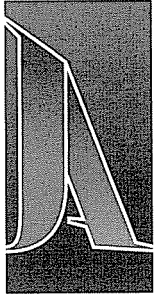


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AMLUNG  
LAW OFFICES

February 12, 2007

Ms. Beth O'Donnell, Executive Director  
Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, KY 40602

RECEIVED

FEB 14 2007

PUBLIC SERVICE  
COMMISSION

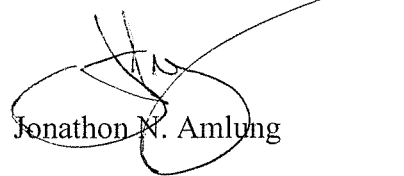
**RE: Touchtone Communication, Inc., and ALEC, Inc. v.  
Kentucky ALLTEL, Inc.,  
Case No. 2005-00482**

Dear Ms. O'Donnell:

Please find enclosed for filing an original and four (4) copies of ALEC's Responses to Windstream's Second Set of Data Requests and First Set of Requests for Admission, for filing in the above-referenced case. Also, please find enclosed for filing ALEC's Motion to file late responses to these requests.

Thank you for your attention to this matter. Please do not hesitate to contact me should you have any questions or concerns.

Cordially yours,



Jonathon N. Amlung

Enclosures

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

TOUCHTONE COMMUNICATIONS, INC. )  
and ALEC, Inc., )  
 )  
Complainants, )  
 )  
vs. )  
 )  
KENTUCKY ALLTEL, Inc., )  
 )  
Defendant. )

Case No.  
2005-00482

RECEIVED  
FEB 14 2007  
PUBLIC SERVICE  
COMMISSION

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MOTION TO FILE LATE DATA REQUEST RESPONSES

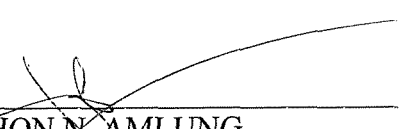
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The Complainants, Touchtone Communications, Inc., and ALEC, Inc. (collectively "ALEC"), hereby move this Honorable Commission for leave to file late responses to Windstream's Second Set of Data Requests and First Set of Requests for Admission. In support of this motion, ALEC asserts that its attorney, Jonathon N. Amlung, consulted with Mark Overstreet, the attorney for Windstream in this matter. Mr. Overstreet did not have any objection to the late filing of these responses by February 9, 2007. Copies of ALEC's responses were provided via e-mail to Mr. Overstreet and P.S.C. staff attorney Jeb Pinney on February 9, 2007. Counsel for ALEC received Windstream's responses to its Second Set of Data Requests February 11, 2007.

ALEC's paper filing is being made with the filing of this motion. No apparent prejudice will result to any party as a result of the delay in filing these responses by ALEC and Windstream.

WHEREFORE, ALEC moves this Commission for leave to file its responses to Windstream's discovery requests outside of the previously allotted time.

Respectfully submitted,



---

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*Attorneys for Complainants*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served upon the following via Electronic Mail and/or regular U.S. Mail, postage pre-paid, this the 12th day of February, 2007:

Hon. Mark Overstreet  
STITES & HARBISON, PLLC  
421 West Main Street  
P.O. Box 634  
Frankfort, KY 40602-0634  
[MOVERSTREET@stites.com](mailto:MOVERSTREET@stites.com)



---

JONATHON N. AMLUNG

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

<b>TOUCHTONE COMMUNICATIONS, INC.</b>	)	
<b>and ALEC, Inc.,</b>	)	
	)	
<b>Complainants,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No.</b>
	)	<b>2005-00482</b>
	)	
<b>KENTUCKY ALLTEL, Inc.,</b>	)	
	)	
<b>Defendant.</b>	)	

**ALEC'S RESPONSES TO WINDSTREAM'S SECOND SET OF DATA REQUESTS  
AND FIRST SET OF REQUESTS FOR ADMISSION**

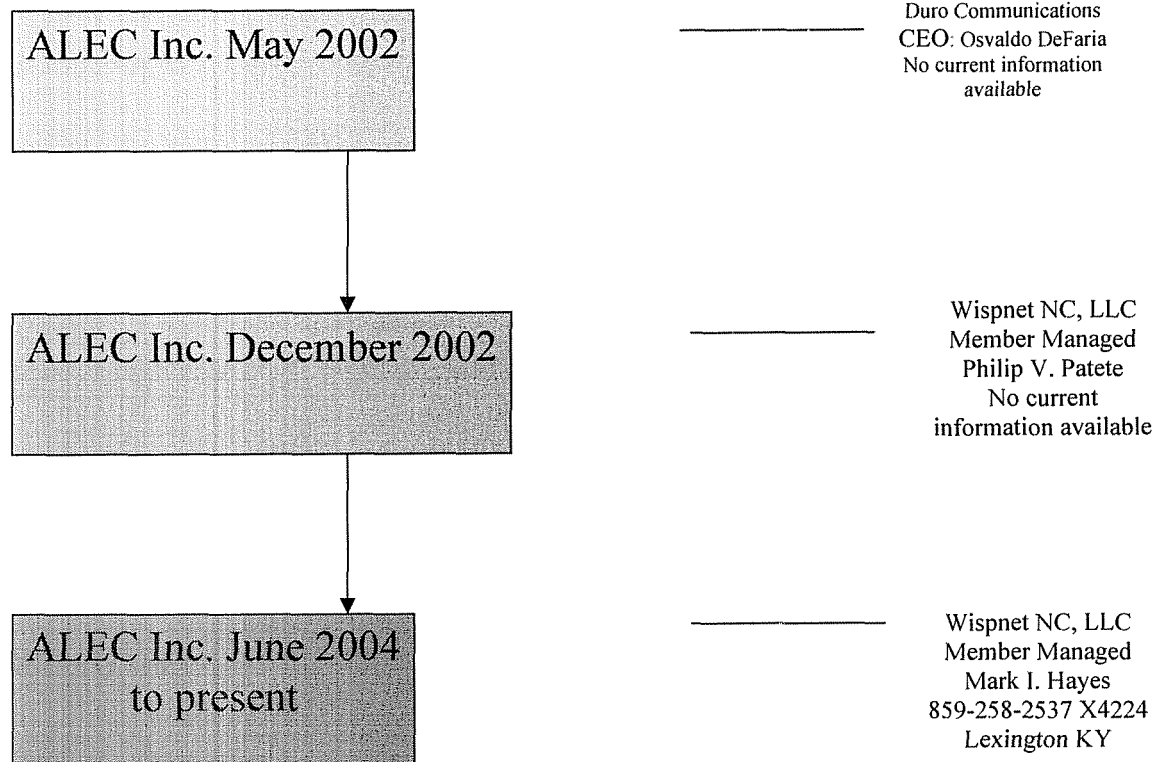
Come now the Complainants, Touchtone Communications, Inc., and ALEC, Inc. (collectively "ALEC"), by and through counsel, and for their responses to the Second set of Data Requests and First set of Requests for Admission of Defendant, Windstream Kentucky East, Inc. f/k/a Kentucky ALLTEL, Inc., state as follows:

**SECOND DATA REQUEST NO. 2-1:** With respect to your responses to Data Requests No. 1 and 2, provide copies of all calculations, formulas, exhibits, memoranda, records, rates, spreadsheets, and other documents that support, detail, and explain the dollar amounts alleged in the exhibits to your Complaint. Include the raw data and other informational materials supporting and explaining the alleged amounts and not summaries or invoices of the alleged amounts.

**RESPONSE:** We have previously provided the information in our possession, in the Complaint and in the overview.

**SECOND DATA REQUEST NO. 2-2:** Identify (a) the prior management of ALEC or its predecessor in interest that was in place as of May 2002 and (b) all changes to that management structure from May 2002 through the date of these Second Data Requests. Include specific names, job titles, job descriptions and areas of responsibility, and current contact information for all management personnel identified herein.

**RESPONSE:**



In December of 2002, Wispnet NC, LLC, purchased ALEC, Inc. Wispnet NC, LLC, was owned by investors with a majority of 60%, and 40% owned in minority by WISPNET, LLC. This continues in 2006.

**SECOND DATA REQUEST NO. 2-3:** Provide copies of all documents, files, retainer agreements, engagement letters, internal announcements, memoranda, and other information supporting, documenting, detailing, and discussing the management structures requested in Second Data Request No. 2-2 above.

**RESPONSE:**

This provision is in the ALEC operating agreement - Management provision:

**ARTICLE VI  
MANAGEMENT**

**Section 6.1 -- Management.**

Control of the Company and all of its affairs shall be vested in the Managing Member who initially shall be Philip V. Patete. Except as otherwise provided in Section 6.3 of this Agreement, Company business decisions shall be made by the Managing Member acting on behalf of the Company. The Managing Member shall be elected at each annual meeting of Members or a special meeting called for the purpose of electing the Managing Member by a Majority in Interest of the Members.

**Section 6.2 -- Term of Office, Resignation.**

The Managing Member shall hold office until the next annual meeting of the Members, or until his successor is elected, or until his resignation, removal from office or death.

The Managing Member may resign at any time by providing an oral statement to that effect at a meeting of the Members or by submitting a writing to that effect to the Members. Such resignation shall take effect immediately or at such other time as such Managing Member may specify.

**SECOND DATA REQUEST NO. 2-4:** Identify and provide the internal records, files, account information, and other documents you used to transition billing functions from ALEC's "prior management" and to resume or initiate billing to Verizon South, Inc.

**RESPONSE:** No transition between systems or people in the billing function took place from ALEC's prior management – see ALEC's response to Data Request 2-13 for a list of the people involved with billing function.



**SECOND DATA REQUEST NO. 2-5:** With respect to your response to Data Request No. 5, identify in detail Richard McDaniel's job responsibilities as an employee of both Duro Communications and ALEC and provide copies of all electronic and written correspondence pertaining to Richard McDaniel's job responsibilities, relationship with, or representation of ALEC, Inc. and Duro Communications.

**RESPONSE:**

Richard McDaniel's prior job responsibilities at Duro Communication are unknown. He acted as a consultant to ALEC and still provides some consulting services to them. The e-mails below show correspondence between ALEC and McDaniel as to any accounts receivable directions he was given by ALEC at the time of transition between ALEC and Duro.

----- Original Message -----

**From:** Richard McDaniel  
**To:** Travis.Jones@alttel.net  
**Cc:** Philip V. Patete Ph.D.  
**Sent:** Monday, February 17, 2003 11:32 PM  
**Subject:** Invoices

Travis: Thanks for your help in getting the invoices sent to the proper locations. As requested today, I am enclosing an invoice for the August timeframe. Please send the total amount for invoices TU200208-1, TU200209-1, TU200210-1 and TU200211-1 to:

ALEC, Inc.  
P. O. Box 950638  
Lake Mary, FL 32795-0638

Send the total for invoice TU200212-1 and future invoices to:

ALEC, Inc.  
250 West Main Street Suite 710  
Lexington, KY 40507

If you have any questions, please give me a call. I did not get the invoice in overnight but will do so tomorrow.

