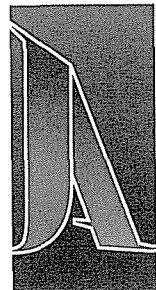


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**AMLUNG**  
LAW OFFICES

February 23, 2006

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

**RECEIVED**

FEB 27 2006

PUBLIC SERVICE  
COMMISSION

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

Dear Ms. O'Donnell:

Please find enclosed for filing an original and four (4) copies of ALEC's Response to ALLTEL's Motion to Dismiss, for filing in the above-referenced case.

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

Cordially yours,

Jonathon N. Amlung

Enclosures

cc: James H. Newberry, Jr.

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

FEB 27 2006

PUBLIC SERVICE  
COMMISSION

TOUCHTONE  
COMMUNICATIONS, INC., and  
ALEC, Inc.,

Complainants,

vs.

KENTUCKY ALLTEL, Inc.  
Defendant,

Case No.  
2005-00482

**COMPLAINANTS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

Come now Touchtone Communications, Inc. ("Touchtone") and ALEC, Inc. ("ALEC") by and through counsel, and for their joint response to the Motion to Dismiss filed by Kentucky ALLTEL, Inc. ("ALLTEL") herein, state as follows:

Initially, it should be noted that ALLTEL'S motion to dismiss is predicated on 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. That Section, however, deals exclusively with the Commission's powers to either dismiss a complaint that does not set forth a prima facie case, or in the alternative, compel the defendant to satisfy or answer the matters set forth in the complaint.

In the present case, this Commission has already accepted and examined the complaint filed herein. This Commission already made the determination that the complaint establishes a prima facie case and ordered ALLTEL to either satisfy or answer the matters alleged in the complaint. Thus, ALLTEL's motion to dismiss pursuant to 807 K.A.R. 5:001 Section 12(4)(a) is misplaced and should be disregarded in its entirety.

Further, ALLTEL does not set forth any meritorious objections to the averments of the complaint. Other than pointing out an obvious typographical error contained in the complaint, ALLTEL does not present any arguments of merit. ALLTEL simply makes self-serving legal arguments and statements of incorrect facts that should be disregarded by this Commission. ALLTEL does not present any uncontroverted legal or factual argument to provide this Commission with a basis for dismissal.

Finally, ALLTEL's motion to dismiss is, at best, premature at this point in this case. No discovery has taken place; no briefs have been filed regarding the issues. Indeed, there has not even been time for the scheduling of an informal conference with the Commission. The Complaint and Answer in this case raise a myriad of legal and factual issues. ALLTEL apparently does not dispute this Commission's jurisdiction to resolve those issues.

ALEC requests this Commission to deny ALLTEL's motion to dismiss and permit this case to proceed so that a full record may be developed.

**I. ALEC AND TOUCHTONE ARE PROPER PARTIES IN THIS MATTER.**

In its motion to dismiss, ALLTEL notes that one of the parties referenced in the Complaint, "Touchstone," is not a lawful corporate entity in good standing with the Kentucky Secretary of State. Reference to "Touchstone" in the Complaint was the result of an obvious typographical error. The relevant entity intended to be included in this case is Touchtone Communications, Inc. ("Touchtone"), which is a corporation in good standing with the Kentucky Secretary of State. ALEC is also a Kentucky corporation in good standing. Complainant requests this Commission to amend the record to reflect correction of this error.

On August 23, 2000, Touchtone notified ALLTEL's predecessor, GTE, that Touchtone's interest in the interconnection agreement ("ICA") between the parties had been assigned to ALEC, an affiliate of Touchtone. A copy of that letter is attached hereto as **Exhibit A**. That assignment conferred all rights, obligations and duties of Touchtone to ALEC, including compensation due and owing from ALLTEL. Thus, ALEC is the proper party-in-interest for this matter. Touchtone is participating in this matter to ensure a complete record is capable of being developed. An obvious typographical error should not be a basis for dismissal. ALLTEL certainly is aware of the identity of the proper parties in this case.

**II. ALEC IS THE PROPER PARTY TO COLLECT MONEY FROM ALLTEL FOR VARIOUS TRAFFIC FROM AUGUST 2000 THROUGH NOVEMBER 2002.**

ALLTEL argues in part that the ALEC affiliate pursuing this claim is not the proper party-in-interest for the time period between August 2000 and November 2002. In support of its argument, ALLTEL asserts that it compensated Duro ALEC Settlement Group ("Duro") for receivables incurred prior to December 2002. ALLTEL asserts that it relied on representations of Mr. Richard McDaniel in making payment to Duro.

