

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

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PUBLIC SERVICE
COMMISSION

**MOUNTAIN RURAL TELEPHONE)
COOPERATIVE CORPORATION, INC.)
 Complainant)
)
v.)
)
**KENTUCKY ALLTEL, INC.)
 Defendant)
_____)****

Case No. 2006-00198

**(I) RESPONSE TO THE ANSWER AND MOTIONS OF ALLTEL
-AND-
(II) SUPPORTING MEMORANDUM FOR MOUNTAIN TELEPHONE'S MOTION FOR
SUMMARY JUDGMENT**

Mountain Rural Telephone Cooperative Corporation, Inc., d/b/a Mountain Telephone ("Mountain Telephone"), by counsel, pursuant to KRS 278.160, KRS 278.170, KRS 278.260 and 807 KAR 5:001 §12, and in response to (i) the motion to dismiss, (ii) motion for discovery and (iii) for injunctive relief of Kentucky AllTel, Inc. ("AllTel"), hereby respond as follows and moves the Kentucky Public Service Commission of the Commonwealth of Kentucky ("Commission") to grant summary judgment in its favor.

INTRODUCTION

The issue before the Commission is whether AllTel must pay Mountain Telephone past-due, tariffed, switched access service charges that are properly filed with and approved by the Commission. To date, AllTel has refused to pay these charges. In its answer to Mountain Telephone's complaint, AllTel alleged no facts and not a single authority -- statutory or otherwise -- that would support either its refusal to pay or request for discovery and injunctive relief. For the following reasons, Mountain Telephone asks the Commission to: (i) overrule AllTel's motion

to dismiss, motion for discovery, and request for injunction; and to (ii) grant Mountain Telephone's motion for summary judgment.

STATEMENT OF FACTS

AllTel delivers switched access traffic to Mountain Telephone. The charges associated with this traffic are governed by a tariff that is on file with and approved by the Commission. When AllTel delivers traffic to Mountain Telephone, Mountain Telephone generates bills based on its tariffed and approved charges, and sends them to AllTel for payment. AllTel refuses to pay any charges associated with these bills, despite the fact that Mountain Telephone continues to receive and terminate AllTel's traffic. These unpaid bills that are more than thirty (30) days overdue presently total approximately \$449,274.99, which includes late charges of \$6,340.50. Not only are AllTel's nonpayment practices inconsistent with its previous practice of paying for a pro rata percentage of the services being provided by Mountain Telephone, it is inconsistent with the terms of Mountain Telephone's tariff.

For more than nine months, Mountain Telephone has sought in good-faith to negotiate and resolve the dispute over switched access charges with AllTel. On March 31, 2006, Mountain Telephone delivered a letter to AllTel requesting its assistance in resolving this dispute. In that letter, Mountain Telephone detailed its complaint and requested a response from AllTel by April 21, 2006. As the letter explicitly noted, Mountain Telephone would otherwise consider invoking the Commission's powers to resolve this dispute. It was not until April 21st, the date on which Mountain Telephone requested a response, that AllTel even acknowledged receipt of the letter and stated that they were "preparing a response." As of May 12, 2006, three weeks later, AllTel still had not formally responded to Mountain Telephone's written request for resolution and continued its refusal to pay any charges associated with switched access traffic. Due to the lack

of any genuine response from AllTel, Mountain Telephone filed its formal complaint with the Commission and notified AllTel of its intention to terminate switched access service on June 12, 2006 as permitted by applicable law.

AllTel made no movement to settle this matter until five days after Mountain Telephone filed a formal complaint with the Commission. On May 17, 2006, AllTel paid Mountain Telephone \$60,403.49 of the \$509,678.48 it currently owes -- less than nine percent of the total charges associated with switched access traffic. This was AllTel's first effort in nine months to effectively respond to Mountain Telephone's complaint. It is unfortunate that a formal complaint with the Commission was required to advance the matter to even that point, but this further illustrates the recalcitrance Mountain Telephone has had to endure.

Throughout this dispute, Mountain Telephone has remained interested in resolving the matter expeditiously and without further involvement of the Commission. Clearly, Mountain Telephone had no desire to take on the expense of legal counsel and the displeasure of pursuing regulatory action against AllTel to resolve this dispute. Filing a formal complaint and notifying AllTel of impending termination of service were the last options available to Mountain Telephone.