Richard McDaniel  
MTA Consulting  
mcdaniel@mta-consulting.com  
Phone 706 467 0661  
Fax 509 756 2132  
Cell 706 318 7898

**SECOND DATA REQUEST NO. 2-6:** With respect to your response to Data Request No. 5, identify in detail all work, transactions, and other deals in which Richard McDaniel acted as a consultant on behalf of both Duro Communications and ALEC, Inc. and identify in which instances Duro Communications and ALEC, Inc. shared or were otherwise jointly responsible for Mr. McDaniel's consultant fees.

**RESPONSE:** Please see response to Second Data Request No. 2-5. To the extent that this Data Request is understood, I was not privy to transactions or responsibilities to transactions of Richard McDaniel either as an employee or consultant for that period.

**SECOND DATA REQUEST NO. 2-7:** With respect to your response to Data Request No. 5, identify each of your employees and representatives supporting the statement, “The ALEC management group was not aware of this activity until this year when ALLTEL informed them of such.” Include specifically, each employee or representative’s name, job title, job description, and current contact information.

**RESPONSE:** To the best of my knowledge, there was no correspondence between DURO Settlement Group and Mark Hayes (President) or any of my employees during the period responded in Data Request No.5.

**SECOND DATA REQUEST NO. 2-8:** Identify in detail and explain all transactions between ALEC, Inc. and Duro Communications (including any Duro affiliate), including specifically any enterprise transactions, vendor relationships, receivable purchases, and other business dealings and relationships. Produce copies of all records, agreements, contracts, nondisclosure agreements, memoranda, and other documents setting forth, discussing, or establishing such dealings and contractual relationships.

**RESPONSE:** Please see attachment hereto.

**SECOND DATA REQUEST NO. 2-9:** With respect to your responses to Data Request No. 5 through 7, provide copies of all asset purchase agreements, merger agreements, and other transactional documents between ALEC, Inc. and Duro Communications (including any Duro affiliate).

**RESPONSE:** Please see attachment hereto.

**SECOND DATA REQUEST NO. 2-10:** With respect to your responses to Data Requests No. 5 through 7, provide copies of all asset purchase agreements, merger agreements, and other transactional documents between ALEC, Inc. and Wispnet NC, LLC, Wispnet, LLC, or any Wispnet affiliate.

**RESPONSE:** ALEC objects to this request as it is overly broad and vague and seeks information that is not properly discoverable.

**SECOND DATA REQUEST NO. 2-11:** With respect to your responses to Data Request No. 5 through 7, provide copies of all asset purchase agreements, merger agreements, and other transactional documents between Duro Communications and Wispnet LLC or Wispnet NC LLC.

**RESPONSE:** ALEC objects to this request as it is overly broad and vague and seeks information that is not properly discoverable. Without waiving this objection, please see the attached Operating Agreement.

**SECOND DATA REQUEST NO. 2-12:** With respect to your responses to Second Data Requests No. 2-8 through 2-11 above and the transactional information sought therein, provide copies of all documents, information, records, memoranda, contracts, agreements, or other files pertaining to the use of entity/company names, handling of employee retention or transfers (including key management personnel), and transfer of billing and other retail/wholesale customer or vendor account information.

**RESPONSE:** ALEC objects to this request as it is overly broad and vague and seeks information that is not properly discoverable.



**SECOND DATA REQUEST NO. 2-13:** With respect to your responses to Data Request No. 5 through 7 and the Second Data Requests No. 2-8 through 2-12 above, identify the individual employees and key manager that were assigned the responsibility of transitioning wholesale customer files, interconnection agreements, and billing information and functions among ALEC, Inc. Duro Communications (including all Duro affiliates), Wispnet NC LLC, and Wispnet LLC. Indicate which of those employees are still retained or employed by ALEC, Inc.

**RESPONSE:** The individuals assigned the responsibility of transitioning wholesale customer files, interconnection agreements, billing information and functions among ALEC Inc, DURO Communications, Wispnet, LLC and Wispnet NC, LLC, are the below listed individuals:

Mark I. Hayes: Manager- still retained  
Mark S. Elliott: Manager- still retained  
George T. Holmes: Manager- still retained

**SECOND DATA REQUEST NO. 2-14:** With respect to your responses to Data Request No. 5 through 7, state the exact, correct and full legal name of each of ALEC, Inc.'s current affiliates, holding companies, parents, partners and subsidiaries.

**RESPONSE:** ALEC, Inc.- operating company

Wispnet NC, LLC - parent company

**SECOND DATA REQUEST NO. 2-15:** With respect to your responses to Data Request No. 5 through 7, state the exact, correct and full legal name of each of ALEC, Inc.'s predecessors.

**RESPONSE:** Touchtone Communications, Inc.

**SECOND DATA REQUEST NO. 2-16:** For each entity identified in response to Second Data Requests No. 2-14 and 2-15, list the state(s) and date(s) of incorporation for each (including both domestic and foreign incorporations). For any entities that are not corporations, list the state(s) where they are authorized to do business and provide the relevant secretary of state certification.

**RESPONSE:** ALEC, Inc. incorporated 1996 in state of Kentucky

Touchtone Communications, Inc. incorporated in 1998 in Kentucky.

Wispnet NC, LLC incorporated in state of North Carolina 2002

WISPNET, LLC incorporated in state of Kentucky 2002

**SECOND DATA REQUEST NO. 2-17:** For each entity identified in response to Second Data Requests No. 2-14 and 2-15, list each entity's alias or assumed name and provide copies of all supporting d/b/a filings, registrations, or certifications.

**RESPONSE:** None currently known. ALEC, Inc. once had an assumed name of Volaris Telecom, Inc., which was withdrawn on March 24, 2003.

**SECOND DATA REQUEST NO. 2-18:** For each entity referenced in your responses to Date Requests No. 5 through 7 and Second Data Requests No. 2-14 and 2-15, list all common owners, directors, principles, investors, officers, and managers shared between or among any of the entities. Provide copies of all board minutes, corporate resolution, or other documents establishing or discussing the common or joint ownership and management.

**RESPONSE:** ALEC objects to this request as it is overly broad and vague and seeks information that is not properly discoverable.

**SECOND DATA REQUEST NO. 2-19:** With respect to the chart/organizational diagrams you provided in response to Data Request No. 6 and 7, list the exact, correct and full legal name for each entity set forth in the boxes on the diagrams. Also identify whether each transaction referenced was an asset acquisition or a merger.

**RESPONSE:**

Duro Communications, Inc. acquired ALEC, Inc. in 1999.

Wispnet NC, LLC, acquired ALEC, Inc. in 2002.

**SECOND DATA REQUEST NO. 2-20:** With respect to your responses to Data Request Nos. 1 through 7, identify all states in which you or your affiliate operates. For each state identified, explain whether you or your affiliate operates therein as an Internet Service Provider (“ISP”), ISP aggregator, competitive local exchange carrier, or toll provider.

**RESPONSE:** ALEC Operates as a competitive local exchange provider in Ohio, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, and Mississippi. Wispnet NC, LLC, operates in the state of North Carolina as a communications provider. WISPNET, LLC, operates in the state of Kentucky as a communications provider.



**SECOND DATA REQUEST NO. 2-21:** With respect to your responses to Data Request Nos. 1 through 7 and Second Data Request No. 2-20, list by name (as the agreement appears on state commission websites) all interconnection agreements pursuant to which you or your affiliates operate in each state identified.

**RESPONSE:** GTE South and Touchtone Communications, Inc.  
Bellsouth Telecommunications and ALEC, Inc.  
Cincinnati Bell Telephone, LLC and ALEC, Inc.  
Sprint and ALEC, Inc.  
Verizon Florida, Inc. f/k/a GTE Florida, Inc.  
Brandenburg Telephone Company, Inc.

**SECOND DATA REQUEST NO. 2-22:** With respect to your response to Data Request No. 8, identify the LRN and calling party number for each record in the file you provided.

**RESPONSE:** ALEC objects to this request as it is overly broad, vague and unduly burdensome, and seeks information that is not properly discoverable.

**SECOND DATA REQUEST NO. 2-23:** With respect to your response to Data Request No. 8, identify the carrier associated with each Carrier Identification Code (“CIC”) referenced in the files you provided.

**RESPONSE:** ALEC objects to this request as it is overly broad, vague and unduly burdensome and seeks information that is not properly discoverable.

**SECOND DATA REQUEST NO. 2-24:** With respect to your response to Data

Request No. 8, provide records (of any type and not limited to EMI records) for August 2006 and include all of the following fields with respect to each record:

- a. All carrier usage and not just that usage that is specific to Windstream;
- b. "From" telephone number;
- c. "To" telephone number;
- d. Date of call;
- e. Minutes;
- f. Carrier Identification Code ("CIC");
- g. "From" Local Routing Number ("LRN");
- h. "To" LRN;
- i. Method of Recording Field; and
- j. Connect Time.

**RESPONSE:** We have already provided this information.

**SECOND DATA REQUEST NO. 2-25:** With respect to the file you provided in response to Data Request No. 8, explain the process you use to identify the calling party number and local routing number.

**RESPONSE:** ALEC identifies the originating carrier through the OCN and CIC and then utilized the factors as they are designated in the ICA for proportioning traffic.

**SECOND DATA REQUEST NO. 2-26:** With respect to your responses to Data Requests No. 3 through 5, state the date(s) that you began operating in Kentucky and were authorized to do business in the Commonwealth.

**RESPONSE:** We have already provided this information.

## REQUESTS FOR ADMISSION

**REQUEST FOR ADMISSION NO. 1:** Did ALEC, Inc. adopt the interconnection agreement that is at issue in this proceeding?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 2:** Did Richard McDaniel operate as a consultant on behalf of ALEC, Inc. without any retainer agreement, letter of engagement, or written definition as to his job responsibilities?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 3:** Was ALEC, Inc. at any time an affiliate of Duro Communications?

**RESPONSE:** No.

**REQUEST FOR ADMISSION NO. 4:** Did Duro Communications purchase the assets of ALEC, Inc.?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 5:** Did ALEC, Inc. become the surviving entity in a merger with Duro Communications?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 6:** Is ALEC, Inc. willing to stipulate that all amounts prior to December 2002 are settled in full?

**RESPONSE:** No.

**REQUEST FOR ADMISSION NO. 7:** Do you record traffic terminating over the interconnecting facility between you and Windstream?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 8:** Do you generate EMI records with respect to traffic terminating to you?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 9:** Do your traffic records identify the calling party number?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 10:** Do your traffic records identify the Local Routing Number?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 11:** Do your traffic records identify the “to” telephone number?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 12:** Do your traffic records identify the date of each call?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 13:** Do your traffic records identify the minutes associated with each call?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 14:** Do your traffic records identify all applicable CICs?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 15:** Do your traffic records identify the “from” Local Routing Number?