Although Mr. McDaniel was affiliated with ALEC between August 2002 and November 2002, he was not authorized to compromise any claims between ALLTEL and ALEC. ALEC is not aware of, nor did it approve of any settlement or compromise by and between ALLTEL and Duro. If ALLTEL in fact made payment to Duro of money owing to ALEC, that does not compromise ALEC's valid claim to payment for its services. That payment would have been ALLTEL's error, and ALEC should not be harmed thereby. Mr. McDaniel was not authorized by ALEC to compromise ALEC's

valid claim for receivables from ALLTEL. ALLTEL should not have relied on representations made by him or other third parties to the contrary, if any were made. ALEC has no knowledge of a settlement or payment between ALLTEL and Duro for ALEC invoices.

Although ALEC acknowledges the payment by Verizon to ALEC for the period January 2002 to July 2002 for \$159,711.09, that amount represents only partial payment (1% vs. 5% required by ICA) for intra-LATA toll services during this time period. A list of Verizon monthly payments against invoices for January 2002 to July 2002 totaling \$159,711.09 is attached herein as **Exhibit B**.

### **III. ALEC IS ENTITLED TO COMPENSATION FROM ALLTEL FOR ISP-BOUND TRAFFIC.**

ALLTEL asserts that ALEC's claim to compensation for ISP-bound traffic is contrary to the ICA between the parties. Despite ALLTEL's assertions to the contrary, ALEC is, in fact, entitled to the compensation for such traffic demanded in its complaint filed herein.

In support of its argument, ALLTEL primarily relies upon the assertion that ALEC's demand for compensation for ISP-bound traffic is contrary to the parties' ICA, and that the FCC's ISP Remand Order<sup>1</sup> is not "final, binding and nonappealable."

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<sup>1</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001)

ALLTEL is apparently referring to Article V, §3.2.3 of the parties' ICA, which reads in pertinent part:

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. . . . 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.

The FCC has attempted to provide a scheme for compensation or ISP-bound traffic. Although ALEC acknowledges that the treatment of ISP-bound traffic is evolving, this does not make the prior FCC orders any less enforceable. The FCC's Triennial Review Order 03-36 interpreted a similar change of law:

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.

The FCC has thus unambiguously determined that change of law provisions in an ICA become effective when the D.C. Circuit Court's decision is final and nonappealable.

The FCC ISP Remand Order was reviewed by the D.C. Circuit Court and decided on May 3, 2002,<sup>2</sup> 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. The parties' ICA mandates change of the treatment of ISP-bound traffic on a final, binding and nonappealable order from the FCC.

ALEC's alleged failure to bill ALLTEL or its predecessor for ISP-bound traffic in the first quarter of 2001 does not forfeit compensation owed for the exchange of ISP-bound traffic. The ISP Remand Order (FCC 01-131 at Paragraph 8) reads:

We also impose a cap on total ISP-bound minutes for which a local exchange carrier (LEC) may receive this compensation. For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, 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 compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation in 2001 . . .

The operative term in this quotation is "entitled." It is ALEC's position that the entitlement to compensation for ISP-bound traffic under the ICA relates back to the ISP-Remand Order and established principals of equitable compensation. Further, the cap provided in the ISP Remand Order is not applicable to ALEC's traffic as ALLTEL failed to invoke the compensation scheme set forth in the ISP Remand Order.

As asserted in ALEC's Complaint, the FCC ISP Remand Order is final and it became applicable when it became effective, on June 14, 2001.

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<sup>2</sup> 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).

#### **IV. ALEC IS ENTITLED TO THE COMPENSATION CLAIMED FROM ALLTEL FOR TOLL TRAFFIC.**

Contrary to ALLTEL's assertion, ALEC presents a valid claim for overdue money owed by ALLTEL for toll traffic. ALEC acknowledges the payment by Verizon to ALEC for the period January 2002 to July 2002 of \$159,711.09, however, ALEC has not included this period in its demand for compensation.

If ALLTEL or its predecessor compensated another entity for ALEC's traffic, ALEC is nonetheless entitled to payment. ALEC is not familiar with Duro Settlement Group and has no affiliation with that entity.

ALLTEL further claims that ALEC did not provide it with necessary information to resolve the billing dispute between the parties. ALEC did, in fact, provide ALLTEL and its predecessor with information sufficient to justify payment of the overdue invoices. ALEC provided the percent local usage ("PLU") to ALLTEL on each and every invoice from ALEC, a very standard format for billing in the industry. Further, ALLTEL's predecessor, Verizon, paid compensation off of the same type of invoicing from ALEC. Finally, the ICA provides at Section 4.3.5:

Touchtone and GTE will reciprocally provide Percent Local Usage (PLU) factors to each other on a semi-annual basis . . . If either Party does not provide to the other Party an updated PLU, the previous PLU will be utilized. The parties agree to the initial PLU factor as set forth in Appendix A.

