

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE FILING BY)	
MIDSTATE TELECOM, INC. FOR)	TC12-102
APPROVAL OF REVISIONS TO ITS)	SUPPLEMENTAL FILING OF
ACCESS SERVICE TARIFF)	MIDSTATE TELECOM

COMES NOW Midstate Telecom, Inc. (Midstate Telecom) and hereby respectfully submits this Supplemental Filing in the above-named docket.

BACKGROUND

1. Docket TC12-102 is Midstate Telecom's request for Commission approval of its transitional terminating intrastate access rates, in compliance with the FCC's 11-161 Order. On June 22, 2012, Midstate Telecom filed revisions to its tariff to comply with the terminating access rate reductions mandated by the FCC 11-161 Order. The docket was originally placed on the Commission's agenda on Tuesday, July 17, 2012, but following receipt of correspondence from Staff, action on the docket was delayed pending further discussions between Staff and Midstate Telecom.

2. Despite several meetings and discussions with Staff, it is apparent that Staff and Midstate Telecom have different interpretations about the proper resolution of this docket. On August 24, 2012, Staff filed a Memorandum recommending that the Commission not approve the tariff revisions as filed in TC12-102, and that Midstate Telecom provide the Commission with a new terminating rate calculation using the RBOC rate of 6.042 cents as a starting point. Midstate Telecom filed a Response to Staff's Memorandum on August 27, 2012, urging the Commission to approve its transitional rate as filed because it is correctly calculated pursuant to the FCC 11-161

Order. In its written response of August 27, 2012, Midstate Telecom focused much of its attention on legal arguments in Response to Staff's Memorandum. Midstate Telecom continues to rely on its filed comments.

3. TC12-102 was on the agenda of the Commission meeting on August 28, 2012. The Commission heard comments and responses to questions from Midstate Telecom and from Staff, and deferred action on the docket for two weeks.

4. At the Commission meeting on August 28, 2012, Midstate Telecom commented on the changes in rules and procedures, at both state and federal levels, that have affected Midstate Telecom generally, and this docket in particular. In May of 2011, the Commission adopted new rules with regard to switched access rates for CLECs. Then the FCC adopted sweeping reforms to Intercarrier Compensation and Universal Service with release of its Order on November 18, 2011. Both of these changes, in and of themselves, have impacted Midstate Telecom, but the impacts have been exacerbated by a lack of clarity of process as well.

5. It was also apparent at the August 28, 2012, meeting, however, that some factual clarifications may be helpful to the Commission in its consideration of Docket TC12-102. Accordingly, Midstate Telecom submits this Supplemental Filing to try to provide some clarification to the process as it has transpired to date.

SUPPLEMENT FACTUAL BACKGROUND

6. While it remains Midstate Telecom's position that the ultimate decision in this docket turns upon proper application of the FCC 11-161 Order and, to the extent applicable after said Order, state law, Midstate Telecom also understands the desire of this Commission to have a clearer picture of what transpired in this docket and in prior

filings, to the extent it is possible to create a clear picture in the midst of changing regulatory rules.

7. Mark Benton, as the General Manager/CEO of Midstate Telecom, can provide some insight and factual clarity in this docket and other actions leading to the current filing. On behalf of Midstate Telecom, we submit with this filing an Affidavit of Mark Benton, which will hopefully provide some supplemental factual information to this Commission. (See Affidavit of Mark Benton, attached hereto).

8. Midstate Telecom was granted a Certificate of Authority by this Commission in April of 2001 (TC01-007). Its initially approved switched access rate was the LECA rate of 13.25 cents per minute. The current tariffed rate of 11.5 cents per minute was approved by this Commission on April 25, 2006, with an effective date of March 20, 2006 (TC05-060). The 11.5 cent rate has not been changed or revised, nor has any other rate been approved by the Commission since that filing. Midstate Telecom's current tariff on file with this Commission contains a switched access rate of 11.5 cents.

9. In May of 2011, this Commission adopted new rules with regard to CLEC access rates. CLECs can, according to said rules, charge the RBOC rate of 6.042 cents or file a cost study, if the CLEC believes higher access rates are justified. Midstate Telecom, in reliance upon the language contained within those rules, believed Midstate Telecom was entitled to charge a higher rate than the RBOC rate, given the sizeable investment it has made in the impacted service area. That is why, on June 22, 2011, Midstate Telecom filed a Cost Study (TC11-075), thus availing itself of the "exception" to the RBOC rate established in the Commission's new rules. Midstate Telecom did not change its tariff pages at that time, pending the outcome of its cost study filing. Midstate Telecom did, however, start charging the RBOC rate, because Midstate Telecom did not want to create

a large retroactive refund, in the event the cost study rate was not approved by this Commission. (*See* Affidavit, Paragraph 8).