**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 16:** Do your traffic records identify the “to” Local Routing Number?

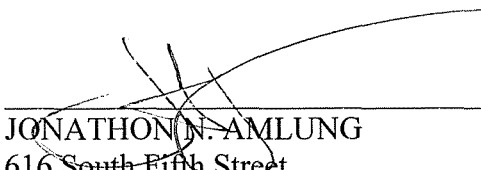
**RESPONSE:** Yes.

**REQUEST FOR ADMISSION NO. 17:** Do your traffic records identify the connect time for each call?

**RESPONSE:** Yes.



Respectfully submitted,



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Louisville, KY 40202  
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San Leandro, CA 94577  
Telephone (510) 903-1304  
Facsimile (510) 868-8418  
[kris@lokt.net](mailto:kris@lokt.net)

*Attorneys for Complainants*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served upon the following via regular U.S. Mail, postage pre-paid, this the 12<sup>th</sup> day of February, 2007:

Hon. Mark Overstreet  
STITES & HARBISON, PLLC  
421 West Main Street  
P.O. Box 634  
Frankfort, KY 40602-0634



---

JONATHON N. AMLUNG

**ALEC ATTACHMENT 1**  
**DATA REQUEST 2-11 RESPONSE**

**Wispnet NC, LLC**

**OPERATING AGREEMENT**

**THE INTERESTS IN THIS COMPANY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT") OR ANY STATE SECURITIES LAWS. THE INTERESTS ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED UNDER THE SECURITIES ACT AND APPLICABLE STATE LAW, PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM. INVESTORS SHOULD BE AWARE THAT THEY WILL BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME. THE TRANSFER OF ANY INTEREST IS FURTHER RESTRICTED AS PROVIDED IN THIS OPERATING AGREEMENT.**

**Wispnet NC, LLC**

**OPERATING AGREEMENT**

**THIS OPERATING AGREEMENT** is made and entered into with intent to be effective on the \_\_\_\_ day of \_\_\_\_\_, 2002, by and among Phil Patete, a citizen and resident of Heathrow, Florida (“**Patete**”); WISPNET, LLC, a Kentucky limited liability company (“**WISPNET**”), and George Todd Holmes, a citizen and resident of Bridgeton, North Carolina (“**Holmes**”), as Members of Wispnet NC, LLC ("Company").

**WITNESSETH:**

**WHEREAS**, the Company has been formed to operate as a competitive local exchange carrier; and

**WHEREAS**, the parties desire to enter into an operating agreement for the Company;

**NOW, THEREFORE**, the parties agree as follows:

**ARTICLE I  
FORMATION**

**Section 1.1 -- Formation of the Company.** The Company was formed on December 9, 2002, upon the filing of Articles of Organization with the North Carolina Secretary of State pursuant to the North Carolina Limited Liability Company Act (as amended from time to time, the “**Act**”). The organization, operation, dissolution, and winding up of the Company, shall be governed by the Act, the Company’s Articles of Organization as amended from time to time (the “**Articles**”) and this Operating Agreement as amended from time to time (the “**Agreement**”).

**Section 1.2 -- Names.** The name of the Company may change from time to time by amendment of the Articles in accordance with the Act. The Company may transact business under one or more assumed names as determined from time to time by the Managing Member, subject to compliance with any applicable laws relating to use of assumed names.

**Section 1.3 -- Registered Agent and Office.** The Company’s registered agent and registered office shall be as determined by the Managing Member from time to time.

## **ARTICLE II DEFINITIONS**

**Section 2.1 -- Definitions.** Whenever used in this Agreement, the following capitalized terms shall have the meaning assigned to them in this Section 2.1, except to the extent expressly otherwise provided in this Agreement:

**Act.** “Act” shall have the meaning provided in Section 1.1.

**Affiliate.** “Affiliate” shall mean, when used with reference to a specified Person: (i) any Person that, directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with the specified Person; (ii) any Person that is an officer of, a director of, general partner in, manager of, or trustee of, or serves in a similar capacity with respect to, the specified Person, or of which the specified Person is an officer, director, general partner, manager, or trustee, or with respect to which the specified Person serves in a similar capacity; (iii) any Person that, directly or indirectly, is the beneficial owner of 5% or more of any class of equity securities of, or otherwise has a substantial beneficial interest (5% or more) in, the specified Person, or of which the specified Person is directly or indirectly the owner of 5% or more of any class of equity securities; and (iv) any relative or spouse of the specified Person.

**Agreement.** “Agreement” shall mean this Operating Agreement as amended from time to time.

**Allocation Addendum.** “Allocation Addendum” shall mean the Allocation Addendum attached hereto and hereby incorporated into this Agreement for all purposes, which for convenience sets forth separately certain provisions relating to allocations among the Members.

**Articles.** “Articles” shall have the meaning provided in Section 1.1.

**Capital Account.** “Capital Account” shall have the meaning provided in the Addendum.

**Capital Contribution.** “Capital Contribution” shall mean, with respect to any Member the amount of money and the initial Gross Asset Value of any property (other than money) contributed to the Company with respect to the Interest held by such Member pursuant to the terms of this Agreement. The principal amount of a promissory note which is not readily traded on an established securities market and which is contributed to the Company by the maker of the note (or a Person related to the maker of the note within the meaning of Regulations Section 1.704-1(b)(2)(ii)(c)) shall not be included in the Capital Contribution of any Member until the Company makes a taxable disposition of the note or until (and to the extent) principal

payments are made on the note, all in accordance with Regulations Section 1.704-1(b)(2)(iv)(d)(2).

**Cash Flow Deficit.** “Cash Flow Deficit” for any period shall mean the amount, if any, by which (A) the sum of the cash receipts of the Company from all sources and amounts released from Reserves, exceed (B) the sum of (i) Operating Expenses, (ii) Debt Service, (iii) capital expenditures, and (iv) contributions to Reserves. For purposes of the foregoing, cash receipts shall be deemed increased by any amounts available to be borrowed by the Company under the Company's credit facilities for the payment of any of the items described in (i), (ii), (iii), and (iv) of the preceding sentence.

**Code.** “Code” shall mean the Internal Revenue Code of 1986 as amended (or corresponding provisions of subsequent laws).

**Company.** “Company” shall have the meaning provided in the recitals of this Agreement.

**Company Assets.** “Company Assets” shall mean all assets, interests, properties and rights of any type owned by the Company, including but not limited to the land and all improvements from time to time located thereon.

**Competitive.** “Competitive” shall mean within the range of prices and other terms customarily charged or given to un-Affiliated persons for the money loaned, property leased, or goods or services provided in question, by Persons that are engaged in the business of loaning such money, leasing similar property, or providing similar goods or services in the relevant market area.

**Debt Service.** “Debt Service” shall mean all payments, including without limitation principal, interest, and fees, that are made in connection with any loan to the Company, whether or not such payments are then due, past due, or are being prepaid.

**Fiscal Year.** “Fiscal Year” shall mean the Company's taxable year for federal income tax purposes or, if the context requires, any portion of such year for which the Company is required to allocate Profits, Losses, and other items of Company income, gain, loss or deduction pursuant to Article VIII.

**Gross Asset Value.** “Gross Asset Value” shall have the meaning provided in the Addendum.

**Interest.** “Interest” shall mean all of a Person's rights and obligations with respect to the Company, including without limitation, any right to share in Company allocations, any right to receive distributions of the Company's assets, and any right to participate in the management of the Company as a Member as provided in this Agreement or the Act.

**Loss.** “Loss” shall have the meaning provided in the Addendum.

**Majority in Interest.** “Majority in Interest” shall mean Members owning a majority of the Percentage Interests owned by all the Members or of such portion of the Members as is specifically referred to.

**Member.** “Member” shall have the meaning provided in the Act.

**Operating Expenses.** “Operating Expenses” shall mean the expenses of the Company other than (i) Debt Service, (ii) capital expenditures, and (iii) depreciation and other noncash charges.

**Percentage Interest.** “Percentage Interest” shall mean the following percentages for each Member:

	Percentage Interest	Capital Contribution
Patete	55%	\$550.00
WISPNET	40%	\$400.00
Holmes	5%	\$ 50.00

**Person.** “Person” shall mean and include any individual, trust, partnership, association, limited liability company, corporation or other entity.

**Profit.** “Profit” shall have the meaning provided in the Addendum.

**Regulations.** “Regulations” shall mean the Income Tax Regulations (including Temporary Regulations) promulgated under the Code, as such regulations may be amended from time to time (including corresponding provisions of succeeding regulations).

**Reserve.** “Reserve” shall mean the amount of the Company’s cash receipts which the Members set aside (i) to pay future Debt Service or Operating Expenses, (ii) to make future capital expenditures which have been authorized, or (iii) to provide for contingent or unforeseen obligations of the Company.

**Securities Act.** “Securities Act” shall have the meaning provided on the cover page of this Agreement.

**Transfer.** “Transfer” and any capitalized variation thereof shall mean or refer to any assignment, sale, grant, conveyance, or other transfer or vesting, whether gratuitously or for consideration, consensually or by operation of law, as a transfer of beneficial and/or legal ownership or as a grant of a lien or other security interest, including but not limited to pursuant to equitable distribution or other divorce proceedings.

**Section 2.2 -- Additional Definitions.** Additional definitions appear elsewhere in this Agreement.

### **ARTICLE III PURPOSE AND POWERS**

**Section 3.1 -- Purpose.** The Company's principal purpose shall be to operate as a competitive local exchange carrier and to provide telecommunications services to Internet Service Providers and others. Subject to the foregoing, the Company may engage in any lawful businesses and activities.

**Section 3.2 -- Powers.** The Company shall have all powers permissible under the Act.

### **ARTICLE IV PRINCIPAL OFFICE**

**Section 4.1 -- Principal Office.** The location of the principal office of the Company shall be 250 West Main Street, Lexington, KY, 40507 or at any other location, as is determined from time to time by the Managing Member.

### **ARTICLE V TAX STATUS AND ACCOUNTING**

**Section 5.1 -- Income Tax Status.** The Members intend that the Company shall be classified as a partnership subject to Subchapter K of Chapter 1 of the Code for federal and state income tax purposes. Such classification as a partnership shall be solely for federal and state income tax purposes, and shall not affect the limited liability of the Members or otherwise affect the status of the Company, or its Members under the Act.

**Section 5.2 -- Accounting.** The Company shall cause to be filed the United States Partnership Return of Income and all other tax returns required to be filed for the Company for all applicable tax years. The Company shall use its best effort to provide to the Persons who owned Interests during a Fiscal Year their respective informational return ("**K-1 Form**") within sixty (60) days following the end of the Fiscal Year. In the event circumstances require extension of the Company's income tax returns with respect to any Fiscal Year, the Company shall provide K-1 Forms to such Persons within fifteen (15) days following the filing of the Company's Federal and North Carolina income tax returns.