Now AllTel, in answer to Mountain Telephone's complaint, has requested the Commission dismiss the complaint requesting payment for past due charges, moves the Commission to allow discovery into Mountain Telephone's rate development and allowable return, and moves the Commission to enjoin Mountain Telephone from disconnecting switched access service.

DISCUSSION AND ANALYSIS

A. AllTel's claim that a special agreement allows it to forego payment of switched access charges fails to present a genuine issue under the filed rate doctrine.

Pursuant to Ky R. Civ. P. 56.03, it is appropriate to grant summary judgment if a party shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. "[T]o prevail, a movant must show that it appears impossible for the opposing party to succeed on its claim or defense." *T & M Jewelry, Inc. v. Hicks*, 2006 Ky. LEXIS 102 (Ky. 2006). Such is the case here. Based upon an alleged "handshake" agreement, AllTel is refusing to pay switched access charges which are controlled by Mountain Telephone's filed and approved tariff. This violates Kentucky law. The Kentucky Administrative Regulations provide that telephone service provided in this Commonwealth shall be provided in accordance with a telephone utility's filed and approved tariff. Section 4(1) ("Basic Utility Obligations") of 807 KAR 5:061 sets forth, "Each telephone utility shall provide telephone service to the public in its service area in accordance with its rules and tariffs on file with the [C]ommission." *Id.* Section 7 ("Tariffs") of 807 KAR 5:061 continues, "Each telephone utility shall file with its tariff the... conditions and circumstances under which service will be furnished" *Id.*

These mandates form the basis of what the Commission recognizes as the "filed rate doctrine," which is codified in Kentucky at KRS § 278.160(1)-(2). KRS § 278.160(1) states in pertinent part that "each utility shall file with the commission . . . schedules showing all rates and conditions for service established by it and collected or enforced." *Id.* The Commission has interpreted this statute and doctrine to require that any "special contract that touches upon rates (or service)... [be] filed with the Commission in the same manner as the utility's generally available tariffs." *In the Matter of Kentucky Utilities Company Revised Special Contract with*

North American Stainless, L.P., Case No. 2003-00137, 2005 Ky. PUC LEXIS 885 (October 19, 2005); *see also* 807 KAR 5:011 § 13 (providing, "Every utility shall file true copies of all special contracts entered into governing utility service which set out rates, charges or conditions of service not included in its general tariff.").

The filed rate doctrine also prohibits any utility from charging and any entity from paying any rate other than that stated in the filed tariff. KRS § 278.160(2) requires that:

No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

Id. In applying this provision, the Commission has made expressly clear that "utilities must strictly adhere to their published rate schedules and may not, either by agreement or contract, depart from them." *In the Matter of Randall C. Stivers v. Henry County Water District No. 2*, Case No. 2002-00045, 2002 Ky. PUC LEXIS 305 (June 14, 2002). The Commission further explains that "[t]he primary effect of KRS 278.160 is to bestow upon a utility's filed rate schedule the status of law." *Id.* This rate cannot be changed, save by publishing a new rate schedule to be filed with and approved by the Commission.

Apparently, AllTel is relying upon an alleged "handshake" agreement that absolves it of its tariff-imposed obligation to pay. An exhaustive search by Mountain Telephone, and presumably AllTel, has failed to uncover any such agreement. Regardless, even if one did exist, AllTel's argument would fail. As stated above, the legislature and Commission have explicitly prohibited agreements that attempt to vary or enlarge the rights as defined by the filed tariff. Mountain Telephone's filed rate for switched access service controls. "The rate when published becomes established by law. It can be varied only by law, and not by act of the parties." *Id.*, quoting *New York N.H. & H.R. Co. v. York and Whitney*, 102 NE 366, 368 (Mass. 1913). No

special agreement, unless filed with and approved by the Commission, can relieve Mountain Telephone from charging and AllTel from paying these tariff-imposed charges. Simply put, AllTel has failed to place any genuine issue of material fact into dispute and Mountain Rural is entitled to a judgment as a matter of law pursuant to Ky. R. Civ. P. 56.03.

