

**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) Docket No. RM05-002
RULES CODIFIED IN ARSD 20:10:27)
THROUGH ARSD 20:10:29)
)

**VERIZON’S COMMENTS ON DRAFT RULES
REGARDING SWITCHED ACCESS RATES**

Verizon¹ submits its comments on the draft rules regarding switched access rates that were distributed by the Commission Staff on June 1, 2010.

While this docket was initially opened to review the entire range of switched access rules contained in three chapters of the state’s administrative rules, ARSD 20:10:27 through ARSD 20:10:29,² the draft rules issued by Staff focus primarily, but not solely, on the rates charged by competitive local exchange carriers (“CLECs”). It appears that the draft rules are intended to implement the Commission’s recent decision in Docket TC 10-014 to subject CLEC switched access rates to pricing regulation.³

The Staff did not provide any commentary explaining the rationale for some of the language it proposed. Accordingly, Verizon offers comments on some of the substantive provisions and raises questions about the purpose of certain language included in the draft. Verizon anticipates that the Commission’s final order will clarify and explain the basis for the rules it adopts and, to that end, provides these comments.

¹ The Verizon companies participating in this filing are MCI Communications Services, Inc. d/b/a Verizon Business Services and MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (“Verizon”).

² See Order Opening Docket, Docket No. RM05-002, issued December 14, 2005.

³ Order Finding Pricing Regulation Appropriate for CLECs’ Switched Access Services; Order Denying in Part and Granting in Part Qwest’s Motion; Order Taking Judicial Notice; and Order Closing Docket, issued May 4, 2010.

I. CLEC SWITCHED ACCESS RATES

Verizon strongly supports the Commission's ruling that pricing regulation is appropriate for switched access services provided by CLECs. In Docket TC10-014, there was substantial record support for imposing a cap on CLECs' intrastate switched access rates. The proposals most commonly discussed in the parties' testimony were to establish a specific benchmark and prohibit any CLEC from charging more than the access rates charged by the incumbent local exchange carrier ("ILEC"), either Qwest or another ILEC, against which the CLEC competes. Rather than codify this general policy, the draft rules proposed by Staff would implement pricing regulation by setting forth actual rates in the Commission's rules. Specifically, Staff's draft proposes to establish a new rule, ARSD 20:10:27:02:01, as follows:

20:10:27:02.01. Determination of intrastate switched access charges for competitive local exchange carriers -- General. A competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the rate of 6.042 cents per minute if 15 percent or more of the competitive local exchange carrier's total access lines in South Dakota are in communities of 10,000 inhabitants or more. The switched access rate shall be the same in each of the competitive local exchange carrier's service areas.

A competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the rate of 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. The switched access rate shall be the same in each of the competitive local exchange carrier's service areas.

Because rates may change over time, it would be a serious mistake to lock in stone specific rates in the Commission's administrative rules. If the objective is to ensure competitive equity among carriers, that principle will be violated as soon as Qwest or any other ILEC lowers its access rates in South Dakota. Before competitive balance would

be restored, the Commission would have to conduct a new rulemaking and revise its rules before any CLEC would be required to lower its rates so that it did not exceed the ILEC's new rate. Such an approach would be administratively inefficient and extremely wasteful of the Commission's and industry's resources.

A far superior approach would be to model the South Dakota rules after those adopted by the Federal Communications Commission ("FCC") and numerous other states.⁴ In not one instance has a state commission or legislature specified an actual rate in the rules. Instead, those regulations typically provide that a CLEC may not charge access rates higher than the rates of the ILEC against which the CLEC competes. Establishing a general standard allows for continuing compliance with the regulation even as ILECs revise their rates over time. CLECs only have to modify their rates to be in conformance with the general requirement that their rates not exceed those of the ILEC. In contrast, a rule that sets forth a specific rate could quickly become outmoded. Moreover, it would limit the Commission's flexibility to make changes or require CLECs to modify their rates as changes occur in the market.⁵

Accordingly, Verizon recommends that the Commission adopt the following language instead:

20:10:27:02.01. Determination of intrastate switched access charges for competitive local exchange carriers -- General. A competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the composite switched access rate charged by the incumbent local exchange carrier in whose service area the competitive local exchange

⁴ Many of those statutes and regulations were cited in the record of Docket TC 10-014. *See, e.g.*, Initial Testimony of Don Price on behalf of Verizon, filed April 1, 2010, at 6-7.

⁵ Such an approach would also be inconsistent with the manner in which the existing rules address ILEC rates. The rules describe a methodology to be followed in setting rates, rather than identify actual rates.

carrier operates. The switched access rate shall be the same in each of the competitive local exchange carrier's service areas.

