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 ARSD 20:10:27 THROUGH 20:10:29	))))	RM05-002 MIDCONTINENT'S COMMENTS

Comes now Midcontinent Communications ("Midcontinent"), by and through its undersigned counsel, and hereby files its comments to the proposed rules set forth in the November 24, 2010, Notice of Public Hearing to Adopt Rules. In comments dating back to at least 2005, Midcontinent has implored the Public Utilities Commission ("Commission") to establish a level playing field for all CLECs in this state, noting on several occasions, in a variety of dockets, that there is simply no justification in fact, or in state law, for the continued differential treatment of one class of CLECs (those choosing only to serve smaller exchanges) to the disadvantage of another class of CLECs (those choosing to serve both small and large exchanges). Nevertheless, as the history discussed below bears out, the CLEC switched access charges currently in effect in this state reveal a continued pattern of preferential treatment based solely on the size of the exchanges a CLEC chooses to serve. Unfortunately, the proposed rule revisions now before the Commission continue this favored treatment for the "rural only" CLECs, without regard to the Commission's clear statutory obligation to establish rates that are fair, reasonable, and nondiscriminatory.

I. History and Timeline of Docket:

Because this docket has been pending for several years and has been combined with other dockets in recent years, any review of comments on the current proposed rule changes must be undertaken with a full understanding of the history and timeline that has led us to this point. Regrettably, after almost six years of taking comments and written testimony and the

combination of at least three different dockets related to the Commission's switched access rules, found at ARSD § 20:10:27, the Commission now has before it a set of proposed rule changes that continue to perpetuate the very problems these dockets were originally initiated to correct. While the proposed rule changes appear to be minimal, their negative effects will be wide-ranging.

A. Dockets TC05-073 and TC05-096

On May 31, 2005, the Local Exchange Carriers Association (LECA)[1] filed an Application for Waiver of Certain Requirements of ARSD § 20:10:27:14, Docket TC05-073. Specifically, LECA sought a waiver of that portion of the cost study rules that requires filing minutes of use on a historical test year basis. Midcontinent and AT&T Communications of the Midwest, Inc. (AT&T) intervened in the docket. Thereafter, on August 4, 2005, LECA filed a motion to withdraw its application for waiver, which was granted by the Commission on August 18, 2005. In the meantime, on June 29, 2005, LECA filed its 2004 Switched Access Cost Study and revised tariff pages in Docket TC05-096. After withdrawing its application for waiver, LECA member companies filed revised cost studies replacing previously filed cost studies using projected minutes of use with cost studies using actual minutes of use. MCImetro Access Transmission Services (MCI), Midcontinent and AT&T petitioned to intervene. In addition, Midcontinent filed a request to suspend the tariff pending review of the cost studies. The Commission granted intervention and suspended the effective date of the tariff for 120 days beyond its proposed effective date.

[1] LECA members consist primarily of Rural Incumbent Local Exchange Carriers. Competitive Local Exchange Carriers or CLECs are typically not considered members of LECA, however some CLECs, like Northern Valley Communications, L.L.C., Sancom, Inc., Midstate Telecom, Inc., SSTelecom, Inc. and RC Communications, Inc. are affiliate companies of Rural ILECs.

Thereafter, the LECA companies and the interveners spent several months negotiating a Settlement Stipulation, which was filed in Docket TC05-096 on November 8, 2006. The Stipulation was designed to resolve forty-one (41) separate dockets opened between 2004 and 2006 as a result of LECA and its LEC member companies filing cost studies for the establishment of LECA intrastate switched access rates. The Stipulation called for the LECA intrastate switched access rate to be set at $0.125, effective 35 days after approval by the Commission. The parties agreed that the Stipulation should not be considered precedent setting or a final resolution of intrastate access rates and also agreed to proceed in good faith and with "reasonable dispatch" into the rulemaking docket RM05-002 (discussed below) which had been opened to examine and study the Commission's switched access rules. The Stipulation was to remain effective for three (3) years unless a Commission order establishing switched access rates based on new rules became effective during the those three years. Finally, the Stipulation granted a waiver from the requirement of filing cost studies every three years under ARSD § 20:10:27:07 for LECA and its member companies during the term of the Stipulation. The Commission approved the Stipulation on November 30, 2006.

