

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION
OF SSTELECOM, INC. FOR APPROVAL
OF A MOTION FOR THE EXTENSION OF
ITS CURRENT EXEMPTION FROM
DEVELOPING COMPANY SPECIFIC
COST-BASED SWITCHED ACCESS RATES

TC09-014

**RESPONSE TO MIDCONTINENT
COMMUNICATIONS' MOTIONS
FOR EVIDENTIARY HEARING
AND UNIFORMITY**

COMES NOW SSTELECOM, Inc. ("SSTELECOM"), by and through its counsel of record, and hereby submits the following response to the Motion for Evidentiary Hearing and Motion for Uniformity in Switched Access Rates and for Evidentiary Hearing filed by Midcontinent Communications ("Midcontinent"). SSTELECOM respectfully requests that the Commission deny Midcontinent's request for evidentiary hearing, or in the alternative, delay ruling on these Motions and instead require Midcontinent to define with particularity the issues for consideration, and scope thereof, at the time of any hearing.

BACKGROUND

As has already been well-established by the many pleadings in this docket, as well as other dockets, specifically TC09-009, 09-022 and 09-031, the issues raised by Midcontinent's prior and current motions challenge the legitimacy of SSTELECOM's current rate, which rate was initially approved pursuant to Stipulation in docket TC05-223, (see Order dated June 5, 2006), and which has now been approved by this Commission on a temporary basis pursuant to an Order dated May 8, 2009. The initial filing made on behalf of SSTELECOM for an extension of its Stipulation was not intended to be a rate-making docket, but rather an attempt to preserve the status quo while new access rate rules for CLECs were being developed. As such Midcontinent's request for a hearing to determine the validity of that rate is not only a collateral

attack on an existing, valid rate, but also an inefficient use of the time and resources of the parties and this Commission.

ARGUMENT AND ANALYSIS

1. The filed rate doctrine precludes Midcontinent from now attacking SSTELECOM's rate.

In its respective Motions, Midcontinent seeks the establishment of a procedural schedule and an order for evidentiary hearing. In its Motion for Evidentiary Hearing filed solely in this docket, Midcontinent "requests that the commission address the issue of uniform CLEC switched access rates in this docket for the reasons identified in its motions in dockets TC09-009, TC09-022, and TC09-031." In its Motion for Uniformity in Switched Access Rates and For Evidentiary Hearing, Midcontinent requests an evidentiary hearing in all of the above-referenced dockets "to determine whether the Commission should order that all CLECs, upon expiration of their previously approved switched access rate, mirror the incumbent rate going forward." Midcontinent further requests that the Commission "schedule an evidentiary hearing in the four captioned dockets to determine whether the legal authorities cited in comparable motions in each of the four captioned dockets support the Commission's ruling that all CLECs must adopt the incumbent carrier's switched access rate at the expiration of its current cost study, or that the Commission order other proceedings to establish uniform CLEC switched access rates."

The problem with Midcontinent's requests is that they are based on the incorrect assumption or presumption that SSTELECOM's rate expired and is no longer valid. To the contrary, SSTELECOM had a *stipulation* which expired, but its *intrastate access tariff* remains on file with this Commission and has not been invalidated. The filed rate doctrine therefore controls. Under the filed rate doctrine, tariff rates "have the force of law and are absolutely binding upon all users until found invalid in an FCC proceeding or by a federal court." See Maislin Indus. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 127, 110 S.Ct. 2759, 2766, 111

L.Ed.2d 94 (1990) (defining filed rate doctrine). See also Verizon Delaware, Inc. v. Covad Communications Co., 377 F.3d 1081, 1087 (9th Cir. 2004) (quoting that “[n]o one may bring a judicial proceeding to enforce any rate other than the rate established by the filed tariff.”) (quoting Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166, 1170 (9th Cir. 2002); see also Am. Tel. and Tel. Co. v. Central Office Telephone Inc., 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (holding that a carrier's duly filed rate is the only lawful charge and that deviation from such rate is not permitted upon any pretext); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2d Cir.1994) (holding that “the legal rights between a regulated industry and its customers with respect to rates are controlled by and limited to the rates filed with and approved by the appropriate regulatory agency”). “In addition to barring suits challenging filed rates and suits seeking to enforce rates that differ from the filed rates, the filed-rate doctrine also bars suits challenging services, billing or other practices when such challenges, if successful, would have the effect of changing the filed tariff.” Brown, 277 F.3d at 1170.

