

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

IN THE MATTER OF THE COMPLAINT)	TC10-096
OF MIDCONTINENT COMMUNICATIONS,)	
KNOLOGY OF THE PLAINS, INC.,)	
AND KNOLOGY OF THE BLACK HILLS,)	ANSWER TO COMPLAINT, REQUEST
LLC, AGAINST MCI COMMUNICATIONS)	FOR STAY TO PERMIT SETTLEMENT
SERVICES INC. D/B/A VERIZON)	NEGOTIATIONS, OR, IN THE
BUSINESS SERVICES FOR UNPAID)	ALTERNATIVE, REQUEST FOR HEARING
ACCESS CHARGES)	ON THRESHOLD FACTUAL ISSUES
)	RELATED TO JURISDICTION
)	

MCI Communications Services, Inc. d/b/a Verizon Business Services (“Verizon”), by and through its counsel of record and in accordance with A.R.S.D. 20:10:01:09, files its answer to the above-referenced Complaint filed by Midcontinent Communications (“Midcontinent”), Knology of the Plains, Inc., and Knology of the Black Hills, LLC (together, “Knology”) on October 27, 2010.

ANSWER TO MATERIAL ALLEGATIONS IN THE COMPLAINT

Any allegations of the Complaint not specifically admitted are denied.

NATURE OF THE CASE

1. Paragraph 1 contains legal conclusions to which no response is required. To the extent that a response is required, Verizon Business denies the allegations in Paragraph 1. Further answering, Verizon states, on information and belief, that Complainants are not paying intrastate (or interstate) switched access charges on a substantial portion of the same type of traffic (that is, Internet protocol (“IP”)-enabled traffic) for which Verizon is disputing the applicability of Complainants’ switched access charges. By not paying switched access charges on traffic that Complainants themselves originate in IP format and send to other local exchange carriers (including Verizon affiliates), while seeking to apply their switched access tariffs to Verizon, Complainants are attempting to create an asymmetrical arbitrage scheme (“tails we win, heads you lose”) unsupported

by any law or public policy. Verizon has offered to negotiate reciprocal, mutually beneficial terms for the exchange of IP-enabled traffic, which would settle this proceeding, but Complainants have been unwilling to engage in such negotiations.

THE PARTIES

2. On information and belief, Verizon admits that the South Dakota Public Utilities Commission granted Midcontinent a certificate of authority to provide competitive local exchange service. Verizon lacks sufficient knowledge and information to form a belief as to the truth of the remaining allegations in Paragraph 2, so they are denied.

3. On information and belief, Verizon admits that the South Dakota Public Utilities Commission granted Knology of the Plains, Inc. a certificate of authority to provide competitive local exchange service. Verizon lacks sufficient knowledge and information to form a belief as to the truth of the remaining allegations in Paragraph 3, so they are denied.

4. On information and belief, Verizon admits that the South Dakota Public Utilities Commission granted Knology of the Black Hills, LLC a certificate of authority to provide competitive local exchange service. Verizon lacks sufficient knowledge and information to form a belief as to the truth of the remaining allegations in Paragraph 4, so they are denied.

5. Verizon admits that it is a corporation organized under the laws of Delaware but denies that its principal place of business is in New Jersey. Further answering, Verizon states that its primary place of business is in Ashburn, Virginia. Verizon admits that it is a registered provider of interexchange telecommunications services, has been certified to provide such services in South Dakota since October 17, 1997, and that it provides intrastate, interstate and international interexchange services. Verizon denies the remaining allegations in Paragraph 5.

FACTUAL BACKGROUND

6. Verizon lacks sufficient knowledge or information to form a belief as to the universe of services provided by Midcontinent and Knology in South Dakota, so the related allegations are denied. The remaining allegations in paragraph 6 set forth a hypothetical example to which no response is required.

7. Paragraph 7 contains general statements about billing for access services to which no response is required. On information and belief, Midcontinent and Knology have on file with this Commission tariffs that establish the rates each company charges for originating and terminating intrastate switched access traffic. The remainder of paragraph 7 is a characterization of SDCL § 49-31-4, which speaks for itself.

8. Verizon denies Paragraph 8.

9. To the extent that Paragraph 9 contains characterizations of exhibits attached to the Complaint, these exhibits speak for themselves, so no response is required. Likewise, no response is required to the legal conclusions in Paragraph 9. Verizon admits that Complainants have billed Verizon for tariffed originating and terminating switched access services, but denies all other allegations in Paragraph 9. Answering further, Verizon avers that, despite invoicing Verizon for tariffed access charges on IP-enabled traffic, Complainants themselves are, by means of their traffic routing practices, disputing the application of, and not paying tariffed access charges on, IP-enabled traffic they send to other local exchange carriers.

