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.	**DOCKET RM05-002** **REPLY COMMENTS OF SDTA AND LECA**

The South Dakota Telecommunications Association (SDTA) and the Local Exchange Carriers Associations (LECA) respectfully submit the following Reply Comments, in response to the initial comments filed by various interested parties to the draft rules of the Commission in Docket RM05-002.

Scope of Docket

The initial comments filed by many of the interested parties in this docket advocate sweeping revisions to access charges in South Dakota in general,[1] rather than addressing the stated purpose of this docket, which is to comment on "draft rules regarding switched access rates for competitive local exchange carriers."[2] In addition to the letter of instruction that accompanied the draft rules, the limited scope of this docket was also clearly articulated in the Commission's Order in Docket TC07-117:

> ORDERED, 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 and that Staff shall provide a straw man proposal for the Commission's consideration within 180 days of this Order.

[1] 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 Comments"), pages 2 & 3 (pages not numbered in Comments; page number references herein are to hand-numbered pages); Verizon's Comments on Draft Rules Regarding Switched Access Rates ("Verizon Comments"), page 7.

[2] Letter from Rolayne Ailts Wiest, Commission Counsel, dated June 1, 2010.

AT&T, for example, proposes that this Commission (a) direct Qwest and all ILECs to implement intrastate switched access rates that match their interstate switched access rates; (b) establish a local retail rate benchmark level; (c) establish a South Dakota USF as a recovery of access revenue reduction.[3] Not only are such comments clearly beyond the articulated scope of this docket, but at least some if not all of AT&T's suggested remedies for access reform would require additional statutory authority for the Commission to implement such suggested reforms. For the Commission to "move forward in this rulemaking to enact comprehensive ILEC and CLEC access reform" is clearly inappropriate.[4]

SDTA/LECA also disagree with the assertions of AT&T and Verizon that the FCC's issuance of its National Broadband Plan (NBP) is a catalyst for immediate and long overdue reform of all switched access rates within this docket.[5] SDTA/LECA support the approach taken by the Commission in the proposed rules that substantively addresses only switched access rates for CLECs. In addition to the reasons stated above regarding the inappropriateness for the Commission to implement further reforms within this docket, SDTA/LECA would remind the Commission that the FCC in the NBP also accurately and appropriately recognized the difficulties rural ILECs will encounter if faced with sudden revenue losses due to intercarrier compensation and USF reform, and the need for caution and coordination with State Commissions:

> As part of the NBP, the FCC will consider requirements which would move state access rates to interstate access rate levels over a period of time . . . The NBP does not clearly articulate how rural ILECs are to recover the revenues lost in reducing state access charges under these proposals, but it

[3] AT&T Comments, pages 13-14.
[4] AT&T Comments, page 15.
[5] AT&T Comments, page 4, 12; Verizon Comments, pages 8 and 9.

> is indicated in addressing these proposals that carriers should be given the "opportunity for adequate cost recovery." . . . These indications related to future FCC action suggest that it will be important for state commissions to coordinate any switched access regulatory reform for ILECs with what is likely to occur at the federal level.[6]

For the foregoing reasons, SDTA/LECA would urge the Commission to resist invitations to expand the scope of this docket beyond its stated purpose, which is to establish switched access rates for CLECs in South Dakota.

CLEC Access Rates

AT&T and Verizon appear to reject the concept embodied in the Commission's draft rules of benchmark rates that vary, depending on the size of the community served, instead advocating that the access rates for CLECs be capped at the rates of the ILECs with which they compete.[7] The rational for these proposals appears to be the mistaken assertion that that is, without exception, what the FCC has done. Midcontinent proposes to allow CLECs to charge the same switched access rates as the incumbent provider in the exchange, on the theory that "a CLEC is a CLEC."[8]

SDTA/LECA support the tiered rates as contained in the draft rules proposed by the Commission, for several reasons. SDTA/LECA disagree that all CLECs are the same, and concur with the Commission's apparent recognition of the differences between CLECs serving in rural versus urban areas, as embodied in the current rules. As noted in the initial comments of SSTelecom, Inc., submitted in this docket, "The Commission's Proposed Rules recognize that a distinction may and should be drawn between those rural CLECs which make an investment in rural, high-cost areas and those urban CLECs

[6] Direct Testimony of Dan Davis on Behalf of the South Dakota Telecommunications Association, Docket TC10-014, ("Davis Testimony"), pages 8-9, *quoting from* "Connecting America: The National Broadband Plan" released March 16, 2010, page 148.
[7] AT&T Comments, page 2; Verizon Comments, page 9.
[8] Midcontinent's Initial Comments ("Midco Comments"), pages 1 and 2.

which serve the largest markets in South Dakota and only seek to serve the more populated urban portions of current ILEC markets."[9]

Contrary to the contentions of AT&T and Verizon[10], there is a precedent at the federal level for different treatment, and different switched access rates, for rural CLECs that provide services in less populated areas:

> The FCC rules relating to CLEC access charges do provide a "Rural Exemption" to give some recognition to the different costs experienced by rural CLECs competing in truly rural, high-cost areas versus those that have operations in the lower-cost areas of larger price cap regulated incumbent carriers. Those CLECs meeting certain rural criteria under the FCC rules are permitted to tariff the NECA rate instead of the ILEC rate for Interstate access. More specifically, the CLEC is allowed to charge the NECA rates when it is competing with a non-rural ILEC as long as no portion of the CLEC service area falls within any incorporated place of 50,000 inhabitants or more or an urbanized area as defined by the Census Bureau.[11]

Therefore, the Commission's proposed rules are consistent with the "Rural Exemption" recognized by the FCC.