B. Docket RM05-002

On December 14, 2005, the Commission, noting that petitions for intervention filed in all of the switched access revenue requirement dockets pending before the Commission had alleged deficiencies in the cost study methodologies contained within the Commission's switched access rules, issued an Order opening a rulemaking docket to consider revisions and/or additions to the Commission's switched access rules. In February, 2006, written comments were filed by AT&T, LECA, the South Dakota Telecommunications Association (SDTA), MCI, Qwest and Midcontinent. AT&T filed additional comments in May, 2006. As mentioned in part A above,

many of the same companies were also engaged, during this time, in negotiations in the LECA switched access tariff filing in Docket TC05-096. No further action was taken by the Commission in this rulemaking docket following the May, 2006, comments filed by AT&T.

Over sixteen months later, in September, 2007, Verizon filed comments in this rulemaking docket. AT&T filed further comments as well. LECA and the SDTA filed reply comments on November 30, 2007. Qwest and Midcontinent each asked the Commission for an opportunity to comment further at the appropriate time, given the length of time that had passed since initial comments had been filed in the docket. Despite the clear interest of the industry and the aforementioned LECA Stipulation, which required that the parties proceed in good faith and with reasonable dispatch in the rulemaking docket, the Commission did not act on the comments of the parties.

C. <u>Dockets TC05-060; TC05-197; TC05-223; TC06-001; TC07-128</u>

Several "rural" CLECs, including Midstate Telecom (TC05-060), Northern Valley (TC05-197), SSTelecom (TC05-223), RC Communications (TC06-001), and Sancom d/b/a Mitchell Telecom (TC07-128) filed petitions for exemption from the Commission rules requiring development of company specific cost-based switched access rates. In each of these dockets, the respective CLEC and the Staff of the Commission negotiated a Settlement Stipulation relating to the switched access rates the CLEC would be allowed to charge. Specific to each of the Settlement Stipulations was an agreement by the parties that the settlement rates were not designed to calculate or produce a specific revenue requirement and an acknowledgement that the rates ***do not*** in any way represent the CLECs cost of providing service. The Settlement Stipulations were to remain in effect for three (3) years or until the effective date of any FCC action or any Commission mandated rate change in the rulemaking docket (RM05-002).

Because no action had been taken by either the FCC or the Commission in Docket RM05-002, four of the five CLECs subsequently filed for an extension of their Settlement Stipulation in 2009.[2] In each of those subsequent dockets, Midstate Telecom (TC09-009), Northern Valley (TC09-031), SSTelecom (TC09-014), RC Communications (TC09-022), Midcontinent intervened and made a motion for uniformity in CLEC switched access rates. Specifically, Midcontinent asked that the Commission hold an evidentiary hearing to determine whether it should order that all CLECs be required to mirror the rates of the ILECs in the territories they serve. Ultimately, the Commission denied Midcontinent's request for an evidentiary hearing and granted the CLECs requests for extension of their stipulated switched access rates. As a result, Midstate, Northern Valley, SSTelecom and RC Communications continue to charge a rate of $0.1150 per minute of use for intrastate switched access throughout their respective service territories.[3]

D. Docket TC07-117

In prior dockets (TC00-135 and TC05-185), the Commission had approved an exemption for Midcontinent from the requirement to develop company-specific cost-based intrastate switched access rates. Unlike most of the "rural" CLECs in the state, however, the Commission required Midcontinent to mirror the Qwest switched access rate of roughly $0.06042. Midcontinent believed (and continues to believe) that the costs associated with its provision of switched access charges warrant a rate higher than the Qwest rate. In addition, in certain areas of the state, Midcontinent is forced to compete against the CLECs mentioned above that are being

[2] Sancom d/b/a Mitchell Telecom's Settlement Stipulation was not limited to a three (3) year term. Rather, the rates agreed to by the parties are to remain in effect until the earlier of a relevant FCC ruling or the effective date of any Commission ruling that would change the Stipulation.

