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CHARLES E. THOMAS
(1913 - 1998)

November 3, 2005

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2005 NOV -3 PM 4:27
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SECRETARY'S BUREAU

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P. O. Box 3265
Harrisburg, PA 17105-3265

DOCUMENT
FOLDER

In re: James W. Kramer v. ALLTEL Pennsylvania, Inc.
Docket No. C-20055421

Dear Secretary McNulty:

Enclosed for filing on behalf of ALLTEL Pennsylvania, Inc. are an original and three (3) copies of both its Motion to Dismiss and Notice to Plead in the above-referenced proceeding. Copies have been served in accordance with the attached Certificate of Service. The Company's Answer and New Matter is being simultaneously filed under separate cover.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

THOMAS, THOMAS, ARMSTRONG & NIESEN

By



Michael L. Swindler

Encl.
cc: Certificate of Service
Laura Zatezalo

ORIGINAL

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

James W. Kramer,
Complainant

v.

Docket No. C-20055421

ALLTEL Pennsylvania, Inc.,
Respondent

NOTICE TO PLEAD

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To: James W. Kramer
6035 Maplegrove Road
Bulger, PA 15019

Pursuant to 52 Pa. Code §§ 5.101 (d) and 5.103 (c), you are hereby notified that, if you do not file a written response to the enclosed Motion to Dismiss of ALLTEL Pennsylvania, Inc. within ten (10) days from service of this notice, the facts set forth in the Motion may be deemed to be true, without requiring other proof. All pleadings such as a Response to the Motion must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for ALLTEL Pennsylvania, Inc.



Michael L. Swindler

Attorney for
ALLTEL Pennsylvania, Inc.

Dated: November 3, 2005

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

James W. Kramer,
Complainant

v.

ALLTEL Pennsylvania, Inc.,
Respondent

Docket No. C-20055421

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**MOTION TO DISMISS
OF
ALLTEL PENNSYLVANIA, INC.**

TO THE HONORABLE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, comes ALLTEL Pennsylvania, Inc. ("ALLTEL" or "Company"), Respondent herein, pursuant to 52 Pa. Code § 5.101, and files this Motion to Dismiss the complaint of James W. Kramer ("Complainant") as follows:

1. Respondent's Answer and New Matter, which is being filed separately, is incorporated herein by reference.
2. Complainant seeks to have ALLTEL provide high-speed Digital Subscriber Line ("DSL") service to him because "Verizon has DSL capability in areas surrounding my home." While the Company appreciates Complainant's desire for DSL service, Complainant's complaint is without merit given that "DSL service" is not a "service" within the jurisdiction of the Commission as set forth at 66 Pa. C.S. § 102.
3. DSL service is distance sensitive due to the high bandwidth speeds utilized. A customer located more than 18,000 feet from the central office or remote

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carrier service location serving the customer will incur loss of transmission and degradation of service that is not conducive to the provision of DSL service. Complainant is served from ALLTEL's Midway central office. ALLTEL's Midway exchange is not contiguous to any other ALLTEL exchanges. As such, ALLTEL is currently not able to offer DSL service to Complainant. That ALLTEL is unable to currently offer DSL service to Complainant is not a violation of any Commission regulation.

4. The primary issue is whether the Commission has the jurisdiction to investigate the matter raised by Complainant within the bounds of the utility's provision of a "service" as that term is defined at 66 Pa. C.S. §102. ALLTEL avers that the provision of DSL service is not a regulated service that is tarified with this Commission. In its capacity as a local exchange carrier of telecommunications services, there is no Commission regulation or applicable Company tariff provision mandating criteria for the transmission of data. As such, the Commission is without the necessary jurisdiction to address Complainant's claim. Nevertheless, ALLTEL avers that its service, communications and accommodations afforded Complainant are adequate, efficient, safe and reasonable.

5. There is no Commission-mandated requirement that obligates Respondent to provide DSL service to its voice-grade customers.

6. This Commission adopted the Initial Decision of Administrative Law Judge Herbert S. Cohen in the matter of Matthew S. Krause, Jr. v. Verizon Pennsylvania Inc., at Docket No. C-00004500 by Final Order entered June 10, 2002 wherein ALJ Cohen held, in pertinent part:

I agree with Respondent's contention that it does not have a legal obligation to provide specified minimum data transmission rates for customers who receive telephone service over its voice network. My examination of the record leads me to conclude that Respondent is not providing Complainant and/or other customers in the Oxford exchange with unreasonable service, as such service relates to modem connect speeds.

