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 COMPLAINANTS' OPPOSITION TO REQUEST FOR STAY

Come now Midcontinent Communications, Knology of the Plains, Inc., and Knology of the Black Hills, LLC, (collectively "Complainants") by and through their undersigned counsel of record, and file this Opposition to MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon's) Request for Stay.

On October 27, 2010, Complainants filed a Complaint with the South Dakota Public Utilities Commission ("Commission") alleging that Verizon was refusing to pay lawfully approved tariffed intrastate switched access charges. Verizon admits that it is refusing to pay tariffed intrastate switched access rates. Each month that passes brings a new "dispute" from Verizon and adds to the total amount of unpaid intrastate switched access charges due to Complainants. Nothing in the Notice of Proposed Rulemaking (hereinafter "NPRM")[1] released by the FCC on February 9, 2011, will resolve this state-specific dispute between Complainants and Verizon about the applicability of intrastate switched access charges. Nothing in the NPRM establishes — or even proposes — that the rules ultimately adopted will apply retroactively to

[1] *Connect America Fund; a National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up,* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-113, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109 (Feb. 9, 2011).

July, 2010. In short, nothing about the NPRM preempts this Commission from deciding whether Verizon currently owes Complainants intrastate switched access charges on intrastate traffic it is sending to Complainants for termination on Complainants networks.

I. A SUBSTANTIAL PORTION OF THE TRAFFIC IN DISPUTE IN THIS CASE IS TRADITIONAL TDM TRAFFIC SUBJECT TO INTRASTATE SWITCHED ACCESS TARIFFS

Buried deep within the current Request for Stay is an admission by Verizon that it has received information in discovery indicating that not all of the traffic Verizon is disputing is IP-based traffic. *See* Request for Stay, p.3, n. 6. As it has done in many pleadings in this case, Verizon implies it is Complainants' fault that Verizon is only now getting the facts about the traffic it disputed. In fact, Verizon has received information in discovery, from both Knology and Midcontinent, that a substantial portion of the traffic it is disputing is actually traffic originated and terminated in TDM format and that ***all*** of the traffic exchanged between Complainants and Verizon is in TDM format.[2] Despite this information, Verizon now asks the Commission to stay these proceedings to some unknown date in the future when the FCC might make a ruling regarding the appropriate compensation to be assessed on VoIP traffic. While Verizon has claimed repeatedly that it has no intention to dispute access charges on traditional

[2] For instance, Verizon has been withholding payments from Knology based on the assumption that 100% of the traffic originating with and terminating to Knology customers is IP-originated or IP-terminated. In fact, only 1.79% of the Verizon intrastate traffic originating with and terminating to Knology is done so in IP format. This huge disparity between Verizon's assumption and the actual facts underscores the problem with self-help measures like those undertaken by Verizon. Knology has been waiting for the last 8 months to be paid for services it has rendered to Verizon. Over 98% of the traffic Verizon is disputing with Knology is ***not*** IP-originated or IP-terminated traffic. Even though Verizon now has actual facts about that traffic (as opposed to the self-serving assumptions it previously relied upon), it still has not made payment to Knology. Rather, it has now sought an "assurance" from Knology in discovery that Knology does not intend to move any of its TDM customers to IP in the next 12 months, even though receiving that assurance would have no impact at all on the TDM traffic that Knology already has carried on Verizon's behalf.

TDM traffic and has stated that it will pay tariffed rates for such traffic (*See* Verizon Answer at ¶ 45; Verizon Reply to Request for Interim Relief at ¶ 3; Verizon Request for Stay at p.3, n.6), noticeably absent from this Request for Stay is any offer by Verizon to immediately pay tariffed rates on the traffic it now knows is TDM traffic. In other words, despite now knowing that a good portion of the traffic it is disputing is ***not*** IP-originated or IP-terminated traffic, Verizon has still not paid the tariffed rates. Rather, it is asking the Commission to stay this matter pending a possible FCC ruling related to VoIP traffic.

There is no justification for Verizon to continue withholding payment for traffic it now knows is TDM traffic.[3] More importantly, to grant a stay of this proceeding knowing that a ruling in the NPRM will not apply to traditional intrastate TDM traffic would be a substantial injustice to the Complainants.

II. THE NPRM DOES NOT PROVIDE A BASIS TO STAY THIS COMPLAINT PROCEEDING

By the FCC's own admission, since 2001 it has been seeking comment in various proceedings on the appropriate intercarrier compensation obligations associated with telecommunications traffic that originates or terminates on IP networks. *NPRM* at ¶ 610. Ten years and numerous dockets later, the FCC has yet to make any definitive ruling. *Id.* To grant a stay in this proceeding based on the assumption that the FCC will finally make a decision in this most recent NPRM would require the Commission to ignore years of indecision and inaction. Despite Verizon's hypothesis that an FCC decision will be issued in the NPRM before the fall of

[3] It should be noted that there is no basis for Verizon to withhold payment on any of the traffic, even if some of it is IP-originated or IP-terminated. There is no current basis in the law to treat interconnected IP-based traffic any differently than TDM traffic. However, given Verizon's repeated assertions that it would, in fact, pay for traffic that was TDM based, at a minimum, Verizon should be ordered to immediately pay the portions of the bills related to that TDM traffic. Midcontinent and Knology should not have to wait until the Commission resolves the dispute regarding IP-based traffic in order receive payment for TDM based traffic.

this year, all prior evidence is to the contrary. In fact, given the breadth of the options under consideration in the NPRM, there is reason to believe that the FCC could still be considering these issues well into next year.

