BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY KADOKA TELEPHONE COMPANY FOR APPROVAL OF REVISIONS TO ITS ACCESS SERVICE TARIFF NO.1	DOCKET NUMBER TC12-076 APPLICATION FOR WAIVER OF CERTAIN REQUIREMENTS OF ARSD 20:10:29

ARSD § 20:10:27:02 provides that the Commission may, for good cause shown, either by its own motion or by application from a carrier's carrier, temporarily waive or suspend any rule in Chapter 20:10:29. Kadoka Telephone Company ("Kadoka") respectfully requests that the South Dakota Public Utilities Commission ("Commission") grant a waiver or suspension pursuant to this rule of certain requirements contained in the following three administrative rules: ARSD §§ 20:10:29:10, 20:10:29:12 and 20:10:29:16. These rules govern the establishment of intrastate switched access charges and, specifically, a waiver/suspension is requested from the provisions in each rule indicating that local exchange carriers should tariff equal rates for originating and terminating traffic.

As above noted, this waiver/suspension request is filed pursuant to ARSD § 20:10:27:02, and Kadoka believes that this Commission should find "good cause" and grant this request based on the following:

1. Kadoka is a local exchange carrier operating in South Dakota. It operates as a "rate-of-return" incumbent local exchange carrier at both the federal and state levels in providing its switched access services, but files a company specific tariff with this Commission in setting forth its intrastate switched access rates and terms.

2. On November 18, 2011, the Federal Communications Commission ("FCC") released a Report and Order and Further Notice of Proposed Rulemaking addressing an array of universal service and intercarrier compensation reform matters.[1] As part of its Report and Order (hereinafter referenced as the "Order") the FCC adopted "bill-and-keep as the default methodology" and "end state" for all intercarrier compensation traffic, including all intrastate traffic.[2] The FCC further adopted a defined "transition path" for moving to this end state for terminating end office switching and certain transport rate elements assessed as access and/or reciprocal compensation charges by incumbent and competitive local exchange carriers.[3] Under the established "Intercarrier Compensation Reform Timeline" set forth in the FCC's Order, generally, all "Price Cap Carriers" and "CLECs that benchmark access rates to price cap carriers" are given six (6) years, beginning July 1, 2012 and ending July 1, 2018, to reduce their terminating switched end office and terminating transport rates (both interstate and intrastate) to bill-and-keep; and all "Rate-of-Return Carriers" and "CLECs that benchmark access rates to rate-of-return carriers" are given eight (8) years, beginning July 1, 2012 and ending July 1, 2020, to reduce their terminating switched end office and reciprocal compensation rates (both interstate and intrastate) to bill-and-keep.[4] By contrast, the Order did not identify any transition path for originating switched access rates, leaving that issue for further proceedings.

3. This transition process to a default bill-and-keep compensation mechanism, as noted, will commence with the first access rate reductions to be made by all local exchange

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[1] *Connect America Fund,* WC Docket No. 10-90, *A National Broadband Plan for our Future,* GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Lifeline and Link-Up, WC Docket No. 03-109, *Universal Service – Mobility Fund,* WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (Order or FNPRM).
[2] Id. at ¶ 736-740.
[3] Id. at ¶ 198 – 808.
[4] Id. at ¶801, reference "Figure 9."

carriers by July 1, 2012. The process begins in an accelerated fashion during the first two years of the transition, with a requirement that by July 1, 2013, all "intrastate terminating switched end office and transport rates" and "reciprocal compensation rates" be reduced to parity with interstate access rates.

4. In mandating an ultimate "bill-and-keep" framework for carrier-to-carrier compensation, the FCC recognized to a limited degree the extent to which local exchange carriers would struggle with revenue losses and thus did as part of its Order also adopt a "transitional recovery mechanism." This mechanism will be contained within the newly established "Connect America Fund" (CAF), and while funding provided through such mechanism is not intended to be 100 percent revenue-neutral, the formula established by the FCC for determining "eligible recovery" out of the mechanism considers actual 2011 terminating access revenue amounts.[5] Under the FCC's "transitional recovery mechanism, local exchange carriers will first have to look to end user customers for recovering lost access revenues (through the assessment of an additional "Access Recovery Charge"), but will also generally have access to an additional "explicit support" mechanism that is sized to permit recovery of at least a certain percentage of revenue lost from <u>intrastate</u> and interstate <u>terminating</u> access rate reductions.

