to Kennebec's network.**

10. Kennebec subsequently filed a Complaint with the Commission on February 20, 2009, contending it was due payment for transiting calls from Alltel. See Complaint, TC 08-031.

**RESPONSE: Undisputed.**

11. On May 12, 2009, Kennebec filed a Motion for Summary Judgment on its implied contract claim. Although the Commission denied Kennebec's Motion, it indicated in the related Order.

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.

**RESPONSE: Undisputed. Moreover, this statement represents the Commission's assertion of jurisdiction in this matter, which assertion is now law of the case because of Alltel's failure to object to such finding.**

12. Kennebec is an independent telephone company serving less than fifty thousand local exchange subscribers. See Exhibit C, January 15, 2010, Affidavit of Talbot J. Wieczorek, ¶2.


**OBJECTION AND RESPONSE: Undisputed. However, Kennebec objects to the inclusion of this statement as a fact material to this Commission's authority to take jurisdiction over this case.**

13. Kennebec did not elect, under SDCL § 49-39-5.1, to voluntarily submit itself to Commission rate regulation. Id. at ¶3.

**OBJECTION AND RESPONSE: Kennebec objects to the characterization of this statement as one of material fact. The statement presumes that Kennebec's failure to utilize the procedure set forth in SDCL § 49-39-5.1 is dispositive of the issue of jurisdiction. Without waiving this objection, Kennebec does not dispute the fact that it has not elected to file with the Commission a board resolution to submit itself to rate regulation.**

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

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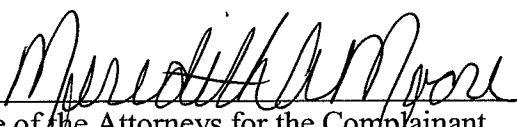
**CERTIFICATE OF SERVICE**

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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