[3] Sancom d/b/a Mitchell Telecom is now charging the QWEST rate pursuant to its Settlement Stipulation.

allowed to charge switched access rates significantly higher than the Qwest rate Midcontinent is allowed to charge. After discussing the issues with Staff and in order to address this disparity, Midcontinent hired an outside firm to help the company develop a cost study. In April, 2007, Midcontinent presented its cost study to the Staff for its review.

Staff expressed concerns about Midcontinent's cost study. Thereafter, on October 31, 2007, Midcontinent filed a Petition for exemption from the requirement of ARSD § 20:10:27:07 to file a company specific cost study. Midcontinent requested permission to mirror the switched access rates being charged by similarly situated CLECs. On July 14, 2008, Midcontinent filed a Motion to Amend the Petition to include alternative relief of either exemption from the aforementioned rule and approval of Midcontinent's use of the state-wide average small LEC rate (LECA Plus rate) or acceptance of its cost study and the rates supported by that study.

The Commission granted Midcontinent's Petition to Amend, however, following pre-filed testimony, a hearing, and post-hearing briefing, the Commission issued an Order on January 14, 2009, denying Midcontinent's request for an exemption from developing company specific cost-based switched access rates (noting that Midcontinent had prepared a cost study), denying the motion to allow Midcontinent to use the rates supported by its cost study as interim rates pending review of the cost study by Staff, and voting to redirect Docket RM05-002 from a general switched access docket to a more focused docket on CLEC switched access rate-setting. Despite the fact that Midcontinent had presented the cost study to Staff for its review in April, 2007, and that the cost study justified rates higher than the QWEST rate, the Commission ruled that Midcontinent's failure to file the cost study until just prior to the hearing prevented a thorough review by the staff. In this January 14, 2009 Order, the Commission went on to direct

Staff to provide a straw man proposal for switched access rule revisions for the Commission's consideration within 180 days.

E. Docket TC10-014

At its January 5, 2010, meeting, Chairman Johnson requested that the Commission open a Docket to consider whether pricing regulation is appropriate for switched access services provided by competitive local exchange carriers. The Commission unanimously voted to open this docket, invited intervention and written testimony, and set the matter for hearing. Petitions to intervene were filed by Verizon, Midcontinent, Northern Valley, AT&T, SSTelecom, Qwest, Sancom, SDTA, Sprint, Midstate Telecom, and RC Communications. Testimony was filed on behalf of Midcontinent, AT&T, SDTA, Northern Valley and Sancom, Verizon, Qwest, Commission Staff, Midstate Telecom, RC Communications and SSTelecom. Following direct testimony, Qwest made a motion to adopt price regulation for switched access services offered by CLECs, suspend further testimony and define further proceedings. On May 4, 2010, the Commission found that pricing regulation is appropriate for switched access services provided by CLECs and voted to close this docket and proceed with the rulemaking docket RM05-002 which, at that point, had been reduced to a proceeding to address only CLEC switched access rates. The Commission also ordered that it would take judicial notice of the testimony filed in Docket TC10-014 in the rulemaking proceeding – RM05-002.

F. Docket RM05-002 (Round Two)

The Commission's January 14, 2009, Order (TC07-117), directed Staff to develop a straw man proposal of rule changes for the Commission's consideration within 180 days. But it was not until June 1, 2010, (17 months later) that the Commission issued official draft rules regarding switched access rates for competitive local exchange carriers and sought comment

from the industry.[4] Written comments were filed by Qwest, AT&T, Northern Valley Communications, LLC and Sancom Inc., SSTelecom, SDTA and LECA, Midstate Telecom and RC Communications, Verizon, and Midcontinent. Reply comments were then filed by Sprint, Northern Valley and Sancom, SSTelecom, SDTA and LECA, Verizon, Midcontinent, Midstate and RC Communications, and AT&T. Following the submission of comments and reply comments in June, 2010, this docket once again sat dormant. On October 14, 2010, Midcontinent, Verizon and Sprint filed a Joint Request to Establish Procedural Schedule. On November 16, 2010, the Commission issued an order to proceed to a formal rulemaking regarding switched access rules for CLECs. On November 24, 2010, the Notice of Public Hearing was filed, along with proposed rules. A public hearing was held on January 20, 2011, and written comments are due by January 31, 2011.