**Section 5.3 -- Capital Accounts.** A separate Capital Account shall be maintained for each Person owning an Interest, in accordance with the definition of Capital Account.

**Section 5.4 -- Tax Matters Partner.** The "tax matters partner" for the Company within the meaning of Code Section 6231(a)(7) ("**Tax Matters Partner**"), shall be **Philip V. Patete** or



such other Member as may be designated from time to time by the Managing Member with the consent of such designated Member and in accordance with the Code and the Regulations.

## **ARTICLE VI MANAGEMENT**

**Section 6.1 -- Management.** Control of the Company and all of its affairs shall be vested in the Managing Member who initially shall be Philip V. Patete. Except as otherwise provided in Section 6.3 of this Agreement, Company business decisions shall be made by the Managing Member acting on behalf of the Company. The Managing Member shall be elected at each annual meeting of Members or a special meeting called for the purpose of electing the Managing Member by a Majority in Interest of the Members.

### **Section 6.2 -- Term of Office, Resignation.**

The Managing Member shall hold office until the next annual meeting of the Members, or until his successor is elected, or until his resignation, removal from office or death.

The Managing Member may resign at any time by providing an oral statement to that effect at a meeting of the Members or by submitting a writing to that effect to the Members. Such resignation shall take effect immediately or at such other time as such Managing Member may specify.

**Section 6.3 -- Unanimous Consent.** The Managing Member shall not have the authority to do any of the following on behalf of the Company without the consent of all of the Members.

- (a) Make, execute, or deliver a general assignment for the benefit of creditors;
- (b) Dispose of the goodwill of the Company;
- (c) Do any act which would make it impossible to carry on the business of the Company;
- (d) Confess a judgment against the Company;
- (e) Submit a claim or liability of the Company for arbitration or reference;
- (f) Admit a new Member, as provided for in Section 7.1; or
- (g) Commence a bankruptcy or receivership proceeding with respect to the Company.
- (h) Increase any employee's annual salary to more than \$120,000.

**Section 6.4 -- Compensation and Expense Reimbursement.** A Member is entitled to compensation for services rendered to the Company upon a Majority Vote of the Members. Upon substantiation of the amount and purpose thereof, Members are entitled to reimbursement for expenses reasonably incurred in connection with the activities of the Company.

**Section 6.5 -- Time Commitment.** Except as provided in Section 7.6, a Member may engage in business or investment activities outside of the Company so long as such activities do not prevent the Member from fulfilling his responsibilities to the Company.

**Section 6.6 -- Certain Specific Authority and Duties.**

Without limiting the Members' other powers provided in this Agreement or the Act, but subject to Section 6.3, the Members' are expressly authorized for, in the name, and on behalf of the Company:

(a) To prepare or cause to be prepared and to file all federal, state or local tax returns required to be filed by the Company. The Company may withhold taxes from amounts otherwise distributable to Members and remit such taxes to the applicable governmental authorities, as applicable laws may permit or require.

(b) Until required in the conduct of the business of the Company, all Company funds, including, but not limited to, Capital Contributions, Company income, and proceeds of any borrowing by the Company, may be deposited or invested in any type of account or investment that the Managing Member determines.. Any interest or other income generated by such deposits or investment shall be for the Company's account. All Company funds may be commingled with other Company funds, and may be withdrawn, expended and distributed as authorized by this Agreement.

(c) The Members shall keep or cause to be kept adequate books and records reflecting the activities of the Company, in such form and content sufficient to meet the requirements of Act Section 57C-3-04. All information with respect to the Company will be kept in strict confidence unless released by the Members.

(d) The Members may procure and maintain, on behalf of and at the expense of the Company, such types and amounts of insurance coverage as the Managing Member determines to be desirable for the protection of the Company, Members, employees, and/or other agents.

**Section 6.7 -- Limited Liability & Indemnification.**

(a) To the full extent provided in the Act, the Members shall not be liable for the obligations of the Company.

(b) The personal liability of any Member of the Company, for monetary damages for breach of any duty provided for in Act Section 57C-3-22, whether arising in an action by or in

the right of the Company or otherwise, is hereby eliminated, other than (i) for acts or omissions that the Member knew at the time thereof were clearly in conflict with the Company's interests, (ii) for transactions from which the Member derived an improper personal benefit, (iii) for the Member's knowing and deliberate breach of this Agreement or (iv) for the Member's gross negligence in the performance of the Member's duties.

(c) The Company shall indemnify each Member for judgments, settlements, penalties, fines, or expenses incurred in a proceeding to which such Member is a party arising out of such Member's status, actions or omissions as a Member, to the full extent permitted by the Act as in effect on the date of this Agreement, other than (i) for acts or omissions that the Member knew at the time thereof were clearly in conflict with the Company's interests, (ii) for transactions from which the Member derived an improper personal benefit, (iii) for the Member's knowing and deliberate breach of this Agreement; or (iv) for the Member's gross negligence in the performance of the Member's duties.

(d) No amendment or repeal of this Section 6.7, nor the adoption hereafter of any provision in the Articles or in this Agreement inconsistent with this Section 6.7, shall eliminate or reduce the protection granted in this Section 6.4 with respect to any matter that occurred prior to such amendment, repeal, or adoption. Each Person who at any time ever is admitted as a Member or otherwise owns any Interest hereby agrees to the provisions of this Section 6.7 as a condition of such admission or ownership.

**Section 6.8 -- Delegation.** Subject to Section 6.3, the Managing Member may delegate authority to act on behalf of the Company to one or more Persons from time to time, provided (i) that the Managing Member may not delegate authority to manage the Company's business and affairs and (ii) that any delegation shall be terminable at the will of the Managing Member with or without cause.

## **ARTICLE VII MEMBERS**

### **Section 7.1 -- Admission & Capital Contributions.**

(a) **Members.** Each of Patete, WISPNET, and Holmes is hereby admitted as a Member. The Company may issue Interests to Persons in the future only with the consent of all the Members. A Transferee of all or a portion of an Interest shall be admitted as a Member only as provided in Article IX.

(b) **Initial Capital Contributions.** Contemporaneously herewith each of Patete, WISPNET, and Holmes shall contribute \$550, \$400 and \$50, respectively, in cash to the Company.

(c) **Additional Capital Contributions to Fund Cash Flow Deficits.** If from time to time the Members determine that a Cash Flow Deficit is likely to exist with respect to any Fiscal

Year quarter absent additional Capital Contributions from the Members, the Members shall estimate the Cash Flow Deficit not sooner than 60 days prior to the first day of such Fiscal Year quarter. At any time within 30 days following a determination of such estimate, a Majority in Interest of all the Members by consent may, in their sole discretion, elect to require that each Member contribute in cash to the Company an amount equal to the product of the Member's Percentage Interest multiplied by such estimated Cash Flow Deficit or such lesser portion of the Cash Flow Deficit as a Majority in Interest elects in their sole discretion shall be funded by additional Capital Contributions. Each Member shall be personally liable to contribute the amount required pursuant to the preceding sentence not later than the tenth (10<sup>th</sup>) day following the Member's receipt of notice of such election by a Majority in Interest.

Each Member hereby grants to the Company a continuing security interest in all of its Interest (whether now owned or hereafter acquired) to secure its obligations to make any additional Capital Contributions that may be required pursuant to this Section 7.1(c). The Company's security interest shall be first in priority except that it shall be junior in priority to any security interest described in Section 9.1(iv). The Company shall have all rights of a secured party under the North Carolina Uniform Commercial Code with respect to the Company's security interest, including without limitation the right of sale of the Interest after default. In the event of any sale of a Member's Interest pursuant to such rights, the Company may apply the sale proceeds to the payment of the Company's reasonable attorneys' fees and legal expenses in addition to all other applications of the proceeds permitted by law. The Member whose Interest is sold shall remain liable for any deficiency. The exercise of the Company's rights and remedies with respect to the Company's security interest in a defaulting Member's Interest shall be determined by a Majority in Interest of the Members other than the defaulting Member. Each Member shall execute such financing statements and other instruments as any other Member may request from time to time to evidence, confirm, or perfect the Company's security interest in the Member's Interest.

To the extent any Member defaults in the payment of any additional Capital Contributions that may be required pursuant to this Section 7.1(c), the Company may borrow up to the amount of such default from any Member or Member Affiliate or any other third party on any terms approved by a Majority in Interest of the Members other than the defaulting Member, notwithstanding Section 6.3 or any other provision of this Agreement. Any such borrowing shall not limit in any way the Company's rights and remedies with respect to the defaulting Member or the security interest in the defaulting Member's Interest.

(d) Other Capital Contributions. Except pursuant to Section 7.1(c), no Person shall make any additional Capital Contributions to the Company without the consent of all the Members.

**Section 7.2 -- Withdrawal.** A Member may withdraw only with the consent of all the other Members. A Member shall cease to be a Member only upon such a withdrawal or the Transfer of all of the Member's Interest in accordance with Article IX.

**Section 7.3 --Meetings of Members.** The Members shall meet annually on the 1<sup>st</sup> of March or at such other time as may be determined by resolution of the Members, commencing with the year 2003, for the purpose of transacting such business as may come before the meeting; provided, however, the failure to hold an annual meeting is not grounds for dissolution of the Company. Special meetings of the Members, for any purpose or purposes, may be called by any Member. The Managing Member shall designate any place, either within or outside the State of North Carolina, as the place of any meeting of the Members. If no designation is made the place of meeting shall be the principal office of the Company. Members may participate in any annual or special meeting through the use of any means of communication by which all of the Members may simultaneously hear each other during the meeting. A Member participating in a meeting by this means is deemed to be present in person at the meeting.

**Section 7.4 -- Notice and Record Date of Meeting.** Except as otherwise provided herein, written notice stating the place, day and hour of a meeting and the purpose or purposes for which the meeting is called shall be delivered not less than ten (10) nor more than fifty (50) days before the date of the meeting, either personally or by mail, to each Member. If mailed, such notice shall be deemed to be delivered two calendar days after being deposited in the United States Mail, addressed to the Member at his or its address as it appears on the books of the Company, with postage thereon prepaid. Members may waive prior notice by attending the meeting or by executing a written waiver of notice before or after the meeting.

**Section 7.5 -- Action by Members Without a Meeting.** Any action required or permitted to be taken at a meeting of Members may be taken without a meeting if the action is evidenced by one or more written consents describing the action taken, signed by the Members approving such action and delivered to the custodian of the Company's records for filing with the Company records. Unless an action requires Unanimous Consent, the written consent will be effective upon approval by a Majority in Interest of the Members.

