

February 6, 2006

**VIA AFTER HOURS DROP BOX**

Ms. Beth O'Donnell  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, KY 40602-0615

Drop Box  
**RECEIVED**

FEB 07 2006

PUBLIC SERVICE  
COMMISSION

RE: Motion to Dismiss and Answer - In the Matter of  
TOUCHSTONE d/b/a ALEC, Inc.  
Case No. 2005-00482

Dear Ms. O'Donnell:

Our firm represents ALLTEL Corporation and its various affiliates, including Kentucky ALLTEL and ALLTEL Kentucky ("ALLTEL"). Enclosed is ALLTEL's original Motion to Dismiss and Answer. A courier from our office will stop by with eleven copies of the Motion, ten copies to file and one to stamp and return to me. Thanks for your assistance.

Sincerely yours,



R. Cordell Pierce

RCP:kms  
Enclosure

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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

FEB 07 2006

PUBLIC SERVICE  
COMMISSION

In the Matter of:

TOUCHSTONE, D/B/A ALEC, INC. )  
Complainant )  
v. ) CASE NO. 2005-00482  
ALLTEL COMMUNICATIONS, INC. )  
Defendant )

**MOTION TO DISMISS AND ANSWER**

Kentucky Alltel, Inc. ("Kentucky Alltel") files the following Motion to Dismiss and Answer with respect to the Complaint filed on November 28, 2005 by TOUCHSTONE, d/b/a ALEC, Inc. ("ALEC") with the Kentucky Public Service Commission ("Commission") and the Amended Complaint filed on January 25, 2006 (the pleadings collectively, "Complaint"):

**MOTION TO DISMISS**

1. ALEC sets forth two claims, each of which is without merit and should be dismissed. First, ALEC alleges that Kentucky Alltel owes ALEC compensation for ISP-bound traffic from June 14, 2001 to August 2005. Second, ALEC claims intra-LATA toll charges from August 2000 to August 2005. Claims for all traffic from August 2000 to November 2002 are improper as ALEC is not the party in interest for this time period as explained below. Additionally, the parties' interconnection agreement does not support ALEC's claim for compensation of ISP-bound traffic and in fact provides that neither party shall bill for such traffic. The latter claim for intra-LATA toll is wrongful due in part to ALEC's counterpart already having been compensated for traffic through November 2002 as well as ALEC's failure to correctly quantify the traffic and provide supporting traffic records, despite Kentucky Alltel's multiple requests.

2. On August 26, 1999, the Commission approved the Interconnection Agreement, Resale and Unbundling Agreement ("Interconnection Agreement") between GTE South Incorporated ("GTE") (one of Kentucky Alltel's predecessors) and ALEC in Case No. 99-318.
3. Kentucky Alltel did not enter the Kentucky market until August 2002. During its acquisition proceeding (Case No. 2001-399), Kentucky Alltel committed to honor existing interconnection agreements entered into by its immediate predecessor (Verizon South, Inc.). That commitment includes the Interconnection Agreement at issue in this proceeding.
4. As an initial matter, it appears the entity filing the Complaint (Touchstone, d/b/a ALEC, Inc.) is not the party that contracted for service with Kentucky Alltel, does not maintain a valid certificate from this Commission, and is not a lawful corporate entity in good standing with the Kentucky Secretary of State. Touchstone, d/b/a ALEC, Inc. is not the party that executed the Interconnection Agreement with Kentucky Alltel's predecessor (that entity being Touchstone Communications, Inc.) and does not appear to be a corporation authorized by the Secretary of State to conduct business in Kentucky or certificated by this Commission. The Secretary of State identifies Touchstone, Inc. as a corporation in bad standing. Touchstone, d/b/a ALEC, Inc. lacks standing and authority to bring the Complaint, and the Complaint should be dismissed with prejudice. Without waiving any of the above, Kentucky Alltel provides the following response.
5. Kentucky Alltel and ALEC exchange various types of traffic including, Internet-bound ("ISP-bound traffic"), local, and intra-LATA toll traffic. ALEC disregards the Interconnection Agreement and wrongfully assesses charges to Kentucky Alltel for various traffic in the amount of \$8,622,061.30 from August 2000 to August 2005. These charges are unsubstantiated and unlawful, and the related Complaint should be dismissed.

