
**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.**

DOCKET RM05-002

**COMMENTS OF
MIDSTATE TELECOM AND
RC COMMUNICATIONS, INC.,
d/b/a RC SERVICES**

Introduction

Midstate Telecom is a competitive local exchange carrier (CLEC) offering telecommunications services in Chamberlain, South Dakota. RC Communications, Inc., d/b/a RC Services, is a CLEC offering telecommunications services primarily in Corona, South Dakota and the rural Watertown exchange.¹ Midstate Telecom and RC Communications, Inc. d/b/a RC Services ("Midstate and RC"), by and through their undersigned attorney, hereby file their joint comments to the proposed rules set forth in the November 24, 2010 Notice of Public Hearing to Adopt Rules.

Background

While this docket has gone through many iterations, the initial draft of rules establishing switched access rates for competitive local exchange carriers ("CLECs") was filed by Staff on June 1, 2010. In that draft of rules, § 20:10:27:02.01 is virtually identical to that section in the November 24, 2010 draft of the rules. That section sets two benchmark switched access rates for CLECs: 6.042 cents per minute if 15 percent or more of the CLEC's total access lines in South Dakota are in communities of 10,000 inhabitants or more; and 9 cents per minute if 85 percent or

¹ Due to RC's specific CLEC operations, the rules proposed in the November 24, 2010, Notice of Public Hearing are not advantageous to RC. However, RC joins in these comments in support of the position of Midstate.

more of the CLEC's total access lines in South Dakota are in communities with populations of less than 10,000 inhabitants. In the June 1st draft of the rules, § 20:10:27:02.02 read as follows:

20:10:27:02.02. Exceptions for 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 with its own facilities 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 and may not rely on the facilities owned by an affiliate or 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.

Interested parties were invited to submit written comments on the June 1st draft of the rules, which Midstate and RC did. On June 15, 2010, Midstate and RC submitted comments that were generally supportive of the draft rules. Midstate and RC supported the position of SDTA and LECA that the proposed rules should apply only to regulation of intrastate switched access rates charged by CLECs operating in South Dakota and should not revise switched access rules of ILECs. Midstate and RC supported the concept of allowing rural incumbent local exchange carriers (ILECs) to remain subject to rate-of-return regulation for their switched access services, which the proposed rules did. This is critical not only because of carrier of last resort obligations of ILECs, but also to incent ILECs to continue to invest in the rural network infrastructure.

Midstate and RC also noted that in implementing price regulation for CLEC access rates, it is important that any rule changes be consistent with the rural safeguards and other provisions found in the federal and state law that are intended to discourage selective marketing by competitors, prevent geographic rate de-averaging between urban and rural areas, and otherwise preserve and advance universal service. Midstate and RC are rural CLECs, so the safeguards and protections in current law are important to them. Midstate and RC believe that the CLEC access rule changes, as proposed, sufficiently take into account these additional regulatory requirements. Midstate's and RC's position on these issues remains unchanged.

In their initial comments, Midstate and RC commented that subparagraph (1) of the above-quoted June 1, 2010 draft of the rules was so narrowly crafted that it precluded any CLEC from qualifying for the exception. Specifically, Midstate and RC suggested that the portion of the rule requiring a CLEC to use its own facilities and not rely on the facilities owned by an affiliate or subsidiary should be deleted from the rule.

Interested parties also were given the opportunity to file reply comments in response to comments filed by other parties in the docket. In their Reply Comments filed on June 28, 2010, Midstate and RC objected to comments filed by other parties that proposed elimination of § 20:10:27:02.02(1). Midstate and RC supported inclusion of the concepts embodied in this subsection of the rules, i.e., ensuring service to rural or remote customers, preventing cherry picking and provisioning of service only in the more lucrative urban portions of an exchange, and recognition of added costs and investment needed to fulfill carrier of last resort obligations. Midstate and RC advocated leaving subparagraph 1 in the rule, but proposed modifications to that subparagraph.

November 24, 2010 Proposed Rules

The position of Midstate and RC remains unchanged. In general, Midstate and RC are supportive of the rules proposed by the Commission Staff, with one important exception. In the current draft of the proposed rules, § 20:10:27:02.02 reads as follows:

20:10:27:02.02. Exceptions for switched access rates of competitive local exchange carriers. 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.

Midstate and RC object to the deletion of the provision included in the initial draft of the proposed rules that would allow a CLEC that serves in a community of less than 10,000 inhabitants to use the LECA plus rate if the CLEC offers service throughout all of the exchanges in which it serves (subparagraph one of 20:10:27:02.02). For the reasons set forth below, Midstate and RC propose inclusion of a modified version of that provision in the current rules.