10. Midstate Telecom then later in 2011 changed the rate it was billing carriers to its higher, legally tariffed rate because of what Midstate Telecom believed and interpreted as the clear and unequivocal message from Staff that Midstate Telecom had to charge the rates in its tariff. (Affidavit, Paragraph 9). Effective with its November, 2011, usage, Midstate Telecom billed 11.5 cents per minute, which the carriers paid without dispute.

11. Midstate Telecom's tariffed rate of 11.5 cents has been in effect since it was approved by this Commission in 2006. The charges Midstate Telecom billed to carriers changed, not as a result of changed tariff pages but to avert the potential of a large refund. The billed rate was changed again in response to instructions from Staff. Midstate Telecom's use of the RBOC rate was to avoid later, potential adverse results to the Company, depending upon the outcome of the cost study docket. Midstate Telecom's actions in initially billing the RBOC rate and then changing the rate it was billing when so directed by Staff show that Midstate Telecom was attempting to cooperate and abide by the Commission's rules and directives, not manipulate them. All of this confusion could have been avoided if the process for interim charging of tariffed rates, in the event of adoption of the RBOC rate by a CLEC, or in the event of a cost study filing by a CLEC, had been defined in RM05-005. The Order was silent as to the actual implementation process.

THE CORRECT "STARTING POINT"

12. As noted at the August 28, 2012, meeting, Midstate Telecom has been a victim of changes in rules at both the state and federal levels, and also the victim of less

than clearly defined procedures. Also as evidenced at that meeting, Midstate Telecom has been plagued by unique factual situations that have occurred in this and related dockets. In the final analysis, however, factual discrepancies are not dispositive of the issue in this docket. It is, indeed, unfortunate that there were misunderstandings and perhaps even misinterpretations of instructions. But confusion as to what charges were billed and why and when should not distract from or influence a final decision on the pivotal issue in this docket. The issue remains, what is the correct starting point for calculating Midstate Telecom's transitional rate? Staff's position that Midstate Telecom should provide the Commission with a new terminating rate calculation using the 6.042 cent figure as a starting point is not supported by the current controlling statutes and rules. As noted in Midstate Telecom's previous filing, under the FCC 11-161 Order, the calculation of access rates for competitive LECs is governed by § 51.911. The plain language of that section establishes the starting point for calculating the transitional rate for terminating intrastate access charges: it is the "tariffs on file with the state regulatory authorities." § 51.911(b). It is undisputed that Midstate Telecom is a Competitive LEC that has a tariff on file with this Commission, and it is also undisputed that Midstate Telecom's tariffed rate 30 days after the publication date of the Order was 11.5 cents. That is a matter of record. The starting point is not the rate Staff believes should have been on file, nor is it the rate Midstate Telecom was billing carriers (although on the effective date of the Order, Midstate Telecom was billing carriers its tariffed rate of 11.5 cents). The beginning point of the transitional rate calculations, per the clear and unambiguous language of the FCC 11-161 Order, is the rate in the CLEC's tariff on file with the Commission.

13. In addition to Staff's position being contrary to the clear and plain language of the FCC's 11-161 Order, there is also no basis for Staff's recommendation that the starting point for calculating the transitional terminating rate is 6.042 cents in the Commission's rules or state statutes. The Commission adopted the CLEC switched access rules in May of 2011, but 20:10:27:02.01 (default RBOC rate) is silent as to how the default rate would be implemented, and the rule also fails to require or establish a timeline for filing of revised tariffs by affected CLECs. There is a process set forth in SDCL 49-31-12.5 related to changes in switched access rates, and that process includes filing revised tariff pages. Accordingly, the lower rate dictated by the rule would also require the filing and approval of a revised tariff, including the lower rate, in order to be the legal, tariffed rate. Midstate Telecom did not file a revised tariff, nor was a revised tariff for Midstate Telecom ever approved by this Commission. Midstate Telecom instead chose to avail itself of the opportunity or potential relief afforded to CLECs in 20:10:27:02.02 and filed a cost study. ARSD 20:10:27:02.02 is also silent as to process for implementation of a different rate resulting from a cost study. The fact remains, however, that because of these ambiguities in the rules, no revised tariff pages were ever filed or approved for Midstate Telecom. Therefore, under state statutes and the filed rate doctrine, Midstate Telecom's legal rate as of December 29, 2011, was its tariffed rate of 11.5 cents, and that legal rate has to be the starting point for calculation of Midstate Telecom's transitional rate.

14. If Staff is relying on the fact that Midstate Telecom charged the RBOC rate for several months after the CLEC switched access rules went into effect as the basis for using the RBOC rate as the starting point for calculation of the transitional rate, that reliance is misplaced, for several reasons. First of all, as Mark Benton has clarified in his

Affidavit, Midstate Telecom did not charge the RBOC rate as an acknowledgement or concession that the RBOC rate was the “correct” rate. Midstate Telecom charged the RBOC rate to avoid a potential large refund. Furthermore, Midstate Telecom’s action of filing a cost study clearly belies any acknowledgement that the RBOC rate was the appropriate rate for Midstate Telecom; Midstate Telecom’s cost study in fact supported a much higher rate. Finally, Midstate Telecom does not have the legal authority, by statute, rule, or settled case law, to change its lawful, tariffed rate. Charging by a company of a rate that is different than its tariffed rate does not affect its legal tariff that has previously been filed and approved, nor does it change or affect the rate contained in said legal tariff.