6. Pursuant to 807 K.A.R. 5:001 Section 12(4)(a), which provides for dismissal of any formal complaint failing to establish a prima facie case, Kentucky Alltel requests that the Commission dismiss the Complaint and Amended Complaint, as ALEC's claims are without merit as set forth in greater detail herein.

**All Claims Prior to December 2002:**

7. ALEC contends, among other things, that Kentucky Alltel owes ALEC money for various traffic from August 2000 through November 2002. However, the ALEC affiliate pursuing the claim in this Complaint is not the proper party in interest for this time period. In fact, Kentucky Alltel and its predecessor, in accordance with the Interconnection Agreement, fully compensated the proper party in interest for traffic from August 2000 through November 2002.
8. On December 6, 2004, John Dodge (a representative of the ALEC entity pursuing the Complaint) acknowledged that in order to avoid Kentucky Alltel being presented with competing claims from different ALEC entities, he had removed from his invoices amounts for the months of August through November 2002 inclusive, which ALEC, Inc. understood to be the subject of another ALEC entity's claims to Kentucky Alltel. Mr. Dodge stated that ALEC would pursue the matter directly with the other ALEC entity represented by Richard McDaniel to determine which entity was entitled to claim the compensation and requested that Kentucky Alltel await an update.
9. Subsequently on February 3, 2005, Mr. McDaniel, who consistently had been the representative in industry negotiations with respect to this Interconnection Agreement, notified Kentucky Alltel that ALEC, Inc. was sold to Wispnet NC LLC and all of ALEC, Inc.'s receivables up to the sale to Wispnet (December 2002) were purchased by Duro ALEC

Settlement Group. Mr. McDaniel confirmed that *any receivables from December 2002 forward remained with ALEC, Inc.*

10. As will be explained in more detail in the sections below, Kentucky Alltel and its predecessor compensated the proper party in interest for all intra-LATA toll charges from August 2000 through November 2002. (See copy of Kentucky Alltel's check to Duro ALEC Settlement Group dated March 9, 2005 attached hereto as Exhibit A.) Additionally, neither Kentucky Alltel nor its predecessor compensated Duro ALEC Settlement Group for ISP-bound traffic from August 2000 through November 2002 as no compensation was due pursuant to the parties' Interconnection Agreement.

11. ALEC and its counterpart each expressed that ALEC is not entitled to pursue claims (which in fact have already been paid) from August 2000 through November 2002. ALEC's attempt now to include those very same claims in the Complaint is wrongful, and Kentucky Alltel should not be made to incur expense defending claims to which ALEC itself has acknowledged it is not entitled. The Commission should dismiss all claims from August 2000 through November 2002 with prejudice.

**ALEC's Claim Regarding ISP-Bound Traffic:**

12. ALEC's claim regarding ISP-bound traffic is contrary to the clear, unambiguous terms of the Interconnection Agreement. Nevertheless, ALEC attempts to unilaterally "reinterpret" the Interconnection Agreement in order to exact large sums of money from Kentucky Alltel for charges for this one-way ISP-bound traffic. Indeed, this type of unbalanced-traffic scenario is one reason that the Federal Communications Commission ("FCC") continues to evaluate Internet service compensation schemes. In particular, the FCC noted:

*The regulatory arbitrage opportunities associated with intercarrier payments are particularly apparent with respect to ISP-bound traffic, however, because*

*ISPs typically generate large volumes of traffic that is virtually all one-way -- that is, delivered to the ISP. Indeed, there is convincing evidence in the record that at least some carriers have targeted ISPs as customers merely to take advantage of these intercarrier payments. Accordingly, in this Order we also take interim steps to limit the regulatory arbitrage opportunity presented by ISP-bound traffic while we consider the broader issues of intercarrier compensation in the NPRM proceeding.<sup>1</sup> (Emphasis supplied.)*

13. ALEC's purported charges are for traffic that results from Kentucky Alltel end users dialing an ALEC telephone number in order to access an Internet service provider ("ISP"). The potential for arbitrage created by this one-sided and unbalanced traffic scenario obviously is the reason that GTE negotiated Article V, Section 3.2.3. of the Interconnection Agreement, which ALEC accepted when it adopted the terms set forth in the agreement. This Section very clearly provides that "until the FCC enters a *final, binding and nonappealable* order ("Final Order"), the Parties shall exchange and each Party may track ESP/ISP Traffic but *no compensation shall be owed* for ESP/ISP Traffic exchanged between the Parties and *neither party shall bill the other* for such traffic." (Emphasis supplied.) The FCC has not issued any such final, binding, *and* nonappealable order, and ALEC's continuing attempts to charge Kentucky Alltel for ISP-bound traffic violate the Interconnection Agreement.