5. The FCC indicates in its Order and its FNPRM that in adopting a bill-and-keep pricing methodology its intention is to ultimately apply such a methodology to all telecommunications traffic. In paragraph 1297 of the FNPRM, the FCC stated:

> Although we specify the implementation of the transition for certain terminating access rates in the Order, we did not do the same for other rate elements, <u>including originating switched access,</u> dedicated transport, tandem switching and tandem transport in some circumstances, and other charges including dedicated transport signaling, and signaling for tandem switching. In this section, we seek further comment to complete our reform effort, and establish the proper transition and recovery mechanism for the remaining elements. . . . <u>[W]e seek comment on</u>

[5] Id. at ¶ 850 – 853.

transitioning the remaining rate elements consistent with our bill-and-keep framework, and adopting a new recovery mechanism to provide for a gradual transition away from the current system.

Emphasis added.

In particular, the Commission emphasized the fact that it had only addressed originating access rates in a limited manner and that additional reforms/changes would be needed to transition to bill-and-keep for originating access charges. The FNPRM released concurrently with the FCC's Order specifically seeks comment on "the final transition for all originating access charges."[6] Various specific questions related to originating access charges are put forth for comment in the FNPRM and the FCC is specifically seeking input from the states on such matters. Questions are presented in the FNPRM related to: a separate transitional timeline for originating access rates, how reductions in originating access rates should be structured, "what, if any, recovery would be appropriate for originating access charges and how such recovery should be implemented," and how the FCC might otherwise "minimize any additional consumer burden associated with the transition of originated access traffic."

6. Kadoka files this request for a waiver/suspension pursuant to ARSD 20:10:27:02 because of the still unresolved federal issues related to intrastate originating access charges. The FCC with its recent Order has determined that it may, pursuant to its authority under Sections 251(b)(5) and 201(b) of the Federal Communications Act, mandate a default bill-and-keep framework for intercarrier compensation and effectively preempt state authority over intrastate switched access services. In taking this action, however, the FCC has also very clearly indicated that its work is not complete – while terminating access rates have been addressed, additional reforms are needed and can be expected relative to the transition steps that will apply to intrastate and interstate originating access charges. At present, the federal reforms that will

[6] Id. at ¶ 1298.

apply to intrastate originating access rates are unknown and it is essential that the existing South Dakota administrative rules governing this Commission's oversight of intrastate switched access charges recognize this reality. The FCC has with its recent Order and FNPRM clearly viewed originating and terminating access rates differently and put them on different timelines and tracks for reform. As currently written, this Commission's administrative rules, specifically Sections 20:10:29:10, 20:10:29:12 and 20:10:29:16 are not flexible enough to take into account these differences.

7. Because the FCC has not taken action to allow carriers to recover the revenue lost associated with such reductions, enforcing the Commission's administrative rules would result in a very significant burden on South Dakota carriers beyond the impact contemplated by the FCC or the South Dakota Commission. If originating access rate reductions are prematurely forced on carriers, prior to the time that the FCC has actually established a transitional process for originating access and prior to the time that any additional recovery mechanism is created to offset LEC revenue losses, there will be a significant negative impact on providers, and as a result, residential and business users residing in high cost rural areas. As this Commission is well aware, the FCC's Order will already force many of the LECs operating in South Dakota to raise the rates that are being charged to their residential and business end users for basic local exchange services. The FCC Order requires that carriers subject to their ICC reforms turn to end user customers first for the recovery of lost terminating access revenues. This occurs in the form of new monthly "ARC" charges that may be bundled with the current monthly federal subscriber line charges.[7] In addition, as earlier noted, the FCC is not providing for 100 percent revenue neutrality with respect to additional explicit support for ICC reform that is available under the Connect America Fund. The FCC is providing in the first year recovery equal to only 95% of

