

**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)))))))))))	<p align="center">TC10-096</p> <p align="center">VERIZON’S AMENDED MOTION TO COMPEL MIDCONTINENT TO ANSWER DISCOVERY</p> <p align="center"><u>REDACTED VERSION</u></p>
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MCI Communications Services, Inc. d/b/a Verizon Business Services (“Verizon”) respectfully files this amended motion to compel Complainant Midcontinent Communications (“Midcontinent”) to respond fully to certain discovery responses. On March 4, 2011, Verizon filed a motion to compel Midcontinent to answer various discovery requests. Verizon is withdrawing several of the original disputes because it has received additional information from Midcontinent and is engaged in ongoing discussions. This amended motion does not add any new disputes; nor does it modify any of the arguments that Verizon initially made with respect to any of the individual disputes. Accordingly, Verizon respectfully requests that the Commission consider this amended motion to compel on the same date – March 30, 2011 – that it has set for hearing the original motion.

The discovery requests for which Verizon continues to seek full responses from Midcontinent are: Interrogatory nos. 4 (subparts c and e) and 15 of Verizon’s First Set of Interrogatories, and Document Request nos. 1 (subparts a and e) and 2 of Verizon’s First Set of Document Requests. Without good faith responses from Midcontinent, Verizon will be prejudiced by an inability to develop a full and complete record.

BACKGROUND

Midcontinent and Knology filed their Complaint in October 2010, after Verizon disputed their application of tariffed switched access charges to VoIP traffic originated by and terminated to their end users. The Commission issued a scheduling order on January 31, 2011. The same day, the parties executed a confidentiality agreement to ensure that sensitive business information exchanged in discovery will be kept confidential and will not be used for any purpose other than this proceeding. That confidentiality agreement included a provision contemplating that providers of “highly sensitive” information may request heightened protection for such information. On March 2, 2011, the parties executed an addendum to the confidentiality agreement which creates special protections for “highly confidential” and which provides that third parties harmed by any party’s cause of action shall have a cause of action against that party.

Verizon propounded its initial discovery on January 14 as set forth in the scheduling order. Midcontinent, however, withheld much of the information requested by Verizon on the grounds that it is confidential and/or because it is purportedly not relevant. Midcontinent also objected to every question, including questions asking for off-the-shelf materials that can easily be collected and copied, on the grounds that responding would be “unduly burdensome.” After Verizon raised concerns about Midcontinent’s discovery responses, Midcontinent provided supplemental responses on March 2, 2011. However, Midcontinent continues to refuse to provide a substantial amount of information that Verizon contends is needed to prosecute its defense in this proceeding.

DISCOVERY STANDARD

The scope of discovery in South Dakota is expansive. SDCL 15-6-26(b) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it

relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

As the South Dakota Supreme Court has indicated, a “broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.” *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (1989). “This phraseology in the rule implies a broad construction of ‘relevancy’ at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial.” *Id.* at 20.

DISCUSSION

A. Arbitrage and Other Policy Issues.

One of the key factual and policy issues in this proceeding is the extent to which Midcontinent is engaged in asymmetrical arbitrage by charging switched access when terminating long distance VoIP traffic while routing long distance VoIP traffic through interexchange carriers (“IXCs”) that withhold switched access payments on such traffic. As Verizon has explained, Verizon has information that Midcontinent is sending Verizon traffic via carriers that dispute the application of switched access charges on VoIP traffic.¹ The existence of such asymmetries – where some carriers benefit from avoiding paying switched access on VoIP traffic that they originate while assessing switched access on traffic they terminate – is

¹ See, e.g., Verizon’s Answer to Complaint, Request for Stay to Permit Settlement Negotiations, or, in the Alternative, Request for hearing on Threshold Factual Issues Related to Jurisdiction (Nov. 18, 2010), ¶¶ 1, 9.

relevant both to Verizon's defense here and to the various policy considerations relevant to the issues presented. Indeed, in its recently-issued NPRM, the FCC indicated that the existing uncertainty with respect to VoIP compensation creates "arbitrage opportunities" which it intends to address in an expedited fashion.² The FCC specifically confirmed that there is evidence of "asymmetrical revenue flows" such as where a VoIP provider is "collecting access charges, for example, but refusing to pay them."³

Verizon is seeking to develop a complete factual record relating to these issues. Many of the facts needed to develop such a complete record are solely in Midcontinent's possession. For example, while Verizon has the facts needed to ascertain that traffic originating with Midcontinent is terminated to Verizon via long distance carriers that dispute the applicability of switched access on IP-enabled traffic, Verizon does not have other important facts such as the nature of the relationships that Midcontinent has with its wholesale long distance providers, how Midcontinent's pricing from such carriers is related to the VoIP nature of its traffic, and whether Midcontinent's wholesale providers may themselves use intermediaries to terminate traffic originated by Midcontinent's end users.