14. The FCC initially addressed ISP-bound traffic in 1999<sup>2</sup> and found ISP traffic to be interstate in nature subject to FCC jurisdiction. Also in 1999, as ALEC recognized in the Interconnection Agreement, the FCC issued a Notice of Proposed Rule Making ("NPRM") to evaluate the prospective treatment of ISP-bound traffic.<sup>3</sup> The FCC's evaluation of the treatment of ISP-bound traffic continues today, and the FCC has yet to issue a final, binding, *and* nonappealable order on the subject.

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<sup>1</sup> *ISP Remand Order* at ¶2.

<sup>2</sup> *See*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689 (1999) ("*Initial Order*").

<sup>3</sup> Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999).

15. The FCC's initial order was appealed to the D.C. Circuit Court of Appeals and remanded to the FCC. Thereafter, the FCC released its *ISP Remand Order* cited above in 2001 in tandem with another NPRM regarding intercarrier compensation. Even aside from the ongoing NPRM, the *ISP Remand Order* itself is not final and in fact, has served as the basis for further judicial appeals. Indeed, the FCC issued the *ISP Remand Order* – as the D.C. Circuit Court of Appeals specifically acknowledged – as an *interim recovery scheme* to aggressively eliminate the types of arbitrage opportunities, of which ALEC's Complaint in this case is a prime example. Further, the FCC desired additional time in which to conduct a more extensive evaluation of these scenarios in its NPRM proceeding.<sup>4</sup> Specifically, the FCC stated as follows in the *ISP Remand Order*:

*Although we believe this arbitrage opportunity is particularly manifest with respect to ISP-bound traffic, we suggest in the NPRM that any compensation regime based on carrier-to-carrier payments may create similar market distortions.* Accordingly, we *initiate an inquiry* as to whether bill and keep is a more economically efficient compensation scheme than the existing carrier-to-carrier payment mechanisms. Alternatively, the record developed in that proceeding may suggest modifications to carrier-to-carrier cost recovery mechanisms that address the competitive concerns identified above. *Based upon the current record, however, bill and keep appears the preferable cost recovery mechanism for ISP-bound traffic because it eliminates a substantial opportunity for regulatory arbitrage.* We do not fully adopt a bill and keep regime in this Order, however, because there are specific questions regarding bill and keep that require *further inquiry*, and we believe that a *more complete record* on these issues is desirable before requiring carriers to recover most of their costs from end-users. Because these questions are equally relevant to our evaluation of a bill and keep approach for other types of traffic, *we will consider them in the context of the NPRM.*<sup>5</sup> (Emphasis supplied.)

16. By no means does the FCC's *ISP Remand Order* meet the standard of “final, binding, and nonappealable” as contemplated by the Interconnection Agreement. *Significantly, the ISP Remand Order has been appealed and remanded back to the FCC for further proceedings*

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<sup>4</sup> *ISP Remand Order* at ¶7.

<sup>5</sup> *ISP Remand Order* at ¶6.

*which, as of the date of this motion, are ongoing.*<sup>6</sup> In remanding the decision, the D.C. Circuit Court of Appeals found, "*Because we can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be, we have no meaningful context in which to assess these explicitly transitional measures."*<sup>7</sup> Thus, ALEC's assertion that judicial review of the *ISP Remand Order* has been exhausted is false. As ALEC even admits in its Complaint, the FCC continues to wrangle with the ISP compensation scheme set forth in the *ISP Remand Order*.

17. ALEC's comparison of the D.C. Circuit Court of Appeals decision regarding the FCC's Triennial Review Order ("TRO") to the *ISP Remand Order* is also flawed and misleading and does not support ALEC's contention that the *ISP Remand Order* is the type of final, binding, and nonappealable decision contemplated under the Interconnection Agreement. The FCC clearly has not promulgated final rules with respect to Internet compensation. The *ISP Remand Order* *remands* the FCC's decision, which again does not yet set forth any final FCC rules as noted by the D.C. Circuit Court of Appeals referenced in Paragraph 16 above. The remand involves ongoing and nonfinalized proceedings, which is also evidenced by the FCC's release of its NPRM with the *ISP Remand Order*.

