

Dinsmore & Shohl LLP
ATTORNEYS

John E. Selent
502-540-2304
john.selent@dinslaw.com

June 26, 2006

RECEIVED

JUN 26 2006

PUBLIC SERVICE
COMMISSION

Via Hand Delivery

Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

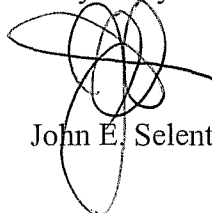
Re: *In the Matter of Mountain Rural Telephone Cooperative Corporation, Inc. v. Kentucky AllTel, Inc. Case No. 2006-00198*

Dear Executive Director O'Donnell:

I have enclosed for filing in the above-styled case the original and eleven (11) copies of Mountain Rural Telephone Cooperative Corporation, Inc.'s reply to Kentucky AllTel, Inc.'s response to motion for summary judgment.

Thank you, and if you have any questions, please call me.

Very Truly Yours,



John E. Selent

JES

Enclosure

cc: Mark R. Overstreet, Esq.
Daniel Logsdon, Esq.

111369v1

1400 PNC Plaza, 500 West Jefferson Street Louisville, KY 40202
502.540.2300 502.585.2207 fax www.dinslaw.com

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

RECEIVED

JUN 26 2006

**PUBLIC SERVICE
COMMISSION**

In the Matter of:

**MOUNTAIN RURAL TELEPHONE)
COOPERATIVE CORPORATION, INC.)
 Complainant)**

v.

**KENTUCKY ALLTEL, INC.)
 Defendant)**

Case No. 2006-00198

REPLY TO ALLTEL'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Mountain Rural Telephone Cooperative Corporation, Inc., d/b/a Mountain Telephone ("Mountain Telephone"), by counsel hereby replies as follows to Kentucky AllTel, Inc. ("AllTel") and its response to Mountain Telephone's motion for summary judgment.

While AllTel may have accurately identified the standard for summary judgment in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 479 (Ky. 1991), that standard is by no means impossible to meet. More recently, the Kentucky Supreme Court has clarified that "[c]ontrary to the view of some, our decision in *Steelvest* [] does not preclude summary judgment. Provided litigants are given an opportunity to present evidence which reveals the existence of disputed material facts, and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate." *Hoke v. Cullinan*, 914 S.W.2d 335 (Ky. 1995). Under *Hoke*, the nonmoving party (in this case, AllTel) must present evidence of record to preclude the entry of summary judgment. When it does not, there can be no genuine issue of material fact, and thus, summary judgment must be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Despite the fact that AllTel has had ample opportunity to present evidence which reveals the existence of a single disputed material fact, it has failed to do so. Instead, AllTel's response posits

an entirely unsupported and erroneous hypothetical: "if Mountain Rural did not include ACS minutes in the development of its CCL rates, then its tariff provisions relating to these charges and the filed rate doctrine are irrelevant and inapplicable."¹ In making this assertion, AllTel once again fails to offer a single fact, piece of evidence or affidavit in support of its contention that ACS minutes are not calculated in Mountain Telephone's assessment of charges.²

In fact, the exact converse of AllTel's hypothetical scenario is true. As Mountain Telephone's attached affidavit sets forth, when calculating carrier common line (CCL) charges, Mountain Telephone includes in that calculation the ACS minutes that AllTel terminates to Mountain Telephone's exchanges.³ In addition, it is Mountain Telephone's policy to update its CCL rate development calculations quarterly and reflect any adjustments for over or under recovery to its customers.⁴ Any suggestion to the contrary is flatly wrong and unsubstantiated by the record.

Moreover, AllTel can denominate the traffic it delivers to Mountain Telephone in whatever manner it wishes. However, simply calling certain switched access traffic "ACS traffic" does not alleviate AllTel's legal obligation to pay the tariff imposed rate for switched access service associated with that traffic. Regardless of what AllTel calls the traffic, it still requires Mountain Telephone to terminate the traffic and that termination is governed by the tariff. Mountain Telephone's tariff is written generally and thus applies generally. It does not, and need not, identify

¹ Page 2 of AllTel's response. Mountain Telephone would like to point out that AllTel's original argument was that it was not required to pay charges associated with ACS minutes based upon some "handshake agreement." AllTel's new hypothetical, had it been asserted earlier, would have been easily resolved by the presentation of facts by affidavit that show Mountain Telephone does indeed include ACS minutes in its calculations. See affidavit of Angela K. Pennington, attached hereto as Exhibit 1.