B. AllTel's request for discovery into Mountain Telephone's rate development and allowable return should be denied.

The Commission should deny any discovery request into Mountain Telephone's rate development and allowable return on at least four grounds. First, the subject matter involved in this action is whether AllTel must pay *past* tariff-imposed switched access charges, not whether the switched access charges are reasonable going forward. Kentucky's Rules of Civil Procedure allow discovery "regarding any matter . . . which is relevant to the subject matter involved in the pending action." CR 26.02. The reasonableness of Mountain Telephone's switched access charges is not at issue and, regarding charges accrued in the past, it is irrelevant to the subject matter involved.

The only question before the Commission is whether or not AllTel must pay past charges owed. In making this determination, the Commission recognizes the rule against retroactive rate-making which "prevents regulators from retroactively correcting or altering past rate-making decisions." *In the Matter of Kentucky Industrial Utility Customers, Inc. v. Big Rivers Electric Corp.*, Case No. 95-011, 1997 Ky. PUC LEXIS 17 (April 1, 1997). Any retroactive rate change is expressly prohibited by KRS 278.160(1)-(2). *Id.* Rates may only be changed prospectively, and, then, only by filing a new rate schedule to be approved by the Commission. Therefore, AllTel must pay all past due charges at the filed rate without adjustment. No amount of discovery into Mountain Telephone's rate development and allowable return will change this. These issues are simply irrelevant to the subject matter at hand.

Second, it is Mountain Telephone's concern that AllTel is attempting, through the discovery request, to open what amounts to a single-issue rate case against Mountain Telephone. The Commission has consistently recognized that there is no statutory authority that allows it to engage in single-issue rate making. *See In the Matter of Application of Jackson Purchase Energy Corporation for Adjustments in Existing Cable Television Attachment Tariff*, Case No. 2004-00319, 2005 Ky. PUC LEXIS 759 (Sept. 14, 2005); see also *In the Matter of the Application of Louisville Gas and Electric Company for Approval of New Rate Tariffs Containing a Mechanism for the Pass-through of Miso-related Revenues and Costs Not Already Included in Existing Base Rates*, Case No. 2004-00459, 2005 Ky. PUC LEXIS 349 (April 15, 2005) ("[T]he Commission finds that there is no statutory authority for LG&E and KU to apply for a rate surcharge which is limited to a single issue."). There is only one rate that affects AllTel -- the rate for switched access services. Attempting to open a rate case based upon a single-rate issue such as the one presented by AllTel would run counter to the Commission's recognized statutory underpinnings under KRS 278.192.

Third, while AllTel may be able, perhaps, to pursue a *general* rate case against Mountain Telephone, the Commission has set forth the appropriate procedure to follow in those cases under 807 KAR 5:001, §10. AllTel has not followed these procedures. Therefore, AllTel should not be allowed to circumvent that procedure by making a request for discovery into Mountain Telephone's rate development and allowable return.

Fourth, as part of the filed-rate doctrine discussed earlier, the Commission has made abundantly clear that current, approved rates are "presumed reasonable" and that it is the complainant that bears the burden of proving otherwise. *In the Matter of East Clark County Water District v. City of Winchester*, Case No. 2005-00322, 2006 Ky. PUC LEXIS 249 (April 3,

2006). Here, not only does AllTel's request for discovery fail on procedural grounds, it has failed to even state a *prima facie* case that Mountain Telephone's rate for switched access service is "unreasonable or unjustly discriminatory" to justify discovery. KRS 278.260(1). Pursuant to KRS 278.160(1), Mountain Telephone filed with the Commission a schedule showing all rates and conditions for service established by it and collected or enforced. If those rates were unreasonable, they would not have been approved by the Commission.

Regardless, even if Alltel were to succeed in a general rate case, it would only affect rates prospectively. AllTel still must pay its past due tariff-imposed charges to Mountain Telephone pursuant to KRS 278.160(2).