18. Reliance on the *ISP Remand Order* to support ALEC's position that ALEC is due compensation for ISP-bound traffic is flawed under the very language of the *ISP Remand Order*. For instance, the order expressly states that the decision is an "interim" and "transitional" measure, which necessitates the conclusion that the order is not the final,

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<sup>6</sup> *Bell Atlantic Tel. Cos. v. FCC*, 340 U.S. App. D.C. 328, 206 F.3d 1, 5, 8 (D.C. Cir. 2000), Intercarrier Compensation for ISP -Bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"). *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), cert. denied, 538 U.S. 1012 (2003).

<sup>7</sup> *Id.*



binding, and nonappealable decision contemplated by the parties under the Interconnection Agreement.

19. The *ISP Remand Order* and associated interim and nonfinal rules, relied on by ALEC, also do not support ALEC's contention that it is entitled to compensation for ISP-bound traffic from June 14, 2001 to August 2005. *Paragraph 78 of the ISP Remand Order provides that for the year 2001, a local exchange carrier ("LEC") may receive compensation for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to receive compensation under its agreement during the first quarter of 2001, plus a ten percent growth factor. For each subsequent year, the volume is equal to the cap for the previous year, plus another ten percent growth factor. Neither Kentucky Alltel's predecessor nor ALEC billed each other for ISP-bound traffic in 2001.* Therefore, neither party received or was entitled under the Interconnection Agreement to receive compensation for ISP-bound traffic during the first quarter of 2001, as evidenced by the fact that ALEC only claims compensation from the second quarter of 2001 (*i.e.*, June 2001) forward.
20. Specifically, in Section 3.2.3 of the Interconnection Agreement, the parties agreed that "*no compensation shall be owed for ESP/ISP Traffic exchanged between the Parties and neither party shall bill the other for such traffic.*" (Emphasis supplied.) This language could not be any more clear. Neither ALEC nor Kentucky Alltel's predecessor was entitled to compensation for ISP-bound traffic during the first quarter of 2001. Given that ALEC was not entitled to compensation for ISP-bound traffic during the first quarter of 2001, ALEC's cap on compensable ISP-bound traffic minutes for 2001 and subsequent years according to

the *ISP Remand Order* is zero. Therefore, even under the *ISP Remand Order*, Kentucky Alltel is not obligated to pay ALEC any compensation for ISP-bound traffic.

21. Additionally, Section 3.2.3 of the Interconnection Agreement provides that once the FCC issues a final, binding, and nonappealable order regarding ISP-bound traffic (which the FCC has not), "the parties shall meet to discuss implementation of the Order." Similarly, Article III, Section 3 provides that any amendments to the agreement (*e.g.*, changes to the existing provisions providing for no ISP compensation) must be in writing and signed by both parties. The Interconnection Agreement, however, does not provide that one party may proceed unilaterally with implementation of an ISP compensation scheme, and the parties have not put any such amendment in writing. Therefore, in addition to the fact that the FCC has not issued an order of the finality contemplated under the Interconnection Agreement, the parties also have not amended the Interconnection Agreement to provide for such as required thereunder. ALEC is not justified with proceeding in any fashion with its purported claim for ISP-bound traffic.

22. In support of its ISP claim, ALEC also references filings pertaining to separate Alltel affiliates in Florida and Wisconsin. These filings are irrelevant. These separate entities are not parties to the Kentucky Interconnection Agreement at issue in this proceeding. Additionally, as noted in Paragraph 62 of the Answer below, ALEC is mistaken as Alltel Communications, Inc. is not a CLEC in Wisconsin. Most importantly, the Florida and Wisconsin filings to which ALEC refers are not inconsistent with Kentucky Alltel's position, as neither of the filings represents the *ISP Remand Order* as being final and nonappealable. Thus, ALEC's discourse on these state filings is completely irrelevant.

23. For these reasons, ALEC's claim regarding ISP-bound traffic is violative of the parties' Interconnection Agreement and unlawful and should be denied in its entirety.

**ALEC's Claim Regarding Toll Traffic:**

24. ALEC has also claimed that Kentucky Alltel owes it compensation for terminating toll traffic from August 2000 through August 2005. ALEC's claim is unsubstantiated, erroneous, and already paid in full to the extent that it was due. ALEC's claim for compensation through November 2002, should be dismissed with prejudice because the traffic was fully compensated.

