

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT) OF MIDCONTINENT COMMUNICATIONS,) KNOLOGY OF THE PLAINS, INC.,) AND KNOLOGY OF THE BLACK HILLS, LLC,) AGAINST MCI COMMUNICATIONS) SERVICES, INC. D/B/A VERIZON BUSINESS) SERVICES FOR UNPAID ACCESS CHARGES)) TC10-096))) AMENDED COMPLAINT) (REDACTED))))
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Come now Midcontinent Communications, Knology of the Plains, Inc., and Knology of the Black Hills, LLC, by and through their undersigned counsel of record, and for their Amended Complaint against MCI Communications Services, Inc. d/b/a Verizon Business Services, hereby state and allege as follows:

NATURE OF THE CASE

1. Midcontinent Communications (“Midcontinent”) and two Knology entities - Knology of the Plains, Inc. and Knology of the Black Hills, LLC (collectively “Knology”) – bring this action seeking recovery of amounts owed as a result of the failure of MCI Communications Services, Inc. d/b/a/ Verizon Business Services (“Verizon”) to pay Midcontinent and Knology amounts Verizon was invoiced properly pursuant to state tariffs for the provision of intrastate switched access services, which tariffs are on file and approved by the South Dakota Public Utilities Commission (“Commission”). This Complaint is filed pursuant to A.R.S.D. § 20:10:01:07.01 and SDCL Chapters 49-13 and 49-31.

THE PARTIES

2. Midcontinent is a general partnership organized and existing under the laws of the State of South Dakota, with its principal place of business at 3901 North Louise Avenue, Sioux Falls, SD 57107. Midcontinent is a competitive local exchange carrier (“CLEC”) engaged in the

provisioning of telephone exchange service and exchange access in the State of South Dakota pursuant to a certificate of convenience and necessity granted by the Commission. Midcontinent provides local originating and terminating switched access services pursuant to its Tariff No. 1, effective October 1, 2000.

3. Knology of the Plains, Inc., is a corporation organized and existing under the laws of the State of South Dakota, with its principal place of business at 1241 O.G. Skinner Drive, West Point, GA 31833. Knology of the Plains, Inc. is a competitive local exchange carrier (“CLEC”) engaged in the provisioning of telephone exchange service and exchange access in the State of South Dakota pursuant to a certificate of convenience and necessity granted by the Commission. Knology of the Plains, Inc. provides local originating and terminating switched access services pursuant to its Tariff No. 1, effective December 29, 2007.

4. Knology of the Black Hills, LLC is a limited liability company organized and existing under the laws of the State of South Dakota, with its principal place of business at 1241 O.G. Skinner Drive, West Point, GA 31833. Knology of the Black Hills, LLC is a competitive local exchange carrier (“CLEC”) engaged in the provisioning of telephone exchange service and exchange access in the State of South Dakota pursuant to a certificate of convenience and necessity granted by the Commission. Knology of the Black Hills, LLC provides local originating and terminating switched access services pursuant to its Tariff No. 1, effective November 13, 2007.

5. Upon information and belief, MCI Communications Services, Inc. d/b/a Verizon Business Services (“Verizon”), is a corporation organized under the laws of the State of Delaware with its principal place of business at One Verizon Way, Basking Ridge, NJ 07920. Verizon operates as a long distance or interexchange carrier throughout the United States,

providing intrastate, interstate, and international interexchange services, and is certified as an interexchange carrier in South Dakota. Verizon acquired MCI Worldcom in approximately July 2006.

FACTUAL BACKGROUND

6. Complainants, Midcontinent and Knology, are CLECs providing telephone exchange service, exchange access, and other services in the State of South Dakota. Complainants provide originating and terminating switched access services to long distance companies, which allow long distance companies to complete the long distance calls of their customers. For instance, when a long distance carrier's customer places a typical 1+ dialed call, the local exchange carrier ("LEC") servicing the customer originates the call over its local exchange facilities in the originating market and hands off the call to the long distance carrier. The long distance carrier then transports the call across its network to the market in which the called party is located, where it then hands off the call to the LEC serving the called party. The LEC serving the called party provides terminating access service by delivering the call from the long distance provider's network to the recipient of the call. In this context, the long distance carrier is a wholesale customer of the originating and terminating LECs, as the LECs do not bill either the customer placing the call or the customer receiving the call. Rather, the long distance carrier bills its customer for the entire call.

