

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF REVISIONS AND/OR	)	RM05-002
ADDITIONS TO THE COMMISSION'S	)	
SWITCHED ACCESS RULES CODIFIED	)	MIDCONTINENT'S REPLY
IN ARSD 20:10:27 THROUGH 20:10:29	)	COMMENTS

**REPLY COMMENTS OF MIDCONTINENT COMMUNICATIONS**

Midcontinent Communications (Midcontinent) hereby respectfully submits its Reply Comments to the initial comments of the parties that were filed on or about June 15, 2010. Consistent with the directions provided by the letter dated June 16, 2010 from the Commission Counsel, Midcontinent will state its agreement and/or disagreement with the various positions of the other parties.

**BRIEF SUMMARY OF MIDCONTINENT'S COMMENTS**

A review of the comments filed in this case shows that Midcontinent's proposal, as compared to the other proposals, provides the most efficient short-term solution for pricing CLEC switched access in South Dakota. The Midcontinent proposal is workable, easy to administer and would lead to "fair and reasonable" prices for CLEC switched access services in that they would at least be the same for all competitors in an exchange. Further, the proposal would fix the current disparity in CLEC rates and remove the market distortions caused by that disparity. While other parties propose a similar mechanism – capping CLEC composite rates at that of the ILEC with which the CLEC competes – as part of their proposals, Midcontinent's proposal is holistic and provides benefits to all aspects of the industry and the economy of the State.

As noted in Midcontinent's Initial Comments and in the testimonies of Mr. Simmons and Mr. Gates in TC10-014, switched access rates in South Dakota should be fair and reasonable for consumers, the IXCs paying the charges and for the carriers providing the service. To achieve that goal Midcontinent recommends the following changes to the Commission's proposed rules:

- Eliminate artificial distinctions (market share, size of communities, corporate structure, etc.) that perpetuate the discriminatory treatment of CLECs in South Dakota, and recognize that a CLEC is a CLEC;
- Eliminate the specific rates in the proposed rules and instead simply refer to the composite rate of the ILEC in the exchange with which the CLEC competes; and,
- Recognize that the chronic problems with switched access in South Dakota emanate from the failure to comprehensively reform the existing rules and set an aggressive schedule to revise those rules consistent with the mandates in the Act, the FCC rules and South Dakota law.

## **MIDCONTINENT'S RESPONSE TO THE PROPOSALS OF THE OTHER PARTIES**

### **Verizon**

Midcontinent agrees with many of the positions and recommendations put forth by Verizon. For instance, Midcontinent agrees with the following Verizon positions:

“The Staff did not provide any commentary explaining the rationale for some of the language it proposed.” (Verizon Comments at 1) Midcontinent assumes this is a reference to the Commission Counsel’s proposed rules as opposed to the Staff.

“Because rates may change over time, it would be a serious mistake to lock in stone specific rates in the Commission’s administrative rules.” (Verizon Comments at 2)

“Such an approach would be administratively inefficient and extremely wasteful of the Commission’s and industry’s resources.” ... “Establishing a general standard allows for continuing compliance with the regulation even as ILECs revise their rates over time.” (Verizon Comments at 2)

Midcontinent agrees generally with the positions in Verizon’s proposed rule 20:10:27:02.01. Midcontinent agrees that including rates in rules is not in the public interest and that the Commission has not justified its attempt to create a distinction between and among CLECs based on where they serve. (Verizon Comments at 4)

“The draft rules, for the most part, ignore the need for reforming the switched access rates of ILECs in South Dakota.” (Verizon Comments at 7)

“The Commission’s antiquated switched access rules have failed to evolve to reflect these changing realities and today are unique among the states.” (Verizon Comments at 8)

“Accordingly, Verizon renews its recommendations that, once the Commission finalizes rules capping CLEC access rates at the ILEC level, it move forward promptly to implement needed access charge reform for ILECs in South Dakota.” (Verizon Comments at 9)