25. The proper ALEC party in interest is paid in full to the extent that compensation was due because Kentucky Alltel's predecessor and Kentucky Alltel paid ALEC over \$275,000 for periods through November 2002. Kentucky Alltel's predecessor paid ALEC over \$160,000 for toll traffic from August 2000 through July 2002. As evidenced by Exhibit A, Kentucky Alltel also compensated the correct ALEC party in interest on March 9, 2005 for toll traffic from August 2002 through November 2002 in an amount exceeding \$115,000. ALEC's claim for these periods should be dismissed with prejudice. (Collectively, these time periods in Paragraphs 24 and 25 may be referred to as the "paid periods.")

26. ALEC's invoices for the remaining time periods are erroneous and unsubstantiated. Article III, Section 10.2 of the Interconnection Agreement allows the billed party to provide the other party in writing a dispute within six months. On March 4, 2003, Kentucky Alltel acted in accordance with this provision when it provided a timely dispute of ALEC's invoices for toll traffic from December 2002 through January 2003. (The period from December 2002 through August 2005 is referenced herein as "the disputed period".) (Attached as Exhibit B is Kentucky Alltel's dispute letter.) In this letter, Kentucky Alltel requested that ALEC provide

the percent local usage ("PLU") used by ALEC to determine the jurisdiction applicable to the traffic, the applicable rates, and supporting records documenting the minutes of use. To date, ALEC has not provided the information necessary to resolve the traffic dispute. This failure by ALEC is in violation of Section 10 of the Interconnection Agreement that requires the parties to provide "all information to accurately, reliably, and properly order and bill for features, functions and services rendered under this Agreement."

27. ALEC's intra-LATA toll invoices are incorrect and conflict with the Interconnection Agreement. The Interconnection Agreement treats ISP-bound traffic (or Internet traffic), local traffic, and intra-LATA toll traffic as separate and distinct types of traffic as follows:

(a) Article II, Section 1.31 defines Internet Traffic as "[t]raffic bound to any Enhanced Service Provider or Internet Service Provider as such traffic is referred to in CC-Dockets 96-98 and 99-68. Subject to Appendix 9 to Attachment 14 of this Agreement, **ESP/ISP Traffic is not included in Local Traffic.**" (Emphasis supplied.)

(b) Article II, Section 1.59 defines Local Traffic and states, "***Local Traffic excludes Enhanced Service Provider (ESP) and Internet Service Provider (ISP) Traffic,*** including but not limited to Internet, 900-976, etc., and Internet Protocol based long distance telephony." (Emphasis supplied)

(c) Section 3.2.4 of the Interconnection Agreement states that charges for termination of intra-LATA toll shall be in accordance with the parties' respective intrastate access tariffs. Further, intra-LATA toll minutes are determined by using an Exempt Factor as set forth in Appendix A, Section F.3.

28. Therefore, pursuant to the Interconnection Agreement, Internet traffic is not be considered part of local traffic. Further, neither Internet traffic nor local traffic is subject to compensation. (See Article V, Sections 3.2.2 and 3.2.3 of the Interconnection Agreement.) Toll traffic is subject to the parties' access tariffs.

29. The first step in billing is to determine the type of traffic for each minute of use (*i.e.*, Internet, local, intra-LATA toll). Because Internet traffic is not considered local or toll traffic, the parties must first subtract the total minutes attributable to Internet traffic from the total traffic

minutes in order to determine the portion of the total traffic that is considered either local or intra-LATA toll. This methodology is not only in accordance with the parties' Interconnection Agreement but is also consistent with standard industry business practice. As will be explained below, ALEC's toll billings do not remove Internet traffic and, therefore, contravene both the Interconnection Agreement and standard industry practice in this respect.

30. Once Internet traffic is removed from the total minutes, factors are applied to the remaining minutes to determine what portion is considered local traffic and what portion is considered toll traffic. Under Article V, Section 4.3.5. of the Interconnection Agreement, the parties apply a PLU (percent local usage) factor to determine the amount of local traffic. The remainder of the traffic after local and Internet traffic are removed is then deemed to be intra-LATA toll (or "Exempt Traffic" as referenced in the Interconnection Agreement). Local traffic is subject to bill-and-keep under Article V, Section 3.2, and Exempt Traffic is compensable in accordance with the parties' respective intrastate access tariffs under Article V, Section 3.2.4.