Another concern that SDTA/LECA have with the proposals of Midcontinent, AT&T, and Verizon is that their proposals would allow de-averaging of rates between service areas. Specifically, Verizon's proposed draft of 20:10:27:02.01 provides:

> **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 carrier operates. The switched access rate shall be the same in each of the competitive local exchange carrier's service areas.* (emphasis added).[12]

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[9] Comments of SSTelecom, Inc., page 1.
[10] AT&T Comments, page 12; Verizon Comments, page 3.
[11] Davis Testimony, page 7, *quoting from In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, Released April 27, 2001, paragraphs 3 and 80.
[12] Verizon Comments, page 3-4.

It is the position of SDTA/LECA that the rules adopted by this Commission with regard to establishing switched access rates for CLECs should be consistent with the rural safeguards and other provisions found in federal and state law that discourage selective marketing by CLECs and prevent geographic rate de-averaging between rural and urban areas. With regard to the provisioning of "interexchange telecommunications services," it is specifically stated in 47 U.S.C § 254(g) that the "rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas." These provisions, as well as other provisions in the federal and state law are obviously intended to prevent carriers from de-averaging rates between urban and rural areas and effectively discriminating against rural area consumers. Permitting carriers to de-average the rates charged for the underlying switched access services that are necessary for the delivery of retail "interexchange" or long distance services would run counter to these geographic rate averaging requirements. It would also seem to directly conflict with the provisions of SDCL 49-31-11, which state that no telecommunications company may "unjustly or unreasonably discriminate between persons in providing telecommunications services or in the rate or price charged for those services." The Commission's proposed rules give recognition to these additional legal requirements that are aimed at preventing rate discrimination between urban and rural markets; the proposals of Midcontinent, Verizon, and AT&T do not.

Another flaw in the proposals of Verizon, AT&T and Midcontinent is the lack of recognition of "carrier of last resort" (COLR) obligations, and the additional costs of fulfilling such obligations. SDTA/LECA believe that any Commission rules governing

the establishment of switched access rates must give some recognition to actual costs incurred in providing the switched access services and, without question, the extent of the area served within any particular exchange area or ILEC service area affects service costs. Contrary to what is suggested by Midcontinent, AT&T and Verizon, it is not competitively neutral from a regulatory perspective to dictate that all CLECs and LECs should be charging the same switched access rates regardless of whether a carrier's local exchange services are or are not provided to those customers within a local exchange or service area who do not live "in-town" or in the population center(s). The reality is that both facility and operational support costs are higher on a per line basis for the more remote customers and some carriers are more willing to serve these customers than others.

SDTA/LECA disagree with Midcontinent's assertion that the Commission's 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 . . ."[13] On the contrary, the tiered rating system in the Commission's proposed rules appropriately gives recognition to the higher costs incurred by carriers that have extended their telecommunications services to all customers within an exchange or service area and appropriately avoids creating an extra incentive for carriers to do the opposite – to actually limit their services to only the lowest cost customers. The tiered rating system in the proposed rules allows those CLECs who choose to compete and offer service throughout an ILEC's exchange or service area a fair opportunity to recover the additional investment and operational costs necessary to fulfill COLR obligations. Accordingly, the Commission's proposed rules as

[13] Midco Comments, page 2.

drafted successfully recognize and maintain the distinction between carriers who have "carrier of last resort" obligations and those who do not, even for CLECs. That is good public policy.

SDTA/LECA continue to stress to this Commission that in implementing price regulation for CLEC access rates, it is important that the rules finally adopted be consistent with the rural safeguards and other provisions in federal and state law that are intended to discourage selective marketing by competitors, prevent geographic rate de-averaging between urban and rural areas, and otherwise preserve and advance universal service. SDTA/LECA believe that the CLEC access rules as proposed sufficiently take into account these additional regulatory requirements.

For all of the foregoing reasons, SDTA/LECA urge the Commission to adopt the rules as proposed and present them to the State Legislative Research Council (LRC).

Respectfully submitted this twenty-eighth day of June, 2010.

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CERTIFICATE OF SERVICE

I, Darla Pollman Rogers, certify that a true and correct copy of Comments of SDTA and LECA were emailed to the following on the 15th day of June, 2010:

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