10. Paragraph 10 contains characterizations of exhibits attached to the Complaint; these exhibits speak for themselves, so no response is required.

11. To the extent that Paragraph 11 contains characterizations of the exhibits attached to the Complaint, these exhibits speak for themselves, so no response is required. Further

answering, Verizon avers that it asserted that the traffic in question was originated or terminated in IP format, because, on information and belief, both Midcontinent and Knology are cable companies that currently use IP technology to provide voice communications and other information services to their customers. Therefore, calls delivered to those customers were IP-terminated, and toll-free 8YY calls (*e.g.*, 800, 877, 888) originated by those customers and delivered to Verizon were IP-originated. In addition, certain of the traffic Verizon delivered to Midcontinent and Knology was IP-originated by customers purchasing VoIP service. Verizon denies all other allegations in Paragraph 11.

12. Paragraph 12 contains characterizations of exhibits attached to the Complaint; these exhibits speak for themselves, so no response is required. Verizon admits that it disputes the application of Complainants' tariffed intrastate switched access rates to traffic that originates or terminates in IP format, but Verizon denies that it refused to pay them for handling this traffic. Answering further, Verizon invited Midcontinent and Knology to enter negotiation of commercial agreements to establish reciprocal rates, terms and conditions and to resolve their existing compensation disputes (*see* Complaint, Exs. 2, 4, 6, 8), but Midcontinent and Knology rejected this invitation.

13. Verizon lacks sufficient knowledge and information to form a belief as to the truth of the allegation that the IP-originated and/or IP-terminated traffic Verizon exchanged in TDM format with Midcontinent and Knology was "indistinguishable" to those companies from any TDM-originated and TDM-terminated traffic those companies received. Further answering, Verizon avers, on information and belief, that all of the traffic Midcontinent and Knology exchanged with Verizon was IP-originated and/or IP-terminated and, further, that both

Midcontinent and Knology were aware of this fact because they use IP technology to provide voice communications and other information services to their customers.

14. Paragraph 14 contains legal conclusions, to which no response is required. To the extent a response is required, the allegations in Paragraph 14 are denied.

15. Paragraph 15 contains legal conclusions, to which no response is required. To the extent a response is required, the allegations in Paragraph 15 are denied.

**COUNT ONE
BREACH OF CONTRACT**

16. Paragraph 16 raises no new allegations, so no response is required. To the extent that a response is required, Verizon incorporates by reference its answers to paragraphs 1 through 15 of the Complaint.

17. Paragraph 17 contains a description of SDCL § 49-13-12.1, which speaks for itself. To the extent Paragraph 17 is intended to allege that Midcontinent and Knology “have a tariff on file” that applies to IP-originated and/or IP-terminated traffic, Verizon denies that allegation.

18. Verizon denies Paragraph 18.

19. Verizon admits that Midcontinent and Knology charged Verizon for tariffed intrastate switched access services, but denies that those tariffed charges apply to IP-originated and/or IP-terminated traffic. Paragraph 19 contains legal conclusions, to which no response is required. To the extent a further response is required, the allegations in Paragraph 19 are denied.

20. Paragraph 20 contains legal conclusions to which no response is required. To the extent a response is required, the allegations contained in Paragraph 20 are denied.

21. Paragraph 21 contains legal conclusions to which no response is required. To the extent a response is required, the allegations contained in Paragraph 21 are denied.

COUNT TWO
BREACH OF IMPLIED-IN-FACT CONTRACT

22. Paragraph 22 raises no new allegations, so no response is required. To the extent that a response is required, Verizon incorporates by reference its answers to paragraphs 1 through 21 of the Complaint.

23. Paragraph 23 contains legal conclusions to which no response is required. To the extent a response is required, the allegations contained in Paragraph 23 are denied.

24. Verizon admits that it has exchanged traffic with Midcontinent and Knology. Verizon denies that, in doing so with respect to IP-originated and/or IP-terminated traffic, Verizon requested or received services Midcontinent and Knology offer pursuant to a state tariff. Further answering, Verizon invited Midcontinent and Knology to enter negotiation of commercial agreements to establish reciprocal rates, terms and conditions and to resolve their existing compensation disputes (*see* Complaint, Exs. 2, 4, 6, 8), but Midcontinent and Knology rejected this invitation.

