BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF REVISIONS AND/OR ADDITIONS TO THE COMMISSION'S SWITCHED ACCESS RULES CODIFIED IN ARSD 20:10:27 THROUGH 20:10:29	))))	RM05-002 MIDCONTINENT'S INITIAL COMMENTS

Comes now Midcontinent Communications, hereafter called "Midcontinent," and files its comments in response to the June 1, 2010, rules submission of Commission Counsel, as follows:

Midcontinent's Proposal

"Switched access rates in South Dakota should be fair and reasonable for consumers, the IXCs paying the charges and for the carriers providing the service." Even before RM05-002 was opened on December 14, 2005, Midcontinent was making this same argument. Today Midcontinent reiterates that same position here – not for fear of being inconsistent – but because it is the right solution for South Dakota and its consumers.

The solution is simple. Allow CLECs in an exchange to charge the same switched access rates as the incumbent provider in the exchange. This makes the pricing in each exchange simple and easy to understand for the carriers. The CLEC tariff would refer to and mirror the ILEC rates. This solution is also simple for the Commission and its Staff to administer. A CLEC is compliant if its composite switched access rate is the same as the ILEC.

This continuity of wholesale pricing eliminates the current discrimination in pricing and will allow all of the providers in the exchange (the ILEC and CLECs) to compete fairly at the retail level.

The Proposed Rule Revisions

The majority of the proposed rules regarding switched access rates for CLECs are inadequate and do not resolve the problem with switched access in South Dakota. There are at least five problems with the proposed revisions:

1. **A CLEC is a CLEC**

Distinguishing between and among CLECs based on where they serve is wrong and only continues the discrimination that has distorted the market; (20:10:27:02.01)

The Commission should reject the underlying attempt in the proposed rules to distinguish between and among CLECs. Instead, the Commission should adopt the traditional approach which states that a CLEC is a CLEC and results in treating all CLECs the same. This approach is fair and consistent with the Act and the South Dakota statute regarding competition. (SDCL 49-31-76)

The Commission has certificated dozens of CLECs in South Dakota since the passage of the Act. The Commission did not and does not distinguish between and among those CLECs based on any of the metrics that are included in proposed rule revisions. The Commission should specifically reject the proposed rules' attempt to create a distinction where none exists.

The range of CLECs is wide and varied – resellers, UNE-P providers, companies that provide some of their own facilities (e.g., switching and/or transport) but also purchase UNEs from the incumbent, and cable companies who build out their own facilities. Some of the CLECs are stand alone companies while others are subsidiaries of ILECs, subsidiaries of RLECs, partnerships, affiliates and a host of other legal entities. Some of the CLECs use traditional circuit switched technology while others use a combination of traditional and next generation (IP-based technology – e.g. soft switches) technologies to provide their local exchange services. These organizational and technology issues are not relevant for purposes of setting rates for a noncompetitive, regulated service offered by a CLEC.

Some CLECs that have been in the market for years may have a decent market share (perhaps more than ten percent). Other CLECs who are new to the market may have only a very minor market share. The regulation of CLECs has never been based on their market share or where they serve. The proposal that the CLEC may mirror the ILEC rate if and only if the CLEC offers "...service with its own facilities throughout all the exchanges where it operates..." (27:10:27:02.02(1)) is not based on good public policy and would continue the discrimination distorting markets today in South Dakota. Indeed, the proposed rules appear to be attempting to continue the preferential treatment of CLECs that are owned by rural ILECs in South Dakota.

When a company makes the decision to enter a new market, the market they are entering should drive the rules, not the type of company structure

they have, or the population of the market or the market share they may obtain. In other words, rural companies should not be considered rural when they enter a Qwest market. This is their business decision and the rules that govern all carriers entering that market should be the same.

2. The Rules Should Not Include Rates

The Commission should reject the rules proposal to include specific rates in the rules. Instead, the Commission should require CLECs to charge no more than the rates of the ILEC – regardless of where the CLEC is serving.[1] This result is simple, fair, and eliminates the discrimination that exists today.

Rules, by design, do not include specific rates, as the rates may change over time. The parties should not have to seek and litigate a rulemaking and participate in the legislative process to get a new or different rate. Instead, the rules should refer to a rate. Midcontinent recommends that the rules simply refer to the switched access rates of the ILEC. This is the traditional way that rules are drafted and results in ease of administration.

