

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

IN THE MATTER OF THE FILING BY) TC09-009
MIDSTATE TELECOM, INC., FOR AN)
EXTENSION OF AN EXEMPTION FROM)
DEVELOPING COMPANY SPECIFIC COST-)
BASED SWITCHED ACCESS RATES)

IN THE MATTER OF THE FILING BY) TC09-014
SSTELECOM, INC. FOR AN EXTENSION)
OF AN EXEMPTION FROM DEVELOPING)
COMPANY SPECIFIC COST-BASED)
SWITCHED ACCESS RATES .)

IN THE MATTER OF THE FILING BY) TC09-022
RC COMMUNICATIONS, INC., FOR AN)
EXTENSION OF AN EXEMPTION FROM)
DEVELOPING COMPANY SPECIFIC COST-)
BASED SWITCHED ACCESS RATES)

IN THE MATTER OF THE APPLICATION) TC09-031
OF NORTHERN VALLEY COMMUNICATIONS,)
L.L.C. FOR APPROVAL OF EXTENSION)
OF ITS CURRENT EXEMPTION FROM)
DEVELOPING COMPANY-SPECIFIC)
COST-BASED SWITCHED ACCESS RATES)

**MIDCONTINENT'S REPLY BRIEF TO RESPONSES OF THE
CAPTIONED TELECOMMUNICATIONS COMPANIES**

COMES NOW Midcontinent Communications ("Midcontinent") and replies to the responses of MidState Telecom, SSTELECOM, RC Communications, and Northern Valley Communications in the above-captioned dockets, as follows:

1. Midcontinent Communications has asked the Commission by motion to hold an evidentiary hearing as to whether the Commission should order that all CLECs, upon expiration of their previously approved switched access rate, mirror the incumbent rate going forward.

2. The major argument advanced by the four companies for a continuation of their high switched access rates is based upon the filed rate doctrine. The companies' argument suggests that it is only the stipulations between Staff and the companies which have expired, and the intrastate access tariff remains in effect. The companies suggest that the tariffs in these four dockets remain binding upon all users because the tariffs themselves have not been invalidated by any administrative proceedings or court action. However, the record does not support this argument and the tariffs on file in their respective dockets were limited by the terms and conditions of the stipulation.

3. An examination of the settlement stipulations and the orders approving them support the proposition that the tariffs expired in accordance with the terms and conditions of the stipulation. Specifically, in each docket, an examination of the orders of approval shows that the Commission simply granted the joint motion for approval of each stipulation. In other words, the order simply approved the stipulation and did not independently approve the tariff. The orders can be found in each of the following dockets:

- a. MidState Communications; Docket TC05-060; Order Approving Stipulation dated April 25, 2006;
- b. SSTELECOM; Docket TC05-223; Order Approving Stipulation dated June 5, 2006;
- c. RC Communications; Docket TC06-001; Order Approving Stipulation dated April 25, 2006; and
- d. Northern Valley Communications; Docket TC05-197; Order Approving Stipulation dated June 5, 2006.

In each case the stipulation provided that the rates agreed to in the stipulation would expire three years from ". . . the date hereof . . ." None of the orders approved a tariff independent of the stipulation.

4. The filed tariff doctrine relates only to a valid tariff. In this case, the tariffs for the respective companies

were valid only so long as they were consistent with the stipulation as approved by this Commission.

5. The authorities relied upon by SSTELECOM in its response to Midcontinent's motions dated July 20, 2009, emphasize that the filed tariff doctrine relates only to a valid tariff. SSTelecom and Midstate also rely on the filed tariff doctrine. The tariffs of the four companies involved in this proceeding were not valid beyond three years of their approval. The finding of invalidity does not require a prior court or agency finding, but simply permits the finding if a tariff is incomplete or invalid on its face. In Freightcor Services, Inc., vs. Kuhlman Corporation Electrical Group, 30 F.3d 43 (6th Cir. 1994) the Sixth Circuit Court of Appeals held that a debtor's failure to file and maintain participation documents as required by self executing agency regulations rendered the filings defective, and thus, no valid tariff was on file. The court specifically rejected the argument that the tariffs must first be found invalid by a court or administrative agency.

6. This same analysis nullifies Northern Valley's contention in its response that the Commission's order of June 30, 2009, ". . . extended NVC's tariffs." The analysis similarly holds against the arguments of SSTelecom, Midstate and RC Communications. Since the tariffs themselves were never ordered approved initially (only the stipulation was approved by order), and since the tariffs by the terms of the approved stipulation in any event expired three years from the date of the stipulation in the original docket, the Commission's order is insufficient to reinstate something that was already invalid. The stipulation's provisions were self executing in the same fashion as the effect of the regulations in the Freightcor case.

7. In its response to Midcontinent's motions for uniformity and evidentiary hearing, Northern Valley relies upon the so-called rural exemption implemented by the FCC. This authority applies only to interstate access charges and has no relevance to intrastate access charges. The Commission knows well staff's ongoing effort to get all CLEC switched access charges to the incumbent rate¹, as well as staff's commentary that allowing a higher CLEC access rate puts the incumbent and

¹ See page 6, Staff's post-hearing brief; Docket TC07-117.

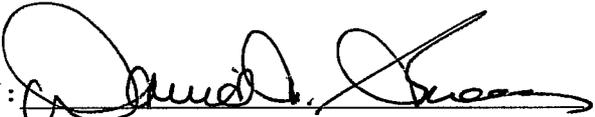
other CLECs at a "huge" competitive disadvantage.² The relief requested by Midcontinent implements these goals.

CONCLUSION

At the very least, questions of fact and law exist which should be resolved by this Commission only after an evidentiary hearing based upon properly submitted facts has occurred. If in fact the due process rights of Midcontinent have been violated, as a party to these proceedings Midcontinent entitled to have the facts established by hearing. Otherwise, the Commission has nothing but the arguments of counsel upon which to base its decision.

Dated this 21st day of August, 2009.

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CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 21st day of August, 2009, 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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² See page 5, Staff's post-hearing brief, Docket TC07-117.

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

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