### **AT&T**

Midcontinent agrees with some of the positions taken by AT&T, but AT&T’s comments go far beyond the issues identified for this rulemaking. For instance, some of the proposals that AT&T makes with respect to the switched access rates of ILECs are not relevant for this proceeding. Consistent with Midcontinent’s approach, however, and

Commission Counsel's request for the parties to identify areas of agreement and disagreement, Midcontinent will first address areas of agreement with AT&T. Midcontinent agrees with the following statements in AT&T's Initial Comments:

"(ii) direct all CLECs to cap their intrastate switched access rates at the corresponding intrastate switched access rates of the ILECs with which they compete." (AT&T Comments at 2)

"...the existing rules are woefully out of date." (AT&T Comments at 3)

"The success and failure of competitors should be determined on the basis of their relative costs, efficiencies, and quality of services, not by regulatory asymmetries." (AT&T Comments at 4)

"The Commission should actively pursue access reform and encourage competition in local exchange markets, balancing the interests of consumers and telecommunications providers alike within the parameters mandated by Congress and the FCC." (AT&T Comments at 5)

"It is past time for the Commission to take meaningful action and move forward with comprehensive access reform." (Id.)

"Charging radically different prices for materially the same functionality leads to arbitrage, substantial expense, waste, and inefficiency, resulting in decreased value for consumers." (AT&T Comments at 10)

"...requiring all CLECs' intrastate switched access rates to be capped at the intrastate rates of the ILECs with which they compete." (AT&T Comments at 13)

"There is no dispute as to the need for comprehensive access reform in South Dakota. Such need is not confined just to CLECs as is presently outlined in the Proposed Rules, but to all LECs operating in South Dakota." (AT&T Comments at 15)

Midcontinent disagrees with other aspects of AT&T's proposals, primarily because many of them are outside the scope of this limited proceeding. For instance, at page 2 of its Comments AT&T recommends that ILECs – but not CLECs -- be allowed to recoup lost access revenues from retail pricing flexibility, rebalancing of local rates, and a new state USF. While Midcontinent agrees that the ILEC switched access rules and rates need to be revised, that is outside the scope of this proceeding. Moreover, AT&T's specific recommendations about a new USF and the funding of that USF through contributions based on intrastate end-user retail revenues is highly contentious and has not been noticed for this proceeding. (AT&T Comments at 15)

AT&T also makes extensive comments about implicit subsidies, threats to universal service and unsupported suggestions that rural providers may not be able to re-invest in their networks or invest in new technologies. All of these issues are outside the scope of this proceeding because they do not deal with the Commission's proposed rules or CLEC switched access rates. Because these issues are outside the scope of this proceeding Midcontinent will not burden the record with a detailed response. Nevertheless, should the Commission allow AT&T's expansion of the issues, Midcontinent reserves the right to respond to the unsupported statements and allegations that AT&T has made.

Midcontinent disagrees with AT&T's suggestion that mirroring ILEC rates "...will reduce implicit subsidies in intrastate switched access rates..." (AT&T Comments at 13) As noted above, Midcontinent agrees with AT&T that competitors should compete based on "...their relative costs, efficiencies, and quality of services." One cannot determine implicit subsidies, however, without knowing the "relative costs" of providing service. So while Midcontinent agrees that the Commission should "...remove implicit subsidies inherent in the current switched access rate structure..." (AT&T Comments at 4), that cannot be accomplished without first knowing what costs are incurred in providing the service.

It is assumed that AT&T's reference to "...the eight-cent rate cap for CLECs operating in communities with less than 10,000 inhabitants..." was a typographical error and will be corrected by AT&T in its reply comments. (AT&T Comments at 3) Obviously the proposed rules included a nine cent rate and not an eight cent rate.

Finally, Midcontinent disagrees with AT&T's suggestion that the right solution would result in all ILECs and CLECs lowering their intrastate switched access rates. (AT&T Comments at 16) This unsupported proposition that lower rates are fair and reasonable is the same dangerous thinking that prompted the Staff to negotiate disparate rates with CLECs as long as they were lower than the existing rates. Simply because rates go down does not mean that the rates are fair and reasonable as required by the South Dakota rules or more general rate making policy. There is no law or rule in South Dakota, or anywhere else for that matter, that says that a lower rate is a "fair and reasonable rate" or a "just and reasonable rate." In fact, given what we know about the network and cost characteristics of CLECs, a lower rate might be a confiscatory rate.