II. Current State of Switched Access Rates in South Dakota

Given the foregoing, the basis for the current switched access rates in South Dakota is confusing at best. Based on the information Midcontinent has available, the following are the current composite switched access rates in effect in this state:

COMPANY	COMPOSITE RATE	TARIFF DATE	COMMISSION DOCKET NUMBER
LECA STIPULATION	0.1250	7/7/07	TC05-096
Alliance Armour Independent Telephone dba Golden West Beresford Municipal Bridgewater-Canistota dba Golden West Cheyenne River Sioux Tribe Telephone Authority			

[4]Draft Rules for Discussion Purposes were posted to the Commission website on May 27, 2009, but were not officially noticed, nor were written comments solicited with that posting. In addition, because of the decision in TC07-117 to change the rulemaking docket to one which would address only CLEC switched access rules, the Settlement Stipulation reached in TC05-096 related to LECA rates remains in effect and is unaffected by any of the proposed changes now before the Commission.

City of Brookings Municipal dba Swiftel Comm City of Faith Golden West Telecommunications Coop Hills Telephone Company Interstate Telecommunication Coop James Valley Coop Jefferson Telephone Company dba Long Lines Kadoka Telephone Company dba Golden West Kennebec Telephone Company McCook Coop Midstate Communications, Inc. RC Communications dba RC Services Roberts County Telephone Cooperative Assoc Santel Communications Coop Sioux Valley Telephone dba Golden West Splitrock Properties Stockholm-Strandburg Telephone dba ITC Tri-County Telecom Union Telephone dba Golden West Valley Telecommunications Coop Venture Communications Coop Vivian Telephone Comp dba Golden West West River Cooperative Telephone Company (Bison) West River Telecommunications Coop (Hazen) Western Telephone Company			
360Networks	0.060565	11/18/09	TC09-092
AT&T	0.0431	3/18/09	TC09-004
Aventure	QWEST Rate in Elk Point, Yankton, Vermillion 0.1225 in Non-Qwest exchanges		TC07-008
Capital Telephone	QWEST Rate	1/18/07	TC06-196
Ft. Randall Telephone	0.07267	4/10/07	
Knology of the Black Hills, LLC	0.060756	11/13/07	
Knology Community Telephone	0.1250	12/17/07	
Knology of the Plains, Inc.	0.077	12/29/07	
MIDCONTINENT	QWEST Rate	12/28/05	TC05-185 and TC07-117
Midstate Telecom, Inc.	.1150		TC05-060 and TC09-009 – Settlement Stipulation with

			Staff
Northern Valley Communications	.1150	1/21/07	TC05-197 and TC09-031 Settlement Stipulation with Staff
QWEST	0.06042	1/11/11	TC11-002 – Application for waiver of cost study rules
RC Communications, Inc.	0.1150	6/30/09	TC06-001 and TC09-022 – Settlement Stipulation with Staff
Sancom d/b/a Mitchell Telecom	QWEST Rate (0.06042)	7/1/10	TC07-128 – Settlement Stipulation with Staff
SSTelecom	0.1150	5/5/09	TC05-223 and TC09-014 – Settlement Stipulation with Staff

III. Summary of Midcontinent's Position On the Proposed Rule Changes:

A CLEC is a CLEC. There is no basis in state law to create categories of CLECs or to treat one set of CLECs differently from another set of CLECs. Midcontinent urges the Commission to reject the attempt in the proposed rules to create an artificial distinction between and among CLECs. The Commission should adopt modifications to the switched access rules that result in fair and equitable treatment of all CLECs in this state. The Commission can and should allow CLECs in a competitive exchange area to charge the same switched access rate that the incumbent provider charges in the exchange, with exceptions for those CLECs that file cost studies to support a different (e.g., higher) rate. This solution is simple, coherent, and rationally related to Commission's statutory obligation to establish rates that are fair, reasonable and

nondiscriminatory. *See* SDCL 49-31-1.4. It would also allow all providers in the same exchange (both ILECs and CLECs) to compete on a level playing field.

