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March 21, 2008

### E-FILING

Patricia Van Gerpen  
South Dakota Public Utilities Commission  
Capitol Building, 1<sup>st</sup> Floor  
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Pierre SD 57501-5070

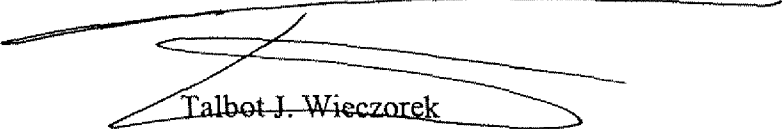
RE: In the matter of the Complaint of Kennebec Telephone Company, Inc. against  
Alltel Communications, Inc. for nonpayment of transiting charges  
TC08-031  
GPGN File No. 5925NYO

Dear Ms. Van Gerpen:

Attached please find Alltel's Response to the above-entitled complaint filed by Kennebec Telephone Company.

If you have any questions, please call me.

Sincerely,



Talbot J. Wieczorek

TJW:klw

Enclosure

c: Service list via e-mail  
Clients

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

TCO8-031

ALLTEL'S RESPONSE

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COMES NOW ALLTEL COMMUNICATIONS, LLC ("Alltel") by and through its undersigned counsel, and responds to the Complaint of Kennebec Telephone Cooperative ("Kennebec") as follows:

1. Unless specifically and expressly admitted herein, Alltel denies each and every allegation within the Complaint.

2. With respect to paragraphs 1 and 2 of the Complaint Alltel admits that Kennebec is an incumbent local exchange carrier within the State of South Dakota subject to the jurisdiction of the Public Utilities Commission of the State of South Dakota. However, Alltel denies that Kennebec is entitled to seek the recovery pled in the Complaint.

3. With respect to paragraph 3 of the Complaint, Alltel admits it is authorized to conduct wireless operations within the State of South Dakota. However, Alltel is now a limited liability company organized under the laws of the State of Delaware and its relevant contact information is as follows:

Stephen Rowell  
One Allied Drive  
Little Rock, AR  
501-905-8460

## FACTUAL BACKGROUND

4. With respect to the Factual Background alleged in paragraphs 4-9 of the Complaint, Alltel admits that prior to the parties 2003 interconnection agreement effective January 1, 2003 (the “2003 ICA”) the parties operated under a previous interconnection agreement (the “1999 ICA”) that included specific terms, conditions and a rate for transiting services provided by Kennebec. The 1999 ICA, including its terms and conditions for transiting services, was terminated by the parties effective January 1, 2003. The subsequent ICA between Alltel (WWC License) and Kennebec (in effect between January 1, 2003 and December 31, 2006) by its express terms superseded and replaced entirely the prior agreement but did not impose any rate or terms for transit transport services.

5. Subsequent to the execution of the 2003 ICA, the parties discussed a possible separate agreement for transiting services. However, the parties did not reach any agreement and did not execute a separate agreement with respect to transiting services or agree that Alltel has any financial responsibility to Kennebec for this transit transport or with respect to a rate that would be applicable if Alltel was responsible for such transiting transport services. Alltel expressly rejected the continued use of the transiting rate identified in the terminated 1999 ICA.

6. Despite the lack of any agreement with respect to rate or terms and conditions addressing transiting transport services, Kennebec continued to bill Alltel under the terms and conditions of the terminated 1999 ICA. Alltel mistakenly continued to pay the charges, but upon discovering that Kennebec was billing Alltel for services under the terminated 1999 ICA, Alltel discontinued payment in April 2007. In entering into the 2003 ICA, the parties expressly understood it did not provide for the recovery of transiting transport charges from Alltel.

7. Kennebec's claim for compensation for transiting transport services relates to traffic originated by Alltel subscribers to subscribers of Vivian Telephone Co. Alltel exchanges such traffic with Vivian through the use of indirect interconnection. Alltel hands the traffic to Qwest as the transiting carrier. Qwest apparently delivers the traffic to Kennebec for delivery to Vivian. The exchange of traffic between Qwest and Kennebec for delivery to Vivian is pursuant to an arrangement between those companies and Alltel is not a party to any agreements between those carriers. Qwest apparently has arrangements to deliver such traffic to Vivian at a POI in Kennebec's service area and that traffic is ultimately transported to Vivian's end office for termination.

8. Kennebec's arrangements with Vivian and/or Qwest for delivery of this traffic may or may not provide it compensation for such transiting transport services directly from Qwest by either payment of charges or by mutual traffic exchange. Either of those methods provide it compensation and it would thus be seeking a double recovery for such services in seeking payment for such transiting transport services from Alltel as well. Alternatively, if it has obtained compensation in those arrangements, it may have waived such as its relationship is with those carriers.