## **Qwest**

Midcontinent agrees with two positions taken by Qwest in this proceeding. First, Qwest is correct that rate of return regulation is not ideal for CLECs. (Qwest Comments at 3) Instead, the CLECs should price to the market, which is accomplished by capping the CLEC rates at the composite rates of the ILEC with which the CLEC competes. Second, Midcontinent agrees with Qwest that there should be no specific rates in the rules. (Qwest Comments at 4) Instead, the rules should refer to the composite switched access rates of the ILEC.

Midcontinent disagrees with Qwest that the CLEC rates should be capped at the "...per minute rate currently charged by the RBOC." (Qwest Comments at 4) Qwest's proposal would limit the CLEC rate to the Qwest rate even when the ILEC is a rural ILEC charging the LECA rate of almost twice that of the Qwest rate. This is not a fair or reasonable solution. As noted in the direct testimony of Mr. Simmons in Docket No. TC10-014, Midcontinent has struggled in areas where ILECs and their affiliate CLECs are charging the LECA rates or negotiated "stipulated rates," that are almost twice as high as the rates that Midcontinent was charging. (Direct Testimony of Mr. Simmons at 5) For instance, Midstate Telecom in Chamberlain is charging the stipulated rate of 11.5 cents per minute while Midcontinent is charging about 6 cents per minute. Similarly, SSTELECOM in Milbank, RC Communications in Corona and rural Watertown, and Northern Valley in Aberdeen all charge the 11.5 cent rate while Midcontinent is charging

the 6 cent rate. This disparity in rates in the same exchange distorts competition at the retail level and should be eliminated.

The RBOC switched access rate is not an appropriate benchmark because it does not reflect the rates in effect in all parts of the State where a CLEC may offer services. Instead, the correct solution is to cap the CLEC rates at the composite switched access rates of the ILEC with which it competes. This results in all providers in the same exchange charging the same wholesale rates to IXCs. This allows the providers to compete on equal footing on the retail side of the market.

### **NVC and Sancom**

NVC and Sancom essentially accept the proposed rules but argue for a change in the “own facilities” language. While the comments are limited, some discussion is required. For instance, while Midcontinent shares a concern with the “own facilities” language in the proposed rules, the NVC and Sancom proposal fails to solve the problem. Rather than craft language that describes the facilities differently, the best approach is to eliminate the exception based on facilities.

NVC and Sancom support their additional language by suggesting that the change would recognize the ownership status of the CLEC and the efficiencies achieved by allowing the CLEC to use the parent’s and/or subsidiaries facilities. (NVC and Sancom Comments at 2) Midcontinent understands that some rural CLECs would not exist without access to the assets and management of their parent ILEC. The “efficiencies” that are discussed are unmistakable since the entities use the same facilities, management, etc. For instance, NVC uses its parent company’s facilities and switch in Aberdeen, while Midcontinent must transport its traffic back to its facilities for switching and then back to Aberdeen for termination. This Midcontinent arrangement is much less efficient than NVC’s arrangement in which it uses the local switch and network of a parent company to handle traffic. And yet NVC with all of its “efficiencies” is charging rates almost twice as high as the “Qwest rate” that Midcontinent is charging.

The best and most efficient solution would be to eliminate this proposed rule exception rather than wordsmithing the language in the proposed rules.

### **SSTELECOM**

Midcontinent disagrees with SSTELECOM’s suggestion that “not all CLECs are the same.” (SSTELECOM Comments at 1) Their discussion of rural and urban areas and opportunities for cost recovery is misleading. It is reasonable to assume as a starting point that all efficient providers would face essentially the same costs in providing switched access services in a given exchange. As such, having the same rate cap for all carriers in the same exchange would limit excessive rates. Further, since the rate serving as the cap will be an ILEC rate set by the Commission, there is at least some support for a “fair and reasonable” rate (at least for the ILEC). Moreover, the “safety valve” provision – allowing a CLEC to provide cost support for a different rate -- would allow individual CLECs to demonstrate that their costs are higher, if in fact that is the case.

