

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JAN 25 2006

PUBLIC SERVICE
COMMISSION

TOUCHSTONE, dba ALEC, Inc.,)
)
 Complainant,)
)
 vs.)
)
 ALLTEL COMMUNICATIONS, Inc.,)
)
 Defendant.)

Case No.
2005-00482

MOTION TO AMEND COMPLAINT
AND SUBSTITUTE PARTY

Comes now Touchstone, d/b/a ALEC, Inc. ("ALEC"), by and through counsel, and hereby moves this Commission for an Order permitting it to amend the formal Complaint filed herein to substitute Kentucky ALLTEL, Inc., as the proper defendant. In support of this Motion, ALEC asserts that ALLTEL Communications, Inc., does not appear to be the proper party against which the Complaint should have been filed. In the interest of procedural economy, ALEC requests substitution of the proper defendant, Kentucky ALLTEL, Inc., as an amendment to the formal Complaint relating in time back to the filing of the formal Complaint.

ALEC further asserts that this Commission has already accepted for filing the above-referenced Complaint, and Kentucky ALLTEL, Inc., will not be prejudiced by the granting of this motion.

Respectfully submitted,



JONATHON N. AMLUNG
Attorney for TOUCHSTONE, d/b/a
ALEC, Inc.
616 South Fifth Street
Louisville, KY 40202
Telephone (502) 582-2424
Facsimile (502) 589-3004
jonathon@amlung.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Amend Complaint and Substitute Party was served upon the following via regular U.S. Mail, postage pre-paid, this the 25th day of January, 2006:

James H. Newberry, Jr.
R. Cordell Pierce
Wyatt, Tarrant & Combs, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507-1746



JONATHON N. AMLUNG

RECEIVED

JAN 25 2006

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

TOUCHSTONE,)
d/b/a ALEC, Inc.,)
))
Complainant,)
))
vs.)
))
Kentucky ALLTEL, Inc.,)
))
Defendant.)
_____)

| |
|---------------------|
| Case No. 2005-00482 |
|---------------------|

AMENDED FORMAL COMPLAINT

The Complaint of TOUCHSTONE, d/b/a ALEC, Inc. respectfully shows:

1. That TOUCHSTONE, d/b/a ALEC, Inc. (“ALEC”) is a competitive local exchange carrier (“CLEC”), providing telecommunications service in the Commonwealth of Kentucky with a registered address of 250 W. Main Street, Suite 710, Lexington, Kentucky 40507. ALEC’s local tariff is on file with the Public Service Commission of Kentucky (“Commission”), with an effective date of April 25, 2003.
2. That Kentucky ALLTEL, Inc. (“ALLTEL”) is a telecommunications carrier serving as an incumbent local exchange carrier (“ILEC”) in Kentucky. ALLTEL is incorporated in Delaware, with a principal place of business at One Allied Dr, Little Rock, Arkansas 72202.

I. JURISDICTION

3. From August, 2000 to August, 2005, ALEC terminated 2,211,618,956 “ALLTEL” minutes for a total local and toll cost of \$6,797,050.15. With interest, ALLTEL owes ALEC \$8,622,061.30.

4. ALEC brings this matter before the Commission pursuant to the *INTERCONNECTION, RESALE AND UNBUNDLING AGREEMENT BETWEEN GTE SOUTH INCORPORATED and TOUCHSTONE COMMUNICATIONS, INC* (filed on July 27, 1999; final order date: August 26, 1999; Tariff approved: October 02, 1998^[CLG1], hereinafter, the "ICA"); Chapter 5 et seq. of the *Rules of Practice and Procedure Before the Commission* (807 KAR 5:001 et seq.); § 252(d)(2)(A) of the Telecommunications Act; and the FCC ISP Remand Order 131.¹
5. ALLTEL has failed and refused to pay compensation to ALEC for ISP-bound local traffic terminated by ALEC. ALLTEL refuses to pay based on their assertion that the Federal Communications Commission has failed to make a *final* order with regard to the treatment of ESP/ISP traffic and on alleged applicability of a "bill and keep" compensation arrangement between the parties.
6. Section 10.2 of the ICA provides:

"If one Party disputes a billing statement issued by the other Party, the billed Party shall notify Provider in writing regarding the nature and the basis of the dispute within six (6) months of the statement date or the dispute shall be waived. The Parties shall diligently work toward resolution of all billing issues."
7. Section 18.1 of the ICA provides:

"Alternative to Litigation. Except as provided under Section 252 of the Act with respect to the approval of this Agreement by the Commission, the Parties desire to resolve disputes arising out of or relating to this Agreement without litigation. Accordingly, except for action seeking a temporary restraining order or an injunction related to the purposes of this Agreement, or suit to compel compliance with this dispute resolution process, the Parties

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 1951 (2001); remanded, but not vacated, WorldCom v FCC, 288 F.3d 429 (D.C.Cir 2002).*

agree to use the following alternative dispute resolution procedures as the sole remedy with respect to any controversy or claim arising out of or relating to this Agreement or its breach.”