IV. The Proposed Rule Revisions:

In comments dating back to the opening of this docket in 2005 and before, Midcontinent has encouraged the Commission to adopt rules that would provide for switched access rates that are fair and reasonable for consumers, the Interexchange Carriers (IXCs) paying the charges, and the carriers providing the service. Unfortunately, the proposed rule revisions now before the Commission do not break the insupportable cycle of discrimination between and among CLECs and, if adopted by the Commission in their current form, will only serve to continue to distort the market in South Dakota to the competitive advantage of some, and disadvantage of others.

A. ARSD 20:10:27:02.01

Midcontinent opposes the proposed revisions to ARSD 20:10:27:02.01. The proposed rule is as follows:

> **20:10:27:02.01. Determination of intrastate switched access charges for competitive local exchange carriers.** A competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the rate of 6.042 cents per minute if 15 percent or more of the competitive local exchange carrier's total access lines in South Dakota are in communities of 10,000 inhabitants or more. The switched access rate shall be the same in each of the competitive local exchange carrier's service areas.
>
> A competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the rate of 9 cents per minute if 85 percent or more of the competitive local exchange carrier's total access lines in South Dakota are in communities with populations of less than 10,000 inhabitants. The switched access rate shall be the same in each of the competitive local exchange carrier's service areas.
>
> **Source:**
>
> **General Authority:** SDCL 49-1-11, 49-31-1.4, 49-31-4.1, 49-31-5, 49-31-18.
>
> **Law Implemented:** SDCL 49-31-18.

The Commission should reject the proposed rule because it creates an arbitrary distinction between and among CLECs in this state. The Commission has certified dozens of CLECs in South Dakota since the passage of the Telecommunications Act. The Commission did not and does not distinguish between and among those CLECs for certification purposes based on any of the metrics or criteria contained in the proposed rule. When a company makes the decision to enter a new market, the market they are entering should drive the rate charged, not the type of company structure they have or the population of the other markets they choose to serve. The business decision to enter a new market should be made based on legitimate assessments of the feasibility of success in that market. Rules adopted by the Commission should support this market-based decision-making approach, rather than one based on an artificial, and ultimately unsustainable, competitive advantage given by the Commission to one class of CLEC over another.

It is the Commission's responsibility to establish rates that are fair and reasonable and to exercise its powers in a manner that prevents unjust discrimination. *See* SDCL §§ 49-31-1.4; 49-31-3; 49-31-4; 49-31-76; 49-31-85. Indeed, SDCL § 49-31-85 directs that "[a]ny regulation of telecommunications service by the commission pursuant to chapters 49-13 and 49-31 shall be fair, reasonable, [and] nondiscriminatory . . . ." While the Commission certainly has the authority to approve exceptions to rules of general applicability, it should do so only when those exceptions are justified and warranted based on evidence or information presented by the company seeking the exception.

The un-level playing field that has been allowed to exist in this state creates a significant competitive disadvantage for CLECs that serve both rural and non-rural communities.[5] The proposed rule revision set forth above, while potentially lowering the rates charged by some CLECs to 9 cents per minute, does not level the playing field. The rule continues to force a distinction between CLECs that is unsustainable and ultimately, harmful to consumers in South Dakota. ARSD § 20:10:27:02.01, as proposed, does not establish a rule of general applicability. Rather, it attempts to create a "rural" distinction based on the composite size of the "communities" a CLEC serves and establishes rates that have no relationship to a CLEC's costs. The rule purports to set intrastate switched access rates for CLECs at two different levels. For those CLECs with 15 percent or more of their lines in "communities" of 10,000 inhabitants or more, the rule establishes a maximum rate of 6.042 cents per minute (presumably patterned after the Qwest rate). For those CLECs with less than 15 percent of their lines in "communities" of 10,000 or more, the rule establishes a maximum rate of 9 cents per minute.