The second paragraph of draft rule ARSD 20:10:27:02.01 should be deleted in its entirety. The Staff did not provide any explanation for the criteria it proposed or the likely effects of such a rule in South Dakota, so it is difficult to assess the proposal in any detail. The draft rule distinguishes between "communities" with more or less than "10,000 inhabitants," without defining what a "community" is. Is a "community" a city, a county, an exchange, a provider's service area, or some other geographic area? Absent a definition, the rule is vague and subject to many interpretations. In addition, Staff did not explain the basis for the dividing line it proposed (i.e., a CLEC may charge the higher rate if "85 percent or more" of its access lines are in communities with fewer than 10,000 inhabitants) or explain why CLECs in certain areas should be able to charge nearly 50% more than CLECs that operate in other "communities." Likewise, Staff did not provide any rationale for the "9 cents per minute" rate contained in the draft. This is higher than Qwest's rate and lower than the rate charged by most other local exchange carriers in the state. "Splitting the baby" is not a sufficient justification for such a requirement. Absent any cogent explanation, the proposed 9 cent rate is purely arbitrary; accordingly, there is no rational basis for concluding that it is a just and reasonable rate.

As a practical matter, the second paragraph of the draft rule is not necessary. If a CLEC operates in smaller communities that are served by a rural ILEC, the CLEC would be able to charge up to the rural ILEC's access rate under the single paragraph of ARSD 20:10:27:02.01 proposed by Verizon. Thus, the second paragraph does not appear to add

anything of substance. Accordingly, it can be safely deleted. In doing, the Commission can also avoid needless confusion.

Staff also proposes to add a new rule to specify circumstances in which a CLEC could charge rates above the benchmark, as follows:

20:10:27:02.02. Exceptions for switched access rates of competitive local exchange carriers. A competitive local exchange carrier may charge different rates than the rates established in § 20:10:27:02.01 if it meets one of the following exceptions:

(1) If a competitive local exchange carrier offers service with its own facilities throughout all the exchanges where it operates, the competitive local exchange carrier may charge intrastate switched access rates that do not exceed the rate established by § 20:10:27:12. A competitive local exchange carrier must offer local exchange service throughout all of the exchanges where it operates using its own facilities and may not rely on the facilities owned by an affiliate or subsidiary; or

(2) If a competitive local exchange carrier believes that a higher rate than the rate allowed under § 20:10:27:02.01 is justified under price regulation, the carrier may file a cost study in accordance with chapters 20:10:27 to 20:10:29 to determine its fully allocated cost of providing switched access services. In addition to considering the fully allocated cost of providing switched access services, the commission shall consider the other factors in SDCL 49-31-1.4 in its determination of the competitive local exchange carrier's price for switched access services.

Staff did not provide any explanation as to why a CLEC that “offers service with its own facilities” should be entitled to an exemption from the standard price benchmark, and Verizon is not aware of any such rationale. In fact, because many CLECs did not enter the market until the late 1990’s or more recently, they have been able to design optimally efficient and cost-effective networks using the most up-to-date technology available. There is no reason to believe that CLECs have higher cost structures than ILECs with legacy network architectures, customer bases and “carrier of last resort” regulatory obligations. Accordingly, there is no reason why a facilities-based CLEC

should be entitled to an exception from the requirement that it charge no more than the competing ILEC charges for switched access. The purpose of subsection (1) is not at all clear, and it should not be adopted absent a valid reason.

The proposed rule is also confusing and should not be adopted for that reason as well. The draft language of subsection (1) states that a CLEC could “charge intrastate switched access rates that do not exceed the rate established by § 20:10:27:12.”⁶ But ARSD 20:10:27:12, as revised by Staff, applies to the determination of switched access rates for an “incumbent local exchange carrier granted an exemption from developing company-specific cost-based switched access rates.” It is not clear whether “the rate” to be charged by the CLEC pursuant to ARSD 20:10:27:02.02 would be one that is established by an ILEC or by the CLEC using the process ILECs are to follow under ARSD 20:10:27:12. This provision is also confusing because one of the inputs used in the calculation of access rates under ARSD 20:10:27:12 are the “switched access revenue requirements for cost companies.” CLECs do not have “revenue requirements,” so it is not clear how a CLEC would calculate its access rates under this provision.

Alternatively, it would not make any sense to calculate a CLEC’s rates using an ILEC’s

⁶ The draft rules provide: “**20:10:27:12. Determination of switched access rates for a company an incumbent local exchange carrier granted an exemption from developing company-specific cost-based switched access rates.** The intrastate switched access rates of a telecommunications company an incumbent local exchange carrier which is granted its petition for an exemption pursuant to § 20:10:27:11 are based on the costs of all the telecommunications companies with less than 100,000 access lines that determine switched access costs pursuant to chapters 20:10:28 and 20:10:29. Switched access rates for companies incumbent local exchange carriers exempted pursuant to § 20:10:27:11 are calculated by dividing the sum of switched access revenue requirements for cost companies with less than 100,000 access lines for intraLATA and interLATA intrastate switched access traffic by the sum of switched access minutes for those same cost companies for intraLATA and interLATA intrastate switched access traffic.”

switched access revenue requirement because, as explained above, CLECs likely have very different cost structures than legacy incumbent companies.