Accordingly, Verizon respectfully requests that the Commission require Midcontinent to provide full and complete answers to each the following:

VERIZON'S INTERROGATORY NO. 4

Interrogatory No. 4. Please refer to second sentence of paragraph no. 18 of the Complaint filed by Midcontinent Communications, Knology of the Plains, Inc., and Knology of the Black Hills, LLC on October 27, 2010 ("Complaint"). Please:

² See *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 11-13, 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 ("Notice"), ¶ 603. (Feb. 9, 2011).

³ *Id.*, ¶ 610.

- a. Explain the process under which Midcontinent customers may "select [] Verizon as their interexchange carrier." If any Midcontinent customers are not able to select Verizon as their interexchange carrier, please identify such customers and explain why they are not able to select Verizon.
- b. Identify the number of Midcontinent customers that have "selected Verizon as their interexchange carrier" for every month since January 2006, as well as the total number of Midcontinent voice service customers for each of those months.
- c. Identify each carrier other than Verizon that Midcontinent customers subscribed to as their interexchange carrier for every month since January 2006, and the number of Midcontinent customers subscribed to each of those carriers for each of those months.
- d. Identify the number of Midcontinent customers that purchased interexchange voice service from Midcontinent for every month since January 2006.
- e. Describe the agreements and arrangements Midcontinent has made with any third parties to deliver interexchange traffic originated by such customers described in subpart d above, including the identity of each such third party and the pricing and other terms of such arrangements and agreements.

MIDCONTINENT'S INITIAL ANSWER TO INTERROGATORY NO. 4:

Midcontinent objects to this Interrogatory on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence. Midcontinent specifically objects to the extent it seeks information dating back to January, 2006. Midcontinent further objects on the grounds that it seeks information related to Verizon's competitors that is competitively sensitive and is not relevant to these proceedings. Pursuant to Verizon's response number 4 to Midcontinent's First Set of Interrogatories, "[t]he only traffic in dispute in this proceeding is traffic exchanged between Midcontinent and Verizon." Therefore, any information related to number of Midcontinent customers that have subscribed to a carrier other than Verizon is irrelevant.

Notwithstanding the objections and without waiving the same, Midcontinent states:

- a. Every customer has the opportunity to choose a long distance (LD) carrier in accordance with the rules of the FCC. Customers who choose Midcontinent's Digital Phone package are automatically subscribed to Midcontinent's LD service. All other customers may choose any carrier that made interconnection arrangements with Midcontinent. If the customer chooses Verizon as the LD carrier, that information is entered into Midcontinent's system and the customer is referred to Third Party Verification to validate the customer's choice of providers.
- b. See objection above. See enclosed CD for Confidential information from June, 2010 forward.

- c. See objection above.
- d. See objection above.
- e. See objection above. In addition, according to Verizon's Answer to Interrogatory number 3 from Midcontinent, "Verizon is disputing Midcontinent's application of tariffed switched access charges to the traffic at issue because it originates from a customer's premises in IP format or terminates at a customer's premises in IP format. . . ." Based on this statement of the dispute by Verizon, how or by whom the disputed traffic is routed or transported after it is originated by Midcontinent or before it is terminated by Midcontinent is not relevant. Notwithstanding the objection and without waiving the same, Midcontinent provides the following information:

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END CONFIDENTIAL INFORMATION**

MIDCONTINENT'S SUPPLEMENTAL RESPONSE PROVIDED 3/2/2011:

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VERIZON ARGUMENT REGARDING INTERROGATORY NO. 4: Midcontinent

refused to answer subparts c and e. The information requested in subpart c is needed by Verizon to confirm that at least some of the carriers which Verizon has identified as (i) carrying traffic from Midcontinent to Verizon's local exchange carriers, and (ii) disputing the applicability of switched access charges on such traffic, are carriers with which Midcontinent has a wholesale relationship. For example, if some of those carriers are instead ones that Midcontinent's *end users* have chosen as their interexchange carriers, that fact would be relevant to this litigation. Midcontinent clearly has the information requested, which it might choose to use offensively to the extent it may help its case, yet it refuses to provide it to Verizon. Midcontinent instead chose to stand on its boilerplate objections. Midcontinent, however, does not present any support for

its assertions that the interrogatory is “vague and ambiguous,” “overly broad,” or “unduly burdensome.”⁴

Midcontinent’s response to subpart e is even more problematic because the information sought is directly relevant to the benefit Midcontinent derives based on the fact that its wholesale providers dispute the applicability of access charges on VoIP traffic. But Midcontinent’s response to subpart e provides information relating only to Midcontinent’s relationship with *Verizon*, not the “pricing and other terms” of its arrangements with third parties that carry interexchange traffic on its behalf. Each of the objections Midcontinent advances is meritless. The relevancy objection is meritless because the information sought about Midcontinent’s relationships with such third parties is obviously relevant to assessing to what extent Midcontinent benefits from an asymmetrical arbitrage scheme. Midcontinent provides no support for its assertion that the information sought is “vague and ambiguous,” “overly broad,” or “unduly burdensome.” Nor does Midcontinent’s objection on the ground that the information sought is “competitively sensitive” withstand scrutiny, given that the parties have negotiated a confidentiality agreement which includes heightened protections for particularly sensitive material. Similarly, Midcontinent’s quotation of an objection from a Verizon discovery response is a red herring because it is both out of context and irrelevant to a Commission determination that Verizon’s discovery request seeks non-privileged information that falls within the broad scope of relevant discovery under SDCL 15-6-26(b).

* * *

VERIZON’S DOCUMENT REQUEST NO. 2

Document Request No. 2. Please provide copies of all documents, including all contracts and

⁴ With respect to Midcontinent’s further objection to the fact that the request seeks information dating back to January 2006, Verizon advised Midcontinent during the meet and confer process that it was willing to narrow the dates.

all internal and external communications, relating to any entity that provides wholesale interexchange services to Midcontinent, including, but not limited, to Sprint, Level 3, AT&T, Global Naps, 01 Communications, Inc., XO Communications, Infotelecom, CommPartners, and OneCommunications.

MIDCONTINENT'S INITIAL RESPONSE TO DOCUMENT REQUEST NO. 2:

Midcontinent objects to this Request on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence. Midcontinent further objects on the grounds that the Request seeks information that is competitively sensitive. In its Answer to Interrogatory number 4 from Midcontinent, Verizon stated that the only traffic in dispute in this proceeding is traffic exchanged between Midcontinent and Verizon. Therefore, whether Midcontinent has wholesale interexchange services agreements with other interexchange carriers and the terms of those agreements are not relevant to these proceedings.

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On February 4, 2011, Sprint was ordered by the Iowa Utilities Board to pay switched access charges on VoIP traffic to Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom. See Iowa Utilities Board Docket No. FCU-2010-0001.

MIDCONTINENT'S SUPPLEMENTAL RESPONSE PROVIDED 3/2/2011:

**BEGIN CONFIDENTIAL INFORMATION
END CONFIDENTIAL INFORMATION**

VERIZON ARGUMENT REGARDING DOCUMENT REQUEST NO. 2: This request asks for documents relating to Midcontinent's relationships with third party wholesale long distance providers. Such documents – including contracts with such providers and communications with them – are central to the asymmetrical arbitrage issue. To the extent Midcontinent has informed wholesale providers of the VoIP nature of its traffic, or to the extent it has sought, or receives, pricing benefits based on the fact that the providers do not pay switched access to the terminating carrier, such information is directly relevant. But Midcontinent's response simply makes vague assertions about Midcontinent's relationship with one of the third parties that terminates long distance traffic on behalf of Midcontinent.

Midcontinent has provided no documents – no contracts, no communications – relating to its relationship with any of its wholesale providers.”