25. Verizon admits that it has exchanged traffic with Midcontinent and Knology. Verizon denies that, in doing so with respect to IP-originated and/or IP-terminated traffic, Verizon used services Midcontinent and Knology offer pursuant to a state tariff. Further answering, Verizon invited Midcontinent and Knology to enter negotiation of commercial agreements to establish reciprocal rates, terms and conditions and to resolve their existing compensation disputes (*see* Complaint, Exs. 2, 4, 6, 8), but Midcontinent and Knology rejected this invitation.

26. Verizon denies Paragraph 26.

27. Verizon admits that it previously paid the invoices of Midcontinent and Knology in full. Verizon denies that it was required to do so insofar as Complainants sought to assess tariffed switched access charges on IP-originated and/or IP-terminated traffic. Verizon denies further that its past payment of those invoices prevents it from disputing Complainants' current improper charges.

28. Paragraph 28 contains legal conclusions to which no response is required. To the extent that a response is required, Verizon denies the allegations in Paragraph 28.

29. Paragraph 29 contains legal conclusions to which no response is required. To the extent a response is required, Verizon denies the allegations in Paragraph 29.

30. Verizon admits that since approximately July 2010, it has exchanged traffic with Midcontinent and Knology. Verizon denies that, in doing so with respect to IP-originated and/or IP-terminated traffic, Verizon requested or received services Midcontinent and Knology offer pursuant to a state tariff. Verizon answers further that, although Complainants billed Verizon tariffed intrastate switched access charges for call originating and terminating services both before and after June 2010, such charges were not properly applied to IP-originated and/or IP-terminated traffic.

31. Paragraph 31 contains legal conclusions to which no response is required. To the extent a response is required, Verizon denies the allegations in Paragraph 31 and answers further that Verizon paid Midcontinent and Knology appropriate compensation for services they provided to Verizon; and that Verizon offered to enter negotiation of commercial agreements to establish reciprocal rates, terms and conditions and to resolve their existing compensation disputes (*see* Complaint, Exs. 2, 4, 6, 8), but Midcontinent and Knology rejected this invitation.

32. Paragraph 32 contains legal conclusions to which no response is required. To the extent a response is required, Verizon denies the allegations in Paragraph 32.

33. Verizon admits that it has disputed Midcontinent's and Knology's invoices and refused to pay them in full. Verizon denies that it was required to do so. The remainder of Paragraph 33 contains legal conclusions to which no response is required.

34. Paragraph 34 contains legal conclusions to which no response is required. To the extent that a response is required, Verizon denies the allegations in Paragraph 34.

**COUNT THREE
UNJUST ENRICHMENT**

35. Paragraph 35 raises no new allegations, so no response is required. To the extent a response is required, Verizon incorporates by reference its answers to paragraphs 1 through 34 of the Complaint.

36. Verizon admits that it has disputed Midcontinent's and Knology's invoices and refused to pay them in full. Verizon denies that it was required to do so. The remainder of Paragraph 36 contains legal conclusions, to which no response is required. To the extent a response is required, Verizon denies the allegations in Paragraph 36.

37. Paragraph 37 contains legal conclusions, to which no response is required. To the extent a response is required, Verizon denies the allegations in Paragraph 37.

38. Paragraph 38 contains legal conclusions, to which no response is required. To the extent a response is required, Verizon denies the allegations in Paragraph 38.

39. Paragraph 39 contains legal conclusions, to which no response is required. To the extent a response is required, Verizon denies the allegations in Paragraph 39.

40. Complainants' prayer for relief, which appears at page 11 of their Complaint, requires no response. To the extent a response is required, Verizon denies that Midcontinent and/or Knology are entitled to any of the relief they seek.

AFFIRMATIVE DEFENSES

First Affirmative Defense

41. The Complaint fails to state a claim on which relief may be granted.

Second Affirmative Defense

42. Midcontinent's and Knology's claims are barred, in whole or in part, by the doctrine of preemption. Complainants' invoices to Verizon seek payment of switched access charges purportedly due under their state tariffs. On information and belief, the calls for which they seek payment from Verizon were IP-originated and/or IP-terminated. The FCC has found that IP traffic is interstate traffic for jurisdictional purposes; states are preempted from regulating the rates, terms, and conditions of interstate services.¹ Therefore, the South Dakota Commission cannot apply the terms of a state tariff to interstate, IP traffic.