7. When a LEC originates or terminates a call that is carried by a long distance provider, the LEC charges the long distance provider access fees to connect to the end users placing or receiving the calls. The LEC bills the long distance provider for the switching, transport, and related switched access features and functions the LEC performs. Midcontinent and Knology each have on file with the Commission an approved tariff which establishes the

rates each company charges for intrastate originating and terminating switched access. The Commission is charged with ensuring that rates charged by LECs and CLECs are “fair and reasonable.” *See* SDCL § 49-31-4.

8. Respondent, Verizon, has utilized the switched access services of both Midcontinent and Knology for the origination and termination of intrastate long distance traffic within South Dakota pursuant to the terms of the aforementioned tariffs.

9. Complainants have each billed Verizon, in the name of MCI Worldcom, on a monthly basis in accordance with the applicable rates set forth in the aforementioned tariffs for the originating and terminating switched access features and functions they have provided Verizon, allowing it to complete its intrastate long distance traffic. Attached as Confidential Exhibit 1 are summary statements from the August, 2010, Carrier Access Billing Statement (“CABS”) sent by Midcontinent to Verizon. Attached as Confidential Exhibit 3 are summary statements from the September, 2010, CABS sent by Midcontinent to Verizon. Attached as Confidential Exhibit 5 are summary statements from the August, 2010, CABS sent by Knology of the Black Hills, LLC and Knology of the Plains, Inc. to Verizon. Attached as Confidential Exhibit 7 are summary statements from the September, 2010, CABS sent by Knology of the Black Hills, LLC and Knology of the Plains, Inc. to Verizon. The monthly invoices are billed in arrears. Thus, each monthly bill reflects services Verizon has already requested and received from Midcontinent and Knology in the previous month.

10. In August and September, 2010, Verizon sent letters to both Midcontinent and Knology, purporting to dispute a portion of the charges billed to Verizon in the August and September invoices. Attached as Confidential Exhibit 2 is the letter sent by Verizon to Midcontinent, refusing to pay a portion of the August, 2010, invoice. Attached as Confidential

Exhibit 4 is the letter sent by Verizon to Midcontinent, refusing to pay a portion of the September, 2010, invoice. Attached as Confidential Exhibit 6, is the letter sent by Verizon to Knology, refusing to pay a portion of the August, 2010, invoice. Attached as Confidential Exhibit 8, is the letter sent by Verizon to Knology, refusing to pay a portion of the September, 2010, invoice.

11. Verizon claims in these letters that IP-originated and IP-terminated traffic is not subject to switched access tariffs or related charges and therefore, that Verizon is withholding payment for traffic it deems to be IP-based. Even though Verizon already has received the benefit of the access services for all traffic billed in the August and September invoices, Verizon proposes that the parties negotiate a commercial agreement to establish the reciprocal rates, terms, and conditions for the exchange of the disputed traffic. Verizon's purported dispute notifications to Midcontinent and Knology provide no basis for its assertion that the traffic in question was *IP-originated or IP-terminated*.

12. Midcontinent and Knology both informed Verizon that they rejected its purported dispute. Midcontinent noted that Verizon had not established any basis for a dispute, that Verizon had treated the disputed traffic as access traffic by routing it as access traffic and that Verizon's failure to seek to negotiate terms for the carriage of the traffic prior to the time the traffic was delivered obviates any claim Verizon might have that Midcontinent's charges are *incorrect*. Attached as Exhibit 9, is the letter sent by Midcontinent to Verizon demanding payment. In its response to Verizon, Knology noted that there is no binding precedent to support Verizon's proposition that IP-originated or IP-terminated traffic is not subject to switched access tariffs and no basis to negotiate alternative arrangements for the payment of switched access charges. Attached as Exhibit 10, is the letter sent by Knology to Verizon demanding payment.

