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** **ADDITIONAL COMMENTS OF MIDSTATE TELECOM AND RC COMMUNICATIONS, INC., d/b/a RC SERVICES**

Introduction

Midstate Telecom is a Competitive Local Exchange Carrier ("CLEC") offering telecommunications services in Chamberlain, Oacoma, and rural Chamberlain and Oacoma, South Dakota. RC Communications, Inc., d/b/a RC Services, is a CLEC offering telecommunications services primarily in Corona, South Dakota and the rural Milbank and Watertown exchanges. Pursuant to the Commission's Notice of Further Comment Period, dated April 1, 2011, Midstate Telecom and RC Communications, Inc. d/b/a RC Services ("Midstate and RC"), by and through their undersigned attorney, hereby file these additional joint comments to the proposed rules as adopted by the Commission at an Ad Hoc Meeting on March 18, 2011.

Background

As noted previously, this docket has gone through many iterations since its opening in 2005. With the exception of the final rules adopted by the Commission on March 18, 2011, every previous draft of the proposed rules for CLEC switched access rates established two benchmark rates for CLECs: 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 or more inhabitants; and 9 cents per minute if 85 percent or more of the CLEC's total access lines in South Dakota are in communities with populations of less than 10,000 inhabitants. All parties have submitted myriad comments on the two-tiered rate approach contained in the initial proposed rules. Some parties, including Midstate and RC and other rural CLECs, generally supported the two-tiered rating approach proposed by the Commission in the initial draft of rules. Some parties objected to such an approach, advocating that there is no justification to treat CLECs differently, and that the same rate should apply to all CLECs.

At its Ad Hoc Meeting on March 18, 2011, the Commission abandoned previous concepts and principles embodied in prior rule drafts and ultimately adopted one benchmark rate for all CLECs, i.e., 6.042 cents per minute. The rural CLECs involved in this docket did not anticipate this abrupt change in approach by the Commission and thus did not have the opportunity to present reasonable and additional meaningful input to the Commission on the devastating financial impact a reduction of a CLEC switched access rate to 6.042 cents would have on their CLEC operations.

In an effort to establish a means to provide that input, the rural CLECs requested the Interim Rules Review Committee to send the rules back to the Commission for an additional comment period. This would afford rural CLECs the opportunity to provide meaningful and additional comments to the Commission on the detrimental financial impacts the newly adopted rules would have on their operations. Midstate and RC provide these comments to the Commission, for that purpose. On April 8, 2011, the Commission also filed a revised Small Business Financial Impact Statement, as requested by the Rules Review Committee.

Policy Reasons Supporting a Two-Tiered Rate Approach

It is Midstate and RC's steadfast and unwavering position that there are sound policy reasons for the Commission to adopt a two-tiered rate approach that recognizes the fundamental differences between rural and non-rural or urban CLECs. These policy arguments have been well articulated in comments previously submitted in this docket by Midstate and RC, by SDTA and LECA, by Northern Valley and by SSTelecom, Inc., and Midstate and RC rely and agree with those previously submitted comments. In summary, it continues to be the position of Midstate and RC that all CLECs are not the same, and the two-tiered rate system proposed in the previous rules correctly and appropriately recognizes that a distinction should be drawn between those rural CLECs that make an investment in rural, high-cost areas and those urban CLECs that serve the more highly populated areas of South Dakota. The prior draft of the rules implementing a two-tiered rating system for CLECs is consistent with rural safeguards and other provisions found 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 preserve and advance universal services. Departure from a two-tiered approach will have a negative impact on expansion and upgrade of services and facilities in rural areas, as rural CLECs will not be able to afford the necessary investment to bring new technology to high-cost, rural areas.

Midstate and RC would also remind the Commission that there is precedent at the federal level for different treatment and different switched access rates for 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.[1]

A 50,000 threshold is too high of a threshold in sparsely populated South Dakota, but the initial rules proposed by the Commission were consistent with the rationale and policy of the FCC in that the rules established a rate demarcation for South Dakota CLECs based on population and line count.

Accordingly, for these reasons Midstate and RC urge the Commission to return the rules to their previous format and reinstate the 9 cent benchmark rate for rural CLECs.