Midstate and RC would propose that the following language be included in § 20:10:27:02.02:

(1) If a competitive local exchange carrier offers service with owned or leased facilities 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.

Inclusion of this language supports the path followed in the original rules proposed by Commission Staff (June 1, 2010 draft). It is the position of Midstate and RC that provisioning of service throughout the exchange(s) in which the CLEC serves, is certainly in the public interest of the customers living in the CLEC exchange area. By making this a requirement of the exception to the rates in 20:10:27:02.01, the rule insures service to rural or remote customers

with modern facilities, thus preventing cherry-picking or providing service only in the more lucrative urban portions of an exchange. If, however, a CLEC is willing to take on the obligation of exchange-wide coverage, the manner of providing such service and over what facilities should be left to the discretion of the CLEC. The exception does not convert the process to a rate-of-return regulatory environment, so whether the CLEC builds its own facilities or leases facilities from either an affiliated entity or otherwise is immaterial. The important policy issue is that the CLEC provide facility based services to the entire exchange. Therefore, the exception should come into play if service is provided throughout the exchange, regardless of how the CLEC provisions the service.

This subsection of the rule was apparently deleted in response to comments previously filed by Midcontinent and Verizon:

The “exception” based on CLEC facilities and where it operates is another attempt to inappropriately distinguish between and among CLECs. A CLEC is a CLEC and neither the Act nor the FCC has suggested that they be treated differently based on technology, extent of service, or corporate structure; (20:10:27:02.02(1)). The Commission should reject the proposed exception that would allow a CLEC to mirror the ILEC rates in an exchange if the CLEC “. . . offers service with its own facilities throughout all of the exchanges where it operates . . .” (20:10:27:02.02)²

Staff did not provide any explanation as to why a CLEC that “offers service with its own facilities” should be entitled to an exemption from the standard price benchmark, and Verizon is not aware of any such rationale. . . . There is no reason to believe that CLECs have higher cost structures than ILECs with legacy network architectures, customer bases and “carrier of last resort” regulatory obligations. Accordingly, there is no reason why a facilities-based CLEC should be entitled to an exception from the requirement that it charge no more than the competing ILEC charges for switched access. The purpose of subsection (1) is not at all clear, and it should not be adopted absent a valid reason.³

Midstate and RC assert that contrary to the comments of Midcontinent and Verizon, there are sound and legitimate reasons for inclusion of this language, as modified above. In addition to the

² Midcontinent’s Initial Comments, filed June 15, 2010, Paragraph 3.

³ Verizon’s Comments on Draft Rules Regarding Switched Access Rates, pages 5-6.

policy reasons noted above, inclusion of a modified version of subsection one legitimately recognizes that a distinction should be drawn between rural CLECs that make an investment in rural, high-cost areas and those urban CLECs that serve the largest markets in South Dakota. The inclusion of subsection one provides those CLECS that choose to compete and offer service throughout the entirety of an exchange, including the rural areas, a better opportunity to recover their costs so that they are better able to make the necessary investment to bring new technology to the area. Inclusion of subsection one also preserves the significance of the rural exemptions and therefore maintains the necessary distinction between carriers that have carrier of last resort obligations and carriers that do not.

Midstate and RC would also point out that contrary to Midcontinent's assertions, above, there is FCC precedent for different regulatory treatment of CLECs. The FCC has recognized a "Rural Exemption" in the context of CLECs. In Commission Docket TC10-014, *In the Matter of the Investigation of Pricing Regulation for Switched Access Services Provided by Competitive Local Exchange Carrers*, Testimony of Dan Davis was filed by SDTA, dated April 1, 2010.⁴ On page 7, lines 6-15, Mr. Davis notes that the FCC rules relating to CLEC access charges provide a "rural exemption" in order to "give some recognition to the different costs experienced by rural CLECs competing in truly rural, high-cost areas versus those that have operations in the lower-cost areas of larger price cap regulated incumbent carriers." Other parties in this docket have made similar observations. "The promotion of competition in rural and underserved areas is embodied in current federal law and policy, which provides a special exemption enabling Rural CLEC's to charge higher access rates than the non-rural ILEC."⁵ Midstate and RC concur with

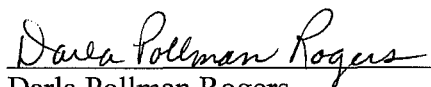
⁴ This testimony was included in this docket as an Attachment to Comments filed by SDTA on January 28, 2011.