**Section 7.6 -- Competition and Related Businesses.**

(a) Until the Company is dissolved, no Member may engage in any business which directly competes with the business of the Company. A Member may, however, engage in a business that is similar or related to, but does not directly compete with, the business of the Company, or which is in the same business as the Company, but in a geographical area in which the Company does not operate or intend to operate.

(b) The Company's proposed business plan includes the acquisition of all of the issued and outstanding common stock of ALEC, Inc., a Kentucky Corporation ("ALEC"). However, the Members understand and acknowledge that the Company's acquisition of the ALEC common stock shall exclude any ALEC accounts receivable which accrued prior to November 30, 2002. These accounts receivable remain the property of Duro Communication Corp. and others that may separately acquire an assignment of these ALEC accounts receivable. Neither the Company nor any Member shall have any right by virtue of this Operating Agreement to share or participate in these ALEC accounts receivable if ultimately collected.

**ARTICLE VIII  
ALLOCATIONS AND DISTRIBUTIONS**

**Section 8.1 -- Profits and Losses.** At the end of each Fiscal Year, the Profit or Loss of the Company for the Fiscal Year then ending shall be determined. After making any allocations pursuant to the Allocation Addendum, and subject to the provisions of the Allocation Addendum, the Profit or Loss for each Fiscal Year shall be allocated among the Members in proportion to their Percentage Interests.

**Section 8.2 -- Distributions.**

(a) **Interim Distributions Generally.** Subject to Sections 8.2(b) and 8.3, a Majority in Interest of the Members shall have discretion to make cash distributions from time to time prior to dissolution of the Company. Any such distribution shall be made among each and all of the Members in proportion to their Percentage Interests. No Member may elect to refuse or defer a distribution which has been properly declared in accordance with this Section 8.2.

(b) **Tax Distributions.** The Members shall endeavor, subject to the availability of sufficient Company funds, subject to compliance with the Company's obligations to lenders, lessors, and other creditors, and subject to Section 8.3, to cause the Company to make distributions pursuant to Section 8.2(a) during a Fiscal Year and/or within ninety days after the end of such Fiscal Year in the lowest aggregate amount such that each Member (including without limitation any Members which are entities that are not subject themselves to income taxes, such as entities classified as partnerships for income tax purposes) receives not less than an amount equal to the Federal and state income taxes attributable to the Member's allocable share of the Company's taxable income for the Fiscal Year, determined by taking into account (without limitation) Addendum Paragraph 6 to the extent, if any, applicable, and by assuming that such income is taxable to the Member at the highest combined effective Federal and state income tax rate applicable to any Member (or, in the case of a Member which is an entity that is not itself subject to income taxes, to any Person who is taxable on all or a portion of such Member's income). In their discretion, a Majority in Interest of the Members may apply the requirements of this Section 8.2(b) on a cumulative basis so as to take into account any losses for income tax purposes incurred during previous Fiscal Years and disregard any intervening Transfers of Interests.

(c) **Tax Payments on Behalf of Persons Owning Interests.** Any payment of Federal, state or local income tax paid by the Company with respect to a Person owning an Interest, as required or permitted by law, shall be treated for purposes of this Agreement as a distribution of cash made by the Company to such Person and credited against any distribution otherwise required by this Agreement to be made to such Person. If it is anticipated that at the due date of the Company's withholding obligation the Person's share of cash distributions due is less than the amount of the withholding obligation, the Person with respect to which the withholding obligation applies shall pay to the Company the amount of such shortfall within ten (10) days

after notice by the Company. In the event a Person fails to make the required payment when due hereunder, and the Company nevertheless pays the withholding, in addition to the Company's remedies for breach of this Agreement, the amount paid shall be deemed a recourse loan from the Company, to such Person bearing interest at an annual rate equal to and varying with prime rate as announced by Centura Bank or its successor plus three percent, and the Company shall apply all distributions or payments that would otherwise be made to such Person toward payment of such loan and interest, which payments or distributions shall be applied first to interest and then to principal until the loan is paid in full.

**Section 8.3 -- Distribution Limitation.** Anything in this Agreement to the contrary notwithstanding, no distribution shall be made if it is prohibited by the Act.

## **ARTICLE IX TRANSFERS OF INTERESTS**

**Section 9.1 -- Restriction on Transfer.** No Person may Transfer any or all of such Person's Interest, other than (i) a Transfer in enforcement of the Company's security interest pursuant to Section 7.1(c), (ii) a Transfer made in which the Transferor has complied with the Right of First Refusal provisions of Section 9.2, (iii) the grant of a security interest to a lender securing a loan to a Member the proceeds of which are contributed or loaned by the Member to the Company, provided such lender is not an Affiliate of the Member or (iv) a Transfer in enforcement of a security interest described in the preceding clause (iii). A Transfer permitted by this Section 9.1, other than a Transfer to the Company, shall not be effective unless and until the Transferor and Transferee execute and deliver to the Company an Instrument of Accession in the form of Exhibit A.

### **Section 9.2 -- Right of First Refusal.**

(a) Offer. A Person desiring to sell all or any portion of such Person's Interest must first obtain from the proposed Transferee a bona fide written offer to purchase the Interests payable in United States dollars, stating the terms and conditions upon which the purchase is to be made and the consideration offered (the "Offer"). The recipient of the Offer (the "Offeree") must notify the other Members of its intention to sell, furnishing a copy of the Offer to those Members.

(b) Acceptance. The other Members on a basis pro rata to the Percentage Interest of those other Members exercising their right of first refusal, each have the right to purchase all (but not less than all) of the Interests proposed to be sold upon the same terms and conditions stated in the Offer by notifying the Offeree of their intention to do so within 15 days after notice from the Offeree. If none of the other Members notify the Offeree of an intention to exercise this right of first refusal within the 15 day period, the right of first refusal regarding the Offer terminates and the Offeree is entitled to sell his Interest, provided that the sale is (1) on substantially the same terms as the Offer, and (2) consummated within 45 days of the expiration of the right of

first refusal. If one or more of the other Members give written notice to the Offeree of their intention to exercise this right of first refusal and to purchase all of the Offeree's Interests on the terms and conditions stated in the Offer, the other Members have the right to designate the time, date and place of closing, provided that the closing date is within 45 days after the receipt of the notification from the Offeree.

**Section 9.3 -- Admission of Transferee.** A Transferee under a Transfer that is effective under Section 9.1 shall be deemed admitted as a Member with respect to the Interest Transferred, and shall be subject to all the restrictions and liabilities of a Member with respect to the Interest Transferred, including but not limited to (i) Section 7.1 (additional Capital Contributions and guaranties) and (ii) this Article IX with respect to any subsequent Transfer of all or any portion of the Interest Transferred.

**Section 9.4 -- Injunctive Relief.** Transfer of all or any part of an Interest in breach of this Agreement shall be of no force and effect and the Company shall not recognize the Transfer for making allocations or distributions, or any other purpose. The Members agree that a Transfer in breach of this Agreement shall result in irreparable harm to the Company and any other Member, for which there is no adequate remedy at law, and that accordingly the Company and any other Member shall be entitled to injunctive and other equitable relief for such breach in addition to damages or other relief available at law.

## ARTICLE X COMPANY'S CALL OPTION

**Section 10.1 -- Purpose of Option.** It is acknowledged by the Members that, (in addition to the initial Capital Contribution, as provided in Section 7.1(b)), the primary consideration for WISPNET's Percentage Interest in the Company is WISPNET's agreement to provide various operational and management services on behalf of the Company, pursuant to a certain Agreement, dated on even date herewith, a copy of which is attached hereto and incorporated herein as Exhibit A, (the "Services Agreement"). However, in the event that WISPNET is unable to fulfill its obligations to the Company under this Services Agreement, due to one of the events specified in Section 10.2, below, the Company shall have the option to purchase all (but not less than all) of WISPNET's Interest upon the terms and conditions and at the price determined pursuant to this Article X (the "Call Option").

**Section 10.2 -- Call Option Triggers.** Each of the following shall constitute a "Call Option Trigger":

- (i) WISPNET has not closed on the Asset Purchase Agreement between WISPNET and Duro Communication Corporation, by February 3, 2003; or
- (ii) WISPNET, at any time prior to December 31, 2005, is unable or unwilling to perform its obligations under the Services Agreement.



**Section 10.3 -- Exercise of Option.** Upon a Call Option Trigger or at any time within 60 days thereafter, the Company, by action of its Managing Member, may exercise the Call Option, by providing written notice to WISPNET of the Company's intent to do so, and shall also designate the time, date and place of closing, provided that the closing date shall be within 30 days after the date of this notification. The price for all of WISPNET's interest in the Company pursuant to this Call Option (the "Option Price") shall be the sum of \$10,000, and shall be paid in full at the closing.

## **ARTICLE XI DISSOLUTION AND LIQUIDATION**

**Section 11.1 -- Dissolution.** The Company shall be dissolved upon, and only upon, the earliest to occur of the following: (i) the consent of all the Members; (ii) entry of a decree of judicial dissolution under Act Section 57C-6-02; or (iii) (subject to the next sentence) the filing by the Secretary of State of a certificate of dissolution under Act Section 57C-6-03. In the event the Company is administratively dissolved pursuant to Act Section 57C-6-03, any Member may apply to reinstate the Company, and appeal any denial of such application, as provided in Act Section 57C-6-03(c).

**Section 11.2 -- Accounting.** In the case of dissolution of the Company, a proper accounting shall be made of the Capital Account of each Member, and the Profits or Losses and other items of the Company from the close of the preceding Fiscal Year shall be determined and allocated among the Members in accordance with Article VIII. Financial statements presenting such an accounting shall be delivered to all Members, at Company expense, within 90 days after the assets of the Company have been distributed to the Members or otherwise applied in accordance with Section 11.3.

### **Section 11.3 -- Liquidation**

(a) **Winding Up & Liquidating Distributions.** Upon dissolution of the Company, the Managers shall liquidate the assets of the Company. The Members shall continue to share Profits, Losses, and other items during the period of liquidation in the manner provided in Article VIII. Subject to Section 6.3, a Majority in Interest of the Members shall have full right and unlimited discretion to determine the time, manner and terms of any sales of Company Assets pursuant to such liquidation, having due regard to the activity and conditions of the relevant market and general financial and economic conditions. Following the payment of, or making adequate provisions for all debts and liabilities of the Company (including any indebtedness of the Company to the Members and Member Affiliates) and the expenses of liquidation, any remaining Company Assets shall be distributed to the Members having positive Capital Account balances in accordance with such Capital Account balances.

(b) **No Deficit Restoration.** Subject to the other provisions of this Agreement, each Member shall look solely to the assets of the Company for the return of the Member's Capital Contributions, the Member's share of any profits, and any other distributions or payments, and

shall have no recourse therefor (upon dissolution or otherwise) against any other Member. Without limiting any of their respective obligations expressly set forth in this Agreement (including but not limited to in Section 7.1 of this Agreement), no Member shall have any obligation to contribute any deficit balance in its Capital Account existing at any time.