Adverse Financial Impact on
Rural CLECs

In addition to the sound policy reasons and FCC precedent supporting the two-tiered rate system for rural CLECs, Midstate and RC would also point out that there are financial impact reasons to re-insert the 9 cent rate for rural CLECs. In the comments/testimony submitted to the Commission, it was indicated that 80 percent of CLECs currently use the 6.042 cent rate. Commission Attorney Rolayne Weist reiterated that statistic to the Rules Review Committee. For those CLECs, it will be business as usual after these rules are adopted, because they will see no change in their switched access rates. The remaining 20 percent of the CLECs that utilize a different rate are primarily rural CLECs, and no consideration appears to have been given to the adverse financial impact that a significant decrease in switched access rates would have on those companies. In fairness to the Commission, the rural CLECs did not provide comments on the devastating financial impact they would suffer if forced to reduce their rates to the 6.042 cent level, because that was not the rate contained in the proposed rules.

[1] 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, Release April 27, 2001, paragraphs 3 and 80.

Midstate and RC both currently have a switched access rate of 11.5 cents. A reduction of 2.5 cents to a 9 cent rate, as contained in the proposed rules, will have an adverse financial impact. Cutting Midstate and RC's rate by nearly 50 percent, to a 6.042 cent rate, has a devastating financial impact. The total amount of revenue Midstate derives from intrastate switched access charges is approximately 13 percent of its total revenue. RC's intrastate access revenues constitute 30.9 percent of its total revenue. To reduce revenue so dramatically would cause Midstate and RC to reduce their services in the CLEC areas, rather than incent them to invest further in these areas.

In the case of Midstate, the financial impact to the CLEC is further exacerbated by the fact that the Company recently incurred additional debt to expand facilities to all customers (town and rural) in the Chamberlain and Oacoma exchanges. This project is deployment of broadband to all Midstate's customers, with exchange-wide access to high speed internet. Midstate calculated its ability to service this debt based on its current switched access rate of 11.5 cents[2], plus a modest increase in local service rates every year. A reduction in switched access rates to 6.042 cents completely skews Midstate's business model. If Midstate is forced to implement a more dramatic increase in local rates every year in order to service its debt obligations, it is Midstate's end user customers that will bear the impact of this rule change.

There are other factors that distinguish Midstate's operations as a CLEC from other CLECs in South Dakota. First of all, the reason Midstate chose to enter the competitive marketplace is because Midstate was asked to provide services by residents of the Chamberlain and Oacoma exchanges. Another unique characteristic of Midstate's CLEC business is the fact

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[2] Midstate's ability to service this additional debt would have been adversely affected by the 9 cent benchmark rate for rural CLECs contained in the November 24, 2010 draft of the rules, but not nearly to the extent of the impact it faces with a 6.042 cent rate. Implementation of a 9 cent rate would have allowed Midstate time to ascertain the advisability of filing a cost study.

that Midstate offers services throughout the service areas of Chamberlain and Oacoma, including rural customers. When Midstate negotiated the 11.5 cent rate with Commission Staff, one of Staff's requirements was that Midstate provide services throughout the entire exchanges of Chamberlain and Oacoma, not just customers residing in the towns. Midstate has thus taken on carrier of last resort obligations in the exchanges in which it offers CLEC services. Midstate has made investments in rural Chamberlain and rural Oacoma in the past, based on its negotiated switched access rate, and Midstate now has plans to expand those investments in rural areas with broadband deployment.

Midstate's situation exemplifies some of the differences between rural and urban CLECs that justify implementation of a two-tiered rating system, as embodied in the November 24, 2010 draft of ARSD 20:10:27:02.01. To dramatically decrease Midstate's switched access rates at this stage of its business has a devastating financial impact on Midstate from the perspective of its ability to service debt and its ability to continue to deploy advanced services throughout the entire exchanges it serves. The only mechanism in the current rules to enable Midstate to demonstrate its unique situation is the expensive option of a cost study.

The claimed "safe harbor" or rate exception proposed by the Commission, i.e., a CLEC can file a cost study, may not provide a viable business alternative for any rural CLECs. One very significant disincentive for a rural CLEC to file a cost study is the cost. Cost studies cannot be completed in house, so it is necessary to hire outside consultants to complete the process. Midstate and RC's consultants estimated a cost study to cost at a minimum $40,500, but this cost would increase dependent upon the complexity of the proceeding. The cost study itself may be prohibitively expensive to the CLEC, but that does not even begin to take into account the time and resources expended by company staff to gather data for the consultant, review the study for accuracies, and respond to or provide input to consultants for response to staff data requests. So, in addition to the initial price of the cost study itself, there is the additional time commitment of key company staff to complete a cost study docket.

There is also the uncertainty of the outcome of a cost study. Even if a CLEC decides to invest in filing a cost study, despite the daunting expense involved to the CLEC, there is no certainty that at the end of the process, the Commission will approve a higher rate. Therefore, the relief that the Commission is attempting to afford to CLECs as an option to the one rate set in the rules may not be a meaningful option, especially for a rural CLEC.