ALEC's invoices to ALLTEL are accurate, and payment is overdue. (See detailed invoices, attached hereto as **Exhibit C**)

ALEC does not intend for this Response to ALLTEL's motion to dismiss to be a full legal analysis of ALEC's position on the issues presented herein. ALEC provides this rebuttal for the Commission's benefit solely for the purpose of refuting claims made

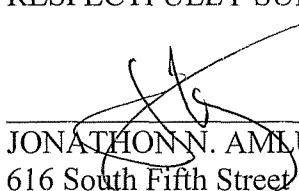


by ALLTEL in its motion. ALEC requests this Commission to deny ALLTEL's motion to dismiss, and proceed with this case in accordance with its procedural schedule for complaint cases, including a formal hearing. During the course of this matter, ALEC will undoubtedly brief the legal and factual issues in greater length and detail for the Commission's benefit.

## **V. CONCLUSION**

For the reasons set forth herein and in the Formal Complaint, ALEC and Touchtone request this Commission to deny ALLTEL's motion to dismiss and issue an Order directing KENTUCKY ALLTEL to pay ALEC past-due inter-carrier compensation in the amount of \$8,662,061.30 (including interest in the amount of \$1,825,011.00), plus penalties subject to Commission discretion, all the fees and costs incurred by ALEC in bringing this formal Complaint and for any other relief the Commission deems appropriate.

RESPECTFULLY SUBMITTED,



---

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616 South Fifth Street  
Louisville, KY 40202  
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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 Response to ALLTEL's Motion to Dismiss was served upon the following via regular U.S. Mail, postage pre-paid, this the 23<sup>rd</sup> day of February, 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

## **EXHIBIT A**

**GERRY, FRIEND & SAPRONOV, LLP**

ATTORNEYS AT LAW

SUITE 1450

THREE RAVINIA DRIVE

ATLANTA, GEORGIA 30346-2117

(770) 399-9500

FACSIMILE (770) 395-0000

EMAIL: gfslaw@gfslaw.com

August 23, 2000

**VIA OVERNIGHT MAIL**

GTE South Incorporated

Attn: Assistant Vice President/Associate General Counsel

Service Corporation

600 Hidden Ridge -- HQEWMNOTICES

Irving, Texas 75038

and

GTE South Incorporated

Attn: Director -- Wholesale Contract Compliance

Network Services

600 Hidden Ridge -- HQEWMNOTICES

Irving, Texas 75038

**Re: Interconnection Agreement dated July 22, 1999 between Touchtone Communications, Inc. ("Touchtone") and GTE South Incorporated ("GTE") for the State of Kentucky (the "Agreement")**

Dear Sirs:

As required by and in accordance with Article III, Section 4 of the Agreement, we hereby notify you that the Agreement has been assigned to ALEC, Inc., an Affiliate of Touchtone that is authorized to provide local exchange service in the State of Kentucky.

In connection with the assignment, ALEC, Inc. agreed in writing to assume all of the rights, obligations and duties of Touchtone under the Agreement.

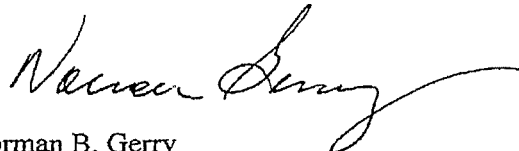
GERRY, FRIEND & SAPRONOV, LLP  
ATTORNEYS AT LAW

GTE South Incorporated  
Attn: Assistant Vice President/Associate General Counsel  
GTE South Incorporated  
Attn: Director – Wholesale Contract Compliance  
August 23, 2000  
Page 2

Please do not hesitate to contact us if you have any questions.

Very truly yours,

GERRY, FRIEND & SAPRONOV, LLP

A handwritten signature in black ink, appearing to read "Norman B. Gerry", with a long, sweeping horizontal stroke extending to the right.

Norman B. Gerry

NBG/nah

cc: Mr. Joe Demmons  
Mr. Richard McDaniel  
Charles A. Hudak, Esq.

## **EXHIBIT B**

Touchtone/Verizon Invoices for MOU

Invoice#	Control#	Transaction Amount
200201-1	911268917	16568.01
200201-2	911268917	19560.45
200201-3	911268917	15564.69
200202	11271466	19327.5
200203	911274379	18818.6
TU200204-1	911278904	17860.86
TU200205-1	911283550	14111.8
TU200206-1	91129237	18295.4
TU200207-1	911293125	19603.78
Total Paid		159711.09

## **EXHIBIT C**