BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY MIDSTATE TELECOM SERVICE, INC. FOR APPROVAL OF REVISIONS TO ITS TARIFF NO. 2	)))))	**STAFF'S MEMORANDUM IN RESPONSE TO SECOND SUPPLEMENTAL FILING OF MIDSTATE TELECOM**

TC12-102

Commission Staff (Staff), by and through its counsel, submits the following Memorandum in Response to Second Supplemental Filing of Midstate Telecom. The question posed by the Public Utilities Commission (Commission) to the parties for briefing is what terminating switched access rate should have been in effect once Midstate Telecom Service Inc.'s (Midstate) withdrew its cost study. Staff submits that the appropriate switched access rate once Midstate withdrew its cost study is 6.042 cents per minute.

The Commission should find that the appropriate switched access rate once Midstate withdrew its cost study is the RBOC rate pursuant to ARSD 20:10:27:02.01. Further, the Commission should not approve the switched access tariff as filed, rather it should order Midstate to file, by a date certain, revisions to its originating and terminating switched access tariff to reflect compliance with the rules approved in RM05-002; it should order Midstate to file a new terminating rate calculation using 6.042 cents as the starting point for the calculation of its transitional rate; and the Commission should order Midstate to file a report showing which IXCs it has a separate contract with regarding switched access rates and what those rates are for those IXCs.

BACKGROUND

By way of background, Staff would offer the following facts:

- April 17, 2001, Midstate certificated as a CLEC and originating and terminating switched access rates of 13.25 cents per minute are approved (TC01-007)

- April 25, 2006, originating and terminating switched access rates of 11.5 cents per minute are approved (TC05-060)
- May 14, 2009, Midstate files a Motion for Temporary Approval of Switched Access Rates requesting that it be allowed to continue to use the switched access rates contained in its current intrastate switched access tariff until such time as a resolution is reached in this docket **or through other Order of this Commission**. (TC09-009) (emphasis added)
- June 30, 2009, the Commission grants Midstate's Motion for Temporary Approval of Switched Access Rates (TC09-009)
- May 30, 2011, the rules in RM05-002 become effective. As noted by Midstate in its Response to Staff's Memorandum dated August 27, 2012, paragraph 2, the rules **require** CLECs to charge switched access rates that do not exceed the intrastate switched access rate of the RBOCs operating in South Dakota. (emphasis added)
- June 22, 2011, Midstate files a cost study (TC11-075)
- Summer of 2011, Midstate begins charging the RBOC switched access rate rather than its tariffed rate
- November 18, 2011, FCC releases order FCC 11-161
- November 29, 2011, FCC Order 11-161 is effective
- December 6, 2011, Staff informs Midstate it must file revised switched access tariffs to reflect the switched access rates currently being charged
- December 29, 2011, date used by CLECs that have a tariff on file with state regulatory authorities for calculation of transitional filing
- January 2012, Midstate changes the rate it is billing carriers from the RBOC rate of 6.042 cents per minute to 11.5 cents per minute for November 2011 minutes
- May 25, 2012, Midstate files letter to dismiss TC11-075

- June 15, 2012, Commission closes TC11-075
- June 22, 2012, Midstate files its Access Service Tariff No. 2 to replace and supersede all Midstate tariffs on file prior to the effective date of the tariff. Midstate files originating switched access rates of 11.5 cents per minute and transitional terminating switched access rates of 10.9848 cents per minute
- July 3, 2012, date transitional rates become effective

I. DUE TO MIDSTATE'S WITHDRAWAL OF ITS COST STUDY, THE ORIGINATING AND TERMINATING SWITCHED ACCESS RATES SHOULD BE THE RBOC RATE

It is quite clear that South Dakota statutes provide the Commission substantial and broad authority to regulate telecommunications throughout South Dakota. *See* SDCL 49-31-3 and *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 595 N.W.2d 604 (S.D. 1999). As a part of its authority to regulate the business of providing telecommunication service, the Commission may promulgate rules. *See* SDCL 49-31-5. Failure of a telecommunications company to comply with a Commission order, rule, or regulation is punishable, after notice and opportunity for hearing, by a civil fine of not less than two hundred nor more than one thousand dollars for each offense. *See* SDCL 49-31-38. Staff notes these statutes simply to point out that the Commission has the authority to promulgate rules that have the force of law.

