

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

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

NORTHERN VALLEY COMMUNICATIONS' SUPPLEMENTAL COMMENTS

Northern Valley Communications, L.L.C. ("NVC") requests that the Commission refrain from adoption and implementation of the rules posted on March 21, 2011, until an appropriate Small Business Impact Statement is filed and parties are allowed to comment on it. The South Dakota Administrative Procedures Act, SDCL 1-26, requires all agencies to submit an appropriate Small Business Impact Statement as a precursor to adoption of any proposed rule. The Small Business Impact Statement must include a "statement of the probable effect on impacted small business." Because the current Small Business Statement fails this requirement, it is fatally flawed. As a result, it puts into jeopardy the enforceability of the proposed rules absent the preparation of a meaningful Small Business Impact Statement that will more fully and fairly inform the Commission as it adopts significant rules relating to CLEC rates in South Dakota.

SMALL BUSINESS IMPACT REQUIREMENT

For obvious policy reasons, including the laudable goal that all agencies in South Dakota contemplating rule changes must take into account the "probable effect on impacted small business," the legislature has directed all agencies, including the Public Utility Commission, to file a Small Business Impact Statement. The Small Business Impact Statement requirement is contained in SDCL 1-26-2.1, which provides as follows:

An agency shall, when submitting any proposed rule that will have a direct impact on small business, prepare an impact statement that includes the following:

- (1) A narrative explanation in plain, easy-to-read language of the effect of the

- rule on small business, the basis for its enactments, and why the rule is needed;
- (2) An identification and estimate of the number of small businesses subject to the proposed rule;
 - (3) The projected reporting and recordkeeping required for compliance with the proposed rule, including the types of professional skills necessary for preparation of the report or record;
 - (4) *A statement of the probable effect on impacted small business*; and
 - (5) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule.

The Small Business Impact Statement file in this docket, (dated April 8, 2011), fails to comply with this statutory requirement. The Small Business Impact Statement is to include "a narrative explanation... [of] why the rule is needed." SDCL 1-26-1.2(1). Paragraph 4 of the Impact Statement provides the "why" of the rule as follows:

4. Why is the rule(s) needed?

As stated above, the Commission recently ruled that the switched access rates charged by CLECs are subject to price regulation instead of rate-of-return regulation and so the proposed rules are needed to reflect this change in classification.

While this statement is correct, it only allowed the Commission to set switched access rates; it did not require the Commission to dramatically reduce those rates. Although the Small Business Impact Statement does comply with the requirement for stating *why* the rule is needed, it does not comply with the requirement for adequately stating the "probable effect on impacted small business."

IMPACT ON SD CLECs

The Small Business Impact Statement is flawed in several respects.

1. Limited to the Impact of 20:10:27:02.01. The Impact Statement only deals with the change that deletes the 9 cent switched access rate for CLECs serving in smaller communities. It does not address the impact that the rule change would have on CLECs faced with a rate change from 11.5 cents to 6.042 cents.

2. Impact on Current Investment Decisions. The Statement does not take into account the impact the change in rates will have on small existing South Dakota telephone companies that have made investment decisions, totaling tens of millions of dollars, based on the rate structure that existed prior to the proposed rule change. The rule change results in hundreds of thousands of dollars a year in lost revenue for South Dakota CLECs. All of that revenue loss rebounds solely to the benefit of the large out-of-state IXC, whose combined gross revenues for 2010 was \$282 billion¹, and who, in all likelihood, made investment decisions in South Dakota based on the rate structure that existed prior to this rule change. Therefore, this rule change will have a disproportionate adverse effect on small South Dakota CLECs, while providing insignificant benefits to the IXCs, with no corresponding benefit to the public. None of the IXC commentators have pledged to reduce rates or increase capital expenditures in South Dakota if these rules are adopted. It will simply result in a wholesale transfer of money from SD CLECs to the IXCs.