⁵ Reply Comments of Northern Valley Communications, L.L.C. and Sancom, Inc. on Proposed Rule Changes, page 2.

these comments, and remind the Commission that there is precedent for implementing a tiered rating system for CLECs in South Dakota.

For all of the foregoing reasons, Midstate and RC urge the Commission to adopt the rules as proposed by Staff, with the reinsertion of subsection one in § 20:10:27:02.02 as modified above.

Respectfully submitted this 31st day of January, 2011.



Darla Pollman Rogers
Riter, Rogers, Wattier & Northrup, LLP
319 S. Coteau – P. O. Box 280
Pierre, SD 57501-0280
605-224-5825
Fax: 605-224-7102

Attorney for Midstate Telecom and RC
Communications, Inc., d/b/a RC Services

CERTIFICATE OF SERVICE

I, Darla Pollman Rogers, certify that a true and correct copy of Comments of Midstate Telecom and RC Communications, Inc., d/b/a RC Services were emailed to the following on the 31st day of January, 2011:

MS PATRICIA VAN GERPEN
EXECUTIVE DIRECTOR
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
500 EAST CAPITOL
PIERRE SD 57501
patty.vangerpen@state.sd.us

MS KAREN E CREMER
STAFF ATTORNEY
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
500 EAST CAPITOL
PIERRE SD 57501
karen.cremer@state.sd.us

MS TERRI LABRIE BAKER
STAFF ANALYST
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
500 EAST CAPITOL
PIERRE SD 57501
terri.labriebaker@state.sd.us

MR RICHARD B SEVERY
ASSISTANT GENERAL COUNSEL
VERIZON
201 SPEAR STREET 9TH FLOOR
SAN FRANCISCO CA 94105
richard.b.severy@verizonbusiness.com

MR THOMAS F DIXON
ASSISTANT GENERAL COUNSEL
VERIZON
707 17TH STREET #4000
DENVER CO 80202
thomas.f.dixon@verizon.com

MR DAVID A GERDES
ATTORNEY AT LAW
MAY ADAM GERDES & THOMPSON LLP
PO BOX 160
PIERRE SD 57501-0160
dag@magt.com

BRETT M. KOENECKE
ATTORNEY AT LAW
MAY ADAM GERDES & THOMPSON LLP
PO BOX 160
PIERRE SD 57501-0160
koenecke@magt.com

MR JAMES M CREMER
ATTORNEY AT LAW
BANTZ GOSCH & CREMER LLC
PO BOX 970
ABERDEEN SD 57402-0970
jcremer@bantzl原因.com

MR WILLIAM M VAN CAMP
ATTORNEY AT LAW
OLINGER LOVALD MCCAHERN & REIMERS PC
PO BOX 66
PIERRE SD 57501-0066
bvancamp@olingerlaw.net

MS MEREDITH A MOORE
ATTORNEY AT LAW
CUTLER & DONAHOE LLP
100 NORTH PHILLIPS AVENUE 9TH FLOOR
SIOUX FALLS SD 57104-6725
MEREDITHM@CUTLERLAWFIRM.COM

MR THOMAS J WELK
ATTORNEY AT LAW
BOYCE GREENFIELD PASHBY & WELK LLP
101 N PHILLIPS AVE SUITE 600
SIOUX FALLS SD 57117-5015
tjwelk@bgpw.com

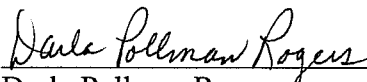
MR CHRISTOPHER W MADSEN
ATTORNEY AT LAW
BOYCE GREENFIELD PASHBY & WELK LLP
101 N PHILLIPS AVE SUITE 600
SIOUX FALLS SD 57117-5015
cwmadsen@bgpw.com

MR GEORGE BAKER THOMSON JR
CORPORATE COUNSEL
QWEST CORPORATION
1801 CALIFORNIA ST SUITE 1000
DENVER CO 80202
george.thomson@qwest.com

MR JEFFREY D LARSON
ATTORNEY AT LAW
LARSON & NIPE
PO BOX 277
WOONSOCKET SD 57385
jdlarson@santel.net

MR RICHARD D COIT
EXECUTIVE DIRECTOR AND GENERAL COUNSEL
SDTA
PO BOX 57
PIERRE SD 57501
richcoit@sdtaonline.com

MR TALBOT WIECZOREK
ATTORNEY AT LAW
GUNDERSON PALMER NELSON & ASHMORE LLP
PO BOX 8045
RAPID CITY SD 57709
tjw@gpnalaw.com



Darla Pollman Rogers