A. No preemption so Commission switched access rules are in effect

Staff asserts that this Commission's CLEC switched access rules have not been preempted by the FCC 11-161 Order (Order). Rather, the FCC recognized that some state commissions had previously acted to create a level playing field when it came to switched access rates. Paragraph 767 of the FCC Order, set forth below, explicitly states, in part, "[S]ection 251(d)(3) instructs the [FCC] **not to preempt state regulations** that are

consistent with and promote federal rules and policies, but it does not protect state regulations that frustrate the Act's policies or our implementation of the statute's requirements." (emphasis added).

The reform of South Dakota's CLEC intrastate access charges in RM05-002 does not frustrate the Act's policies or the FCC's implementation of the statute's requirements. Clearly, RM05-002, creating a level playing field for CLECs, is much in line with the FCC's goal of ICC reform. Therefore, explicitly, RM05-002 is not preempted in any way by the FCC, and is in fact, affirmed by paragraph 767 of the Order.

The FCC also stated in paragraph 767 of the Order that "[i]n prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that—(A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." Certainly, the rules promulgated in RM05-002 meet these three standards and therefore there is no preemption of the Commission rules.

> 767. Section 251(d)(3) states that "[i]n prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—(A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." As the Commission has previously observed, "section 251(d)(3) of the Act independently establishes a standard very similar to the judicial conflict preemption doctrine," and "[i]ts protections do *not* apply when the state regulation is inconsistent with the requirements of section 251, *or* when the state regulation substantially prevents implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act." Moreover, "in order to be consistent with the requirements of section 251 and not 'substantially prevent' implementation of section 251 or Part II of Title II, state requirements must be consistent with the FCC's implementing regulations." In other words, section 251(d)(3) instructs the

> Commission not to preempt state regulations that are consistent with and promote federal rules and policies, but it does not protect state regulations that frustrate the Act's policies or our implementation of the statute's requirements. As discussed in this Order, we are bringing all telecommunications traffic terminated on LECs, including intrastate switched access traffic, into the section 251(b)(5) framework to fulfill the objectives of section 251(b)(5) and other provisions of the Act. Consequently, we find that, to the extent section 251(d)(3) applies in this context, it does not prevent us from adopting rules to implement the provisions of section 251(b)(5) and applying those rules to traffic traditionally classified as intrastate access.

B. ARSD 20:10:27:02.01 requires CLECs to charge RBOC rates

Having established that the FCC did not preempt the Commission's rules as they pertain to originating and terminating switched access rates, it is clear that when Midstate withdrew its cost study, it was required to charge switched access rates that did not exceed the intrastate switched access rate of the RBOC operating in South Dakota. For CLECs in South Dakota, that switched access rate is 6.042 cents per minute.

Once Midstate withdrew its cost study, there was no impediment to its filing revised switched access tariff rates in order for it to comply with the Commission's rules and the Commission should order Midstate to file switched access tariffs to reflect that compliance. Once Midstate complies with the rules, it is not permitted to use its transitional rate filing to raise its intrastate terminating rate. The FCC rules [51.911 (b)(6)] state that nothing allows a CLEC that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or revisions raising such rates.

> **§ 51.911 Access reciprocal compensation rates for competitive LECs.**
>
> . . . .
>
> (b) Beginning July 1, 2012, notwithstanding any other provision of the Commission's rules, each Competitive LEC that has tariffs on file with state regulatory authorities shall file intrastate access tariff provisions, in accordance with §51.505(b)(2), that set forth

> the rates applicable to Transitional Intrastate Access Service in each state in which it provides Transitional Intrastate Access Service. Each Competitive Local Exchange Carrier shall establish the rates for Transitional Intrastate Access Service using the following methodology:
>
> . . . .
>
> **(6) Nothing in this section obligates or allows a Competitive LEC that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.**
>
> (emphasis added).