8. Section 18.2 of the ICA provides:

“Negotiations. At the written request of a Party, each Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising out of or relating to this Agreement. The Parties intend that these negotiations be conducted by non-lawyer, business representatives. The location, format, frequency, duration, and conclusion of these discussions shall be left to the discretion of the representatives. Upon agreement, the representatives may utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations.”

9. The parties have attempted to resolve this dispute through independent negotiations.

Unfortunately, this process has failed to bring about any resolution and ALEC thus brings this matter before the commission according to its contested case procedures.

II. FACTUAL ALLEGATIONS

10. The parties adopted an interconnection agreement in May 1999.² This Complaint addresses two periods of time: for local traffic, the period of time after June 14, 2001 (the effective date of the FCC ISP Remand Order) to August, 2005; for toll traffic, the period of time from August 2000 to August 2005.

11. The ICA governs the terms and conditions for termination of ISP-bound traffic and treats it as local traffic. Compensation for this traffic after June 14, 2001 is at issue and discussed below under Reciprocal Compensation.

12. The ICA differentiates between local and non-local traffic by employing an initial usage factor as set forth in *Appendix A* of the ICA³.

² ALEC, Inc. dba Volaris Telecom, Inc and Verizon South ICA filed 07/27/1997; final order date 08/26/1999; tariff approved by Ky. PUC 10/02/1998.

³ Appendix A

13. The ICA states that traffic will be assumed to be 95% local, therefore, applying a “Percent Local Usage” or “PLU” of 95% to all traffic delivered to the parties.
14. This local traffic is subject to the ICA’s reciprocal compensation provisions and regulatory decisions relating to such provisions.⁴
15. The ICA further states that all other non-PLU traffic will be assumed to be “non-local traffic,” therefore, creating an “Exempt” factor of 5%, whereby this traffic will be compensated at intraLATA toll access rates. This is discussed in further detail in Section V below (“Allocation Factor”).
16. The second issue involves the “Allocation Factor” concerning traffic from August 2000 to August 2005 and is a straight-forward contract issue discussed below under this heading as well.

III. TERMINATED TRAFFIC

17. ALEC has terminated 2,192,703,194 minutes of intrastate local and intralata toll calls originating from ALLTEL local exchange customers from June 2001 through August 2005.
18. ALLTEL has not compensated ALEC for the termination of these calls.
19. In November 2004, ALEC inquired about and requested compensation for the telecommunications traffic it had been terminating on behalf of ALLTEL.⁵
20. As of August 2005, the total reciprocal compensation due ALEC from ALLTEL for terminating local calls is \$1,862,583.98.
21. This amount due is based on 2,083,068,034 minutes at the varying rates per minute as set forth in the FCC ISP Remand Order transitional compensation regime.⁶

⁴ Appendix A

⁵ Letter from John C. Dodge to Francis X. Frantz and Trevor Jones, Nov. 19, 2004.

22. ALLTEL has refused to compensate ALEC based on the assertion that the Federal Communications Commission has failed to make a final order with regard to the treatment of ESP/ISP traffic and that the “bill and keep” compensation arrangement between the parties governs this traffic in the interim.

IV. RECIPROCAL COMPENSATION

A. ICA

23. For PLU ISP-bound traffic exchanged after June 14, 2001, the ICA provides that such traffic will be terminated pursuant to the Federal Communications Commission’s (“FCC”) *ISP Remand Order*.⁷ The ICA at Article V, § 3.2.3 states as follows:

“Treatment of ESP/ISP Traffic. The Parties have not agreed as to how ESP/ISP Traffic should be exchanged between the Parties and whether and to what extent compensation is due either Party for exchange of such traffic. GTE’s position is that the FCC cannot divest itself of rate setting jurisdiction over such traffic, that such traffic is interstate and subject to Part 69 principles, and that a specific interstate rate element should be established for such traffic. AT&T’s position is that ESP/ISP traffic should be treated as local for the purposes of inter-carrier compensation and should be compensated on the same basis as voice traffic between end users. The FCC has issued a NPRM on prospective treatment of ESP/ISP Traffic. Nevertheless, without waiving any of its rights to assert and pursue its position on issues related to ESP/ISP Traffic, each Party agrees that until the FCC enters a final, binding, and nonappealable order (“Final FCC 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. At such time as a “Final FCC Order” becomes applicable, the Parties shall meet to discuss implementation of the Order and shall make adjustments to reflect the impact of the Order including but not limited to adjustments for compensation required by the Final FCC Order. This agreement to leave issues related to ESP/ISP traffic unresolved until after the Final FCC Order becomes applicable and in the interim to not compensate for ESP/ISP Traffic, shall in no manner whatsoever establish any precedent, waiver, course of dealing or in any way evidence either Parties’ position or

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 1951 (2001); *remanded, but not vacated*, WorldCom v FCC, 288 F.3d 429 (D.C.Cir 2002).

⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 1951 (2001); *remanded, but not vacated*, WorldCom v FCC, 288 F.3d 429 (D.C.Cir 2002).

intent with regard to exchange and/or compensation of ESP/ISP Traffic, each party reserving all its rights with respect to these issues. (emphasis added)

24. The regulatory authority of the FCC is expressly contemplated in the ICA at Article III, §35: “Regulatory Agency Control. This Agreement shall at all times be subject to changes, modifications, orders, and rulings by the Federal Communications Commission and/or the applicable state utility regulatory commission to the extent the substance of this Agreement is or becomes subject to the jurisdiction of such agency.”

B. FCC ISP REMAND ORDER IS FINAL, BINDING AND NONAPPEALABLE

25. The ICA at Article V, § 3.2.3, cited above, provides that when the “*Final FCC Order* becomes applicable”, the compensation will be adjusted according to the Order. ALEC’s position is that the FCC ISP Remand Order is final and it became applicable when it became effective, on June 14, 2001.
26. Judicial review of the FCC ISP Remand Order has been exhausted. While the FCC continues its efforts to fashion a unified, comprehensive, telecommunications compensation scheme, those ongoing proceedings do not affect the finality of the ISP Remand Order.
27. Contract interpretation and change of law issues are a concern for many in the industry. The FCC has addressed these concerns, specifically as it relates to reciprocal compensation under § 251 of the TCA.
28. In the FCC’s Triennial Review Order 03-36, a similar change of law provision was interpreted:

“705. Third, we recognize that some BOC’s are concerned that the negotiation process may be unnecessarily delayed where a change of law provision provides for interconnection agreement modification pursuant to ‘legally binding intervening law of final and unappealable [judicial] orders’ [SBC/Quest/BellSouth Jan. 21, 2003 *Ex Parte* Letter at 2. . . . Instead, the BOC’s contend that the only logical reading of such provisions is that such provisions are triggered when the decision of the D.C. Circuit reversing the

Commission's prior UNE rules becomes final and nonappealable. We believe that the BOC's interpretation of such provisions is reasonable and that either a court or a state commission would agree with such a reading. Indeed, once the . . . new rules adopted in this Order become effective, the legal obligation upon which the existing interconnection agreements are based will no longer exist. Given that the prior UNE rules have been vacated and replaced today by new rules, we believe that it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." (emphasis added) FCC TRO 03-36

29. The FCC has thus unambiguously determined that change of law provisions in an interconnection agreement become effective when the D. C. Circuit Court's decision is final and nonappealable.
30. The FCC ISP Remand Order was reviewed by the D.C. Circuit Court and decided on May 3, 2002⁸, remanding the matter to the Commission, but expressly NOT vacating the Remand Order. According to the TRO above, as of May 3, 2002, the Remand Order became final and nonappealable.
31. The ICA herein provides that the final, binding and nonappealable Order of the FCC triggers the party's duty to make adjustments based on the new Order as soon as the Order is "applicable."
32. The ICA fails to define "applicable," but the plainest and most obvious interpretation is that the Remand Order is applicable when it becomes effective, which was on June 14, 2001. This is ALEC's position.

⁸ WorldCom, Inc v FCC, et al 351 U.S. App D.C. 176; 288 F.3d 429 (2002); rehearing denied (Sept. 24, 2002); writ of certiorari denied 123 S. Ct. 1927 (May 5, 2003).