The Commission should reject the propose rule for several reasons. First, the term "communities" is not defined in the rule. This ambiguity, in and of itself, will make the rule impossible to enforce. (Who defines "community"? How will the Commission confirm whether a company qualifies for the 9 cent rate or the 6.042 cent rate?) Second, assuming a consensus could be reached on the definition of "community," the criteria used to justify the two different

[5] Midcontinent, for instance, continues to compete head to head against other CLECs that are, as set forth above, allowed to charge significantly higher switched access rates. For instance, Midcontinent competes against Midstate in the Chamberlain area, against SSTelecom in the Milbank area, against RC Communications in Corona and rural Watertown and against Northern Valley in the Redfield and Aberdeen area. Each of those companies is currently charging a composite rate of $0.1150, while Midcontinent is only allowed to charge the QWEST rate of roughly 6 cents per minute. This is true even though there is no current evidence to suggest that Midcontinent's cost to serve these rural exchanges is any less than the costs incurred by these other providers.

rates (greater or less than 15% of total lines in communities of 10,000) are entirely arbitrary. The resources expended over the past six years by numerous parties filing comments in multiple dockets relating to switched access rates have been enormous. Yet, there are currently no facts before the Commission supporting either the 15% figure or the 10,000 inhabitant figure. There has been no evidence or testimony presented to establish that companies with less than 15% of their total lines in communities of 10,000 or more have a higher cost structure than companies that may have 16% or more of their total lines in communities of 10,000 or more. Third, even if there were a legitimate basis to distinguish between companies based on the number of lines they serve in communities of 10,000 or more, the proposed difference in rates (6.042 cents per minute versus 9 cents per minute) is equally without foundation. The proposed rule must therefore be rejected as an artificial distinction created without any basis in fact or law.

More importantly, the Commission is required by statute to consider fully allocated costs when setting the price for a noncompetitive service. According to SDCL § 49-31-1.4, the Commission, when determining fair and reasonable prices in price regulation, "shall also consider the fully allocated cost of providing the service." As noted, there has been no submission of cost data in this docket to justify a 9 cent per minute rate for companies with less than 15% of their lines in communities of 10,000 or more. Nor has there been any cost data submitted to the Commission to justify a 6.042 cent per minute rate for companies with more than 15% of their lines in communities of 10,000 or more.

Midcontinent proposes that the rule be amended to require all CLECs to charge no more than the rates of the ILEC in the same competitive service area. If the ILEC rate is insufficient to cover a CLEC's costs, the CLEC should be allowed to provide cost support to justify an exception under ARSD § 20:10:27:02.02. Relying on the ILEC rate as a benchmark for CLECs

creates a level playing field for all competitors operating in the same exchange. It also takes into consideration costs of providing service, as required by the statute, because the benchmark in any given exchange will be the ILEC's rate, which has been set based on cost data provided to the Commission. It is clear from the dockets discussed above that the majority, if not all, CLECs, have consistently sought an exemption from the Commission for the production of cost studies. Midcontinent has done so. However, the ILECs in this state, including Qwest and the LECA companies, have filed cost support (some more recently than others) to justify their switched access rates.

Using those rates as a benchmark not only levels the playing field for all providers, it does so on an exchange-by-exchange basis, thereby taking into account the potentially higher costs incurred in serving smaller exchanges. A CLEC that chooses to provide service in a QWEST exchange will charge no more than the QWEST rate, yet that same CLEC, when providing service in a smaller rural exchange, may charge the higher LECA rate, assuming that is the rate charged by the rural ILEC serving the same exchange. Ultimately, if the LECA rates are changed in a further rulemaking, the CLEC would simply change its switched access rates accordingly. Moreover, the "safety-valve" provision in ARSD § 20:10:27:02.02, 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.[6] The Midcontinent proposal is simple, easy to administer, and very workable. As mentioned, it would also lead to just, reasonable, and nondiscriminatory rates. Unlike the proposed rule, the use of ILEC rates as a

[6] Any claim that a rural CLEC does not have the resources necessary for conducting a cost study should be rejected. Many of the CLECs operating in rural exchanges, particularly those that support the proposed rules because they allow them to charge higher switched access rates than their competitors, are owned by rural ILECs with extensive experience in producing cost studies. Those CLECs would have a distinct and significant advantage over other CLECs that do not have parent company with extensive experience in producing cost studies.

benchmark also complies with the statutory requirement that the Commission consider costs when setting prices in price regulation of noncompetitive services.