Even if Verizon could guarantee an FCC ruling by the fall of this year, there is nothing in the language of the NPRM indicating that such a ruling will or should be applied retroactively to this dispute, which involves intrastate toll traffic exchanged between the parties since July, 2010.[4] By picking snippets out of the NPRM, Verizon attempts to convince the Commission that the FCC is poised to make a ruling that it alone has jurisdiction over interconnected VoIP traffic, that such traffic is "information services" traffic, and that something other than tariffed switched access charges should apply to such traffic. In fact, the FCC is considering a myriad of options and has expressed no opinion on how it will rule on any of those issues. The FCC also has invited parties to propose additional options not mentioned in the NPRM ("We seek comment on these and other alternatives for addressing intercarrier compensation for interconnected VoIP traffic.") *NPRM* at ¶ 619. While it is conceivable that eventually the FCC could issue a ruling that might, in some manner, phase out the application of intrastate access charges to the traffic at issue in this case, no such order has been issued to date. If the FCC does issue a ruling in the future that affects the issues in this case, the parties and the Commission can deal with that ruling

[4] It would be extremely unusual for the FCC to issue rules and then order that those rules be applied retroactively to traffic that has already been exchanged and for which payment is already due. In fact, federal law strictly limits retroactive application of new rules. *See, e.g., Georgetown University Hospital v. Bowen,* 821 F.2d 750 (D.C. Cir. 1987) (invalidating application of revised Medicare reimbursement rule to services provided before the rule was adopted as contrary to federal Administrative Procedure Act).

at that time. The mere possibility of such a ruling at some uncertain date in the future is not an appropriate basis to stay this proceeding.[5]

What the NPRM does make clear is that the FCC discourages self-help measures and unilateral actions that disrupt current compensation schemes. As the FCC explains:

> We recognize the need for the Commission to move forward expeditiously with reform and understand that disputes regarding compensation for interconnected VoIP traffic have increased during the time these issues have been pending. We recognize that such disputes could impede the industry's ability to make an orderly transition to a reformed intercarrier compensation system. Accordingly, nothing in the instant Notice should be read to encourage, during the pendency of this proceeding, unilateral action to disrupt existing commercial arrangements regarding compensation for interconnected VoIP traffic. Such actions could create additional uncertainty for investments in broadband-capable networks and fuel further disputes, which is counter to our goal of developing a predictable framework for reform, and we strongly discourage such actions. . . .

NPRM at ¶ 614. The unilateral decision by Verizon to disrupt the payment scheme that was already in place, i.e., application of tariffed switched access charges, is precisely the type of action the FCC discourages in this NPRM. In fact, Verizon has a current "commercial agreement" with Midcontinent, which the NPRM suggests should remain in place, yet Verizon is refusing to abide by that agreement, thus creating uncertainty and fueling disputes.[6] Granting a stay in the face of this commercial agreement would be contrary to the FCC's intent that such agreements be allowed to operate without disruption.[7]

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[5] *See, e.g., In Re: Sprint Communications Company, L.P. v. Iowa Telecommunications Services, Inc.*, Order, Docket No. FCU-2010-0001 (Ia. Util. Bd. Feb. 4, 2011) at 54-62 ("IA Board Order") (rejecting claims that state regulators should await FCC ruling on this issue).

[6] Verizon touts the benefits of "commercial agreements" and repeatedly informs the Commission that Knology and Midcontinent have refused to negotiate, yet fails to explain why the current commercial agreement it has with Midcontinent should not be enforced.

[7] Verizon's claim that it still hopes to negotiate a commercial agreement is mere window dressing. Verizon has not evidenced any intent to pay more than the nominal $0.0007 per minute that it proposed *after* it attempted to gain the upper hand by ceasing payments to the

Moreover, the implication that the Commission would be sticking its neck out by allowing this "controversial and vigorously litigated" proceeding to continue is without foundation. First, while there are three proceedings pending against Verizon related to its refusal to pay intrastate switched access rates on IP-based traffic, many other states have addressed the same underlying issues in prior proceedings.[8] Those cases were discussed in depth in Complainants' Brief in Opposition to Verizon's original Request for Stay.[9] Those cases also were thoroughly reviewed and cited with approval by the Iowa Utilities Board in its February 4, 2011, decision ordering Sprint to immediately pay intrastate switched access charges on IP-based traffic. In that decision, issued just a few weeks ago, the Iowa Board evaluated claims made by Sprint (similar to the claims made by Verizon here) that the Board should wait for an FCC decision and concluded as follows:

> But the FCC has not yet completed its work and the Board's decision in ARB-05-4 to treat non-nomadic VoIP like any other voice call is still relevant. Ultimately, the FCC may decide in the IP-Enabled Services rule making that the type of VoIP calling involved in this case is an information service subject to exclusive federal regulation, but it could classify such VoIP calling as a telecommunications service. Either way, the FCC has not yet made this classification and Sprint's decision to stop paying the intrastate access charges under Iowa Telecom's tariff

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Complainants. Equally significant, Verizon has made no effort to address its failure to pay for TDM traffic, even though it now has facts related to Complainants' TDM customers.