## **ARTICLE XII MISCELLANEOUS**

### **Section 12.1 -- Notices & Consents.**

(a) All notices, consents, or other communications required or permitted to be given pursuant to this Agreement to be effective must be in a writing signed by the giving party.

(b) All such communications shall be deemed given, delivered, and received on (i) the date of delivery shown on the return receipt, if sent by certified or registered mail, return receipt requested, first class, postage prepaid, addressed to the recipient at its last known address shown in the Company's records, or (ii) on the date of actual delivery to such address, if sent by other means.

(c) Except to the extent otherwise provided in this Agreement, any consent of a Person required by this Agreement may be given or withheld in good faith by such Person in such Person's sole discretion and subject to any conditions such Person may impose in good faith.

**Section 12.2 -- Amendments.** Amendments to this Agreement may be made by, and only by, the consent of each Member.

**Section 12.3 -- Counterparts.** This Agreement may be executed in as many counterparts as shall be deemed necessary by the Members who are the initial signatories hereto, and when so executed, each such counterpart shall be deemed to be an original, but all of which shall be deemed to constitute one instrument.

**Section 12.4 -- Governing Law.** This Agreement shall be governed by and construed in accordance with the Act and the other applicable laws of the State of North Carolina. If any provision of this Agreement violates any such applicable laws, then such provision shall be deemed severed and deleted from this Agreement and this Agreement shall be applied as though it did not contain such provision.

**Section 12.5 -- Successors and Assigns; Third-Party Beneficiary.** This Agreement and all the terms and provisions hereof shall be binding upon and shall inure to the benefit of the Company, the Members, and, subject to the restrictions on Transfer, their respective successors and assigns. No other Person shall be deemed a third-party beneficiary of, or otherwise have any rights under or with respect to, this Agreement. Without limiting the generality of the foregoing,

no creditor of the Company shall have any rights under or with respect to Section 7.1 of this Agreement.

**Section 12.6 -- Captions, Articles, Sections, Paragraphs, Numbers, Gender, Exhibits, and Schedules.** Captions contained in this Agreement are intended only as a matter of convenience and in no way define, limit or extend the scope or intent of this Agreement or any provision hereof. All references in this Agreement to Articles, Sections, or Paragraphs shall be deemed to refer to Articles, Sections, or Paragraphs of this Agreement except to the extent otherwise required by the context. When required by the context, (i) whenever the singular number is used in this Agreement it shall include the plural, and vice versa, and (ii) reference to a gender shall include the other genders. Any Exhibits or Schedules referred to in this Agreement are incorporated into this Agreement by such reference.

**Section 12.7 -- Arbitration.** Except for the Company's and the Members' right to seek injunctive and/or other appropriate equitable relief (including without limitation as provided in Section 9.4), which may be brought in any court of competent jurisdiction, any dispute arising out of this Agreement shall be submitted to and resolved by binding arbitration conducted in Wake County, North Carolina under the North Carolina Uniform Arbitration Act and, to the extent permitted by such Act, the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator in his or her discretion may award attorney's fees and expenses, the arbitrator's fees and expenses, and other costs of arbitration. To the extent not so awarded, each party to the arbitration shall pay the party's pro rata share (based on the number of parties) of the arbitrator's fees and expenses and any arbitration filing fee.

**IN WITNESS WHEREOF**, this Agreement has been executed as a sealed instrument with intent to be effective as of the date first above written.

PHIL PATETE \_\_\_\_\_

\_\_\_\_\_  
WISPNET, LLC, by \_\_\_\_\_, its Member

GEORGE TODD HOLMES \_\_\_\_\_

**EXHIBIT A**

**FORM OF INSTRUMENT OF ACCESSION**

**WHEREAS**, the undersigned Transferor and the undersigned Transferee desire to have the Transferor's Transfer of an Interest to the Transferee pursuant to the attached instrument (the "Transfer") be effective under the Wispnet NC, LLC Operating Agreement as it heretofore may have been amended (the "Operating Agreement");

**NOW, THEREFORE:**

1. Each of the Transferor and the Transferee (i) hereby acknowledges the Transfer to the Company and (ii) represents and warrants to the Company that such Transfer is in accordance with the Operating Agreement and all applicable laws.
2. The Transferee hereby agrees to be bound by the Operating Agreement. Without limiting the generality of the foregoing, the Transferee hereby acknowledges to the Company that the Transferee shall not be entitled to admission as a Member with respect to such Transferred Interest except as provided in the Operating Agreement.
3. Capitalized terms used but not otherwise defined herein shall have the meanings provided in the Operating Agreement.

**IN WITNESS WHEREOF**, the Transferor and Transferee have executed this instrument under seal this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**Transferor:**

\_\_\_\_\_(SEAL)

**Transferee:**

\_\_\_\_\_(SEAL)

**ALLOCATION ADDENDUM  
TO  
OPERATING AGREEMENT  
OF  
Wispnet NC, LLC**

This Allocation Addendum shall be deemed a part of the Operating Agreement referred to above for all purposes.

**1. Definitions.** Whenever used in this Allocation Addendum or elsewhere in this Agreement, the following terms shall have the meaning assigned to them in this Paragraph 1 except as expressly otherwise provided in this Agreement:

**Adjusted Capital Account Deficit.** “Adjusted Capital Account Deficit” shall mean with respect to any Member, the deficit balance, if any, in such Member’s Capital Account as of the end of the relevant Fiscal Year, after giving effect to the following adjustments:

- (i) Credit to such Capital Account any amounts which such Member is obligated to restore or is deemed to be obligated to restore pursuant to the penultimate sentences of Regulations Sections 1.704-2(g)(i) and 1.704-2(i)(5); and
- (ii) Debit to such Capital Account the items described in Regulations Sections 1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5), and 1.704-1(b)(2)(ii)(d)(6).

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Regulations Section 1.704-1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

**Capital Account.** “Capital Account” shall mean with respect to any Member, the Capital Account maintained in accordance with the following provisions:

- (i) To each Member’s Capital Account there shall be credited such Member’s Capital Contributions, such Member’s distributive share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Allocation Addendum Paragraphs 2, 3 or 4, and the amount of any Company liabilities assumed by such Member or which are secured by any Company Property distributed to such Member.
- (ii) To each Member’s Capital Account there shall be debited the amount of cash and the Gross Asset Value of any Company Property distributed to such Member pursuant to any provision of this Agreement, such Member’s distributive share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Allocation Addendum Paragraphs 2, 3, or 4, and the amount of any liabilities of such

Member assumed by the Company or which are secured by any property contributed by such Member to the Company.

(iii) In determining the amount of any liability for purposes of clauses (i) and (ii) above, there shall be taken into account Code Section 752(c) and any other applicable provisions of the Code and Regulations.

The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulations Sections 1.704-1(b) and 1.704-2 and shall be interpreted and applied in a manner consistent with such Regulations. The Members shall (i) make any adjustments that are necessary or appropriate to maintain equality between the Capital Accounts of the Members and the amount of Company capital reflected on the Company's balance sheet, as computed for book purposes in accordance with Regulations Section 1.704-1(b)(2)(iv)(g), and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Regulations Sections 1.704-1(b) or 1.704-2.

**Depreciation.** "Depreciation" shall mean for each Fiscal Year an amount equal to the depreciation, amortization, or other cost recovery deduction allowable with respect to any asset for such year or other period, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such year or other period, Depreciation shall be an amount which bears the same ratio to such beginning Gross Asset Value as the Federal income tax depreciation, amortization, or other cost recovery deduction for such year or other period bears to such beginning adjusted tax basis; provided, however, that if the adjusted basis for Federal income tax purposes of an asset at the beginning of such year or other period is zero, Depreciation shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by a Majority in Interest of the Members.

**Gross Asset Value.** "Gross Asset Value" shall mean, with respect to any asset, the asset's adjusted basis for federal income tax purposes, except as follows:

(i) The initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as specified in this Agreement or (if not so specified) as determined by a Majority in Interest of the Members.;

(ii) The Gross Asset Values of all Company assets shall be adjusted to equal their respective gross fair market values, as determined by a Majority in Interest of the Members, as of the following times: (A) the issuance of any Interest in the Company to any new or existing Member; (B) the distribution by the Company to a Member of more than a de minimis amount of Company Assets as consideration for an interest in the Company; and (C) the liquidation of the Company within the meaning of Regulations Section 1.704-1(b)(2)(ii)(g); provided, however that adjustments pursuant to clauses (A) and (B) above shall be made only if a Majority in Interest of the Members determine that

such adjustments are necessary or appropriate to reflect the relative economic interests of the Members in the Company;

(iii) The Gross Asset Value of any Company Asset distributed to any Member shall be adjusted to equal the gross fair market value of such asset on the date of distribution as determined by a Majority in Interest of the Members; and

(iv) The Gross Asset Values of Company Assets shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to Regulations Section 1.704-1(b)(2)(iv)(m) and clause (vi) of the definition of Profits and Losses and Allocation Addendum Paragraph 3(g); provided, however, that Gross Asset Values shall not be adjusted pursuant to this clause (iv) to the extent a Majority in Interest of the Members determine that an adjustment pursuant to clause (ii) above is necessary or appropriate in connection with a transaction that would otherwise result in an adjustment pursuant to this clause (iv).

If the Gross Asset Value of an asset has been determined or adjusted pursuant to clauses (i), (ii), or (iv) above, such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits and Losses.

**Nonrecourse Deductions.** “Nonrecourse Deductions” shall have the meaning provided in, and shall be determined in accordance with, Regulations Section 1.704-2.

**Nonrecourse Liability.** “Nonrecourse Liability” shall have the meaning provided in, and shall be determined in accordance with, Regulations Section 1.704-2(b)(3).

**Partner Nonrecourse Debt.** “Partner Nonrecourse Debt” shall have the meaning provided in Regulations Section 1.704-2.

**Partner Nonrecourse Debt Minimum Gain.** “Partner Nonrecourse Debt Minimum Gain” shall have the meaning provided in, and shall be determined in accordance with, Regulations Section 1.704-2.

**Partner Nonrecourse Deductions.** “Partner Nonrecourse Deductions” shall have the meaning provided in, and shall be determined in accordance with, Regulations Section 1.704-2.

**Partnership Minimum Gain.** “Partnership Minimum Gain” shall have the meaning provided in, and shall be determined in accordance with, Regulations Section 1.704-2.