Section 1501 of the Public Utility Code, 66 Pa. C.S. §1501, declares, 'Every Public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs. . . and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of. . .the public. . . .' This Commission has previously held that the provision of public utility facilities that are adequate for voice service constitutes adequate service under the requirements of Section 1501 of the Public Utility Code. Disparate levels of modem connection speeds among customers in the Oxford exchange does not, per se, constitute inadequate or reasonable service. Respondent correctly submits, 'The Code. . .contains no requirement that incumbent local exchange carriers provide anything but voice service over the public switched network. . . .' (Verizon, M. Br. P.6.).

In the matter of Boyd v. GTE North Incorporated, 83 Pa. P.U.C. 531, Docket No. C-00945821 (Order entered December 14, 1994), Administrative Law Judge Michael Schnierle stated: 'While I have been unable to find no case that directly addresses this issue, I am convinced that telephone service which is adequate, efficient and reasonable for voice communications need not be capable of supporting high speed data communications to meet the statutory standard.'

Krause Initial Decision at 14-15.

This Commission made a similar ruling in Richard P. Orsulak v. ALLTEL Pennsylvania, Inc., Docket No. C-20029100, Order entered July 30, 2003.

Moreover, in the "Initial Decision Granting Preliminary Motion to Dismiss the Complaint" in the matter of Julie B. Cohen v. ALLTEL Pennsylvania, Inc., at Docket

No. C-20043191, dated September 14, 2004,¹ Administrative Law Judge Robert P.

Meehan stated:

ALLTEL correctly notes that the Commission has held that issues involving DSL and internet service providers are not matters within its regulatory jurisdiction.

Cohen Initial Decision at 3. Also see, Initial Decision Granting Respondent's Motion to Dismiss Complaint of Administrative Law Judge Fred R. Nene in the matter of Todd E. Kepple v. ALLTEL Pennsylvania, Inc., Docket No. C-20042846, dated July 21, 2004, adopted by Final Order of the Commission entered September 9, 2004.

7. With respect to requests for broadband service in areas where it does not currently provide broadband, ALLTEL complies with the terms of its Bona Fide Retail Request Program pursuant to 66 Pa. Code § 3104(c).

8. Complainant's complaint fails to set forth an act or thing done or omitted to be done by the Company in claimed violation of a statute which the Commission has jurisdiction to administer or of a regulation or order of the Commission thereby justifying the dismissal of Complainant's complaint. 52 Pa. Code §§ 5.21(a) and 5.22(a)(4).

9. The Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 52 Pa. Code § 5.21(d). Section 5.21(d) reads, in pertinent part:

(d) The filing of a formal complaint entitles the complainant to a formal hearing before the Commission except that the Commission

¹ Decision of ALJ Meehan became final without further Commission action by Final Order entered November 30, 2004.

may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest.

10. Complainant's complaint should be dismissed without a hearing as unnecessary in the public interest. DSL service is not "service" within the jurisdiction of the Commission. Accordingly, the issue raised in Complainant's complaint is inappropriate and forms no basis for a complaint against the Company.

11. The public interest demands that Complainant's complaint must be dismissed without hearing. The primary object of public service laws such as the Commonwealth's Public Utility Code, is to serve the interests of the public. Columbo v. Pa. P.U.C., 48 A.2d 59 (Pa. Super. 1946); Ridley Twp. v. Pa. P.U.C., 94 A.2d 168 (Pa. Super. 1953). The Commission's duty has been designated, first and foremost, "to serve the best interests of the public generally as distinguished from the interests of the applicant and protestant or any other private party... (emphasis added)." Application of Frank O. Speelman t/d/b/a Diamond Cab Company, 44 Pa. P.U.C. 312 (1969); Application of Ellwanger Truck Service, Inc., 44 Pa. P.U.C. 158 (1969). The Commission has expressly stated that the term "public" in public interest is meant to incorporate the broadest of interpretations. Respondent, ALLTEL, implores this Commission to dismiss Complainant's complaint, so as not to encumber ALLTEL, or this Commission with any further expenditure of time and resources relative to this complaint or to shackle ALLTEL's general body of ratepayers with the costs related thereto.

WHEREFORE, ALLTEL Pennsylvania, Inc. for the reasons set forth herein respectfully requests that the instant complaint be dismissed.