Through these responses, Midcontinent and Knology each demanded payment from Verizon for the allegedly IP-based traffic pursuant to the terms of the tariffs on file with the Commission. Despite the demand for payment, Verizon refuses to pay.

13. All traffic exchanged between Verizon, on one hand, and Midcontinent or Knology, on the other hand, was exchanged in standard Time Division Multiplexed (“TDM”) format. Thus, to the extent that any of the traffic between the parties was originated or terminated as IP-based traffic, it was indistinguishable from other access traffic at the time it was exchanged.

14. Verizon’s claim that it is exempted from paying access charges on traffic that is IP-originated or IP-terminated has no basis in the Complainants’ tariffs or under applicable law. Whether traffic is subject to the intrastate access tariffs is based on the originating and terminating locations of the calls being transmitted, as determined by the telephone numbers of the originating and terminating parties. Calls that originate and terminate within the state of South Dakota, that do not terminate within the same local calling area, are subject to intrastate access charges under these tariffs. The tariffs do not contain any provision that distinguishes traffic based on whether, at some point during its transmission, or at its origination or termination, it was IP-based.

15. There are no provisions in state law and no decisions of the Federal Communications Commission (“FCC”) that warrant treating intrastate TDM traffic differently from intrastate IP-based traffic for intercarrier compensation purposes. As a result, Verizon currently is indebted to Midcontinent and Knology in the amounts set forth in Confidential Exhibit 11, plus applicable interest, fees and penalties. Additional damages shall continue to

accrue until such time as Verizon resumes payment of the amounts invoiced monthly by Midcontinent and Knology for the access services they render to Verizon.

**COUNT ONE
BREACH OF CONTRACT**

16. Midcontinent and Knology re-allege paragraphs 1 through 15 above and incorporate the same as if fully set forth herein.

17. Midcontinent and Knology each have a tariff on file with the Commission. Pursuant to SDCL § 49-13-12.1, a tariff shall constitute prima facie evidence that the rates or prices approved thereby are fair and reasonable.

18. Pursuant to the Midcontinent and Knology tariffs, Verizon ordered, used, and benefited from intrastate switched access services, including originating and terminating switched access service. Midcontinent provided originating and terminating access services to Verizon for customers who selected Verizon as their interexchange carrier for the time periods reflected on the August and September CABS (Confidential Exhibits 1 and 3), and continues to provide such services today. Similarly, Knology provided originating and terminating access services to Verizon for customers who selected Verizon as their interexchange carrier for the time periods reflected on the August and September CABS (Confidential Exhibits 5 and 7), and continues to provide such services today.

19. Verizon, as a customer of Midcontinent and Knology, was charged for the intrastate switched access services it utilized based on the rates and terms set forth in the approved Midcontinent and Knology tariffs.

20. Verizon's use of the switched access services provided by Midcontinent and Knology, pursuant to the approved tariffs on file with the Commission, established valid and binding contracts for which Verizon is liable.

21. Verizon's refusal to pay for the intrastate switched access services rendered constitutes a breach of the applicable Midcontinent and Knology tariffs and, therefore, a breach of contract, by which Midcontinent and Knology have been damaged and continue to be damaged in an amount to be proven at hearing.

**COUNT TWO
BREACH OF IMPLIED-IN-FACT CONTRACT**

22. Midcontinent and Knology repeat and re-allege each and every allegation contained in paragraphs 1 to 21 of this Complaint as if fully set forth herein.

23. In the alternative, Midcontinent and Knology assert that Verizon has breached implied-in-fact contracts. This Count need not be addressed by the Commission unless Midcontinent's tariff or Knology's tariff, or both, are held not to apply to the traffic at issue.