C. REGULATION OF INTERCARRIER TRAFFIC COMPENSATION

33. The jurisdiction of the FCC includes the jurisdiction to specify rates, terms and conditions governing compensation for transport and delivery or termination of traffic pursuant to Section 251 of the Act and FCC's rules and orders.⁹
34. The FCC has statutory jurisdiction over transport and delivery or termination of local traffic subject to reciprocal compensation and has asserted jurisdiction over ISP-bound traffic in the ISP Remand Order 131.
35. In conjunction with the reciprocal compensation Order released by the Commission, it also released a Notice of Proposed Rulemaking (“NPRM”) concerning a Unified Intercarrier Compensation Regime¹⁰. These proceedings sought to harmonize the Commission's patchwork of intercarrier interconnection rules to make them compatible with a deregulated, competitive telecommunications environment.
36. The Unified Intercarrier Compensation Regime is generally consistent with and certainly does not void other FCC orders, including the ISP Remand Order.
37. As part of the Unified Intercarrier Compensation Regime, the FCC established a transitional cost recovery mechanism for the exchange of ISP-bound traffic with the Remand Order.
38. Reciprocal compensation continues, however, under the existing contracts of carriers.
39. The intention of the FCC to settle the jurisdiction and establish a scheme for compensation for ISP traffic is clear, explicit and unambiguous. ALLTEL’s suggestion that Commission decisions being subject to judicial review causes these decisions to lose their binding regulatory authority is preposterous. Most regulations, statutes, and judicial rulings

⁹ Telecommunications Act of 1996, 47 USC § 152 et seq.

¹⁰ Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999)

have the potential to be reviewed and perhaps altered. These are not any less binding law than a long-standing rule. ALLTEL's proposed new regulatory scheme would also be directly contrary to public policy and FCC authority.

40. The FCC has determined that through the enforcement of interconnection agreements, state commissions are the proper forum to address intercarrier compensation issues such as this.

41. ALLTEL's attempt to exempt itself from the binding affect of the FCC's ISP Remand Order is based on a tortured and unsupported construction of the interconnection agreement.

E. ALLTEL HAS ALREADY ASSERTED THAT THE ISP REMAND ORDER IS FINAL IN OTHER JURISDICTIONS

42. ALLTEL's response to the FCC ISP Remand Order has been inconsistent. In other jurisdictions, ALLTEL, operating as ALLTEL FLORIDA, INC, has accepted the FCC ISP Remand Order as final and binding:

“On March 27, 2002, the parties filed a Joint Stipulation, suggesting we defer action on the issues raised in Phase I of this docket. In support of this proposal, the parties stated that on April 27, 2001, the FCC issued its ruling in the case of Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Order on Remand and

¹¹ Telecommunications Act, 47 USCS §151

¹² The commission's statutory authority to “execute and enforce” *the Communications Act, §151*, and to “prescribe such rules and regulations as may be necessary . . . to carry out the [Act's] provisions,” *§ 201(b), give the Commission power to promulgate binding legal rules*; the Commission issued the order under review in the exercise of that authority; and there is no dispute that the order is within the Commissions's jurisdiction. *Chevron U.S.A. Inc. v NRDC*, 467 U.S. 837, 81 L.Ed. 2d 694, 104 S. Ct. 2778 (1984)

¹³ 28 USCS §2342 (1). Jurisdiction of court of appeals

Report and Order (ISP Remand Order), FCC 01131. The parties asserted that the ISP Remand Order established certain nationally applicable rules regarding intercarrier compensation for ISP-bound traffic. Therein, the parties contended that the FCC had asserted jurisdiction over ISP-bound traffic and hence, we should decline to issue a ruling on the issues in Phase I, which addresses reciprocal compensation for ISP-bound traffic. The parties asserted that although the ISP Remand Order is under court review, it had not been stayed and was, therefore, binding.¹⁴

43. When operating as a CLEC (ALLTEL Communications, Inc.), ALLTEL has elected to amend their ICA, to accept the optional reciprocal compensation rate plan for traffic subject to Section 251 (b)(5) of the Act and pursuant to the FCC transitional scheme set forth in the ISP Remand Order. *See*, ICA between VERIZON NORTH, INC. and ALLTEL Communications, Inc., Wisconsin, effective June 14, 2001.
44. For ALLTEL to accept the Remand Order as final and binding in Florida, and invoke the transitional compensation scheme of the Remand Order as a CLEC in Wisconsin, but claim the Remand Order is not binding on them in Kentucky is disingenuous and severely compromises the integrity of their argument to this Commission. Either ALLTEL is making a knowingly unsupportable argument before this Commission, or they have made such assertions in other jurisdictions.