II. ILEC SWITCHED ACCESS RATES

The draft rules, for the most part, ignore the need for reforming the switched access rates of ILECs in South Dakota.⁷ Staff did not explain this piecemeal approach, but it appears that Staff avoided more comprehensive reform measures in light of the Commission's ruling in an unrelated proceeding "that Docket RM05-002 shall be redirected from a general switched access rulemaking docket to a rulemaking docket focused more specifically on a CLEC switched access rate-setting policy."⁸ That case involved the petition of a single carrier; significantly, other than Staff, no other party to this docket participated. It was thus highly unorthodox for the Commission, in disposing of that one carrier's petition, to "redirect" the focus of this separate rulemaking proceeding and, without providing notice to any of the other participants narrow the scope of the issues that the Commission initially announced it would consider.

The earlier record in this proceeding and testimony in Docket TC 10-014 provide compelling evidence that reform of ILEC access charges in South Dakota is necessary and long over-due.⁹ The Commission's existing rules were written during and for a

⁷ Staff proposes to eliminate a requirement in ARSD 20:10:27:07 that "[e]ach carrier's carrier or association shall file cost data in support of its switched access service tariff *no less than once every three years*." (Proposed deletion in italics). This proposed change should not be adopted because it would allow the LECA companies to keep their current rates – which are unreasonably high and among the highest in the country – in effect indefinitely, without any prospect for meaningful, periodic review.

⁸ *In the Matter of the Petition of Midcontinent Communications for Approval of Switched Access Rates, Order Denying Requests for Exemption and Waiver, Requiring the Filing of a Rate Tariff and Redirecting Docket RM05-002 to Focus on CLEC Switched Access Rate Issues, Docket TC07-117, issued January 14, 2009.*

⁹ *See, e.g.,* Verizon's Proposed Revisions to the Commission's Switched Access Rules, Docket No. RM05-002, filed September 20, 2007; Direct Testimony of Don Price, *supra* note 4, at 30-35; Direct Testimony of Timothy J. Gates on behalf of Midcontinent Communications, Docket TC 10-014, filed April 1, 2010, at 4-11.

different era characterized by monopoly entities serving exclusive franchise service territories, when rate regulation was based on traditional cost-of-service principles. Since 1993, when the rules were adopted, telecommunications markets have experienced real transformative changes. Competition is now thriving with numerous CLECs and in various intermodal forms, including wireless, VoIP and cable. Incumbents that once provided only voice services, now provide a variety of other services, such as broadband, alarm and video.

These dramatic changes have led the FCC and other state regulators to move away from traditional cost-of-service regulatory tools. Regulators increasingly rely on alternative regulatory mechanisms, rather than accounting, cost-of-service tools. The FCC has made much use of benchmarks rather than prescriptive rules for determining just and reasonable rates, for ILECs and CLECs alike, based in part on its recognition that cost-of-service regulations are increasingly anachronistic in a competitive market.¹⁰ This Commission's antiquated switched access rules have failed to evolve to reflect these changing realities and today are unique among the states.

The importance of moving forward on access charge reform is even more pressing given the FCC's issuance of its *National Broadband Plan*. That blueprint for action identifies reform of the intercarrier compensation system – including reducing carriers' intrastate switched access rates – as a critical, but as-yet unmet, goal.¹¹ The *NBP* recommends adoption of a framework for long-term intercarrier compensation reform

¹⁰ See, e.g., FCC 01-062, released May 22, 2001.

¹¹ See Federal Communications Commission, "Connecting America: The National Broadband Plan" ("NBP"), (March 16, 2010) at 148 (copy available on-line at <http://www.broadband.gov/download-plan/>).

that will *eliminate* per-minute access charges in ten years.¹² The first phase of this process, to be accomplished in two to four years, is to “move carriers’ intrastate terminating switched access rates to interstate terminating switched access rate levels in equal increments.”¹³ Of particular relevance here, the *NBP* also “encourag[es] states to complete rebalancing of local rates to offset the impact of lost access revenues.”¹⁴

Accordingly, Verizon renews its recommendations that, once the Commission finalizes rules capping CLEC access rates at the ILEC level, it move forward promptly to implement needed access charge reform for ILECs in South Dakota.

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Respectfully submitted,

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¹² See *NBP* at 148 (Recommendation 8.7).

¹³ *Id.*

¹⁴ *Id.*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 15, 2010, I sent a true and exact copy of the within VERIZON'S COMMENTS ON DRAFT RULES REGARDING SWITCHED ACCESS RATES by e-mail to all parties identified on the Commission's Service List for this docket.

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