Revised Form 14
Small Business Impact Statement

At the Rules Review Committee meeting on March 29, 2011, the Committee requested that the Commission submit a revised Form 14--Small Business Impact Statement Form, ("Impact Statement") that is based on the administrative rule that was actually adopted by the Commission (ARSD 20:10:27:02.01) on March 18, 2011. The Impact Statement originally filed by the Commission was based on the November 24, 2010 draft of the rule. The Commission filed a revised Impact Statement on April 8, 2011. Midstate and RC believe that although the revised Impact Statement more accurately reflects the impact on small businesses, it has significant omissions.

The first understated impact to small CLECs is the discussion concerning reduction in the access rates from 11.5 cents for most rural CLECs to the 6.042 RBOC rate. While the Impact Statement acknowledges the severe deduction in the access rates for some CLECs, it does not quantify the impact. The Impact Statement notes that in absence of a cost study, "the actual amount of reduction in switched access revenue will be dependent on the CLEC's minutes of use for switched access services." While that is true, the other piece of the equation is what percentage of overall revenue does the CLEC derive from intrastate switched access. That is one way to quantify the extent of the adverse financial impact, and those percentages are provided herein with regard to Midstate and RC. Even though the Commission may not have company specific percentages of revenue, acknowledgement of that factor to help quantify the impact to small business should have been included in the Impact Statement.

A second area of concern with the Impact Statement is the information concerning a cost study. The Impact Statement asks at question 7 if small businesses would be required to file or maintain any reports or records under this rule, and the Impact Statement indicates "no". While the inclusion of an explanation of cost studies is helpful, to the extent the explanation implies that a cost study is within the ordinary course of business for a rural CLEC is inaccurate. Even though the cost study rules have been in place for years, neither Midstate nor RC have ever filed a cost study. It is probably accurate to say that none of the rural CLECs have done so. Midstate and RC negotiated the 11.5 cent rate with Commission Staff, based on requested financial information, and the rate was approved by the Commission. Make no mistake: filing a cost study would be a <u>significant</u> financial burden on small rural CLECs that are impacted by these rules.

Finally, Midstate and RC disagree with the response to question 8 of the Impact Statement. The question is whether there are any less intrusive or less costly methods to achieve the purpose of the rule, and the clear answer to that question is yes. The Commissions response of "no", with an explanation of "The rules were set to be in accordance with the implementation of price regulations for CLECs" is not responsive to the question.

One clear path the Commission could follow is to re-instate the two-tiered rate system, with a 9 cent rate for qualifying rural CLECs. As demonstrated in these comments, this would result in a less intrusive and less costly impact on the small businesses engaged in operating CLEC companies in rural South Dakota, and it would still satisfy the goal of the Commission to implement rules in accordance with implementation of price regulation for CLECs.

Reasonable Phase-In Period

If the Commission continues down the path of excluding the two-tiered rate system from the final rules, Midstate and RC request that the Commission include a transition or phase-in period so that the rural CLECs have the ability to plan for the devastating impacts the rule will have on their business. This could be accomplished in one of several ways. One way would be to delay the implementation of the new rate for any CLEC currently utilizing a different rate than the RBOC rate. Another way would be to phase-in the RBOC rate by allowing CLECs not currently using that rate to reduce their rate to the 9 cent rate for a period of time, and then transitioning down to the RBOC rate at a later date. A third way would be to re-instate the 9 cent rate, but sunset that rate after a period of time. There may be other options as well, but allowing CLECs that will experience a significant decrease in access rates as a result of the rules time to transition to a lower rate would be more reasonable than forcing small companies to face such a dramatic financial impact immediately.

Conclusion

For all of the foregoing reasons, Midstate and RC urge the Commission to revise 20:10:27:02.01 to mirror the language in the November 24, 2010, proposed rules and reinstate the two-tiered rate system. Alternatively, if the Commission does not reinstate the 9 cent rate for rural CLECs, Midstate and RC urge the Commission to include a reasonable transition period to allow CLECs whose switched access rates will change as a result of the rules time to make appropriate business adjustments to accommodate the revised rate.

Respectfully submitted this 13 day of April, 2011.

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CERTIFICATE OF SERVICE

I, Darla Pollman Rogers, certify that a true and correct copy of Comments of Midstate Telecom and RC Communications, Inc., d/b/a RC Services were emailed to the following on the 13 day of April, 2011:

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