BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

Proposed Rulemaking of the Public Utilities Commission of South Dakota on Telecommunications Switched Access Rules	)	Docket No. RM05-002

First Reply Comments of AT&T Communications of the Midwest, Inc. in the Proposed Rulemaking of the Public Utilities Commission of South Dakota on Telecommunications Switched Access Rules

AT&T Communications of the Midwest, Inc. ("AT&T") comes before the Public Utilities Commission of the State of South Dakota and respectfully submits the following reply comments on the proposed Telecommunications Switched Access Rules, 20 ARSD, Chapter 20:10:27 ("Proposed Rules"). AT&T has reviewed the joint comments filed by Northern Valley Telecom ("NVT") and Sancom, Inc., ("Sancom"); Qwest Corporation and Qwest Communications Company, LLC (collectively "Qwest"); Midcontinent Communications ("Midcontinent"); MCI Communications Services Inc. d/b/a/ Verizon Business Services and MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services (collectively, "Verizon"); the Local Exchange Carriers Association (LECA) and the South Dakota Telecommunications Association ("SDTA"); and Midstate Telecom and RC Communications, Inc, d/b/a RC Services.

The number and breadth of issues raised in the participants' comments highlight the importance of the Proposed Rules and the vast support for the Commission to take action to reform the intrastate switched access rates in South Dakota. AT&T welcomes the opportunity to participate in this reform effort, particularly in light of the national mission set forth in the Federal Communications Commission ("FCC")'s National Broadband Plan, its focus on universal service and the ubiquitous deployment of advanced technologies, and the particular importance of those measures on South Dakota consumers. AT&T further commends the South Dakota Public Utilities Commission ("Commission") and its staff for reinvigorating a long-pending proceeding to address the issue.

Perhaps not surprisingly, the comments submitted by the other parties are easily categorized according to the short-term economic interests of the submitting parties. Clearly, those incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") who provided unqualified support for the Proposed Rules, as drafted, have a significant vested interest in propping up existing business models that require their competitor IXCs to pay higher charges in order to underwrite obsolete business models. AT&T continues to urge the Commission to go farther than the Proposed Rules. After years of stymied action in South Dakota, it is time to objectively consider implementing meaningful and long-term changes that (i) balance the long term interests of all market participants, particularly including the customers of the IXCs, (ii) create a platform for the deployment of technological innovation to consumers; and (iii) sustain meaningful market progress by eliminating

unsustainable, implicit subsidies to ILECS as well as to CLECs. It is time to look past short term gains for a few at the long term expense of others. In doing so, AT&T urges the Commission to mirror the policy reforms blueprinted by the FCC, and almost half of other states, by adopting rules that require ILEC intrastate switched access rates, terms and conditions to be at parity with interstate switched access rates terms and conditions. As these other regulators have recognized, the most effective reforms--bringing immediate market efficiencies and stability, ensuring long term investment and innovative deployment in rural areas, eliminating the need for ongoing administrative and regulatory proceedings for continual pricing adjustments--will be achieved only if ILEC intrastate switched access rates are brought to parity with their own interstate switched access rates and if CLEC rates are simply capped at the ILEC intrastate rates in the local market served. AT&T proposes the FCC model be considered for its simplicity, effectiveness and fairness.

As a result of the Commission's lack of prior action and the regulatory policies it has adopted and implemented toll customers have been forced to pay inflated rates for toll services. Many intermodal forms of competition exist for interexchange toll service, including VoIP, wireless, and cable. Each of these services use the same facilities and functions as those used for toll call completion, yet each is paying a different rate for the use of those facilities and functions. There is no market-based rationale for rate differentiation in today's marketplace. The market would not sustain the difference if it were not supported by the artificial constructs of regulation. In considering the Proposed

Rules, AT&T submits that thorough, not partial, reforms are required. Following a path that merely perpetuates rate disparity between ILECs and CLECs furthers a market distortion that should not be supported.