43. Furthermore, under federal law, state (and federal) tariffed access charges do not apply to traffic that is IP-originated and/or IP-terminated. *See PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-cv-397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010); *Manhattan Telecommunications Corp. v. Global NAPs, Inc.*, No. 08-Civ-3829, 2010 WL 1326095 (S.D.N.Y. Mar. 31, 2010). In both cases, the courts denied efforts by a competing local exchange carrier to apply their federal and state tariffed access charges to VoIP traffic.

¹ See Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004), *petitions for review denied*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

44. In addition, insofar as Midcontinent and Knology provide IP-based communications services to end users, they are information service providers — not telecommunications carriers — because they both engage in net protocol conversions and offer consumers an integrated suite of capabilities that allow consumers to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications.”² Federal law preempts the application of tariffed access charges by companies operating as information service providers.

45. For each of these reasons, to the extent the traffic at issue is IP-originated and/or IP-terminated, dismissal of the Complaint for lack of subject-matter jurisdiction would be appropriate. However, Complainants appear to dispute that the traffic at issue is 100 percent IP-originated and/or IP-terminated. *See* Complaint at 5, ¶ 4 and Ex. 9. To the extent that the traffic at issue both originated and terminated in TDM format, the Complaint is within the Commission’s jurisdiction and Complainants’ tariffed intrastate switched access charges would apply to such traffic (assuming the charges are otherwise consistent with the terms of the tariffs). In light of this threshold factual dispute, a thorough investigation of the nature of their services will be essential to determining the scope of the Commission’s jurisdiction over those services and its authority to resolve the Complaint.

46. In accordance with Commission practice, the proper way to resolve disputed issues of material fact related to the Commission’s jurisdiction is by means of a proceeding under SDCL 15-6-12(d), which provides for an evidentiary hearing to determine jurisdictional

² 47 U.S.C. § 153(20).

facts.³ Verizon asks the Commission to notice such a proceeding as the first step in addressing the Complaint (if the parties cannot reach a negotiated resolution).

47. A section 15-6-12(d) hearing, including discovery and sworn testimony, will allow the Commission to settle the factual dispute about whether any of the disputed traffic was both TDM-originated and TDM-terminated. Proceeding in this manner will enable the Commission to resolve the factual issues related to its jurisdiction in an orderly, efficient way, reaching the jurisdictional determination only if and when it becomes necessary to do so.

Third Affirmative Defense

48. Midcontinent and Knology provide retail VoIP services to their end users. VoIP is an information service both because it involves a net protocol conversion (when used to communicate with customers on the public switched telephone network) and because it offers consumers an integrated suite of capabilities that allow consumers to “generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utiliz[e], or mak[e] available information via telecommunications.”⁴ Midcontinent and Knology, therefore, operate as information service providers when they provide VoIP services. Under South Dakota law, the tariffed access regime applies only to companies operating as local exchange carriers, not to information service providers. No state law or rule permits information service providers to impose access charges by filing tariffs.

Fourth Affirmative Defense

49. Verizon has already paid adequate compensation to Midcontinent and Knology for the services they provided in originating and terminating IP-enabled traffic.

³ See, e.g., *Complaint Filed by Christopher A. Cutler on Behalf of Recreational Adventures Co., Hill City, South Dakota, Against AT&T Comm. of the Midwest, Inc. Regarding Failure to Provide Service*, Final Decision and Order Granting Motion to Dismiss; Notice of Entry of Decision and Order CT02-021, at 4 (Sept. 26, 2003).

⁴ 47 U.S.C. § 153(20).

Fifth Affirmative Defense

50. Midcontinent and Knology are not paying tariffed switched access charges on the IP-to-public-switched-telephone-network (“PSTN”) traffic they send to other local exchange carriers (including Verizon's affiliates), because they route the traffic through companies that, on information and belief, Midcontinent and Knology know dispute invoices for tariffed access charges on the same grounds that Verizon has disputed Midcontinent's and Knology's invoices. The same rules that prevent VoIP providers from having to pay access charges when they deliver IP-to-PSTN traffic to terminating local exchange carriers preclude them from collecting access charges when they receive PSTN-to-IP traffic. Any other rule would enable asymmetric arbitrage.