Midcontinent has advised Verizon that it is seeking permission from *one* of its wholesale providers (**BEGIN CONFIDENTIAL END CONFIDENTIAL**) to produce its contract with that provider. However, Midcontinent has refused to provide any of its correspondence or other communications with that wholesale provider, such as discussions about whether the traffic at issue is VoIP and whether Midcontinent derives a pricing benefit based on the fact that the wholesale provider withholds switched access payments when terminating VoIP traffic to operating companies such as Verizon. Moreover, Midcontinent indicated in a different discovery response that it also relies on **BEGIN CONFIDENTIAL END CONFIDENTIAL** to terminate its long distance traffic, but Midcontinent refuses to provide *any* documents relevant to those wholesale relationships.

As with the previous response, Midcontinent provides no support for its assertion that the information sought is “vague and ambiguous,” “overly broad,” or “unduly burdensome.” Similarly, Midcontinent’s quotation of an objection from a Verizon discovery response is both out of context and irrelevant to a Commission determination that Verizon in this discovery request seeks non-privileged information that falls within the broad scope of relevant discovery under SDCL 15-6-26(b).

B. Basic Financial and Business Information.

This dispute raises various financial and economic issues, including ones relating to Midcontinent’s costs (and margins) associated with terminating traffic in IP format, any damages Midcontinent may claim based on Verizon’s withholding, the financial impact that a reduction in terminating revenue will have on Midcontinent, and, possibly, evidence relevant to any claim

that Midcontinent's switched access revenue may subsidize any universal service commitments. *See, e.g.*, Complaint, ¶¶ 16-21 (asserting that Midcontinent's tariffed rates are "fair and reasonable" for VoIP traffic and that Midcontinent has been "damaged in an amount to be proven at hearing"); Complainant's Request for Interim Relief (Dec. 21, 2010), ¶ 9 (asserting that Midcontinent is "essentially being forced to subsidize the free ride of Verizon, resulting in uncompensated use of their network"); Verizon's Answer to Complaint, Request for Stay to Permit Settlement Negotiations, or, in the Alternative, Request for hearing on Threshold Factual Issues Related to Jurisdiction (Nov. 18, 2010) ("Answer"), ¶ 46 (disputing that Verizon has failed to provide adequate compensation for the services Midcontinent provides when originating and terminating IP-enabled traffic). Yet Midcontinent has refused to provide even basic information about its finances, investments, or operations.

Accordingly, Verizon respectfully requests that the Commission require Midcontinent to provide full and complete answers to each of the following:

VERIZON'S INTERROGATORY NO. 15

Interrogatory No. 15. Please describe and quantify all investments Midcontinent has made since January 2, 2006 to deploy facilities or equipment enabling Midcontinent to provide VoIP services, including, but not limited to, any and all investments in soft switches, media gateways, routers, any technology or equipment purchased from Metaswitch Networks, and customer premises equipment, including cable modems and analog telephone adapters.

MIDCONTINENT'S ANSWER TO INTERROGATORY NO. 15: Midcontinent objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence. According to Verizon's Answer to Interrogatory number 18 from Midcontinent, "Verizon is not disputing the charges at issue in this proceeding because of network architecture." Therefore, the investments made by Midcontinent, and the costs of those investments, are irrelevant.

VERIZON ARGUMENT REGARDING INTERROGATORY NO. 15: This request asks for basic information about investments Midcontinent has made to deploy its IP network in South Dakota. In addition to being relevant to costs associated with that network (including its termination costs), this request is relevant to the fundamental issue of ascertaining whether Midcontinent's claims to be a TDM provider have merit.

VERIZON'S DOCUMENT REQUEST NO. 1

Document Request No. 1. Please provide copies of:

- a. All financial statements and annual reports of Midcontinent since January 1, 2006.
- b. All of Midcontinent's articles of incorporation and bylaws, as well as any documents that have amended or modified them.
- c. All interconnection agreements or other agreements between Midcontinent and any other carriers.
- d. All certificates or other permissions relating to the provision of voice service in South Dakota.
- e. All franchises and other permissions necessary for the provision of cable service in South Dakota.
- f. All inter-affiliate agreements, contracts, or other arrangements, including any interconnection agreements between any affiliate and Midcontinent.
- g. All transcripts of all conferences or analyst calls where Midcontinent employees have discussed voice services or traffic routing practices.

MIDCONTINENT'S RESPONSE TO DOCUMENT REQUEST NO. 1:

Midcontinent objects to this Request and each of its subparts on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence.