SSTELECOM states "...CLECs operating in rural exchanges do not have the resources necessary for conducting a cost study which comports with the existing rules nor do they have the time and resources for engaging in lengthy negotiations for purposes of setting a rate." Midcontinent disagrees. The CLECs operating in rural exchanges that are owned by rural ILECs absolutely have the resources necessary for conducting a cost study. In fact, they would have a comparative and significant advantage over other CLECs that do not have a parent with extensive experience with cost studies.

SSTELECOM is a wholly owned subsidiary of Stockholm-Strandburg Telephone Company which is a wholly owned subsidiary of Interstate Telecommunications Cooperative, Inc. ("ITC"). (See Petition to Intervene of SSTELECOM in TC10-014, dated February 8, 2010) ITC is a LECA company and is very experienced at using the Commission's existing switched access rules to conduct cost studies. SSTELECOM could rely upon the resources of its parent – ITC – for conducting a cost study. This is also true for other CLECs who are owned by ILECs who conduct LECA and/or NECA cost studies

### **SDTA and LECA**

SDTA and LECA support the adoption of the proposed rules. The two organizations also make arguments that are outside the scope of this proceeding. For instance, the organizations also discuss the need for some sort of "revenue replacement" mechanism should switched access rates for ILECs be reduced. Midcontinent will not burden the record with a detailed response. Nevertheless, should the Commission allow SDTA and LECA to expand the issues in this proceeding, Midcontinent reserves the right to respond to the unsupported statements and allegations that the two organizations have made.

### **Midstate Telecom and RC Communications**

Midstate and RC also address issues that are outside the scope of this proceeding. For instance, the two companies argue that rural ILECs should "...remain subject to rate-of-return regulation for their switched access services ... ." (Midstate and RC Comments at 1) This is evidently an attempt to support the positions of their parent ILEC companies, but is nonetheless outside the scope.

Midstate and RC recommend that the proposed rule changes should be specific to CLECs and suggest removal of the word "incumbent" from 20:10:27.02. Midcontinent does not oppose this suggestion.

The two companies take issue with the "own facilities" language in the proposed rules. As noted above, this concern is best resolved by simply eliminating the exception in its entirety. But that is not acceptable to Midstate and RC because they do support the language requiring a CLEC to offer service throughout all of the exchanges in which the CLEC serves. Ironically Midstate and RC discuss the problem of cherry-picking, but here they "cherry pick" the parts of the proposed rules that benefit them. (Midstate and RC Comments at 3) The bottom line is that this exception language is flawed and would

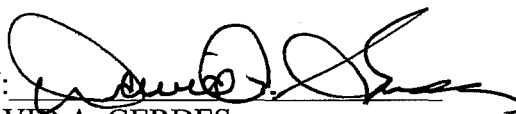
result in continuing discriminatory treatment of CLECs. The 20:10:27:02.02 (1) exception should be eliminated.

#### SUMMARY

Midcontinent's proposal is fair, easy to implement and consistent with the Act and the South Dakota statute. Switched access rates for CLECs in South Dakota should be on the same basis in any exchange in which they offer service. A CLEC is a CLEC and absent cost support to the contrary, there is no good reason to have a CLEC in a given exchange providing the very same service as the incumbent and other CLECs in that exchange, at a different rate. In fact, that discriminatory treatment of carriers – which is evident today in South Dakota – is patently unfair and inconsistent with the legislature's goals for competition in South Dakota.

Dated this 28<sup>th</sup> day of June, 2010.

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#### CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 28<sup>th</sup> day of June, 2010, he filed electronically and e-mailed a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

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A handwritten signature in black ink, appearing to read "David A. Gerdes", written over a horizontal line.

David A. Gerdes