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February 5, 2010

### E FILING

Patricia Van Gerpen  
Executive Director  
SDPUC  
500 E Capital Avenue  
Pierre, SD 57501-5070

Re: In the matter of the Complaint of Kennebec Telephone Co., Inc. Against  
Alltel Communications, Inc. for Nonpayment of Transiting Charges  
TC08-031 GPNA File No.: 05925.0049

Dear Ms. Van Gerpen:

Enclosed for filing in the above-entitled matter, please find Alltel's Reply to Kennebec's Opposition to Alltel's Motion for Summary Judgment Based Upon Lack of Subject Matter Jurisdiction. By copy of same, counsel have been served. If you have any questions, please call me.

Sincerely,



Talbot J. Wieczorek

TJW:klw  
Enclosures  
C: Service List  
Client

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**  
REPLY TO KENNEBEC'S OPPOSITION TO  
ALLTEL COMMUNICATIONS, INC.'S  
MOTION FOR SUMMARY  
JUDGMENT BASED UPON LACK  
OF SUBJECT MATTER JURISDICTION

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COMES NOW Alltel Communications, LLC (hereinafter "Alltel") by and through its counsel of record, Talbot J. Wieczorek of Gunderson, Palmer, Nelson & Ashmore, LLP, and hereby submits Alltel's Reply to Kennebec Telephone Company, Inc.'s (hereinafter "Kennebec") Opposition to Motion for Summary Judgment Based Upon Lack of Subject Matter Jurisdiction.

**DISCUSSION**

Kennebec's allegations that the timing of Alltel's subject matter jurisdiction challenge renders it disingenuous, procedurally nonsensical, and improperly proffered to cause delay; are made in complete disregard for the absence of timing constraints over and the fundamental purpose of such a challenge. Challenges to subject matter jurisdiction are invited throughout the course of litigation because the consequence of a tribunal's determination, made in the absence of subject matter jurisdiction, is the determination is deemed void. Barnes v. Matzner, 2003 SD 42, ¶ 10, 661 N.W.2d 372, 375 (citing In re Application of Koch Exploration Co., 387 N.W.2d 530, 536 (S.D. 1986)). More importantly, subject matter jurisdiction, "...can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ." Id. (quoting Freeman v. Sadlier, 1998 SD 114, ¶ 10, 586 N.W.2d 171, 173). Further, "Because jurisdictional questions have no time limitation, they can be raised at any time by either the parties or the court sua sponte." Id. Accordingly, Kennebec's repeated unsupported

assertions that the timing of Alltel's Motion for Summary Judgment somehow renders it improper are without merit.

**A. Standard of Review.**

Kennebec appears to infer that this motion is not properly raised as a motion for summary judgment. Irrespective of how a motion is presented, if the parties present evidence outside the pleadings, the motion is properly considered by the Commission as a motion for summary judgment. Tiede v. Cortrust Bank, N.A., 2008 SD 31, ¶ 6, 748 N.W.2d 748, 750 (*citing* Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Const. Inc., 2005 SD 87, ¶ 6, 701 N.W.2d 430, 434 (*citing* Tibke v. McDougall, 479 N.W.2d 898, 903-04 (S.D. 1992))). In this case, Alltel submitted facts for the Commission's consideration that are not contained in the pleadings. *See* Alltel's Statement of Material Facts. Kennebec also incorporated facts from Mr. Bowar's Affidavit in its Opposition brief. As a result, the motion is appropriately considered under the legal standards for summary disposition set forth in Alltel's Brief in Support of Motion for Summary Judgment. There under, in the event the Commission concludes there is no question of material fact, the Commission may determine the issue of subject matter jurisdiction as a matter of law.

**B. Legal Argument.**

Subject matter jurisdiction is, "...conferred solely by constitutional or statutory provisions..." Barnes, 2003 SD 42 at ¶ 10 (*quoting* Freeman, 1998 SD 114 at ¶ 10). The South Dakota Supreme Court has expressly held that in the absence of such conference of authority, the Commission lacks the power to interpret contracts. In re Northwestern Public Service Co., 1997 SD 35, ¶ 29, 560 N.W.2d 925, 930; *See Also* In re Application of the City of White, 294 N.W.2d 433, 435 (S.D. 1980)(holding the Commission did not have jurisdiction to determine

compensation due, if any, under service contracts); Williams Elec. Coop., Inc., 79 N.W.2d at 518 (upholding NDPUC determination that it did not have jurisdiction to consider the construction, interpretation, and enforcement of private contracts). More specifically, in In re Northwestern Public Service Co., the court concluded that the Commission lacked the authority to make any determination as to rates for a rural electric cooperative. Id. at ¶ 28. It also concluded that the guidelines provided for the Commission’s general authority over public utilities, “...does not include contract interpretation as an authority or power of the PUC. Id. at ¶ 29 (*citing* S.D.C.L. § 49-34A-4). A similar analysis extends to the scope of authority extended to the Commission in S.D.C.L. Ch. 49-31.

In the case presently before the Commission, Kennebec has failed to provide a single constitutional or statutory provision that grants the Commission the authority to interpret or enforce implied contracts.<sup>1</sup> Kennebec also failed to undertake any efforts to distinguish or denounce the extension of In re Northwestern Public Service Co., to the issue presently before this Commission. Instead, Kennebec argues, without any supporting authority, that the general authority provided in S.D.C.L. § 49-31-3, encompasses implied contract interpretation. Kennebec’s position fails to acknowledge that the ultimate issue in this case concerns transiting rates, and that by statute Kennebec is exempt from Commission rate regulation. S.D.C.L. § 49-31-5.1; SMF ¶ 12; SMF ¶ 13; In the Matter of the Public Utilities Commission Declaratory Ruling (F-3436), 364 N.W.2d 124, 128 (S.D. 1985)(finding that the legislature intended to exempt “...small independent telephone systems from rate regulation...”). It also ignores the fact that while S.D.C.L. § 49-31-5, confers specific authorities upon the Commission, the statute

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<sup>1</sup> Kennebec incorrectly implies in a footnote that because subject matter jurisdiction was not challenged in In the Matter of WWC License, LLC against Golden West Telecommunications Cooperative, Inc., et. al. Docket # CT 05-001; that the Commission must have jurisdiction in this instance. As indicated above, subject matter jurisdiction cannot be conferred upon a tribunal through the action or inaction of the parties. Barnes, 2003 SD 42 at ¶ 10.

is silent on contract interpretation. As there are no statutory provisions that grant the Commission the authority over contract interpretation, the Commission lacks subject matter jurisdiction or this transiting rate dispute.


Finally, Kennebec's suggestion that the Commission is the "...*only* proper body to hear this portion of the dispute..." is patently incorrect. (*emphasis in original*). Furthermore, Kennebec's assertion that it will be left without a remedy is disingenuous. Kennebec is well aware that it may bring this issue in state or federal court. S.D.C.L. § 16-6-9; 28 U.S.C. § 1332.

### CONCLUSION

Alltel respectfully requests that this Commission summarily dismiss Kennebec's Complaint as the Commission lacks subject matter jurisdiction over the issues raised therein.

Dated this 5<sup>th</sup> day of February, 2010.

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 5<sup>th</sup> day of February, 2010, I served a true and correct copy of Reply to Opposition to Alltel Communication, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction electronically to:

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