

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

IN THE MATTER OF THE APPLICATION)	TC09-031
OF NORTHERN VALLEY COMMUNICATIONS,)	
L.L.C. FOR APPROVAL OF EXTENSION)	
OF ITS CURRENT EXEMPTION FROM)	MIDCONTINENT'S MOTION
DEVELOPING COMPANY-SPECIFIC)	TO DENY PETITION FOR
COST-BASED SWITCHED ACCESS RATES)	EXTENSION AND FOR
)	EVIDENTIARY HEARING

COMES NOW Midcontinent Communications ("Midcontinent") and moves the Commission to deny the petition of Northern Valley Communications L.L.C., ("NVC") for continuation of its current exemption from developing company specific cost-based switched access rates and for a concomitant extension of its switched access rate and to conduct an evidentiary hearing on the factual and legal issues presented by this docket, as follows:

1. NVC is a CLEC authorized to do business in the Qwest exchanges. NVC operates in the Aberdeen exchange and Midcontinent competes with NVC in the Aberdeen exchange. In Docket TC05-197 the Commission approved the terms of a Settlement Stipulation between Commission Staff and NVC by its order of June 5, 2006. In that settlement NVC lowered its intrastate switched access rate effective July 1, 2006, from \$0.1325 to \$0.1150. That rate was further lowered effective July 1, 2007, from \$0.125 to \$0.115. The rate was thereafter frozen until the earlier of FCC action on federal access rules which did not occur, the effective date of SDPUC rules in Docket RM05-002 which did not occur, or three years, which has since passed.

2. NVC now seeks to have the Commission approve an extension of its exemption from developing company specific switched access rates ". . . for a period of three months after the effective date of the new rules to be adopted under RM05-002 . . ." and that its current switched access rate be likewise extended.

3. Docket RM05-002 has been open since December 14, 2005. Comments filed in that docket range from February 1, 2006, to January 10, 2008. Draft rules have not yet been issued, although a preliminary draft has been circulated. In the meantime, the Commission has not addressed a consistent approach to intrastate switched access charges. While lip service is given to the proposition that the Commission's switched access rules in Chapter 20:10:27 were adopted prior to the 1996 Telecommunications Act and thus not designed for CLECs, the Commission has historically utilized those rules in combination with staff-generated settlements which are not consistent. The industry recognizes that a consistent approach is necessary, but that day has not arrived.

4. As the Commission knows, Midcontinent in Docket TC07-117 was unsuccessful in obtaining Commission approval of a cost study which was supported by expert testimony and by that testimony represented to convert Midcontinent's GAAP Accounting to the USOAA Accounting reflected in Chapter 20:10:27. Midcontinent is presently left at the Qwest rate while waiting for switched access rules and the process of another review of its cost study.

5. Notwithstanding that Midcontinent and NVC are both certificated CLECs, presumably equal under the law, NVC is permitted to utilize an intrastate switched access rate of \$0.1150 (obtained by stipulation, not cost study or any other objective statutory or rule-based methodology). Midcontinent is restricted to the Qwest rate of \$06.042 per minute. To paraphrase Staff, this discrepancy puts Midcontinent at a "huge" competitive disadvantage.

6. Equal protection of law is guaranteed to all under South Dakota Constitution Article VI, § 18, and by the Fourteenth Amendment to the United States Constitution. Equal protection of the law requires that the rights of every person be governed by the same rule of law, under similar circumstances. State vs. Krahwinkel, 656 NW2d 451 (SD 2002). While equal protection of the law does not require that persons be treated identically, it does require that any distinctions have a rational basis for different treatment of other classifications. Cheyenne River Sioux Tribe Telephone Authority

vs. Public Utilities Commission of South Dakota, 1999 SD 60, 595 NW2d 604. Neither Federal law nor State law recognizes a classification with respect to or a difference between the status of CLECs. As a consequence, it is a violation of the constitutional requirement of equal protection of the laws to construct or tolerate any such distinctions.

7. Midcontinent believes that it has been subjected to disparate treatment which violates the equal protection clauses of both the United States Constitution and the Constitution of the State of South Dakota. The Commission has routinely approved switched access rates for CLECs owned by rural incumbent local exchange carriers at rates comparable to the LECA plus rate authorized by ARSD Ch. 20:10:27, the "settlement rate" of \$0.1150 cents per minute, or a step-down rate arrived at by negotiation. Commission Staff has recommended these rates with the tacit recognition that CLECs owned by RLECs are entitled to emulate the switched access rates of their parents. On the other hand, Midcontinent, and other non-RLEC owned CLECs are relegated to the Qwest rate.


8. As the Commission knows, the FCC makes no distinction among CLECs, based upon ownership status or size relative to other telecommunications companies. Further, South Dakota law makes no distinction among CLECs. The FCC has been silent on the direct subject, but where the FCC has spoken equal treatment of CLECs has been the rule. For example, no distinctions exist as to how rates are set for transport and termination under Section 252 of the Telecommunications Act. And the FCC rules specifically assume that, absent a special showing, CLEC interstate transport and termination rates must be set at the same level as the transport and termination rates of the ILEC in whose exchange the CLEC operates. The rules also require, generally speaking, that CLEC-to-CLEC transport and termination rates be symmetrical. 47 CFR § 51.711.

9. While Staff has given lip service to attempting to emulate a goal articulated by the FCC of bringing all CLECs to the ILEC rate, that process has resulted in disparate treatment of even RLEC owned CLECs, and has required non-RLEC owned CLECs to compete at a disadvantage.

WHEREFORE Midcontinent prays that the Commission deny the motion for temporary approval of switched access rates and set this matter down for an evidentiary hearing to permit the Commission to receive evidence on the issues raised by this motion.

Dated this 4th day of June, 2009.

MAY, ADAM, GERDES & THOMPSON LLP

BY: 
DAVID A. GERDES
Attorneys for Midcontinent
503 South Pierre Street
P.O. Box 160
Pierre, South Dakota 57501-0160
Telephone: (605)224-8803
Telefax: (605)224-6289
E-mail: dag@magt.com

CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 4th day of June, 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:


Patricia Van Gerpen, Executive Director
South Dakota Public Utilities Commission
Patty.vangerpen@state.sd.us

Karen E. Cremer, Staff Attorney
South Dakota Public Utilities Commission
karen.cremer@state.sd.us

Jon Thurber, Staff Analyst
South Dakota Public Utilities Commission
jon.thurber@state.sd.us

Tim Binder, Staff Analyst
South Dakota Public Utilities Commission
tim.binder@state.sd.us

James M. Cremer
jcremer@bantzlaw.com



David A. Gerdes