15. In the FCC 11-161 Order, regulatory authority by state commissions under state rules and statutes is only granted for originating intrastate switched access rates. § 51.911(a)(2). For terminating intrastate access rates, CLECs that have tariffs on file with state regulatory authorities, such as Midstate Telecom, are only required to file transitional rates with the state commission, § 51.911(b) (emphasis added), using the methodology set forth in the subsequent sections of the Order. For a state commission to apply state switched access rules and statutes to a transitional terminating intrastate rate filing, as Staff seems to be requesting the Commission to do in the current docket, would be contradictory to both the letter and spirit of the FCC’s 11-161 Order.

16. Staff’s position is also not supported by the FCC’s 11-161 Order, because it suggests that Midstate Telecom should start with the RBOC rate and then calculate a new terminating rate. The RBOC rate is lower than Midstate Telecom’s interstate access rate, and § 51.911(b)(6) does not allow a CLEC to make a transitional tariff filing for revisions that raise such rates. Accordingly, per the FCC 11-161 Order, the RBOC rate proposed by Staff is not a starting point but rather the ending point that would

detrimentally impact Midstate Telecom's transitional rates for the next several years of the transition to bill and keep.

RELATIONSHIP OF COST STUDY DOCKET TO THIS DOCKET

17. Staff appears to place an undue amount of emphasis on withdrawal and closing of the Midstate Telecom Cost Study Docket (TC11-075). In fact, at the August 28, 2012, meeting, Staff noted that once the cost study docket was closed, the starting point for terminating access charges was the RBOC rate.

18. Staff points to no legal basis for its conclusion. The FCC 11-161 Order, released November 18, 2011, and effective December 29, 2011, clearly established the rules for intrastate terminating access rates. Id at § 51.911. Thus, the rules governing transitional terminating intrastate access rates were in effect prior to the closing of the cost study docket in June of 2012, and withdrawal of the cost study docket does not affect the transitional terminating rate calculated and filed in the current docket.

19. In response to questions from the Commission with regard to the cost study, Staff referred to ten potential adjustments to Midstate Telecom's cost study, recommended by the Staff retained analyst, which would result in an access rate of less than 11.5 cents. Despite informal requests for a copy of Staff's consultant's analysis of Midstate Telecom's cost study, and despite having been charged by the Commission over \$13,000 for the analysis, Midstate Telecom has not been provided a copy of any documentation pertaining to the adjustments the consultant recommended to Midstate Telecom's cost study. In the absence of an opportunity to review the analysis, Midstate Telecom is unable to respond to Staff's comments at the August 28, 2012, meeting, suggesting that the rate in Midstate Telecom's cost study is not sustainable.

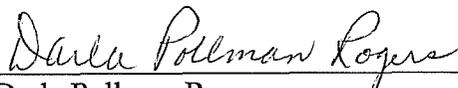
20. Midstate Telecom will re-submit its cost study, and will formally request production of Staff's analysis of said study. Until such time as Midstate Telecom's cost study has been approved as submitted or as modified by this Commission, Midstate Telecom continues to maintain the position that its cost study justifies a higher rate than its tariffed rates of 11.5 cents per minute.

CONCLUSION

21. At the August 28th, 2012, meeting, the Commission indicated its desire to study Docket TC12-102 more carefully, to ensure a correct decision. Midstate Telecom respects and appreciates the Commission's efforts, and submits this filing to assist the Commission in its efforts.

22. While Midstate Telecom has attempted to clarify some points discussed at the August 28th, 2012, meeting, Midstate Telecom's position remains unchanged. Midstate Telecom's transitional terminating rate as filed in the current docket should be approved by this Commission without change or modification. Regardless of confusing facts and circumstances that may have correctly or incorrectly guided the actions of Midstate Telecom in the last months, the applicable and governing statutes and rules clearly dictate the outcome. The starting point for calculation of Midstate Telecom's transitional terminating access rate is the rate in its legal tariff on file with the Commission on December 29, 2011, per §51.911 of the FCC 11-161 Order and per South Dakota law. It is undisputed that Midstate Telecom's tariffed rate on that date was 11.5 cents; it is a matter of public record on file with the Commission. Midstate Telecom's transitional rate as filed in this docket is correct and accordingly, Midstate Telecom respectfully requests that the rate be approved.

Dated this 7th day of September, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that an original Supplement Filing of Midstate Telecom was served upon the PUC electronically, directed to the attention of:

Ms. Patricia Van Gerpen, Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501

Dated this 7th day of September, 2012.



Darla Pollman Rogers