² Interestingly, despite AllTel's insistence that the Commission "employ the Civil Rules of Procedure [*sic*] in a fashion consistent with the Courts," counsel for AllTel has yet to present, pursuant to Ky. R. Civ. P. 56.05, even a single affidavit setting forth "such facts as would be admissible in evidence" substantiating its position in opposition to motion for summary judgment. See *e.g. Neel v. Wagner-Shuck Realty Co.*, 576 S.W.2d 246, 250 (Ky. App. 1978)(Stating that "[i]f the appellant had proof that a genuine fact issue existed, it was appellant's duty to tender some proof to the court."). AllTel has not produced such an affidavit because it cannot truthfully do so.

³ See Affidavit of Angela K. Pennington, attached hereto as Exhibit 1.

⁴ See Affidavit of Angela K. Pennington, attached hereto as Exhibit 1.

every possible type of switched access traffic that another utility may decide to deliver. In fact, such identification would be utterly impossible. To allow AllTel to evade paying the fees defined in the tariff simply because they call this traffic "ACS" traffic would open the door for any utility to name traffic whatever they will just to avoid paying the tariff fee.

Therefore, recognizing the Commission is not bound by the Rules of Civil Procedure, summary judgment is proper. Alltel has simply failed to present a single issue of material fact. In the place of facts or evidence, AllTel rests upon an erroneous, hypothetical scenario. Such an unsupported and, now, contradicted hypothetical, without more, cannot be the basis for non-payment of rates,⁵ a request for discovery into Mountain Telephone's rate development, and a public hearing. There simply is no genuine issue in dispute. Summary judgment is mandated.

In closing, Mountain Telephone would like to be clear about what is at stake. AllTel in essence wants to use Mountain Telephone's switched access services related to ACS minutes for free. This is no more than and no less than theft.⁶ Therefore, the underlying question before the Commission is whether it will allow a large, for-profit, Arkansas-based company like AllTel to force a small, rural, not-for-profit cooperative like Mountain Telephone to subsidize AllTel's customer calling plans. Mountain Telephone's members should not be forced to so subsidize a for-profit corporation.

Moreover, by not paying Mountain Telephone's switched access tariff rates, AllTel would gain a distinct competitive advantage over other interexchange carriers ("IXC") who are required by tariff to pay for the same service. The ACS minutes that AllTel references in its response are minutes that relate to an optional local calling plan AllTel offers to its customers. AllTel's customers

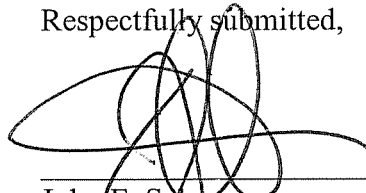
⁵ It should be noted that AllTel is the only ILEC that refuses to pay Mountain Telephone's tariffed rates for switched access services. Every single other ILEC pays these rates without dispute.

⁶ In Mountain Telephone's view, such an act is comparable to theft of services. See e.g., KRS 514.060.

pay AllTel for these extended calling plans.⁷ Since these local calling plans are toll substitution plans, AllTel is essentially asking Mountain Telephone to subsidize the charges associated with this traffic by going "off tariff" so that AllTel can offer -- for a fee -- discounted local calling plans to its customers and thereby gain a competitive advantage over other IXCs, which are required to pay the tariff-imposed switched access charges. This would be a windfall for AllTel and, again, is tantamount to theft of Mountain Telephone's network resources.

For the above stated reasons, Mountain Telephone requests that the Commission grant Mountain Telephone's 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. Seent
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.**

⁷ According to AllTel's tariff, customers pay AllTel anywhere from \$3.08 a month plus \$0.055 cents a minute to \$20.08 a month for a flat rate when calling into an area that includes Mountain Telephone's exchanges.

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 26th day of June, 2006.



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

Mountain Telephone finds that it has over-assessed or under-assessed a customer based upon the adjusted rate, Mountain Telephone reflects as such on the customer's bill.

Further, the affiant saith not.

Angela K. Pennington
Affiant's Signature

State of Kentucky)
)
County of Morgan)

Subscribed and sworn to before me, a notary public in and for said county and state, on this 26 day of June, 2006.

Laura Littlefield
Notary's Signature

(Seal)