31. With respect to the specific PLU factors to be applied to the traffic to make this local/toll allocation, Appendix A of the Interconnection Agreement establishes an *initial* PLU of 95% and Exempt Factor of 5%. Thereafter, Article V, Section 4.3.5 of the Interconnection Agreement requires ALEC to provide PLU factors to Kentucky Alltel on a semi-annual basis in order to identify the *proper* percent of local traffic. Thus, ALEC is responsible for updating its factors so that the factors reflect the appropriate mix of types of traffic that it terminates to the other party. However, the Interconnection Agreement does not permit a party to simply refuse to update its factors as ALEC has done in this instance. (See for instance, Section 10 of the Interconnection Agreement referenced above in Paragraph 25.)

32. Following Kentucky Alltel's initial request in 2003 for records and updated factors, ALEC failed to provide any of the information requested by Kentucky Alltel. Using call records that Kentucky Alltel obtained from its own billing system and that ALEC subsequently validated, Kentucky Alltel determined that at least 96% of the traffic terminated by Kentucky Alltel to ALEC was Internet traffic. Thus, based on just these call detail records which identified 96% of the traffic as Internet traffic, it became even more evident that ALEC's toll invoices (which continued to improperly apply a 95% local factor and 5% Exempt Factor to traffic that also included Internet traffic) were incorrect. Consequently, Kentucky Alltel sent another letter on June 2, 2005 (attached as Exhibit C), disputing ALEC's invoices. ALEC has yet to provide the supporting records and factors requested by Kentucky Alltel.
33. Again, not only has ALEC used improper PLU/Exempt factors of 95%/5%, respectively, but ALEC has also applied the factor incorrectly as explained above. By way of example, assuming 40 million minutes of total traffic in one month, ALEC would incorrectly multiply the entire 40 million minutes by 5% and claim that 2 million minutes were compensable as intra-LATA toll.
34. The correct method under the parties' Interconnection Agreement and standard industry practice is to subtract from the total 40 million minutes the portion identified as Internet traffic. In this case, the call detail records validated by ALEC revealed that at least 96% of the total traffic is Internet traffic. Therefore, ALEC should have multiplied 40 million minutes by 96% and then subtracted that amount from the total 40 million minutes to remove Internet traffic and determine the amount of traffic attributable to local and intra-LATA toll. Then, ALEC should have applied properly updated PLU/Exempt factors to the remaining 1.6 million minutes to determine what portion of the 1.6 was local and what portion was toll.

Under the correct method required by the Interconnection Agreement (assuming 95%/5% PLU/Exempt factors for example), the result is that 5% of the remaining 1.6 million minutes is 80,000 minutes and the appropriate amount of traffic attributable to intra-LATA toll in this example. To reiterate, Kentucky Alltel disputes that 95%/5% are the correct factors, but Kentucky Alltel offers this example to demonstrate the significance of the inaccuracies in ALEC's calculations (*i.e.*, difference of over 1.9 million minutes). In reality, given that most of ALEC's traffic is ISP-bound traffic, one would expect the factors to reflect a lower percent of intra-LATA toll than the 5% used above, which makes the inaccuracies in ALEC's toll billings even more significant.

35. ALEC's improper inclusion of Internet traffic in its calculations of Exempt Traffic (*i.e.*, intra-LATA toll) and its use of lower local traffic factors inflates the amount of compensation it claims Kentucky Alltel owes.
36. ALEC's demand also is not clear as to which rates it applies to toll traffic. As noted above, the Interconnection Agreement provides that ALEC's intrastate access tariff rates are applicable. In one invoice dated December 2004 (attached as Exhibit D), ALEC appears to use a rate of \$0.029000. However, ALEC's tariff (effective August 2004), sets forth a different rate of \$0.01402. To compound the confusion, in a letter dated March 6, 2003, ALEC attached a copy of its purported tariff page reflecting a rate of \$0.0412.
37. In summary, ALEC's claims are without merit and should be dismissed. First, ALEC asserts claims for time periods for which it is not the proper party in interest and for traffic which already has been compensated. Second, ALEC's contention that Kentucky Alltel has "failed" to compensate ALEC for ISP-bound traffic is without merit as the parties' Interconnection Agreement provides that the parties shall not bill each other for this type of traffic until such

time as certain conditions are met. As explained above, none of those conditions have been met. Third, ALEC should be estopped from asserting any claim for compensation for intra-LATA toll traffic since ALEC has already been compensated for some periods and continues to utilize and misapply inappropriate factors. As ALEC is in violation of the parties' Interconnection Agreement in these ways, ALEC should not be allowed to continue these wrongful and unsubstantiated claims.