C. Midstate's switched access rate in effect on December 29, 2011, is 6.042 cents

Midstate states that the FCC Order requires CLECs to use as the starting point of its transitional calculation the intrastate access rate in effect on December 29, 2011. Midstate then claims that its rate on that day was 11.5 cents. The reality however is that on December 29, 2011, the Midstate switched access rate "in effect" was 6.042 cents.

According to the FCC rules, the starting point for calculating the transitional rate is the access rates "**in effect** on December 29, 2011," not rates that were on file. The rate that was **in effect** on December 29, 2011, as explained by Marlene Bennett at the August 28, 2012, Commission meeting, was the RBOC rate. It is true that the rate "on file" was 11.5 cents but that was not the rate "in effect." Midstate was not charging 11.5 cents on December 29, 2011; rather it was charging the RBOC rate. It was not until January 2012 that Midstate began billing carriers an 11.5 cent rate per minute for November 2011 minutes. Even Midstate, in paragraph 9 of its Second Supplemental Filing, acknowledges that the 11.5 cent rate was "on file" yet it never states that the 11.5 cent rate was "in effect" on December 29, 2011, as required by § 51.911.

§ 51.911 Access reciprocal compensation rates for competitive LECs.

(a) *Caps on Access Reciprocal Compensation and switched access rates.* Notwithstanding any other provision of the Commission's rules:

(1) In the case of Competitive LECs operating in an area served by a Price Cap Carrier, no such Competitive LEC may increase the rate for any originating or terminating intrastate switched access service above the rate for such service **in effect on December 29, 2011**.

(2) In the case of Competitive LEC operating in an area served by an incumbent local exchange carrier that is a Rate-of-Return Carrier or Competitive LECs that are subject to the rural exemption in §61.26(e) of this chapter, no such Competitive LEC may increase the rate for any originating or terminating intrastate switched access service above the rate for such service **in effect on December 29, 2011**, with the exception of intrastate originating access service. For such Competitive LECs, intrastate originating access service subject to this subpart shall remain subject to the same state rate regulation in effect December 31, 2011, as may be modified by the state thereafter.

(b) Beginning July 1, 2012, notwithstanding any other provision of the Commission's rules, each Competitive LEC that has tariffs on file with state regulatory authorities shall file intrastate access tariff provisions, in accordance with §51.505(b)(2), that set forth the rates applicable to Transitional Intrastate Access Service in each state in which it provides Transitional Intrastate Access Service. Each Competitive Local Exchange Carrier shall establish the rates for Transitional Intrastate Access Service using the following methodology:

(1) Calculate total revenue from Transitional Intrastate Access Service at the carrier's interstate access rates **in effect on December 29, 2011,** using Fiscal Year 2011 intrastate switched access demand for each rate element.

(2) Calculate total revenue from Transitional Intrastate Access Service at the carrier's intrastate access rates **in effect on**

December 29, 2011, using Fiscal Year 2011 intrastate switched access demand for each rate element.

. . . .

(emphasis added).

The Commission should give the words and phrases found in the rules their plain meaning and effect. *US West Communications v. PUC*, 505 N.W.2d 115 (S.D. 1993). The Commission should declare that the words "in effect" as found in the FCC rules have a plain meaning and effect and not construe the words in such a manner that would allow Midstate the ability to charge its 11.5 cent switched access rate that is "on file" rather than the 6.042 cent switched access rate that is "in effect" on December 29, 2011. To do otherwise would give Midstate a competitive advantage over all other South Dakota CLECs until July 1, 2016.

D. The filed rate doctrine is not determinative in this matter

Midstate argues that the filed rate doctrine prevails here. However, staff asserts that if the Commission were to apply this doctrine to these facts, Midstate will never have to come into compliance with the Commission's CLEC rules requiring it to charge RBOC rates as its 11.5 cent tariff rates will always prevail. Midstate has cited cases that speak to disputes between companies, and what rate applies during a dispute. This is not a dispute between two companies' interpretations of the rules. This is an instance where the filed rate is in direct conflict with the Commission's rules, and therefore, need not be followed. If a company could rely on the filed rate doctrine as precedential and having authority over the Commission's rules, the Commission's ability to regulate telecommunications tariffs would be greatly diminished. Could a company simply ignore Commission directives, never file a tariff in compliance, and keep charging what their previous rate dictated?