**Profit or Loss.** “Profit” or “Loss” shall mean for each Fiscal Year an amount equal to the Company’s taxable income or loss for the Fiscal Year, determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss or deduction required to be stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income or loss), with the following adjustments:

(i) Any income of the Company that is exempt from Federal income tax and not otherwise taken into account in computing Profits and Losses pursuant to this definition shall be added to such taxable income or loss;

(ii) Any expenditures of the Company described in Code Section 705(a)(2)(B) or treated as Code Section 705(a)(2)(B) expenditures pursuant to Regulations Section 1.704-1(b)(2)(iv)(i), and not otherwise taken into account in computing Profits and Losses pursuant to this definition, shall be subtracted from such taxable income or loss;

(iii) In the event the Gross Asset Value of any Company Asset is adjusted pursuant to clauses (ii) or (iii) of the definition of Gross Asset Value the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset;

(iv) Gain or loss resulting from any disposition of Company Asset with respect to which gain or loss is recognized for Federal income tax purposes shall be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of such property differs from its Gross Asset Value;

(v) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Fiscal Year computed in accordance with the definition thereof;

(vi) To the extent an adjustment to the adjusted tax basis of any Company Asset pursuant to Code Section 734(b) or Code Section 743(b) is required pursuant to Regulations Section 1.704-1(b)(2)(iv)(m)(4) to be taken into account in determining Capital Accounts as a result of a distribution other than in liquidation of Member’s interest in the Company, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) from the disposition of the asset and shall be taken into account for purposes of computing Profits and Losses; and

(vii) Notwithstanding any other provisions of this definition, any items which are specially allocated pursuant to or Section 8.1(b) or (c) or Allocation Addendum Paragraphs 2, 3, or 4 shall not be taken into account in computing Profits and Losses.

The amounts of the items of Company income, gain, loss, or deduction to be specially allocated pursuant to Allocation Addendum Paragraphs 2, 3, or 4 shall be determined by applying rules analogous to clauses (i) through (vi) above.

**2. Limitation on Loss Allocations.** Losses under Section 8.1 shall not be allocated to a Member to the extent (i) such allocation would create or increase an Adjusted Capital Account Deficit for such Member at the end of any Fiscal Year and (ii) such Losses can be allocated to one or more other Members without creating or increasing an Adjusted Capital Account Deficit at the end of any Fiscal Year for such other Member(s); instead, such Losses shall, to such extent, be allocated to such other Member(s), shared among them (if more than one) in proportion to the maximum amount of Losses that can be allocated to each such other Member without so creating or increasing an Adjusted Capital Account Deficit for such other Member.

**3. Special Allocations.** The following special allocations shall be made in the following order:

(a) **Minimum Gain Chargeback.** Except as otherwise provided in Regulations Section 1.704-2(f), notwithstanding any other provision of this Agreement, if there is a net decrease in Partnership Minimum Gain during any Fiscal Year, each Member shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Member's share of the net decrease in Partnership Minimum Gain, determined in accordance with Regulations Section 1.704-2(g). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Regulations Sections 1.704-2(f)(6) and 1.704-2(j)(2). This Allocation Addendum Paragraph 3(a) is intended to comply with the minimum gain chargeback requirement in Regulations Section 1.704-2(f) and shall be interpreted consistently therewith.

(b) **Partner Minimum Gain Chargeback.** Except as otherwise provided in Regulations Section 1.704-2(i)(4), notwithstanding any other provision of this Agreement, if there is a net decrease in Partner Nonrecourse Debt Minimum Gain attributable to a Partner Nonrecourse Debt during any Fiscal Year, each Member who has a share of the Partner Nonrecourse Debt Minimum Gain attributable to such Partner Nonrecourse Debt, determined in accordance with Regulations Section 1.704-2(i)(5), shall be specially allocated items of Company income and gain for such Fiscal Year (and, if necessary, subsequent Fiscal Years) in an amount equal to such Person's share of the net decrease in Partner Nonrecourse Debt Minimum Gain attributable to such Partner Nonrecourse Debt, determined in accordance with Regulations Section 1.704-2(i)(4). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Regulations Section 1.704-2(i)(4) and 1.704-2(j)(2). This Allocation Addendum Paragraph 3(b) is intended to comply with the minimum

gain chargeback requirement in Regulations Section 1.704-2(i)(4) and shall be interpreted consistently therewith.

(c) **Qualified Income Offset.** In the event any Member unexpectedly receives any adjustments, allocations, or distributions described in Regulations Section 1.704-1(b)(2)(ii)(d)(4), Section 1.704-1(b)(2)(ii)(d)(5), or Section 1.704-1(b)(2)(ii)(d)(6), items of Company income and gain shall be specially allocated to each such Member in an amount and manner sufficient to eliminate, to the extent required by the Regulations, the Adjusted Capital Account Deficit of such Member as quickly as possible, provided that an allocation pursuant to this Allocation Addendum Paragraph 3(c) shall be made only if and to the extent that such Member would have an Adjusted Capital Account Deficit after all other allocations provided for in this Agreement have been tentatively made as if this Allocation Addendum Paragraph 3(c) were not in this Agreement.

(d) **Gross Income Allocation.** In the event any Member has a deficit Capital Account balance at the end of any Fiscal Year which is in excess of the sum of (i) the amount such Member is obligated to restore pursuant to any provision of this Agreement, and (ii) the amount such Member is deemed to be obligated to restore pursuant to the penultimate sentences of Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), each such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible, provided that an allocation pursuant to this Allocation Addendum Paragraph 3(d) shall be made only if and to the extent that such Member would have a deficit Capital Account balance in excess of such sum after all other allocations provided for in this Agreement have been made as if Allocation Addendum Paragraph 3(c) and this Allocation Addendum Paragraph 3(d) were not in this Agreement.

(e) **Nonrecourse Deductions.** Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Members in proportion to each Member's Percentage Interest.

(f) **Partner Nonrecourse Deductions.** Any Partner Nonrecourse Deductions for any Fiscal Year shall be specially allocated to the Member who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which such Partner Nonrecourse Deductions are attributable in accordance with Regulations Section 1.704-2(i)(1).

(g) **Section 754 Adjustments.** To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) or Code Section 743(b) is required, pursuant to Regulations Sections 1.704-1(b)(2)(iv)(m)(2) or 1.704-1(b)(2)(iv)(m)(4), to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of such Member's interest in the Company, the amount of such adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members as provided in Article VIII in the event that Regulations Section 1.704-2(b)(2)(iv)(m)(2) applies, or to the Member to whom such distribution was made in the event that Regulations Section 1.704-(b)(2)(iv)(m)(4) applies.

(h) **Allocations Relating to Taxable Issuance of Interests.** Any income, gain, loss, or deduction realized as a direct or indirect result of the issuance of an interest by the Company to a Member (the “Issuance Items”) shall be allocated as determined by a Majority in Interest of the Members among the Members so that, to the extent possible, the net amount of such Issuance Items, together with all other allocations under this Agreement to each Member, shall be equal to the net amount that would have been allocated to each such Member if the Issuance Items had not been realized.

(i) **Discretionary Authority for Compliance.** A Majority in Interest of the Members are authorized in their discretion to allocate items of income, gain, loss, deduction, or credit for any Fiscal Year differently than otherwise provided for in this Agreement to the extent that allocation in the manner provided for in this Agreement, in the opinion of the professional tax advisor to the Company (tax counsel or accountants), would cause the determinations and allocations of each Member’s distributive share of income, gain, loss, deduction, or credit (or item thereof) not to be permitted by Code Section 704(b) and the Regulations thereunder.

**4. Curative Allocations.** The allocations set forth in Allocation Addendum Paragraphs 2, 3(a), 3(b), 3(c), 3(d), 3(e), 3(f), and 3(g) (the “Regulatory Allocations”) are intended to comply with certain requirements of the Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other items of Company income, gain, loss, or deduction pursuant to this Paragraph 4. Therefore, notwithstanding any other provision of this Agreement (other than the Regulatory Allocations), the a Majority in Interest of the Members shall make such offsetting special allocations of Company income, gain, loss, or deduction in whatever manner they determine appropriate so that, after such offsetting allocations are made, each Member’s Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of this Agreement and all Company items were allocated pursuant to the other provisions of this Agreement. In exercising their discretion under this Allocation Addendum Paragraph 4, the Members shall take into account future Regulatory Allocations under Allocation Addendum Paragraphs 3(a) and 3(b) that, although not yet made, are likely to offset other Regulatory Allocations previously made under Allocation Addendum Paragraphs 3(e) and 3(f).

**5. Other Allocation Rules.**

(a) For purposes of determining the Profits, Losses, or any other items allocable to any period, Profits, Losses, and any such other items shall be determined on a daily, monthly, or other basis, as determined by a Majority in Interest of the Members using any permissible method under Code Section 706 and the Regulations thereunder.

(b) The Members are aware of the income tax consequences of the allocations made by this Agreement and hereby agree to be bound by the provisions of this Agreement in reporting

their shares of the items of Company income, gain, loss, deduction, and credit for income tax purposes.

(c) To the extent permitted by Section 1.704-2(h)(3) of the Regulations, a Majority in Interest of the Members shall endeavor to treat cash distributions as having been made from the proceeds of a Nonrecourse Liability or a Partner Nonrecourse Debt only to the extent that such distributions would cause or increase an Adjusted Capital Account Deficit for any Member.

(d) If during a Fiscal Year, any event occurs which results in a change during the Fiscal Year in any Member's interest in the Company within the meaning of Code Section 706(d), the allocations of Profit, Loss, and other items of income, gain, loss, deduction and credit of the Company for such Fiscal Year shall take into account such change using any method permitted by Code Section 706(d) that is selected by a Majority in Interest of the Members in their discretion.

**6. Tax Allocations: Code Section 704(c).** In accordance with Code Section 704(c) and the Regulations thereunder, income, gain, loss, and deduction with respect to any property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such property to the Company for Federal income tax purposes and its initial Gross Asset Value.

In the event the Gross Asset Value of any Company asset is adjusted pursuant to clause (ii) of the definition of Gross Asset Value, subsequent allocations of income, gain, loss, and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for Federal income tax purposes and its Gross Asset Value in the same manner as under Code Section 704(c) and the Regulations thereunder.

A Majority in Interest of the Members shall have the maximum discretion and flexibility permitted by Code Section 704(c) and the Regulations thereunder, including without limitation making curative allocations over a reasonable period of time as permitted by Regulations Section 1.704-3(c)(3)(ii), disregarding the general limitation on character as permitted by Regulations Section 1.704-3(c)(3)(iii)(B), using the remedial allocation method permitted by Regulations Section 1.704-3(d), and disregarding the application of Section 704(c) or using one of the other options permitted by Regulations Section 1.704-3(e)(1) in the case of a "small disparity".

Allocations pursuant to this Paragraph 6 are solely for purposes of Federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other items, or distributions pursuant to any provision of this Agreement.

**ALEC ATTACHMENT 2**

**DATA REQUEST 2-8 AND 2-9 RESPONSE**

## **COMMON STOCK PURCHASE AGREEMENT**

This Common Stock Purchase Agreement (the "Agreement"), is entered into as of December 16, 2002 by and among Wispnet NC, LLC a North Carolina limited liability company ("Purchaser") and Duro Communication Corporation, a Delaware corporation, d/b/a Volaris Online d/b/a ALEC (the "Company").