38. For the reasons set forth above, the Commission should grant this motion and dismiss the Complaint in its entirety, as it does not set forth any basis for relief.

#### **ANSWER**

39. Paragraphs 1 through 38 above in the Motion to Dismiss are incorporated herein by reference.

40. Kentucky Alltel denies all allegations in the Complaint unless specifically admitted herein.

41. Kentucky Alltel is without information sufficient to admit or deny Footnotes 11, 12, and 13 in the Amended Complaint because they are not referenced in the body of the document and, therefore, denies the allegations.

42. Kentucky Alltel is without sufficient information to admit or deny the allegations in Paragraph 1 of the Complaint and, therefore, denies the allegations.

43. Kentucky Alltel denies the allegation in Paragraph 2 of the Complaint that Kentucky Alltel's principal place of business is as stated therein.

44. Kentucky Alltel denies the allegations in Paragraphs 3 and 5 of the Complaint.

45. As to Paragraphs 4, 6, 7, 8, and 12 of the Complaint, the Interconnection Agreement is a written document, the Commission's Rules of Practice and Procedure (807 KAR 5:001 *et. seq.*) are public documents, and §252(d)(2)(A) of the Telecommunications Act of 1996 ("the



Act”) and the FCC’s ISP Remand Order are public documents, all of which speak for themselves.

46. Kentucky Alltel admits the statement in Paragraph 9 of the Complaint that it has attempted to resolve this dispute between the parties.

47. Kentucky Alltel denies the allegations in Paragraph 10 of the Complaint that the parties adopted an interconnection agreement in May 1999. More accurately, Kentucky Alltel committed to the Commission in 2002 in Case No. 2001-399 that it would honor all existing interconnection agreements entered into by its predecessor (Verizon South, Inc.), which includes the Interconnection Agreement at issue in this proceeding. On February 13, 2002, the Commission issued an order finding in part that, "ALLTEL shall honor all interconnection agreements entered into by Verizon."

48. With respect to Paragraph 11 of the Complaint, Kentucky Alltel denies ALEC's statement as to ISP-bound traffic being considered "largely as local traffic" as the Interconnection Agreement clearly excludes ESP and ISP traffic from the definition of local traffic.

49. Kentucky Alltel denies the assertion in Paragraph 13 of the Complaint that the parties will assume that traffic is 95% local for the reasons set forth more fully in the Motion to Dismiss.

50. As to Paragraphs 14 and 15 of the Complaint, the Interconnection Agreement is a written document which speaks for itself.

51. Kentucky Alltel denies the assertions in Paragraphs 16, 17, and 18 of the Complaint and affirms that it has compensated ALEC per the parties' Interconnection Agreement.

52. With respect to Paragraph 19 of the Complaint, Kentucky Alltel admits that it received a letter from ALEC.

53. Kentucky Alltel denies the allegations in Paragraphs 20, 21, 22, 23, 25, 26, and 27 of the Complaint.
54. With respect to Paragraphs 24 and 28 of the Complaint, the Interconnection Agreement and TRO are written documents which speak for themselves, but ALEC's citation of the agreement in Paragraph 24 is erroneous.
55. Kentucky Alltel denies the allegations and opinions in Paragraphs 29, 30, 31, and 32 of the Complaint and affirms that the Interconnection Agreement, FCC orders, and D.C. Circuit Court of Appeal's decision are written documents which speak for themselves.
56. Kentucky Alltel denies that the assertions in Paragraph 33 of the Complaint are an accurate interpretation of the FCC's jurisdiction.
57. With respect to Paragraph 34 of the Complaint, the *ISP Remand Order* is a written document which speaks for itself.
58. With respect to Paragraphs 35 and 36 of the Complaint, Kentucky Alltel admits only that the FCC released a Notice of Proposed Rulemaking which speaks for itself.
59. As to Paragraphs 37, 38, and 40 of the Complaint, Kentucky Alltel denies any opinions and allegations therein and states that the FCC's authorities are written documents which speak for themselves.
60. Kentucky Alltel denies the opinions set forth in Paragraphs 39 and 41 of the Complaint and avers that ALEC's opinion with respect to the FCC's "intention" in Paragraph 39 is unsubstantiated.
61. Kentucky Alltel denies the allegations in Paragraph 42 of the Complaint.
62. Kentucky Alltel denies statements set forth in Paragraph 43 of the Complaint and states that ACI is a wireless carrier in Wisconsin, not a CLEC as ALEC alleges. Further, Kentucky

Alltel affirms that, in the Wisconsin amendment to which ALEC refers, ACI does *not* construe the FCC's *ISP Remand Order* as being final, binding, and nonappealable such that there is no inconsistency between ACI's actions and Kentucky Alltel's actions, although such evidence is wholly irrelevant to this proceeding.

