BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY MIDSTATE TELECOM, INC. FOR APPROVAL OF REVISIONS TO ITS TARIFF NO. 2	))))))	TC12-102 RESPONSE TO STAFF'S MEMORANDUM

COMES NOW Midstate Telecom, Inc. (Midstate Telecom) and hereby respectfully submits this Response to Staff's Memorandum filed on August 24, 2012.

PROCEDRUAL HISTORY

1. Midstate Telecom is a competitive local exchange carrier (CLEC) engaged in the provisioning of telephone exchange service in the State of South Dakota pursuant to a certificate of convenience and necessity granted by the South Dakota Public Utilities Commission (Commission). Midstate Telecom provides local and switched access services pursuant to its Tariff No. 1, effective March 20, 2006. Midstate Telecom provides local exchange services, including all of the essential services that are included in the federal definition of universal service within its established service area in South Dakota, which includes Chamberlain, Oacoma, and the surrounding rural areas.

2. On May 10, 2012, the Commission adopted revised switched access rules pertaining to CLECs. Those rules require CLECs to charge switched access rates that do not exceed the intrastate switched access rate of the RBOCs operating in the state. ARSD 20:10:27:02.01. It is important to note, however, that the revised switched access rules for CLECs also provide an opportunity for CLECs to file a cost study for review and approval by the Commission if they believe their cost-based rate is higher than the existing RBOC rate.

3. On June 22, 2011, Midstate Telecom filed a Cost Study pursuant to ARSD 20:10:27:02:02, which cost study showed that Midstate Telecom's intrastate access rates exceed not only the existing RBOC rate, but also the existing Midstate Telecom's tariffed rate of 11.5 cents.

4. On November 29, 2011, the Federal Communications Commission (FCC) issued a Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Connect America Fund, et al., Order on Reconsideration,* WC Docket 10-90, FCC 11-161 (FCC 11-161 Order). In that Order, the FCC adopted a bill-and-keep compensation methodology for all intercarrier compensation traffic. *See* FCC 11-161 Order at ¶736. The FCC has explained that its adoption of such bill-and-keep methodology was and is to be implemented in a gradual manner, thereby resulting in a logical "end state". Id. at ¶739. The current defined transition period focuses primarily on terminating end office switching and transport rate elements. Id. Specifically, the FCC has ordered that the time frame for the transition to bill-and-keep will begin on July 3, 2012. CLECs that benchmark their rates to "rate-of-return carriers" shall have nine years to transition their terminating switched end office and transport rates to bill-and-keep. Id.

5. As set out above, all CLECs must make their first terminating intrastate access rate reductions on or before July 3, 2012. On or before July 2, 2013, all "intrastate terminating switched end office and transport rates" and "reciprocal compensation rates" must be reduced to parity with interstate access rates. Id. at pp. 272-273, Figure 9. Accordingly, on June 22, 2012, Midstate Telecom filed revisions to its switched access services tariff to comply with the terminating access rate reductions mandated by the FCC 11-161 Order.

6. On August 24, 2012, Staff filed a Memorandum recommending that Midstate Telecom's tariff revisions not be approved and that it 1) file tariff revisions to bring originating and terminating intrastate access rates to 6.042 cents per minute to comply with the rules approved in RM05-002; 2) provide the Commission a new terminating rate calculation using the 6.042 cent figure as a starting point, and 3) if the resulting transition rate is greater than the 6.042 cent RBOC rate, provide supporting documentation from the FCC Order that proves this transitional rate mandate allows for rate increases.

BACKGROUND

7. Midstate Telecom has invested over $10 million since 2002 to overbuild the outdated and poorly maintained plant of Qwest after repeated requests for reasonable service from the citizens of the Chamberlain area. The impact of those investments is that today, Midstate Telecom serves over 90% of the access lines in Chamberlain and the surrounding rural areas. Not surprisingly, the network costs of Midstate Telecom are considerably higher than those of the RBOC. The RBOC had not made significant investments in the local plant in decades. It does not take sophisticated analysis to realize that the low RBOC access rates, which are a function of the RBOC dilapidated plant investments, do not reflect the sizeable investments made by Midstate Telecom.

8. Prior to approval of Midstate Telecom's 11.5 cent switched access rate, Midstate Telecom had several discussions with Commission Staff and ultimately agreed to serve the rural areas surrounding Chamberlain in exchange for an agreed to "below-cost" access rate. Midstate Telecom is thus unique because as a CLEC, it serves not only the urban customers but also the rural customers in its service area.