V. ALLOCATION FACTOR

45. The ICA allocates between local and non-local traffic by employing an initial factor as set forth in *Appendix A* of the ICA¹⁵.

¹⁴ *In re investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Florida Public Service Commission, Order No. PSC-02-1248-FOF-TP, Issued Sept. 10, 2002.

¹⁵ Appendix A

46. The ICA states that local traffic (“Percent Local Usage” or “PLU”) is allocated at 95% PLU and is subject to reciprocal compensation.¹⁶
47. The ICA further states that non-local traffic is set at an “Exempt” factor of 5% and is billed at intraLATA toll access rates, which include ALEC’s current tariff rate,¹⁷ but varies under the agreement.
48. The non-local [CLG2]traffic is 5%, for a total of 128,550,921 minutes terminated by ALEC, resulting in a total owed of \$4,934,466.16 for non-PLU traffic.
49. ALLTEL has failed and refused to compensate ALEC at the ICA agreed rate of 5% for all Exempt traffic. The language in the contract regarding the Allocation Factor is unambiguous and any attempt by ALLTEL to employ a smaller Exemption Factor is a unilateral change and prohibited under the contract.

VI. CONCLUSION

50. The parties could not agree at the time the ICA was signed as to how ESP/ISP traffic should be exchanged between them and whether and to what extent compensation is due either party for exchange of such traffic.
51. Each party’s position on the issue was set forth, and it was agreed that while ESP/ISP traffic shall be exchanged and tracked, no compensation shall be owed or billed until the FCC enters a “final, binding and nonappealable order,” ICA §3.2.3.
52. The FCC ISP Remand Order 01-131 has been appealed to the D.C. Circuit Court without reversal and the U. S. Supreme Court refused to review the decision.¹⁸

¹⁶ Appendix A

¹⁷ Appendix A

¹⁸ *WorldCom, Inc v FCC*, et al 351 U.S. App D.C. 176; 288 F.3d 429 (2002); rehearing denied (Sept. 24, 2002); writ of certiorari denied 123 S. Ct. 1927 (May 5, 2003).


53. By any standard, the FCC ISP Remand Order is final, binding and nonappealable.
54. Under the terms of the ICA, the adjustments to compensation in light of the FCC ISP Remand Order are past due and applicable to June 14, 2001 forward.
55. The ISP Remand Order was the result of considerable debate and study, taking into account a multitude of factors such as the reciprocal compensation rates, the volume of ISP-bound traffic between carriers and their specific network interconnection designs.
56. Allowing ALLTEL to selectively invoke or ignore the FCC's ISP Remand Order as it suits them, in the short run, is to allow ALLTEL to avoid paying ALEC millions of dollars. In the long run, it will only scuttle the FCC's attempt to bring about an orderly transitional cost recovery mechanism and inject chaos into the industry in this state.
57. Granting ALLTEL's interpretation of "final order" in the ICA will also inhibit fruitful negotiation between ILECs and CLECs governing the pricing and terms of ISP-bound traffic and would result, contrary to the FCC's rules, in a reciprocal compensation rate that would not reflect either party's costs.
58. The 5% Exempt factor was unilaterally abrogated by ALLTEL without justification.

PRAYER FOR RELIEF

Wherefore, in accordance with the Telecommunications Act of 1996, applicable Federal Communications Commissions Orders and Rules, the laws of the Commonwealth of Kentucky, the rules and decisions of this Commission and applicable access tariffs, ALEC requests this Honorable Commission enter an Order directing ALLTEL to pay ALEC past-due intercarrier compensation in the amount of \$8,662,061.30 (including interest in the amount of \$1,825,011.00), plus penalties pursuant to Commission discretion, all fees and costs incurred by

ALEC in bringing this formal Complaint and for any other actions the Commission deems appropriate.

RESPECTFULLY SUBMITTED,



JONATHON N. AMLUNG
616 South Fifth Street
Louisville, KY 40202
Telephone (502) 582-2424
Facsimile (502) 589-3004
jonathon@amlung.com

and

Kristopher E. Twomey
Law Office of Kristopher E. Twomey, P.C.
1725 I Street, NW
Suite 300
Washington, DC 20006
P: 202 250-3413
F: 202 517-9175
Email: kris@lokt.net

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Amend Complaint and Substitute Party was served upon the following via regular U.S. Mail, postage pre-paid, this the 25th day of January, 2006:

James H. Newberry, Jr.
R. Cordell Pierce
Wyatt, Tarrant & Combs, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507-1746



JONATHON N. AMLUNG