Under the filed rate doctrine, Midcontinent is precluded from now attacking SSTELECOM's rate. The time at which to do so would have been in 2005 when SSTELECOM filed its petition for extension of exemption. Midcontinent did not intervene in that docket and it cannot do now what it may wish it did then.

Given that Midcontinent cannot challenge the validity of SSTELECOM's existing rate there is no need for a hearing. Contrary to those statements made in its current motions, Midcontinent has not defined with particularity the scope of the issues to be presented at the hearing. SSTELECOM opened this docket. If a scheduling order is established, presumptively, SSTELECOM bears the burden of providing pre-filed testimony and, simply stated, making its case. However, under the current rules, SSTELECOM is without guidance as to what it needs to prove. Again, this docket is not a rate-making docket.

While Midcontinent asks for a hearing on the issues it has defined, neither of its Motions truly defines the scope of this Commission's reviews and what SSTELECOM and the other CLECs will be required to prove. Moreover, to what standard will SSTELECOM be held? Requiring an evidentiary hearing only compounds the problems that already exist as to how to proceed from this date. What Midcontinent continues to ignore in each of the above-referenced dockets is that the CLECs at issue have a valid rate which was established several years ago. Midcontinent's own filing was not done until 2007 and its proposed rate was never approved by this Commission. Therefore, it is not currently being treated differently from the other CLECs. While the undersigned understands the frustration expressed by Midcontinent, holding a hearing on a rate that has already been deemed valid is neither an efficient nor economical use of any parties' time at this juncture.

2. Midcontinent should be required to define issues for an evidentiary hearing.

If the Commission orders an evidentiary hearing in this matter, as well as the other similar dockets, SSTELECOM requests that Midcontinent file a statement of issues so that SSTELECOM can determine what evidence, if any, need be presented in response. Whether there exists legal authority for the use of SSTELECOM's rate is a question of law, and not one of fact for which evidence would be introduced. As such, if Midcontinent seeks a hearing, it is only fair to all involved, including the Commission, for Midcontinent to better define what it seeks to have SSTELECOM and other CLECs prove.

CONCLUSION

Midcontinent's request that SSTELECOM be required to justify its existing rate at an evidentiary hearing is premature and, ultimately, unsustainable. Accordingly, SSTELECOM requests that this Commission deny Midcontinent's request. In the alternative, SSTELECOM

requests that this Commission hold Midcontinent's motions in abeyance until such time as Midcontinent better defines those issues to be heard at the time of the hearing.

Dated this 20 day of July, 2009.

CUTLER & DONAHOE, LLP
Attorneys at Law



Ryan J. Taylor

Meredith A. Moore
Cutler & Donahoe, LLP
100 N. Phillips Ave., Ste. 901
Sioux Falls, SD 57104
Attorneys for SSTELECOM, Inc.

CERTIFICATE OF SERVICE

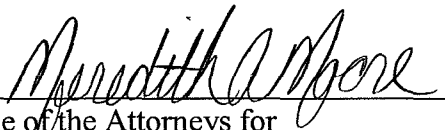
The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 20 day of July, 2009, upon the following:

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
patty.vangerpen@state.sd.us
Telephone: 605-773-3201

Mr. David Gerdes
May, Adam Gerdes & Thompson, LLP
PO Box 160
Pierre, SD 5750
dag@magt.com
Telephone: 605-224-8803

Ms. Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
karen.cremer@state.sd.us
Telephone: 605-773-3201

Ms. Terri Labrie Baker
Staff Analyst
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
terri.labriebaker@state.sd.us
Telephone: 605-773-3201



One of the Attorneys for
SSTELECOM, Inc.