It is an unreasonable construction of the filed rate doctrine that would

permit it to override compliance with the South Dakota Commission rules. Certainly, at the time of the filing of the cost study, Midstate had an argument for not charging the RBOC rates-even though it did charge the RBOC rate for months. By charging the RBOC rates and assuring the Commission that it was charging the RBOC rates, Midstate cannot now rely on the filed rate doctrine when it works to its advantage and to the disadvantage of the IXCs and ultimately the consumers of South Dakota. The rule permitting a CLEC to suspend filing switched access rates surely was not intended to mean that the rules were void as to any CLEC that filed a cost study, later withdrew its cost study, and then thereafter claim its earlier filed tariff should prevail.

For a decision in this matter, the Commission need not rule on whether the filed rate doctrine applies. A determination of whether or not Midstate needed to comply with the Commission's rules once it had withdrawn its cost study is determinative of the matter. On May 25, 2012, Midstate requested that the cost study docket be closed. At its June 5, 2012, meeting, the Commission granted this request. At that time, pursuant to SDCL 49-31-3, 49-31-12.2, 49-31.12.4, and 49-31-38, Midstate was required to comply with the Commission's rules or face a penalty for not doing so.

Once Midstate's request to dismiss and close the docket was granted, it could no longer rely on ARSD 20:10:27:02.02 to avoid filing switched access rates (both originating and terminating) that would bring it into compliance with the Commission's rules. The aim of ARSD 20:10:27:02.02 is to permit a CLEC the opportunity to show that a higher rate than the rate allowed in 20:10:27:02.01 is justified under price regulation. But for the filing of the cost study, Midstate had a responsibility to comply with the rules or face the penalty for lack of compliance.

E. Procedure for filing non-competitive tariffs

Midstate claims the rules adopted in May 2011 lack guidelines or procedures setting forth how the new rates were to be implemented by CLECs. Midstate however does acknowledge that many other CLECs managed to file revised tariff pages for approval, as has been the practice of the industry for many years. SDCL 49-31-12.2 and 49-31-12.4 set forth the procedure for the filing of new or changed tariffs pertaining to noncompetitive services. If Midstate was unsure of how to proceed with the filing of tariffs, it could have asked either staff or the Commission for guidance. Staff has never advocated that Midstate be relieved from following existing procedures for changing tariffed rates. In fact, staff reminded Midstate in December 2011 of its obligation to file revised tariffs to reflect the switched access rates that it was actually charging.

II. CONCLUSION

Staff's position in this matter is really quite simple. First, the spirit and intent of the Commission's rules and the FCC's rules are essentially in agreement when it comes to CLECs switched access rates—the rates should reflect the RBOC rates—therefore there are no preemption issues and the Commission's rules remain in effect. Second, § 51.911 states that it is the access rates "in effect" on December 29, 2011, that determine the starting point for the transitional calculation and that rate is the RBOC rate so there is no filed rate doctrine disagreement. Third, § 51.911(b)(6) states that nothing in its rules allow a CLEC that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates therefore the granting of the withdrawal of the cost study did have an impact in this matter, that is, once Midstate was no longer acting under ARSD 20:10:27:02.02, it had to comply

with ARSD 20:10:27:02.01 and file revised tariffs that reflected the RBOC rate. Staff's recommendation is as follows:

1. the Commission not approve the tariff pages as filed;
2. the Commission order Midstate to file, by a date certain, tariff revisions to reflect its compliance with the rules approved in RM05-002;
3. that Midstate file a new terminating rate calculation using 6.042 cents as the starting point for that calculation; and
4. that the Commission have Midstate file a report showing which IXCs it has a separate contract with regarding switched access rates and what those rates are for those IXCs.

Dated this 21st day of September, 2012.

Karen E. Cremer

Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201