The rules proposal has included two rates and referred to other rates in its proposed rule revisions. If a CLEC has 15 percent or more of its lines in communities of 10,000 or more, the proposed rules argue that it must charge intrastate switched access rates of no more than 6.042 cents per minute. The rules further state that a CLEC "shall" charge a rate of not more than 9 cents per minute ". . . if 85 percent or more of the competitive local exchange carrier's total access lines in South Dakota are in communities with populations of less than 10,000 inhabitants." (20:10:27:02.01)

The proposed rules' attempt to create a "rural" distinction based on where a CLEC serves is not in the public interest and should be rejected. Including rates with no relationship to the CLECs' costs is likewise ill advised and should be rejected. The 6.042 cent rate appears to be the current Qwest per minute rate given certain assumptions. The 9 cent rate is evidently a proposal that lies somewhere between the Qwest rate and the LECA rate, but again has no relationship to any individual CLEC or to CLECs in general. The fair and simple approach is to require all CLECs providing wireline local exchange service in an exchange to charge no more than the

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[1]Midcontinent agrees with the proposal that if the ILEC rates are insufficient the CLEC may petition the Commission and provide cost support for higher rates. (See Staff proposed revisions to 20:10:27:04)

switched access rates of the ILEC – regardless of where the CLEC is serving. Including rates in the rules is not in the public interest and the rates are not supported. (20:10:27:02.01)

3. The Proposed Rule's "Exception" Based on Facilities is Flawed

The "exception" based on CLEC facilities and where it operates is another attempt to inappropriately distinguish between and among CLECs. A CLEC is a CLEC and neither the Act nor the FCC has suggested that they be treated differently based on technology, extent of service, or corporate structure; (20:10:27:02.02 (1)) The Commission should reject the proposed exception that would allow a CLEC to mirror the ILEC rates in an exchange if the CLEC "...offers service with its own facilities throughout all of the exchanges where it operates... ." (20:10:27:02.02) This artificial distinction would again result in undue discrimination and the inefficient operation of the market. Instead, the Commission should require the CLEC to charge rates no higher than that of the ILEC unless the Commission reviews and approves a cost study supporting a higher rate.

Midcontinent supports the proposed rules' second exception that would allow a CLEC to file a cost study to support a different and likely higher switched access rate. (*Id.*) Such an opportunity is important to avoid the "takings" argument.

4. The Proposed Rules Should Not Eliminate the Time Frame for Cost Support

The proposed rules should not remove the time frame for updating cost support. (20:10:27:07) The rules proposes to strike "no less than once every three years" from 20:10:27:07. This change, in and of itself, would allow the LECA companies to keep their outrageously high intrastate switched access rates in place. Eliminating this provision now, while there is no proceeding to revise the switched access rules for ILECs, is especially outrageous.

While it is clear that this provision (rate filings every three years) has resulted in dramatic increases in rates over time -- that is the result of the flawed rules. If a rule utilized a forward looking construct that reflected the most efficient and currently available technologies, then rates would trend downward consistent with the fact that telecommunications is a decreasing cost industry.

The problems with CLEC switched access rates in South Dakota all emanate from the existing switched access rules and the resulting ILEC switched access rates. The switched access rules date from before the 1996 Telecommunications Act ("Act") and as such are in dire need of a complete revision to be consistent with the goals of the Act and associated South Dakota law, not just some tinkering to address CLECs. Once those rules are replaced with rules that are consistent with the competitive mandate in the Act, and the rates and rate structures are rationalized, the problems with switched access in South Dakota will be replaced by healthy competition that will benefit the State and consumers.

Summary

Midcontinent's proposal is fair, easy to implement and consistent with the Act and the South Dakota statute. Switched access rates for CLECs in South Dakota should be on the same basis in any exchange in which they offer service. A CLEC is a CLEC and absent cost support to the contrary, there is no good reason to have a CLEC in a given exchange providing the very same service as the incumbent and other CLECs in that exchange, at a different rate. In fact, that discriminatory treatment of carriers – which is evident today in South Dakota -- is patently unfair and inconsistent with the legislature's goals for competition in South Dakota.

Dated this 15 day of June, 2010.

MAY, ADAM, GERDES & THOMPSON LLP

BY: ______________________
DAVID A. GERDES
Attorneys for Midcontinent
503 South Pierre Street
P.O. Box 160
Pierre, South Dakota 57501-0160
Telephone: (605)224-8803
Telefax: (605)224-6289
E-mail: mfs@magt.com

CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 15 day of June, 2010, he filed electronically and e-mailed a true

and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

Patricia Van Gerpen
patty.vangerpen@state.sd.us

Karen E. Cremer
karen.cremer@state.sd.us

William Van Camp
bvancamp@olingerlaw.com

Richard D. Coit
richcoit@sdtaonline.com

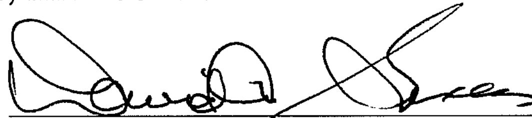
Darla Pollman Rogers
dprogers@riterlaw.com

Brett M. Koenecke
brett@magt.com

Thomas F. Dixon
thomas.f.dixon@verizon.com

and by first class mail to:

Jason D. Topp
Qwest Corporation
200 South 5th Street, Room 2200
Minneapolis, MN 55402



David A. Gerdes