1. **ILEC Intrastate Switched Access Rate Reforms are required.**

The Proposed Rules are an incomplete solution because they expressly apply only to CLECs. The harms caused by implicit subsidization of the local rate structure through artificially inflated intrastate switched access rates are not solely the providence of CLEC market behavior: ILEC reform is equally urgent and equally necessary. AT&T urges the Commission to take more than an incremental step in the long-awaited reform of intrastate switched access and to impose meaningful reforms to ILECs as well as CLECs, as articulated in AT&T's prior comments. Switched access is a bottleneck monopoly service[1], the cost of which is directly borne by IXCs--and ultimately their customers. IXCs have no option other than to utilize the service of an ILEC or CLEC selected by the end user. Irrational economic outcomes will continue as long as CLEC and ILEC intrastate switched access rates are not equally and coincidentally addressed.

2. **20:10:27:02.01: Mandated Rates based on Carrier's Access Line Market**

The Proposed Rules, Section 20:10:27:02.01, provide that a CLEC shall charge intrastate switched access rates not in excess of 6.042 cents per minute if 15 percent or more of the CLEC's total access lines in South Dakota are in communities of 10,000 inhabitants or more and shall charge intrastate switched access rates that do no exceed 9.0 cents per minute if 85 percent or more of the

[1] SDCL§49-31-1 through 1.3

CLEC's total access lines in South Dakota are in communities with populations of less than 10,000 inhabitants.

First, AT&T is generally in agreement with the comments filed by Verizon, Qwest, and Midcontinent in regard to this rule, all of which raise the issue that setting specific rates in the rules is a mistake that will lead to the inefficient use of regulatory resources by mandating future review of the specified rates, through a rule-making or some other process, as soon as market conditions change. AT&T in particular supports Verizon's comments[2] that the South Dakota rules should be modeled after those adopted by the FCC and many other states, none of which has seen the need to specify an actual rate in the rules. The preferred approach is a policy standard which allows rates to be revised over time and the caps on those rates to adjust automatically in accordance with the ILEC's intrastate switched access rates in the market in which the CLEC competes.

Second, AT&T further agrees with Verizon that the Proposed Rules provided no guidance as to the rationale behind the rate setting, giving the appearance of arbitrarily setting a standard at some sort of midpoint. Such a methodology is inadvisable, particularly within the confines of the South Dakota statutes which require a showing that rates for non-competitive services are fair and reasonable[3]. Yet, more importantly, as determined by the FCC, cost-based rates should not even be required where real market information--a more meaningful reference--is available.

> "The Commission explicitly declined to apply [a cost-based approach to competitive LEC access charges] and explained that it

[2] Verizon comments, pg. 3-5
[3] SDCL§49-31-4; 49-31-12.4

> was applying market-based approach. Consistent with this finding, the Commission held that it will assess the reasonableness of competitive LEC access rates by evaluating market factors rather than a particular carrier's costs."[4]

Thus, even in the absence of market information, it is simply misguided to arbitrarily set a rate in the Proposed Rules as a *proxy* for a cost-based showing that may be required to meet the "fair and reasonable" standard set forth in applicable rules. However, where market information is available, even cost-based rate setting, based on fully allocated costs as required in the applicable statutes, should be revisited in an age of competitive alternatives. While it would be appropriate to revisit the requirements SDCL 49-31-4 and 49-31-12.4 as they pertain to the requirement of cost establishment, waiting for such a review should not add further delays to this long-awaited process. Adopting a policy whereby switched access rates for ILECs are at parity with the ILECs' interstate switched access rates CLECs rates are at parity with the ILEC's rates with whom they compete is an appropriate way for this Commission to revise the rules for the long term and affords significant regulatory efficiencies.