C. AllTel's request for injunction fails the *Maupin* standard and should, therefore, be denied.

AllTel has failed to make a substantial showing to justify the issuance of an injunction against Mountain Telephone's right to terminate service as of June 12, 2006. In *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978), the court set forth a three-fold test to determine the sufficiency of a complaint to support an injunction. *Id.* at 699. First, AllTel must show that irreparable injury will occur in the absence of the issuance of the injunction. *Id.* AllTel has not alleged a single fact that suggests irreparable injury will occur if Mountain Telephone terminates switched access service to AllTel. The Kentucky Supreme Court has found that where money damages are calculable, such damages do not meet the burden required for a showing of irreparable injury. *Cyprus Mountain Coal Corp. v. Brewer*, 828 S.W.2d 642, 646 (Ky. 1992). Furthermore, termination of service will not impact AllTel's or Mountain Telephone's customers. AllTel can make alternative arrangements to gain switched access services with other interexchange carriers. In fact, if the injunction is granted, it would be Mountain Telephone (or

other interexchange carriers) who is injured by being forced to continue to subsidize AllTel's local calling plan.

Second, the Commission must weigh the equities of the case, considering the public interest, harm to Mountain Telephone, and whether the injunction will merely preserve the status quo. *Maupin*, 575 S.W.2d at 699. The equities of this case are not in favor of Alltel. The legislature and Commission have made abundantly clear that rate discrimination (KRS 278.170) and retroactive rate-making are not in the public interest. An injunction in this case would invert that interest by allowing AllTel to receive switched access services, on a retroactive basis, for free.

Furthermore, what AllTel is seeking with this injunction is to continue to force Mountain Telephone, a small, rural cooperative in Eastern Kentucky servicing a high-cost coverage area, to subsidize AllTel's local calling plan. It is well within AllTel's legal rights to offer such a plan to its customers. It is not, however, equitable or just to push the cost of this plan on to Mountain Telephone. Ultimately, the only status quo that AllTel's request for injunction will preserve is one that allows AllTel to continue circumventing its statutory obligation to pay Mountain Telephone's tariff-imposed switched access charges. This is inconsistent with the terms of Mountain Telephone's tariff, contrary to state statute, and counter to the public interest.

Third, and most significantly, in order for the Commission to grant AllTel's request for injunction, AllTel's complaint must present a "substantial question" to the Commission, which it does not. *Id.* AllTel has alleged no facts and no authority that would support its refusal to pay tariff-imposed switched access charges. As shown above, simply alleging that there was some unsubstantiated agreement not to charge switched access fees and that the charges are

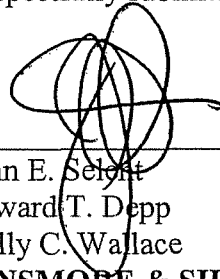
unreasonable presents no question at all. AllTel must pay all past due tariff-imposed switched access charges.

Unless and until AllTel pays these past due charges, Mountain Telephone remains well within its legal rights under 807 KAR 5:006 §14(1)(a) and 14(1)(f) to disconnect switched access service to AllTel for noncompliance with Mountain Telephone's tariff and nonpayment of bills.

CONCLUSION

For the above stated reasons, Mountain Telephone requests that the Commission: (i) overrule AllTel's motion to dismiss, motion for discovery, and request for injunctive relief; (ii) and grant Mountain Telephone's attached motion for summary judgment by entering an order directing AllTel to pay Mountain Telephone approximately \$449,274.99 (plus legal interest) and to pay Mountain Telephone's switched access tariffed charges on a going forward basis.

Respectfully submitted,



John E. Seibert
Edward T. Depp
Holly C. Wallace
DINSMORE & SHOHL LLP
500 West Jefferson Street
1400 PNC Plaza
Louisville, Kentucky 40202
(502) 540-2300 (tel.)
(502) 585-2207 (fax)

**COUNSEL TO MOUNTAIN RURAL
TELEPHONE COOPERATIVE
CORPORATION, INC.**

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was served by mailing a copy of the same by First Class United States mail, postage prepaid, to Daniel Logsdon, Esq., Alltel Kentucky, Inc., 229 Lees Valley Road, Shepherdsville, KY 40165 and Mark R. Overstreet, Esq., Stites & Harbison, 421 W. Main Street, P.O. Box 634, Frankfort, KY 40602-0634, this 6th day of June, 2006.



**COUNSEL TO MOUNTAIN RURAL
TELEPHONE COOPERATIVE
CORPORATION, INC.**

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