[8] In addition to this proceeding, complaints have been filed against Verizon by Armstrong Cable in Pennsylvania and by Bright House in Florida.

[9] *See Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Voice" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service,* Docket No. 2008-421, Order (October 27, 2010, ME PUC) at p. 18; *Investigation into regulation of Voice over Internet Protocol ("VoIP") services,* Docket No. 7316, Board Order RE Phase I (October 28, 2010, VT PSB) at pp. 26; *Petition of AT&T Wisconsin for Declaratory Ruling that Its "U-verse Voice" Service is Subject to Exclusive Federal Jurisdiction,* Docket No. 6720-DR-101, Final Decision (September 24, 2010 Wisc. PSC) at pp. 12; *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*, 21905-U, Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision (July 31, 2009, GA PSC) at 4.

> was premature. It would be premature for the Board to try to anticipate any conclusions the FCC might make in the IP-Enabled Services NPRM.

IA Board Order at p. 35. The Board went on to reject the "policy concerns" raised by Sprint, noting that any such concerns "should be resolved in favor of maintaining the present access charge system, which the FCC has not revised at this time (and may not revise in a way that affects this traffic in any special manner)." IA Board Order at p.36. The FCC's statements opposing network free riders support the Iowa Board's decision. For instance, in the IP-Enabled Services rulemaking, the FCC stated:

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[10]

Just as Sprint's decision to stop paying access charges under Iowa Telecom's tariff was premature, so too was the decision by Verizon to stop paying access charges under the Midcontinent and Knology tariffs. And just as the Iowa Board concluded that there was no basis to delay a decision regarding Sprint's obligation to pay pending any FCC rulemaking decision, so too should this Commission conclude that there is no basis to delay a decision regarding Verizon's obligation to pay pending an FCC decision.

Finally, considering that Verizon continues to hold a substantial amount of money owed to Knology and Midcontinent, the argument that the Commission and Staff should not "waste their time and limited resources" trying to resolve this dispute is offensive. Verizon predicts that if this case is allowed to proceed, "it promises to be one of the most controversial and vigorously litigated proceedings the Commission is likely to handle, with the attendant drain on resources."

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[10] *IP-Enabled Services*, WC Docket No. 04-36, "Notice of Proposed Rulemaking," 19 FCC Rcd. 4863 (rel. March 10, 2004)

Request for Stay at p.5. Verizon goes on to state that a "stay would save the Commission and its Staff from wasting these resources . . . ." Request for Stay at p. 5. Verizon invites the Commission to disclaim its own responsibilities to "sav[e] resources," at the expense of the Complainants who continue to wait to be paid for services they have already provided, and even though Verizon knows that it would be required to pay for many of those services even if its description of the FCC's likely actions were correct.

Bright House recently filed a complaint against Verizon in Florida and summarized Verizon's actions in a manner that is equally descriptive of this case:

> Verizon's conduct is breathtaking in its combination of arrogance and lawlessness. The FCC has never held that VoIP is an information service, and has made clear within the last two weeks that the question remains open. The FCC has never held that it is impossible to "jurisdictionalize" traffic to or from interconnected VoIP providers, and in a November 2010 order held to the contrary. The FCC has never preempted any state authority with respect to fixed VoIP providers. The FCC has never held that IXCs do not owe access charges for intrastate traffic where the end users are retail customers of an interconnected VoIP provider, and state commissions considering this issue have routinely reached the opposite conclusion. No state or federal court in [South Dakota], or otherwise with jurisdiction over this Commission, has ever issued any ruling that supports Verizon's views. Verizon is withholding literally [hundreds of thousands] of dollars of access charges that it owes to [Knology and Midcontinent] simply because it thinks it can.[11]

Verizon can continue to proclaim that interconnected VoIP traffic is information services traffic, is subject solely to FCC jurisdiction, and is exempt from intrastate switched access charges, but the fact remains that no authority for this position exists. Until such authority does exist, the Commission has an obligation to proceed forward with this complaint proceeding.

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[11] Bright House Networks Information Services (Florida) LLC v. Verizon Florida, LLC and MCI Communications Services, Inc. d/b/a Verizon Business Services, Complaint before the Florida Public Service Commission, filed February 22, 2011, at ¶ 8 (citations omitted).

CONCLUSION

WHEREFORE, Complainants respectfully request that the Commission deny Verizon's Request for Stay and allow this matter to proceed.

Respectfully Submitted this 28th 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 "Complainants' Opposition to Request for Stay" was served via email upon the following:

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