Third, and in addition to the views of the other commenting parties, AT&T reiterates that allowing any potential for a rate structure with two or more tiers creates implicit and artificial subsidies in CLECs' switched access charges, the burden of which is imposed on IXCs and their customers. This is particularly true if, as Verizon points out, the rural ILEC's access rate is used as the cap. Again, AT&T urges the Commission to be mindful that CLEC switched access rates are

---

[4] *In the Matter of Access Charge Reform; Reform of Access charges Imposed by Competitive Local Exchange Carriers,* Eighth Report and Order and Fifth Order on Reconsideration in CC Docket NO. 96-262; FCC 04-110 (released May 18th, 2004). ("2004 CLEC Access Order").

a monopoly service that the user—here, the IXC—has no choice but to incur. Where a market functions effectively, a new entrant, such as a CLEC can not sustain rates that are greater than the incumbent with which the new entrant competes. Who would pay a higher rate without some greater value? Sound economics dictate that the CLEC levels need to be capped at the ILEC rate, which itself should be tied to the ILEC interstate rate, which has undergone some regulatory reform. Otherwise, the environment is ripe for arbitrage schemes which undeniably are present in the South Dakota market.

Therefore, while AT&T generally supports the proposition of Verizon regarding the revised language to 20:10:27:02.01, it advocates the following edits, as set forth below, in order to resolve the issues discussed above:

> **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 weighted average composite switched access rate charged by ~~the~~ incumbent local exchange carriers in whose service area the competitive local exchange carrier operates. The switched access rate shall be the same in each of the competitive local exchange carrier's service areas.

AT&T's proposed language changes allow for a weighted average composite mechanism when a CLEC operates in multiple ILEC markets. This proposal eliminates the need for cost studies and minimizes arbitrage opportunities.

3. Facilities Ownership Exception:

AT&T disagrees strongly with the combined comments of NVT and Sancom which attempt to justify higher rates through alternative facilities ownership structures. This exemption will only create elaborate loopholes to justify higher rates. First, as stated above, AT&T strongly disputes that there exists justification for CLEC rates other than those that are no greater thanthe ILEC rates in the market in which the CLEC operates. There simply is no justification for CLEC intrastate switched access rates to exceed the ILEC intrastate switched access rates. Therefore, no "facilities ownership" exception is even required. Any CLEC that opts to enter a market based on receiving inflated access revenues should be viewed as a flawed business model and not afforded regulatory support for their excessive rates.

Further, AT&T agrees with Midcontinent and Verizon, and believes that the ownership of facilities as the basis of an exemption to the pricing rules requirements creates additional room for abuse. Again, in the absence of any discussion of the intent or rationale behind this proposal it is difficult to understand why the exemption might even be necessary. CLECs that have more recently entered the market have done so, as noted by Verizon, with the advantage of designing networks that are more efficient and take advantage of new technology and efficiencies.[5] Taking Verizon's comments one step further, AT&T submits that those very CLECs also have the advantage of being able to selectively identify advantageous market locations, thereby reaping even greater margins on a selective basis. It is not at all clear that CLECs have somehow

[5] Verizon comments at 6.

borne higher cost structures than ILECs and CLECs enter those markets bearing no carrier of last resort obligations that often impose unrecoverable costs. It is inappropriate to establish rules that will encourage or allow CLECs to voluntarily deploy facilities without regard to the true market economics simply because their competitors can be forced to subsidize those inappropriate decisions through the assessment of high switched access charges. Rather, the commission should take the same approach as the FCC and not allow CLECs to charge a rate for switched access that is higher than the incumbent provider and if additional recovery is necessary for the CLEC to survive then the CLEC should recover those additional dollars from their retail customers. Therefore, CLEC rates should be capped at the intrastate levels of the ILECs with whom they compete.

The definition of "ownership" in this section is vague and ambiguous and does not account for variations such as the shared ownership of facilities, through joint venture or otherwise, or complex corporate affiliate structures that exist or might be created in response to this rule, which could be used to expand the proposed exemption. In the absence of any definition, the proposed exemption creates the potential for multiple loopholes and further abuse, all of which can be avoided in AT&T's proposal.