The Commission should also reject the rule as proposed because the rule includes specific rates. As has been pointed out in past comments, rules, by design, do not include specific rates because those rates change over time. Inclusion of specific rates in the rules requires parties to seek and litigate a rulemaking in order to change a rate in the future. Midcontinent recommends, as have many others, that the Commission adhere to the traditional manner of drafting rules and simply refer to the switched access rates of the ILEC as proposed above. Again, by using the ILEC rate as the benchmark, the Commission can avoid the future time consuming and unnecessary rulemakings that would inevitably result if rates were made part of the rules themselves.

Based on the foregoing, Midcontinent proposes the text of the rule read as follows:

> **20:10:27:02.01. Determination of intrastate switched access charges for competitive local exchange carriers – General.** A competitive local exchange carrier shall charge composite intrastate switched access rates that do not exceed the composite switched access rates of the ILEC serving the same competitive service area.

B. <u>ARSD 20:10:27:07</u>

Assuming the Commission agrees with the changes Midcontinent has proposed to ARSD § 20:10:27:02.01, Midcontinent has no objection to the proposed change to ARSD § 20:10:27:27. However, should the Commission continue to support the artificial distinction between CLECs, Midcontinent objects to ARSD § 20:10:27:27, which, as written, requires only those companies using a cost study in their calculation of rates to file cost data every three years. To the extent the rules allow some CLECs to charge substantially higher switched access rates than other CLECs, those companies charging the higher rate should be required to file cost

support at least every three years. SDCL § 49-31-1.4 requires the Commission, when determining fair and reasonable prices in price regulation, to consider the fully allocated cost of providing service. It cannot do so without submission of cost data. Removing the requirement to file cost support gives those CLECs qualifying for the higher rate an unending free pass to continue to collect the higher rates without ever having to justify them. It should not be enough to simply say "trust us, our costs are higher than those CLECs serving both small and large communities."[7] If the Commission is determined to continue the disparate treatment of CLECs based on the size of the communities they serve, it must have some factual or legal basis to do so.

C. ARSD 20:10:27:02.02

The prior version of this rule released on June 1, 2010, proposed to allow a CLEC to mirror ILEC rates in an exchange if the CLEC offers service with its own facilities throughout all of the exchanges where it operates. Midcontinent concurs with the Commission's decision to remove paragraph (1) of the prior proposed rule. As noted in comments filed in June, 2010, the range of CLECs is wide and varied – resellers, UNE-P providers, companies that provide some of their own facilities (e.g. switching and/or transport) but also purchase UNEs from the incumbent, and cable companies who build out their own facilities. Some of the CLECs are stand-alone companies while others are subsidiaries of ILECs, subsidiaries of RLECs, partnerships, affiliates and a host of other legal entities. Some use circuit switched technology

[7] Midcontinent at least attempted to produce a cost study to support the rates it was asking to charge and, despite the fact that the cost study justified a rate higher than the QWEST rate, the Commission ruled that the study had not been properly filed and the Staff had not had sufficient time to evaluate it. The Commission also rejected Midcontinent's request to allow interim rates to be put into effect based on the study while it was being evaluated. Why, then, should the Commission be willing to allow other CLECs to charge significantly higher rates based solely on the CLECs' claims that their costs justify those rates?

while others use a combination of traditional and next generation technologies to provide their local exchange services. These organizational and technology issues are not relevant for purposes of setting rates for noncompetitive, regulated service offered by a CLEC.

There is no stated policy to support the proposal that a CLEC may mirror the ILEC rate if and only if the CLEC offers service with its own facilities throughout all the exchanges where it operates. It was, therefore, properly removed from these proposed rules. Yet, at the public hearing on these rules, some companies proposed adding the exception back into these rules and word-smithing the exception to include those CLECs that also use a combination of their own facilities and those of their parent or affiliated companies. The Commission should reject these attempts to create yet another arbitrary distinction among CLECs. Under Midcontinent's proposal, a CLEC would be allowed to mirror the ILEC rate in each exchange it serves, regardless of how the CLEC serves that exchange. The only proper exception, as now proposed in 20:10:27:02.02, should be reserved for those companies that produce cost justification for a higher rate.

WHEREFORE, Midcontinent respectfully requests that the Commission modify the proposed rules as suggested by Midcontinent.

Dated: January 28, 2011

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Midcontinent Communications, hereby certifies that a true and correct copy of the foregoing "Midcontinent's Comments" was filed electronically and served upon the following via email:

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