Sixth Affirmative Defense

51. The predominant issues in this case either involve federal determinations (*e.g.*, the definition of VoIP traffic, the scope of federal preemption of VoIP) or are traditional legal theories (*e.g.*, implied-in-fact contract, unjust enrichment) that this Commission is not empowered to address. Where those types of issues preponderate, the Commission should avoid granting relief that may be incomplete or inconsistent with the legal or factual findings of those bodies that are empowered to adjudicate the entirety of the case. *See, e.g., Cutler, supra*, at 8 (dismissing complaint without prejudice “so that Complainant may seek relief from the FCC or in the appropriate state or federal court having jurisdiction to hear the entirety of Complainant’s claims and to award the full range of remedies that may be justified by the facts and the law”). Accordingly, even if the Commission concludes that it has jurisdiction over Complainants’ assertion that their intrastate switched access tariffs apply to IP traffic (and they do not), it should

dismiss or stay this proceeding. As discussed above, the federal district courts do have jurisdiction over the entirety of the issues raised presented in this proceeding.

Seventh Affirmative Defense

52. Counts II (alleged breach of implied-in-fact contract) and III (alleged unjust enrichment) should be dismissed because they are traditional theories of law and equity that are beyond the scope of the Commission's jurisdiction. The Commission is not empowered to adjudicate those claims because an agency "has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction." *O'Toole and O'Toole v. Board of Trustees of the South Dakota Retirement System*, 648 N.W.2d 342, 346 (S. Ct. 2002).

Eighth Affirmative Defense

53. Consistent with the FCC's ruling that VoIP traffic is jurisdictionally interstate, the FCC's National Broadband Plan ("NBP") recognizes that it is the FCC's task to address "whether VoIP traffic is subject to [intercarrier compensation] charges, and, if so, what type of charges apply."⁵ Verizon understands that, in accordance with the NBP's recommendation, the FCC intends to initiate a proceeding to focus on intercarrier compensation, including the treatment of VoIP traffic. Therefore, even if this Commission had concurrent jurisdiction to address VoIP compensation (and it does not), it would not be efficient for the Commission to devote resources to a proceeding that may be curtailed by FCC action and that risks inconsistency with FCC rulings.

54. Until the FCC provides definitive guidance on the issue of intercarrier compensation for IP-originated and IP-terminated traffic, the best course would be for this

⁵ See *Connecting America: The National Broadband Plan*, <http://download.broadband.gov/plan/national-broadband-plan.pdf> (2010) ("National Broadband Plan"), at 159 n. 53,

Commission to strongly encourage companies to negotiate their own agreements for exchange of such traffic. At least one other state commission has already directed the parties to a complaint seeking application of tariffed intrastate access charges to VoIP traffic to “enter into private contract negotiations on the rates, charges, terms and conditions for the exchange” of that traffic.⁶ Negotiated agreements provide a stable basis for ongoing business relationships, they accommodate companies’ particular business plans and evolving technology, and they avoid the need for regulators to address thorny jurisdictional issues.

55. Verizon invited Midcontinent and Knology to engage in commercial negotiations in an effort to reach a mutually beneficial agreement on the rates, terms, and conditions under which the parties would exchange VoIP traffic. Unfortunately, Complainants (unlike a number of other companies) refused to consider entering such negotiations.

56. Verizon is confident that, given the opportunity, it can reach negotiated agreements with the Complainants. Before moving forward on the Complaint, the Commission should, therefore, order the parties to try to achieve a voluntarily negotiated solution to their dispute over VoIP compensation.

WHEREFORE, Verizon requests that the Commission dismiss the Complaint, enter judgment against Complainants, order Complainants to pay Verizon’s costs of defending this action, including attorney’s fees and expenses, and order such other and further relief as the Commission deems appropriate. In the alternative, if the Commission wishes to proceed on the Complaint, Verizon asks it to direct Midcontinent and Knology, respectively, to enter into negotiation of commercial agreements with Verizon for the exchange of IP-originated and IP-terminated traffic. If, after 60 days, negotiations are unsuccessful and Midcontinent and/or

⁶ Order Directing Negotiation, *Complaint of TVC Albany, Inc. d/b/a Tech Valley Comm. Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Case 07-C-0059 (New York Pub. Serv. Comm’n Mar. 20, 2008).

Knology still wish to pursue their Complaint, Verizon requests a hearing under SDCL § 15-6-12(d) to resolve the disputed issues of material fact relating to the Commission's jurisdiction over the Complaint. After the Commission resolves those factual issues, and to the extent that it determines that some or all of the traffic at issue is IP-originated or IP-terminated, Verizon will file the appropriate dispositive motion to resolve the issue of Commission jurisdiction over that traffic.

Dated November 18, 2010.

MAY, ADAM, GERDES & THOMPSON LLP

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CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 18 day of November, 2010, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above captioned action to the following at their last known addresses:

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