[7] Id at ¶ 52.

the determined "eligible recovery" amount for rate-of-return incumbent LECs and 90% of the eligible recovery amount as determined for price-cap incumbent LECs, and thereafter these amounts will be subject to further annual reductions or be eliminated entirely. And, finally, the FCC's Order also includes reform to the existing legacy high cost funding mechanisms that for most of South Dakota rural telephone companies will result in less universal service support funding on an annual basis. All of these reforms will put significant financial pressure on existing LEC operations and very likely require further local service rate increases beyond those associated with the additional ARC surcharges permitted by the Order. Granting a waiver and permitting the incumbent LECs operating in South Dakota to make originating access rate reductions in a sensible manner that is coordinated with anticipated further FCC ICC reforms, and to do so with the benefit of an offsetting additional recovery mechanism (either a state or federal recovery mechanism) is necessary to avoid extreme local service rate impacts and preserve the affordability of basic telecommunications services in the high cost rural areas of this State.

8. The administrative rules subject to this waiver request could be interpreted to bind the reform and transition of originating access rates to those of terminating access rates in a manner inconsistent with the FCC's recent Order prior to the adoption and implementation of federal reforms specific to originating access services. The language within these cited administrative rules is set forth below:

> ARSD § 20:10:29:10. A charge that is expressed in dollars and cents per access minute of use is assessed on all users of switched access that use local exchange common line facilities for the provision of intrastate telecommunications services. . . .
>
> A per minute charge is computed by dividing the annual intrastate carrier common line revenue requirement by the annual intrastate

> carrier common line minutes of use. *The per minute charge is equal for both originating and terminating traffic.*
>
> ARSD § 20:10:29:12. A charge that is expressed in dollars and cents per access minute of use is assessed on all users of switched access which use local exchange switching facilities for the provision of intrastate services.
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> A per minute charge is computed by dividing the annual intrastate local switching revenue requirement by the annual intrastate local switching access minutes of use. *The per minute charge is equal for both originating and terminating traffic.*
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> ARSD 20:10:29:16. A charge that is expressed in dollars and cents per access minute is assessed on all users of switched access that use switching or transmission facilities that are apportioned to the transport element for purposes of apportioning net investment.
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> A per minute charge is computed by dividing the annual intrastate transport revenue requirement by the annual intrastate transport minutes of use. The per minute charge is not distance sensitive. *The per minute charge is equal for both originating and terminating traffic.*

Emphasis added.

In the absence of a suspension or waiver from application of the italicized portions of the above rules, the terminating rate reductions mandated by the FCC's Order may also be viewed as applying to originating intrastate switched access rates for South Dakota LECs. This result would clearly be contrary to the FCC's Order, which provides states with the freedom to reduce originating access rates, but also indicates that states provide any additional recovery support [needed] as a result of a faster transition.[8]

9. The FCC Order in itself provides "good cause" for granting this waiver/suspension request and, clearly, there are other strong public policy reasons supporting such action. As earlier indicated, the FCC in its NPRM has raised questions concerning the possible establishment of an additional "recovery mechanism" to offset the revenue losses that

[8] Id., fn 1542.

would result from mandating originating access rate reductions.[9] Requiring reductions in originating access rates before the FCC takes action on this issue will exacerbate the likely impacts on consumer rates discussed in paragraph 8 above. In some cases, carriers will have no ability to recover lost revenue, due to rate caps imposed by the FCC Order or due to competitive pressures.

10. Granting the requested waiver is also important to continued broadband deployment throughout the State. The carriers that would be harmed by untimely originating access reform are the same carriers that are being asked to carry a substantial share of the load for desired broadband deployment, and are also subject to increasingly hard to support universal service voice obligations.