24. For the past several years, Verizon has requested and received from Midcontinent and Knology call originating and terminating services used by Verizon in its provision of interexchange services to its paying end-user subscribers.

25. For the past several years, Verizon has used Midcontinent's and Knology's call originating and terminating services to provide interexchange services to Verizon's paying end-user subscribers.

26. For the past several years, Midcontinent and Knology have invoiced Verizon in amounts reflecting the value of the services Midcontinent and Knology provided Verizon and from which Verizon benefited.

27. For the past several years Verizon has paid the invoices of Midcontinent and Knology for these call originating and terminating services in full.

28. This behavior and these actions between Verizon, on the one hand, and Midcontinent and Knology, on the other hand, represent an established course of dealing between the parties.

29. Such behavior and actions constituted acceptance by Verizon of offers by Midcontinent and Knology, respectively, to sell call originating and terminating services and created enforceable implied-in-fact contracts.

30. Since approximately July, 2010, Verizon has requested and received from Midcontinent and Knology, call originating and terminating services for use in Verizon's provision of interexchange services to Verizon's paying end-user subscribers of the same sort that Verizon received and paid for through the period up to approximately June, 2010.

31. Verizon received and has retained the full benefit of the call originating and terminating services provided by Midcontinent and Knology beginning in approximately July 2010.

32. Verizon has received invoices from Midcontinent and Knology reflecting the value of the call originating and terminating services Midcontinent and Knology provided and which Verizon received since approximately July, 2010, under the implied-in-fact contracts.

33. Beginning with the service period in or about July 2010, Verizon has refused and continues to refuse to pay the total amounts invoiced by Midcontinent and Knology in breach of Verizon's obligations under these implied-in-fact contracts with Midcontinent and Knology.

34. Verizon is liable to Midcontinent and Knology for the call originating and terminating services provided, invoiced, and not-paid-for, and for which Verizon benefited, in an

amount to be proven at hearing, plus applicable pre and post judgment interest, and additional amounts at the same per minute rates under the established implied-in-fact contract for any future access services provided to Verizon for which Verizon does not pay.

**COUNT THREE
UNJUST ENRICHMENT**

35. Midcontinent and Knology re-allege paragraphs 1 through 34 above and incorporate the same as if fully set forth herein.

36. Midcontinent and Knology each provided intrastate switched access services to Verizon through the origination and termination of long distance traffic. Such services conferred a benefit upon Verizon because Verizon was able to complete calls on behalf of its customers and collect fees from its customers for the provision of long distance service. Verizon has not paid Midcontinent or Knology for the provision of such services.

37. It would be inequitable for Verizon to retain the benefit of the services provided by Midcontinent and Knology without properly compensating Midcontinent and Knology for the fair and reasonable value of the services provided.

38. Pursuant to SDCL § 49-31-12.1, the approved tariffs on file with the Commission are prima facie evidence that the rates or prices contained therein are fair and reasonable.

39. Pursuant to the equitable doctrines of *quantum meruit* and unjust enrichment, Midcontinent and Knology are each entitled to payment from Verizon in the amounts set forth in Confidential Exhibit 11, plus applicable pre and post judgment interest, and additional amounts at the same per minute rates for any future access services provided to Verizon for which Verizon does not pay.

**COUNT FOUR
BREACH OF CONTRACT**

40. Midcontinent (the sole Complainant as to Count Four) re-alleges paragraphs 1 through 39 above and incorporates the same as if fully set forth herein.

41. On March 7, 2007, MCI Communications Services, Inc. and Midcontinent entered into a Switched Access Services Agreement (“Agreement”), which is attached as Confidential Exhibit 12. Thereafter, on March 3, 2010, the parties signed Amendment Number One to the Agreement, which is attached as Confidential Exhibit 13, to extend the term of the Agreement to four (4) years with a provision for automatic renewal for consecutive one (1) year terms unless terminated by either party upon sixty (60) days prior written notice.