- a. Not relevant. Midcontinent is a privately held company and its financial statements and annual reports are confidential and have no bearing on this dispute regarding switched access charges with Verizon.

- b. Not relevant. Midcontinent is a privately held company and its articles of incorporation and bylaws are confidential and have no bearing on this dispute regarding switched access charges with Verizon.
- c. Interconnection agreements are on file with the Commission. See enclosed CD.
- d. Not relevant. See Answer to Interrogatory number 5.
- e. Not relevant.
- f. Not relevant. Notwithstanding, no such agreements exist with respect to the provision of switched access services in South Dakota.
- g. Not relevant. Midcontinent is a privately held partnership.

VERIZON ARGUMENT REGARDING DOCUMENT REQUEST NO. 1: Subparts a and e of this document request are the only ones for which the companies have not reached agreement. Subpart a asks for Midcontinent's annual reports and financial statements, which of course are routine, off-the-shelf documents about Midcontinent's operations and finances. Such documents are essential to developing a basic understanding of Midcontinent and its operations. They are relevant, *inter alia*, to the role switched access revenue plays in Midcontinent's overall operations and to the profit Midcontinent receives for switched access. Without such basic facts, it will not be possible, for example, to evaluate whatever evidence Midcontinent presents to support its assertion that Verizon is engaged in "unjust enrichment" by paying compensation that is lower than Midcontinent's switched access rates, or to assess Verizon's defense that the interim rate it is paying is not unreasonable.⁵

Of course, Midcontinent argument that producing its financial statements is "unduly burdensome" is frivolous. Verizon is not asking that it undertake a special study, but rather than it produce off-the-shelf financial documents. There is similarly no merit to Midcontinent's assertion that it should not be required to produce its financial statements because they are

⁵ The Commission, as Verizon explained in its Answer, does not have authority to decide Midcontinent's unjust enrichment claim because it is a traditional legal doctrine sounding in equity which can be granted only by a court. However, a full factual record will be crucial on any appeal because the appropriate relief under an unjust enrichment theory is an inherently factual issue. *See, e.g., Manhattan Telecommunications Corp. v. Global NAPS*, 2010 U.S. Dist. LEXIS 32315 (S.D.N.Y. 2010), at 11-12 (holding that an IXC's failure to pay anything for termination of VoIP traffic constituted unjust enrichment, but making clear that the appropriate rate is below the LEC's tariff-based switched access rates, which are "too high" for VoIP traffic).

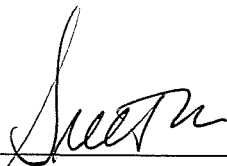
“confidential.” The parties have entered into a confidentiality agreement, and Verizon is producing substantial amounts of confidential information in response to Midcontinent’s discovery requests. There is no reason why Midcontinent should not produce basic financial information subject to appropriate confidentiality protections.

Finally, subpart e of the document request asks for copies of Midcontinent’s “franchises and other permissions necessary for the provision of cable service in South Dakota.” While it may eventually turn out that Midcontinent is correct that such documents are not relevant, Verizon has requested them so that it can understand, *inter alia*, the representations Midcontinent has made about the nature of its operations, the nature of the rights-of-way over which Midcontinent has constructed its cable network, and other details about Midcontinent’s operations that may be relevant to this case or that may “lead to the discovery of admissible evidence.” SDCL 15-6-26(b). Especially given that Midcontinent has no *bona fide* argument that producing its franchise agreements is “unduly burdensome,” this request falls within the broad scope of permissible discovery in South Dakota.

CONCLUSION

As discussed above, Verizon respectfully requests that the Commission require Midcontinent to respond fully to Interrogatory nos. 4 (subparts c and e) and 15 of Verizon’s First Set of Interrogatories, and Document Request nos. 1 (subparts a and e) and 2 of Verizon’s First Set of Document Requests propounded on January 14, 2011.

Respectfully Submitted this 28 day of
March, 2011.



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CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 28 day of March 2011, he electronically filed or 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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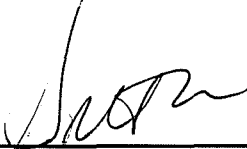
Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 28 day of March 2011, he electronically filed or mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the redacted version of the foregoing in the above captioned action to the following at their last known addresses:

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