9. Kennebec did not, at any relevant time to this proceeding, and does not presently have a filed and approved tariffed rate with respect to the transit services that it is asking this Commission to force Alltel to pay. Nor do Alltel and Kennebec have an effective agreement providing for such an obligation. Kennebec, therefore, has no lawful basis to bill Alltel for the services for which it seeks compensation.

**FIRST CAUSE OF ACTION**  
**BREACH OF IMPLIED CONTRACT**

10. Alltel incorporates paragraphs 1-9, as if fully stated herein and with respect to complaint paragraphs 10-12, responses are as follows:

11. Kennebec, a regulated public utility, has no lawful claim against Alltel for compensation under a theory of breach of implied contract. Kennebec may lawfully bill only rates and for services where it has a filed and approved tariff and in certain instances pursuant to agreements on file and approved by this Commission.

12. S.D.C.L. 49-31-12.2 proscribes that a telecommunications company shall “print and keep for public inspection in a convenient and publicly accessible place, its tariff showing the rates or prices for telecommunications services offered by the company which are in force at the time” and shall “not deviate from any of its current published rates.” One of the purposes of the filed rate doctrine is “insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require.” *Qwest Corp. v. Scott* 380 F.3d 367, 374 (8th Cir. 2004). Under the filed rate doctrine, as set forth in this statute, Kennebec may only bill effective rates and can not lawfully bill any rate for service that is not on file with and approved by the Commission. As a regulated utility, implied contract is, therefore, not a lawful basis for compensation.

13. Alltel also affirmatively denies the formation and existence of an implied contract for transiting transport services. Under S.D.C.L. 53-1-2, one of the essential elements of a contract is consent. The consent must be free, mutual and communicated. S.D.C.L. 53-3-1. Additionally, consent is not mutual unless the parties all agree on the same thing in the same sense. S.D.C.L. 53-3-3. There is no implied contract between Alltel and Kennebec as there was no mutual consent between the parties regarding transiting transport services. Upon termination of the 1999 ICA and effectiveness of the 2003 ICA, the parties expressly understood there would

be no agreement between the parties with respect to transiting transport services. In discussions with Kennebec representatives, Alltel affirmatively rejected the continued use and reliance on the transiting rate identified in the terminated 1999 ICA. Any subsequent or continued payment by Alltel of the transiting rate imposed under the terminated 1999 ICA was done in error and thus Alltel is entitled to recovery of such previous payments made in error.

**SECOND CAUSE OF ACTION**  
**UNJUST ENRICHMENT**

14. Alltel incorporates paragraphs 1 -13 as if fully stated herein and in response to complaint paragraphs 13-16, responses are as follows:

15. Kennebec has no lawful claim against Alltel for compensation under a theory of unjust enrichment. Again, Kennebec may lawfully bill only pursuant to rates and for services for which it has a filed and approved tariff and in certain instances pursuant to agreements on file and approved by this Commission. See S.D.C.L. 49-31-12.2. As a regulated utility, unjust enrichment like the implied contract theory, is, therefore, not a lawful basis for compensation.

**AFFIRMATIVE DEFENSES**

16. As an affirmative defense, Kennebec is also not entitled to compensation as it appears it is already being compensated for the services or has waived charges for such services. Upon information and belief, Kennebec has arrangements with Qwest and/or Vivian that provide or waive compensation for such transiting transport services for traffic delivered to Vivian by Qwest. Alltel relies upon Qwest, as the intermediate carrier, for ultimate delivery of such traffic to the terminating carrier and as such the arrangement for transiting transport of such traffic for ultimate termination to Vivian exchanges is between Qwest and Kennebec and Vivian – not Alltel.

17. As an affirmative defense, the per minute/per mile transiting transport charge claimed by Kennebec is not fair and reasonable and has not been approved as such. Other than rates negotiated between parties and then approved by the Commission, rates imposed by regulated companies must be established in accordance with the applicable statutory requirements. The rate that Kennebec is attempting to impose has not been established in accordance with law and is clearly not reasonable. The proposed rate is far in excess of its tariffed interstate access rate for similar service.


18. As an affirmative defense, Kennebec cannot legally charge for transiting these calls.

THEREFORE, Alltel Communications prays for relief as follows:

1. That Petitioner's claims be dismissed and Petitioner take nothing thereby;
2. For Alltel's costs and disbursement to the extent allowed by law; and
3. For such other and further relief as the Commission may deem just and equitable.

Dated this 21<sup>st</sup> day of March, 2008.

GUNDERSON, PALMER, GOODSSELL  
& NELSON, LLP



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 21st day of March, 2008, I served a true and correct copy of Alltel's Response to Kennebec's Complaint electronically to:

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