42. The Agreement is currently in full force and effect and has been so during all times relevant to this Complaint. The original four year term expires on March 7, 2011. However, neither party has provided written notice indicating its intent to terminate the Agreement. Therefore, the Agreement remains in effect for an additional one-year period.

43. Section 4.1 of the Agreement provides **REDACTED CONFIDENTIAL INFORMATION**

44. Section 1.9 of the Agreement defines “Traffic” **REDACTED CONFIDENTIAL INFORMATION**

45. Section 1.8 of the Agreement defines Telecommunications Toll Traffic to **REDACTED CONFIDENTIAL INFORMATION** (emphasis added)

46. Section 10 of the Agreement provides the following with respect to a Change of Law:

REDACTED CONFIDENTIAL INFORMATION

47. At the hearing on the Request for Interim Relief held on January 4, 2011,

Verizon's attorney, Mr. Brett Koenecke, made the following comments:

"Having said that, we would take issue with a number of the statements that have been made by the Complainants in both their oral and written remarks. The status of the matter is that two Federal District Courts on the Eastern Seaboard, in Washington, DC, and New York City, made a decision that tariff rates don't apply to what we believe to be the traffic in question here.

Verizon has conducted its business then accordingly. We don't believe the facts of the matter would be any different before a Federal District Court in South Dakota or in any other state, as to the facts that were in issue in those jurisdictions, and the resulting change in the status of the matter, we believe we've responded appropriately."

48. Similarly, at the hearing on the Request for Interim Relief held on January 4, 2011, Mr. Curtis Groves of Verizon stated the following:

"We're in a bit of a regulatory vacuum with respect to the treatment of IP-originated and IP-terminated traffic, because Verizon and the industry have been waiting for the FCC to resolve this issue for a number of years, and that hasn't happened. And Ms. Ford mentioned that there are a number of companies that pay switched access charges. The reality is that there are a number of others that don't. And nobody has a clear sense of what the rules are, because the FCC hasn't set the rules.

But, earlier this year, the laws started to shift a little bit, started to change a little bit, and started to become a bit more clearer, with the two District Court decisions, one out of the DC District, the other out of the Southern District of New York, both of which concluded that access tariffs do not apply to VoIP traffic.

So, I don't think in this situation we have a carrier that's come along and has arbitrarily decided to stop making payment. Rather, what we have is a situation where the law is evolving, the law is changing, and a number of carriers have taken the position that access tariffs don't apply to VoIP."

49. Based on the foregoing comments, Verizon has clearly indicated that it is refusing to pay switched access charges on VoIP traffic based on what it believes to be a change in law.

50. Verizon has not provided the notice required by Sections 10 and 22 of the Agreement to invoke the Change of Law process of Section 10.

51. For the reasons described in Midcontinent's previous filings, there has been no change of law that would permit Verizon to invoke the process described in Section 10.

52. Verizon has breached the Agreement in several respects, including, but not limited to, one or more of the following:

a. Beginning on or about June 1, 2010, and continuing to the present,

REDACTED CONFIDENTIAL INFORMATION

b. Beginning on or about June 1, 2010, and continuing to the present,

REDACTED CONFIDENTIAL INFORMATION

c. Beginning on or about June 1, 2010, and continuing to the present,

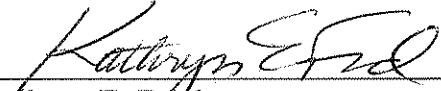
Verizon failed **REDACTED CONFIDENTIAL INFORMATION**

WHEREFORE, Midcontinent and Knology each request judgment against Verizon as follows:

1. For damages in an amount to be proven at hearing.
2. For pre-judgment interest, post-judgment interest, costs of this proceeding and attorneys' fees, to the full extent permitted by law.
3. For such other and further relief as the Commission deems just and reasonable.

Dated this 3rd day of February, 2011

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Complainants, hereby certifies that a true and correct copy of the foregoing Amended Complaint (Redacted) was served via email upon the following:

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on this 3rd day of February, 2011.

Kathryn E. Fed