Respectfully submitted,

ALLTEL PENNSYLVANIA, INC.

By 

Michael L. Swindler

Attorney for
ALLTEL Pennsylvania, Inc.

THOMAS, THOMAS, ARMSTRONG & NIESEN

212 Locust Street, Suite 500
P.O. Box 9500
Harrisburg, PA 17108
(717) 255-7609

Dated: November 3, 2005

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Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

James W. Kramer,
Complainant

v.

ALLTEL Pennsylvania, Inc.
Respondent

Docket No. C-20055421

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of November, 2005, served a true and correct copy of the foregoing Motion to Dismiss and Notice to Plead on behalf of ALLTEL Pennsylvania, Inc. upon the person and in the manner listed below:

FIRST CLASS MAIL, POSTAGE PREPAID

James W. Kramer
6035 Maplegrove Road
Bulger, PA 15019



Michael L. Swindler

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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Administrative Law Judge
P.O. BOX 3265, HARRISBURG, PA 17105-3265
November 8, 2005

IN REPLY PLEASE
REFER TO OUR FILE

Re: C-20055421

(SEE ATTACHED LIST)

James W. Kramer v. ALLTEL Pennsylvania, Inc.

Service Dispute

Motion Judge Assignment Notice

This is to inform you that a preliminary motion was filed on the above-captioned case. This motion is being assigned to Chief Administrative Law Judge Veronica A. Smith for ruling. The Commission rule of practice at 52 Pa. Code §5.101 specifies that the person who filed the complaint has ten (10) days from the date the motion was served on you to file an answer.

If you file any pleading or document relating to this motion with the Secretary of the Commission, please provide a duplicate copy to the judge.

Procedural questions or comments should be directed to the judge at:

717-783-5452

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pc: SA Lopez-Goldberg
Cherie Pyle, Scheduling Officer
Beth Plantz
Docket Section

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Act 294

Case Identification:

C-20055421; James W. Kramer v.
ALLTEL Pennsylvania, Inc.

Initial Decision By:

Chief ALJ Veronica A. Smith

Deadline for Return to OSA:

January 4, 2006

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This decision has not been reviewed by OSA.

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- JAN 18 2006

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I want full Commission review of this decision.

Commissioner

Date

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Dendell J. Skland

JAN 6, 2006

Commissioner

Date

Act 294

Case Identification: C-20055421; James W. Kramer v. ALLTEL Pennsylvania, Inc.

Initial Decision By: Chief ALJ Veronica A. Smith

Deadline for Return to OSA: January 4, 2006

This decision has not been reviewed by OSA.

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Commissioner

Date

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James H. Cawley

Commissioner

1/5/05

Date

Dave

Act 294

Case Identification:

C-20055421; James W. Kramer v.
ALLTEL Pennsylvania, Inc.

Initial Decision By:

Chief ALJ Veronica A. Smith

Deadline for Return to OSA:

January 4, 2006

This decision has not been reviewed by OSA.

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Commissioner

Date

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Bill Shaw / ms

1/3/2006

Commissioner

Date

Act 294

Case Identification: C-20055421; James W. Kramer v. ALLTEL Pennsylvania, Inc.

Initial Decision By: Chief ALJ Veronica A. Smith

Deadline for Return to OSA: January 4, 2006

This decision has not been reviewed by OSA.

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Commissioner

Date

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X *Kim Fitzgerald*

Commissioner

1-4-06

Date

Act 294

Case Identification:

C-20055421; James W. Kramer v.
ALLTEL Pennsylvania, Inc.

Initial Decision By:

Chief ALJ Veronica A. Smith

Deadline for Return to OSA:

January 4, 2006

This decision has not been reviewed by OSA.

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Commissioner

Date

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Terrance J. Fitzgerald

12/30/05

Commissioner

Date

DATE: January 19, 2006

DOCUMENT
FOLDER

SUBJECT: C-20055421

TO: Office of Administrative Law Judge
Susan Hoffner

FROM: James J. McNulty
Secretary
nvl

JAMES W. KRAMER

VS

ALLTEL PENNSYLVANIA INC

The Initial Decision has been served upon all parties of interest.

Neither exceptions nor requests for review from the Commissioners have been received by the Commission. This matter is referred to your office for whatever action you deem necessary.

cc: Office of Special Assistants

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JAN 23 2006

P.S. Please note that exceptions or reply exceptions may come in timely with certificates of mailings. A second memo will not be released for these exceptions.