The reduction in revenue to South Dakota CLECs will adversely affect their ability to provide state-of-the-art telecommunications services and meaningful employment opportunities in their communities. These impacts do not appear to have been taken into account by the Commission when it began this rulemaking process. However, SDCL 1-26-2.1 requires that these impacts be the benchmark from which decisions are made and, failing to do so may make these rules unenforceable under SDCL 1-26-6.8 (No agency rule may be enforced by the courts of this state until it has been adopted in conformance with the procedures set forth in this chapter.)

¹ 2010 Annual financial statements of AT&T \$124 billion; Verizon \$107 billion; Sprint \$32 billion; and Century Link/Qwest \$19 billion.

RATE-MAKING PROCESS

The requirement that the Small Business Impact Statement include the "probable effect on impacted small business" appears to be the legislature's codification of the South Dakota Supreme Court's adaptation of the United States Supreme Court's guidance for courts reviewing the rate-making process. The court, in South Dakota Public Utilities Commission v. Otter Tail Power Co. 291 NW2nd 991 (SD 1980) concluded as follows:

In NPS v. Chamberlain, supra, we quoted approvingly from this expression of the United States Supreme Court in Permian Basin Area Rate Cases, 390 US 747, 791-2, 88 S.Ct. 1344, 1373, 20 L.Ed. 2d 312, 350 (1968):

It follows that the responsibilities of a reviewing court [with respect to rate issues] are essentially three. First, it must determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. ***Third, the court must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable.*** The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors. (emphasis added)

The third essential responsibility of a reviewing court, that the Rule "may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risk they have assumed, and yet provide appropriate protection to the relevant public interests..." appears to be the meat on the bones of the requirement that the Commission provide a "statement of the probable effect on impacted small business." However, the Small Business Impact Statement filed by the Commission falls far short of this test. It is silent as to the effect the rules will have on South Dakota CLECs' ability to "maintain financial integrity, attract necessary capital, and fairly compensate [the South Dakota CLECs] for the risk they have

assumed...." It appears the Commission has only heard and considered the clarion call of the IXCs for reduced rates. The impact the rule has on IXCs is not one of the statutorily required considerations of the Impact Statement.

FATALLY-FLAWED IMPACT STATEMENT

Because the Small Business Impact Statement is fatally flawed, it does not provide the statutory required underpinnings for the adoption of the entire set of revised rules. Rather than inviting litigation over the appropriateness of the Commission proceeding with these rules based on this Impact Statement, the more appropriate course of action would be to reinstate the original draft proposal which tied the rate of a CLEC that serviced through the service area to the rate established by § 20:10:27:12. NVC proposes the rule read as follows:

20:10:27:02.02. Exceptions for determination of switched access rates of competitive local exchange carriers. A competitive local exchange carrier may charge different rates than the rates established in § 20:10:27:02.01 if it meets one of the following exceptions:

- (1) If a competitive local exchange carrier offers service throughout all the exchanges where it operates, the competitive local exchange carrier may charge intrastate switched access rates that do not exceed the rate established by § 20:10:27:12. A competitive local exchange carrier must offer local exchange service throughout all of the exchanges where it operates using its own facilities or in combination with facilities owned by its wholly owned subsidiary; or
- (2) If a competitive local exchange carrier believes that a higher rate than the rate allowed under § 20:10:27:02.01 is justified under price regulation, the carrier may file a cost study in accordance with chapters 20:10:27 to 20:10:29 to determine its fully allocated cost of providing switched access services. In addition to considering the fully allocated cost of providing switched access services, the commission shall consider the other factors in SDCL 49-31-1.4 in its determination of the competitive local exchange carrier's price for switched access services.

This rate would be consistent with the legal obligations of the Commission to ensure that the rule

will "maintain financial integrity, attract necessary capital, and fairly compensate [South Dakota CLECs] for the risks they have assumed...."

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CERTIFICATE OF SERVICE

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