### **Background**

The Company desires to sell to Purchaser, and Purchaser desires to purchase from the Company, all of the issued and outstanding shares of common stock of ALEC, Inc., a Kentucky corporation and a wholly-owned subsidiary of the Company ("ALEC"), on the terms and conditions set forth in this Agreement. Therefore, in consideration of the promises and mutual covenants set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

### **Terms**

#### **1. Sale and Purchase of Shares.**

**1.1 Authorization.** The Company has authorized the sale to Purchaser, pursuant to the terms of this Agreement, of all of the issued and outstanding capital stock of ALEC consisting of One Thousand (1,000) shares of common stock (the "Shares").

**1.2 Sale.** Subject to the terms and conditions set forth herein, the Company hereby agrees to sell to the Purchaser, and the Purchaser hereby agrees to purchase from the Company, the Shares at the Closing (as defined below).

**2. Purchase Price.** The purchase price ("Purchase Price") for the Shares shall be Twenty-Five Thousand Dollars (\$25,000.00). The Purchaser shall pay the full Purchase Price to the Company at Closing (as defined below).

**3. Excluded Assets.** The assets, rights and causes of action of ALEC listed on Exhibit A hereto (the "Excluded Assets") shall not be a part of this transaction and shall remain the sole property of the Company.

**4. Closing.** Subject to the terms and conditions of this Agreement, the sale of the Shares, and the full payment of the Purchase Price, shall take place at the closing (the "Closing") to be held at the offices of Holland & Knight LLP, 200 S. Orange Avenue, Suite 2600, Orlando, Florida. The Company acknowledges that as of Closing, the Purchaser will own all assets and liabilities of ALEC.

The Purchaser is free to operate ALEC as it wishes and except for its continued ownership of the Excluded Assets, the Company will have no further claims upon ALEC. However, both parties acknowledge and agree that even through the Agreement has been reached, due to the required approval of the stock transfer by the North Carolina Utility Commission ("NCUC"), the Company will hold the stock on the Purchaser's behalf until the earliest of the following: (1) on or before January 31, 2003; or (2) within two days after the Purchaser notifies the Company that the required regulatory approval of the NCUC has been obtained.

**5. Representations and Warranties of the Company.** The Company hereby represents and warrants to the Purchaser the following:

**5.1 Organization and Standing; Articles of Incorporation and Bylaws.** The Company is a corporation duly organized, validly existing, and in good standing under the laws of the State of Delaware, and has full power and authority to own and operate its properties and assets and to carry on its business as presently conducted. The Company is duly qualified and authorized to do business, and is in good standing as a foreign corporation, in each jurisdiction where the nature of its activities and of its properties (both owned and leased) makes such qualification necessary and where a failure to so qualify would have a material adverse effect on its business or properties.

**5.2 Corporate Power.** The Company has all requisite legal and corporate power to execute and deliver this Agreement, to sell the Shares hereunder and to carry out and perform its obligations under the terms of this Agreement.

**5.3 Authorization.** All corporate action on the part of the Company, its officers, directors and shareholders necessary for the authorization, execution and delivery of this Agreement, the performance of all the Company's obligations hereunder and thereunder, and for the sale and delivery of the Shares has been taken. This Agreement, when executed and delivered, shall constitute the valid and legally binding obligation of the Company enforceable in accordance with its terms, subject to laws of general application relating to bankruptcy, insolvency and the relief of debtors and rules of law governing specific performance, injunctive relief or other equitable remedies.

**5.4 Validity of Shares.** The Shares, when sold and delivered in compliance with the provisions of this Agreement, will be validly issued, fully paid, and nonassessable, and will be free of any liens or encumbrances; provided, however, that the Shares may be subject to restrictions on transfer imposed by state and/or federal securities laws as set forth herein or as otherwise required by such laws at the time a transfer is proposed.



**5.5 Assets of ALEC.** The known assets of ALEC (other than the Excluded Assets) are listed on Exhibit B hereto (the "ALEC Assets"). However, the parties understand and acknowledge that there may be additional assets of ALEC not listed on Exhibit B, which the Purchaser shall acquire pursuant to this Agreement subject to the written agreement of the parties.

**5.6 Absence of Undisclosed Liabilities.** Except to the extent reflected on Exhibit C, hereto, to the knowledge of the Company ALEC has no material liabilities of any nature, whether accrued, absolute, contingent, or otherwise. The Company represents and warrants that it does not know of any basis for the assertion against ALEC of any material liability of any nature or in any amount not fully reflected on Exhibit C.

**5.7 Litigation.** There is no litigation or proceeding pending, or to the Company's knowledge threatened, against or relating to ALEC, its properties, or business, nor does the Company know of any basis for any such action, or of any governmental investigation relative to ALEC, its properties, or business with the exception of the complaints referenced in Item 6 of Exhibit A (Excluded Assets).

**5.8 Leases, Contracts, and Licenses.** The Company represents and warrants that the transfer of the Shares in accordance with the terms of this Agreement will not constitute a prohibited assignment or transfer of any of its licenses, leases, or contracts, and that any of the foregoing will remain in full force and effect without acceleration as a result of this transaction.

**6. Representations and Warranties of the Purchaser.** Purchaser hereby represents and warrants to the Company as follows:

**6.1 Legal Power.** Purchaser has the requisite legal power to enter into this Agreement, to purchase the Shares hereunder, and to carry out and perform its obligations under the terms of this Agreement.

**6.2 Due Execution.** This Agreement has been duly authorized, executed and delivered by Purchaser, and, upon due execution and delivery by the Company, this Agreement will be a valid and binding agreement of Purchaser enforceable in accordance with its terms, subject to laws of general application relating to bankruptcy, insolvency and the relief of debtors and rules of law governing specific performance, injunctive relief or other equitable remedies.

**7. Access and Information.** The Company shall allow the Purchaser reasonable access, during normal business hours throughout the period prior to the Closing, to all of ALEC's properties, books, contracts, commitments, and records, and shall furnish the Purchaser during such period with all such information concerning ALEC's affairs as the Purchaser reasonably may request.

**8. Conduct of Business Pending Closing.** The Company covenants that, pending the Closing:

- (a) ALEC's business will be conducted only in the ordinary course.
- (b) No change will be made in ALEC's Certificate of Incorporation or Bylaws, except as may be first approved in writing by the Purchaser.
- (c) No change will be made in ALEC's authorized or issued corporate shares.
- (d) No dividend or other distribution or payment will be declared or made in respect of ALEC's corporate shares.
- (e) No contract or commitment will be entered into by or on behalf of ALEC extending beyond December 31, 2002.
- (f) No contract right of ALEC will be waived.

**9. Conditions Precedent.** All obligations of the parties under this agreement are subject to the fulfillment, prior to or at Closing, of each of the following conditions:

- (a) As to Purchaser:
  - (i) Representations and Warranties True at Closing. The Company's representations and warranties contained in this Agreement shall be true at the time of Closing as though such representations and warranties were made at Closing.
- (b) As to the Company:
  - (i) Representations and Warranties True at Closing. The Purchaser's representations and warranties contained in this Agreement shall be true at the time of Closing as though such representations and warranties were made at Closing.

**10. Miscellaneous.**

**10.1 Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Florida without regard to the conflicts of laws provisions thereof.

**10.2 Survival.** The representations, warranties, covenants, and agreements made herein shall survive the closing of the transactions contemplated hereby.

**10.3 Successors and Assigns.** Except as otherwise expressly provided herein, the provisions hereof shall inure to the benefit of, and be binding upon, the successors, assigns, heirs, executors, and administrators of the parties hereto.

**10.4 Entire Agreement.** This Agreement, the Exhibits hereto and the other documents required to be delivered pursuant hereto constitute the full and entire understanding and agreement between the parties with regard to the subject matter hereof and no party shall be liable or bound to the other party in any manner by any representations, warranties, covenants, or agreements except as specifically set forth herein or therein. Nothing in this Agreement, express or implied, is intended to confer upon any party, other than the parties hereto and their respective successors and assigns, any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided herein.

**10.5 Separability.** In case any provision of this Agreement shall be invalid, illegal, or unenforceable, it shall to the extent practicable, be modified so as to make it valid, legal and enforceable and to retain as nearly as practicable the intent of the parties, and the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

**10.6 Notices.** Except as otherwise expressly provided in this Agreement, any notice or request to be given hereunder by either party to the other shall be in writing and may be affected either by personal delivery or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to the parties at the following addresses, but either party may change its notice address by providing written notice to the other in accordance with this Subsection.

If to the Company:           Duro Communication Corporation  
  1101 Greenwood Blvd.  
  Suite 201  
  Lake Mary, FL 32746  
  Attention: Steven G. Sapp

with a copy to:               Holland & Knight LLP  
  200 South Orange Avenue, Suite 2600  
  Orlando, Florida 32801  
  Facsimile: (407) 244-5288  
  Attn: Louis T.M. Conti, Esq.

If to Purchaser:             Wispnet NC, LLC  
  250 West Main Street, Suite 710  
  Lexington, Kentucky 40507

Attn: Mark Elliott

**10.7 Fees and Expenses.** Each party shall pay its own legal expenses relating to this Agreement. If legal action is brought to enforce or interpret this Agreement, the prevailing party shall be entitled to recover its attorneys' fees and legal costs in connection therewith.

**10.8 Titles and Subtitles.** The titles of the Sections and Subsections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement.

**10.9 Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one instrument.

**10.10 Gender.** All references to "Purchaser," "it" or "he" herein shall be deemed to include the masculine and the feminine with reference to any individuals and the neuter with reference to any artificial persons.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

**"COMPANY"**

DURO COMMUNICATION CORPORATION

By: Steven G. Sapp  
Name: Steven G. Sapp  
Title: Treasurer

**"PURCHASER"**

WISPNET NC, LLC

By: Mark S. Elliott  
Name: Mark S. ELLIOTT  
Title: President, Data Services

**EXHIBIT A**  
**EXCLUDED ASSETS**

1. Interconnection Agreement between ALEC and Bellsouth in AL, MS, TN, KY, SC, FL, GA.
2. Interconnection Agreement between ALEC and Alltel in KY and GA.
3. Interconnection Agreement between ALEC and Verizon in FL.
4. Interconnection Agreement between ALEC and Sprint in FL.
5. Certificate of Public Convenience and Necessity in FL, GA, KY, TN, SC, MS, and AL.
6. Any and all claims between ALEC and Sprint before the Florida Public Service Commission (including without limitation the claim referred to in Docket No. 020099-TP) or the Georgia Public Service Commission.

**EXHIBIT B**  
**ALEC ASSETS**  
(See attached.)

**EXHIBIT B**  
**ALEC ASSETS**

1. Domain name ALEC.NET
2. (See attached.)



**EXHIBIT C**  
**OTHER LIABILITIES**

None.

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