9. Midstate Telecom filed its cost study on June 22, 2011, confident that based upon the Commission's cost study rules, the calculated intrastate access rate is well above not only the existing RBOC rate, but also above the existing Midstate Telecom tariffed rate of 11.5 cents. Midstate Telecom's purpose in filing the cost study was not to charge the higher rate justified by the cost study, but to support its position that the RBOC rate is not reasonable in Midstate's case, and that Midstate Telecom's current tariffed rate, which is between the two rates, is appropriate. Absence of Commission approval of the cost study, the continued and escalating expenses of the study (including Commission consultant expenses), and strong encouragement from Staff prompted Midstate Telecom's decision not to pursue its cost study, which docket was closed on June 5, 2012. Midstate Telecom did not, and still does not, believe that its request that the cost study docket be closed in any way affects its transitional rate filing, which follows the FCC 11-161 Order.

10. On June 22, 2012, Midstate Telecom filed its Access Service Tariff No. 2, which will replace and supersede all Midstate Telecom access tariffs on file prior to the effective date of this tariff. Midstate Telecom also filed an Application for Waiver of Commission administrative rules, which rules are contained in Chapters 20:10:27, 20:10:28 and 20:10:29 of South Dakota's administrative rules to allow for different originating and terminating intrastate switched access rates, once the terminating transitional rate is approved.

ARGUMENT AND AUTHORITY

11. It is important to note that the sole issue before the Commission in this proceeding is Midstate's terminating access rates. While the FCC 11-161 Order capped both originating and terminating intrastate rates, only originating access service remains subject to state rate regulation. FCC 11-161, § 51.911(a)(2). For intrastate terminating switched access rates, the

starting point for calculating the transitional rate is "tariffs on file with the state regulatory authorities." § 51.911(b). § 51.911(b) goes on to set forth the exact steps to be followed by the CLEC in its transitional filing, and those are the steps Midstate Telecom followed in the current transitional rate filing. The FCC guidelines require CLECs to calculate total revenue for fiscal year 2011 by applying the carrier's interstate and intrastate access rates "in effect . . . 30 days after date of publication" of the Order, which was December 29, 2011. § 51.911(b)(1) and (2). On December 29, 2011, the approved tariffs on file with the respective Commissions includes a composite interstate terminating access rate of 10.496 cents (FCC) and a composite intrastate terminating access rates of 11.5 cents (Commission). Accordingly, pursuant to the filed rate doctrine, the tariff effective on December 29, 2011 "has the effect of law". Alliance Communications Co-op., Inc. v. Global Crossing Telecommunications, Inc., 663 F. Supp. 2d 807, 819 (D.S.D. 2009).

12. Under section 203(a) of the Communications Act, Midstate Telecom is required to file tariffs with the FCC and the Commission "showing all charges" and "showing the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). These tariffs have the effect of law. *See* American Tel. & Tel. Co. v. Central Office Telephone, Inc., 524 U.S. 214, 221-22, 118 S. Ct. 1956, 141 L.Ed.2d 222 (1998). "Section 203(c) makes it unlawful for a carrier to 'extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.' ") (quoting 47 U.S.C. § 203(c)). Under the filed rate doctrine, "once a carrier's tariff is approved by the FCC (or the Commission), the terms of the federal tariff are considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities' as between the carrier and the customer.' " Iowa Network Servs., Inc. v.

Qwest Corp., 466 F.3d 1091, 1097 (8th Cir.2006) (quoting Evanns v. AT & T Corp., 229 F.3d 837, 840 (9th Cir.2000)) (alteration in original). This doctrine is equally applicable to rates filed with state regulatory agencies. Firstcom, Inc. v. Qwest Corp., 555 F.3d 669, 679 (8th Cir.2009); Alliance Communications Co-op., Inc. v. Global Crossing Telecommunications, Inc., 663 F. Supp. 2d 807, 819 (D.S.D. 2009).

13. Accordingly, Midstate Telecom used its lawfully filed tariff as the starting point to implement the FCC's Order mandating transition of its terminating access rates. The inputs used by Midstate Telecom in the transitional rate calculations are the inputs specified by the FCC 11-161 Order at § 51.911. The calculation mandates inputs that reflect the actual revenue collected by Midstate Telecom during the base period specified in the Order. The rates utilized in its analysis are the rates contained in Midstate Telecom's approved and effective tariffs on file on December 29, 2011, at which time Midstate Telecom was still awaiting action by the Commission on its pending cost study Docket TC11-075. In May of 2012, Midstate Telecom requested the closing of TC11-075 based upon the assumption that the intrastate terminating access rates had been dictated by the FCC, and Midstate Telecom's originating access rates would need to be reviewed and studied in a separate filing by Midstate Telecom with the Commission.

CONCLUSION

It is Midstate Telecom's position that with regard to its terminating access rates, the Commission's regulatory jurisdiction has been preempted by the FCC, pursuant to the FCC 11-161 Order, pending ruling by federal courts. Midstate Telecom's transitional rate as filed in the current docket is correctly calculated pursuant to the FCC 11-161 Order and should be approved by this Commission. Midstate Telecom will address its intrastate access rates in a subsequent, separate filing.

Dated this 27th day of August, 2012.

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