4. Eliminating Arbitrage opportunities

Regulators and lawmakers in the Federal and in state jurisdictions (including South Dakota) have seen a rise in "access stimulation" schemes (a.k.a., *"traffic pumping"*) premised on the ability to tariff excessive switched access rates and to take advantage of rate disparities. For example, once the

FCC took preclusive action, ILECs that were suddenly faced with the need to disclose their business plans for vastly increasing the traffic to which their proposed rates would be applied, either returned to the NECA[6] pool or agreed to tariff language that would trigger automatic mid-course rate corrections in response to any substantial traffic increases.[7] Still, this did little to discourage CLECs. In many cases, supposedly "rural" CLECs– most of which are operated solely to exploit FCC rules and may not actually serve any rural customers – are rapidly expanding their traffic pumping activities. CLECs now account for more than three quarters of the traffic pumping minutes being billed to AT&T. The access charge rules governing CLECs, however, make it far more difficult for the FCC to prevent CLEC traffic pumping through individual tariff suspensions and investigations. Thus the greater burden for reform falls on the shoulders of the state regulators such as the Commission. Retrospective enforcement on an ad-hoc basis, based on complaint cases for example, do not effectively stop these CLEC schemes, because (in contrast to ILECs) it is a simple matter for CLECs to start new enterprises to replace traffic pumping operations that have been exposed and halted.[8]

Other states have also had to face this issue, at the expense of valuable and limited regulatory resources. For example, The Iowa Utilities Board ("IUB") recently released an order against eight (8) LECs in response to a complaint filed by Qwest. In its complaint, Qwest alleged that these LECs

---

[6] National Exchange Carrier Association

[7] *See*, Comments of AT&T, Inc., In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, December 17, 2007, at page 2. ("AT&T Comments – Traffic Pumping").

[8] *AT&T Comments – Traffic Pumping* at page 3.

> engaged in a deliberate plan to dramatically increase the amount of terminating access traffic delivered to their exchanges via agreements with conference calling companies [and] that the Respondents in this case attempted to manipulate the access charge regulatory system in order to collect millions of dollars from interexchange carriers (IXCs) at rates that far exceeded the cost of providing switched access services.[9]

In its order, the IUB found that the LECs "started with access rates that were indirectly based on their cost of providing low volumes of access services, then entered into agreements with free conference calling companies that were intended to increase traffic volumes by 10,000 percent or more at the same rates."[10] The IUB concluded "that the intrastate interexchange calls to the conference calling companies were not subject to access charges."[11] The IUB also required that refunds and credits be given to the affected IXCs.[12] And, the IUB announced "that it is initiating a proceeding to consider proposed rules intended to prevent this abuse in the future."[13]

The Commission should consider the arbitrage opportunities created by the Proposed Rules and instead of adopting the Proposed Rules should strongly consider the recommendations made by AT&T and others in this proceeding.

---

[9] *In Re: Qwest Communications Corporation, Complainant, vs. Superior Telephone Cooperative; The Farmers Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; Dixon Telephone Company; Reasnor Telephone Company, LLC; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC, Respondents; Reasnor Telephone Company, LLC, Counterclaimant, vs. Qwest Communications Corporation and Qwest Corporation, Counterclaim Respondents*, Docket No. FCU-07-2, Final Order, Iowa Utilities Board, September 21, 2009 at page 2. ("Iowa Traffic Pumping Order"). AT&T intervened in the case.

[10] *Iowa Traffic Pumping Order* at page 2.

[11] *Iowa Traffic Pumping Order* at page 2.

[12] *Iowa Traffic Pumping Order* at page 2.

[13] *Iowa Traffic Pumping Order* at page 2.

5. Conclusions

The Commission should take an important step by adopting a policy that would rationalize the pricing for intrastate switched access and align it with the current market realities, while defending against unfair abuses that ultimately plague consumers. AT&T encourages the Commission to not only address CLEC switched access rates in this proceeding, but to bring full reform to switched access in South Dakota.

In light of the importance of this effort and its far reaching implications, AT&T respectfully requests that any proposed draft rules that are produced as the result of this comment cycle be further open to review and comment by all interested parties.

Respectfully submitted this 28thth day of June, 2010.

Olinger, Lovald, McCahren & Reimers, P.C.

/s/ William M. Van Camp
William M. Van Camp
Attorney at Law
PO Box 66-117 E Capitol
Pierre SD 57501
Attorneys for AT&T Communications of the Midwest, Inc.