11. It should also be noted that the FCC's Order is subject to numerous federal court appeals including an appeal filed on or about January 20, 2012, by the National Association of Regulatory Utility Commissioners. This petition filed on behalf of the collective interests of State utility commissions seeks an order and judgment that "portions of the FCC Order are arbitrary and capricious, . . . beyond the FCC's jurisdiction, authority or power, . . . an abuse of discretion, and otherwise not in accordance with the law . . ." Through these court appeals, significant legal challenges have been lodged to vacate portions of the FCC's Order, including those provisions of the Order mandating the implementation of a bill-and-keep framework for both interstate and intrastate access compensation. In addition, numerous petitions for reconsideration have been filed with the FCC seeking substantial changes to the Order and the new federal rules adopted therein. At this point in time, the requested waiver of ARSD §§ 20:10:29:10, 20:10:29:12 and 20:10:29:16 is further justified because it would essentially preserve the status quo with respect to at least originating access services while these

[9] Id. at ¶ 1301 and 1302.

proceedings are pending, allowing a reasonable pause and some opportunity for a resolution of the present disputes before action is taken to mandate further ICC rate reductions.

12. There are also sound business reasons for treating originating access rates and terminating access rates differently from a regulatory perspective and for ensuring that originating access rates are not affected by the FCC ordered terminating access reforms. Unlike terminating access, originating access simply does not fit the reciprocal compensation paradigm ordered by the FCC for the transport and termination of telecommunications access traffic. Originating access services, sold as toll transport services to interexchange carrier ("IXC") customers, are not reciprocal in nature. The carrier receiving the service, the IXC, is not mutually sending traffic to the LEC providing the originating service and the IXC's customer is also served by the originating LEC. In the reciprocal compensation context, the carriers involved are providing service to different customers and are completing calls for each other.

13. The more appropriate paradigm for classifying originating access services is to view the carrier-to-carrier transaction as the purchase of an input required to provide service. Call origination is analogous to the provisioning of intermediate transit/transport and long-haul transport services and it is economically irrational and a distortion of market based principles to require any carrier to provide such services to other carriers or service providers for nothing. If originating access services are ultimately also made subject to the "zero-rate" that typically is part of a bill-and-keep arrangement, it will be impossible for carriers to recover the cost of building and maintaining their networks.

14. Originating and terminating access services should also be viewed differently from a regulatory perspective because, generally, IXCs and end user customers have options with respect to charges that are assessed for call origination. IXCs generally choose the markets

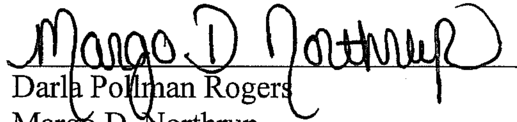
where they wish to provide their long distance services and end user customers not only have choices as to who they wish to use for their long distance service, but may also turn to other telecommunications services technologies if they do not like the charges that are billed by their wireline long distance provider. The same cannot, generally, be said for charges associated with terminating access services. The originating IXC or the calling party customer does not determine the charges that are assessed by the carrier providing network services on the called party's end. The FCC in establishing a specific transition for only terminating access rates recognized these differences, noting that its concerns "with respect to network inefficiencies, arbitrage, and costly litigation are less pressing with respect to originating access . . . ."[10]

15. It would be disruptive and burdensome for consumers to also layer the rebalancing of originating access rates on top of the substantial reform of terminating access rates. End user customers are already being asked to take on significantly greater shares of the cost of local service caused by terminating access reform. It would be unduly burdensome to consumers and disruptive to the marketplace to ask consumers to pick up the additional rate increases needed to support reductions in originating access revenue, should originating rates be tied to terminating rates.

Based on all of the foregoing, Kadoka respectfully submits that it has provided the Commission with "good cause" and hereby requests the Commission immediately suspend or waive the requirements identified in §§ ARSD 20:10:29:10, 20:10:29:12 and 20:10:29:16 requiring originating and terminating charges to be equal.

[10] Id. at 777.

Respectfully submitted this 10th day of July, 2012.



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