63. Kentucky Alltel denies the allegations and opinions in Paragraph 44 of the Complaint and states that there is no inconsistency between the positions of the separate Alltel affiliates listed in ALEC's Complaint. Nevertheless, Kentucky Alltel affirms that actions in these other jurisdictions by separate and independent entities are irrelevant to the facts of this proceeding which are governed by the plain language in the Kentucky Interconnection Agreement between Kentucky Alltel and ALEC.

64. Kentucky Alltel denies the assertion in Paragraph 45 of the Complaint as it is an incomplete summary of the traffic involved.

65. Kentucky Alltel denies the allegations in Paragraphs 46, 47, and 48 of the Complaint.

66. Kentucky Alltel denies the allegations and misleading characterizations in Paragraph 49 of the Complaint and affirms that ALEC has failed to provide semi-annual factor updates as required by the Interconnection Agreement.

67. Kentucky Alltel denies the allegations in Paragraph 50 of the Complaint, states that the Interconnection Agreement referenced in Paragraph 51 of the Complaint speaks for itself, and notes ALEC's contradiction between Paragraphs 50 and 51.

68. The federal authorities referenced in Paragraph 52 of the Complaint are written documents which speak for themselves.

69. Kentucky ALLTEL denies the allegations in Paragraphs 53 and 54 of the Complaint.

70. Kentucky Alltel denies the allegations and unsubstantiated opinions in Paragraphs 55 and 56 of the Complaint and affirms that, contrary to ALEC, Kentucky Alltel is abiding by the terms of the parties' Interconnection Agreement.
71. Kentucky Alltel denies the allegations and opinions in Paragraphs 57 and 58 of the Complaint.
72. Kentucky Alltel denies that ALEC's requested relief is appropriate or justified and affirmatively requests that the Commission deny all such relief and dismiss the Complaint.
73. Kentucky Alltel reserves the right to plead further in this case as it may deem necessary including with respect to any applicable statute of limitations.

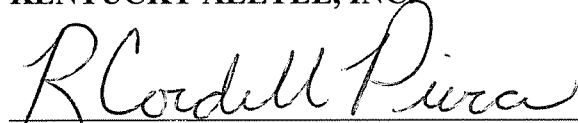
**CONCLUSION**

WHEREFORE, Kentucky Alltel requests that the Commission dismiss ALEC's Complaint in its entirety and grant all other necessary and proper relief to which Kentucky Alltel is entitled.

Respectfully submitted,

**KENTUCKY ALLTEL, INC**

By:



James H. Newberry, Jr.

R. Cordell Pierce

Wyatt, Tarrant & Combs, LLP

Attorneys for Kentucky ALLTEL, Inc.

1600 Lexington Financial Center

Lexington, KY 40507-1746

Telephone: 859-233-2012

Facsimile: 859-259-0649

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss and Answer was served upon the following via regular U.S. mail postage prepaid this 6th day of February, 2006:

Jonathon N. Amlung  
Attorney for:  
TOUCHSTONE, d/b/a/ALEC, Inc.  
616 South Fifth Street  
Louisville, KY 40202

A handwritten signature in cursive script that reads "R. Cordell Pierce". The signature is written in black ink and is positioned above a horizontal line.

Attorney for Kentucky ALLTEL, Inc.

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March 4, 2003


Travis Jones  
Revenue Accounting  
(501) 905-5361  
(501) 905-6878 (FAX)

Touchtone dba ALEC, Inc.  
Attn: Stephanie Anderson  
250 W. Main Street Suite 710  
Lexington, KY 40507

Dear Ms. Anderson,

This letter is in regards to ALLTEL's dispute of invoice numbers TU200208-1 through TU200301-1. ALLTEL will not pay the Intrastate Local Interconnection charges due to the fact that this is ISP traffic and, per FCC 01-131, is interstate in nature and not subject to compensation. In order to process payment for the Intrastate Intralata Toll, ALLTEL requests the PLU used to determine the jurisdiction, the rate applied, and the records supporting the minutes of use.

Regards,

  
Travis Jones