CERTIFICATE OF SERVICE

On this 28th day of June, 2010, a true and correct copy of the foregoing was mailed electronically to:

Ms. Patricia Van Gerpen
Executive Director
SD Public Utilities Commission
500 E Capitol
Pierre SD 57501
patty.vangerpen@state.sd.us
605-773-3201-voice
866-757-6031-fax

Ms. Karen E. Cremer
Staff Attorney
SD Public Utilities Commission
500 E Capitol
Pierre SD 57501
karen.cremer@state.sd.us
605-773-3201-voice
866-757-6031-fax

Ms. Terri Labrie Baker
Staff Analyst
SD Public Utilities Commission
500 E Capitol
Pierre SD 57501
Terri.labriebaker@state.sd.us
605-773-3201-voice
866-757-6031

Richard B. Severy
Assistant General Counsel
Verizon
201 Spear Street 9th Floor
San Francisco CA 94105
richard.b.severy@verizonbusiness.com
415-228-1121-voice
415-228-1094-fax

Thomas F. Dixon
Assistant General Counsel
Verizon
707 17th Street #4000
Denver CO 80202
thomas.f.dixon@verizon.com
303-390-6206-voice
303-390-6333-fax

David A. Gerdes
May Adam Gerdes & Thompson LLP
PO Box 160
Pierre SD 57501
dag@magt.com
605-224-8803-voice
605-224-6289-fax

Brett M. Koenecke
Attorney at Law
May Adam Gerdes & Thompson LLP
PO Box 160
Pierre SD 57501
koenecke@mgt.com
605-224-8803-voice
605-224-6289-fax

James M. Cremer
Attorney at Law
Bantz Gosch & Cremer LLC
PO Box 970
Aberdeen SD 57402-0970
jcremer@bantzlaw.com
605-225-2232-voice
605-225-2497-fax

Ms. Meredith A. Moore
Attorney at Law
Cutler & Dpnahoe
100 No. Phillips Ave. 9th Floor
Sioux Falls SD 57104-6725
MEREDITHM@CUTLERLAWFIRM.COM
605-335-4950-voice
605-335-4961-fax

Thomas Welk
Attorney at Law
Boyce Greenfield Pashby & Welk LLP
101 No. Phillips Ave. Suite 600
Sioux Falls SD 57117-5015
tjwelk@bgpw.com
605-336-2424-voice
605-334-0618-fax

Christopher W. Madsen
Attorney at Law
Boyce Greenfield Pashby & Welk LLP
101 No. Phillips Ave Suite 600
Sioux Falls SD 57117-5015
cwmadsen@bgpw.com
605-336-2424-voice
605-334-0618-fax

George Baker Thomson, Jr.
Corporate Counsel
Qwest Corporation
1801 California St. Suite 1000
Denver CO 80202
george.thomson@qwest.com

Jeffrey D. Larson
Attorney at Law
Larson & Nipe
PO Box 277
Woonsocket SD 57385
jdlarson@santel.net
605-796-4245-voice
605-796-4227-fax

Richard D. Coit
Executive Director and General Counsel
SDTA
PO Box 57
Pierre SD 57501
richcoit@sdtaonline.com
605-224-7629-voice
605-224-1637-fax

Talbot Wieczorek
Attorney at Law
Gunderson Palmer Nelson & Ashmore LLP
PO Box 8045
Rapid City SD 57709
tjw@gpnalaw.com
605-342-1078-voice
605-342-0480-fax

Darla Pollman Rogers
Attorney at Law
Riter rogers Wattier & Northrup LLP
PO Box 280
Pierre SD 57501
dprogers@riterlaw.com
605-224-5825-voice
605-224-7102-fax

Margo D. Northrup
Attorney at Law
Riter Rogers Wattier & Northrup LLP
PO Box 280
Pierre SD 57501
m.northrup@riterlaw.com
605-224-5825-voice
605-224-7102-fax

/s/ filed electronically
William M. Van Camp