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 COMMENTS

Comes now Midcontinent Communications ("Midcontinent"), by and through its undersigned counsel, and hereby files supplemental comments to the final rules adopted by the Public Utilities Commission ("Commission"), on March 18, 2011, and posted on March 21, 2011.

The rules adopted by the Commission establish a level playing field for all CLECs in this state. As noted by the Commission in its ad hoc meeting on March 18, 2011, there is no justification for specialized treatment of one set of CLECs over another. CLECs choosing to serve areas of this state do so voluntarily. The Commission has a clear statutory obligation to establish rates that are fair, reasonable, and nondiscriminatory and the rules adopted by the Commission fulfill that obligation.

In TC10-014, the Commission concluded, with input from a variety of LECs, CLECs and IXCs, that pricing regulation is appropriate for switched access services provided by competitive local exchange carriers. Parties participating in that proceeding included Verizon, Midcontinent, Northern Valley, AT&T, SSTelecom, Qwest, Sancom, SDTA, Sprint, Midstate Telecom, and RC Communications. Testimony was filed on behalf of Midcontinent, AT&T, SDTA, Northern Valley and Sancom, Verizon, Qwest, Commission Staff, Midstate Telecom, RC Communications and SSTelecom. On May 4, 2010, the Commission found that pricing regulation is appropriate for switched access services provided by CLECs and voted to close the docket and proceed with this rulemaking docket RM05-002.

Throughout the multitude of dockets involving switched access rates, many parties, including Midcontinent, maintained the position that a CLEC is a CLEC and that there is no basis in state law to create categories of CLECs or to treat one set of CLECs differently from another set of CLECs. Many parties, including Midcontinent, urged the Commission to reject the attempt in the proposed rules to create an artificial distinction between and among CLECs, and instead, adopt modifications to the switched access rules that result in fair and equitable treatment of all CLECs in this state. The proposals repeatedly presented to the Commission included the suggestion that the Commission use as a benchmark, either the RBOC switched access rate, or switched access rate that the incumbent provider charges in the same exchange, with exceptions for those CLECs that file cost studies to support a different (e.g., higher) rate. The Commission ultimately adopted a rule using the RBOC rate as a benchmark. This solution is simple, coherent, and rationally related to Commission's statutory obligation to establish rates that are fair, reasonable and nondiscriminatory. *See* SDCL 49-31-1.4. It allows all providers in the state to compete on a level playing field.

The rules adopted by the Commission properly reject the arbitrary distinction that previously existed between and among CLECs in this state. The Commission did not and does not distinguish between and among those CLECs for certification purposes based on any of the metrics or criteria contained in the proposed rule, and the new rules are consistent with that certification process. When a company makes the decision to enter a new market, the market they are entering should drive the rate charged, not the type of company structure they have or the population of the other markets they choose to serve. The business decision to enter a new market should be made based on legitimate assessments of the feasibility of success in that market. The rules adopted by the Commission support this market-based decision-making

approach, rather than one based on an artificial, and ultimately unsustainable, competitive advantage given by the Commission to one class of CLEC over another.

With the adoption of these rules, the Commission has adhered to its responsibility to establish rates that are fair and reasonable and has exercised its powers in a manner that prevents unjust discrimination. *See* SDCL §§ 49-31-1.4; 49-31-3; 49-31-4; 49-31-76; 49-31-85. Indeed, SDCL § 49-31-85 directs that "[a]ny regulation of telecommunications service by the commission pursuant to chapters 49-13 and 49-31 shall be fair, reasonable, [and] nondiscriminatory . . . ." Moreover, the rules properly allow the Commission the authority to approve exceptions to the general rule regarding the RBOC benchmark. If a company can justify a higher rate with a cost study, it is allowed to make such a filing with the Commission.

The un-level playing field that has been allowed to exist in this state created a significant competitive disadvantage for CLECs that serve both rural and non-rural communities.[1] There is no basis, as claimed by some, to maintain a "rural" distinction for CLECs. More importantly, the Commission is required by statute to consider fully allocated costs when setting the price for a noncompetitive service. *See,* SDCL § 49-31-1.4 (the Commission, when determining fair and reasonable prices in price regulation, "shall also consider the fully allocated cost of providing the service"). Relying on the RBOC rate as a benchmark for CLECs creates a level playing field for all competitors operating in the state. It also takes into consideration costs of providing service,

[1] Midcontinent, for instance, has been competing head to head against other CLECs that were allowed to charge significantly higher switched access rates. For instance, Midcontinent competes against SSTelecom in the Milbank area, against RC Communications in Corona and rural Watertown and against Northern Valley in the Redfield and Aberdeen area. Each of those companies is currently charging a composite rate of $0.1150, while Midcontinent is only allowed to charge the QWEST rate of roughly 6 cents per minute. This is true even though there is no current evidence to suggest that Midcontinent's cost to serve these rural exchanges is any less than the costs incurred by these other providers.

as required by the statute, because the benchmark RBOC rate has been set based on cost data provided to the Commission.

The "safety-valve" provision in ARSD § 20:10:27:02.02, allowing a CLEC to provide cost support for a different rate –allows individual CLECs to demonstrate that their costs are higher, if in fact that is the case.[2] The rules adopted by the Commission are simple, easy to administer, and very workable. As mentioned, they will lead to just, reasonable, and nondiscriminatory rates. Unlike the prior proposed rule, the use of the RBOC rate as a benchmark also complies with the statutory requirement that the Commission consider costs when setting prices in price regulation of noncompetitive services.

WHEREFORE, Midcontinent respectfully supports the Commission's new switched access rules as adopted.

Dated: April 8, 2011

DAVENPORT EVANS HURWITZ & SMITH, LLP

By: _____

Kathryn E. Ford
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57104
605.357.1246 (telephone)
605.251-2605 (facsimile)
kford@dehs.com
Attorneys for Midcontinent

[2] Any claim that a rural CLEC does not have the resources necessary for conducting a cost study should be rejected. Many of the CLECs operating in rural exchanges, particularly those that support the proposed rules because they allow them to charge higher switched access rates than their competitors, are owned by rural ILECs with extensive experience in producing cost studies. Those CLECs would have a distinct and significant advantage over other CLECs that do not have parent company with extensive experience in producing cost studies.

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Midcontinent Communications, hereby certifies that a true and correct copy of the foregoing "Midcontinent's Comments" was filed electronically and served upon the following via email:

Ms. Patricia Van Gerpen
Patty.vangerpen@state.sd.us

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

Ms. Terry Labrie Baker
Terri.labriebaker@state.sd.us

Mr. Richard B. Severy
richard.b.severy@verizonbusiness.com

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

Mr. James M. Cremer
jcremer@bantzlaw.com

Mr. William M. Van Camp
bvancamp@olingerlaw.net

Ms. Meredith A. Moore
Meredithm@cutlerlawfirm.com

Mr. Thomas J. Welk
tjwelk@bgpw.com

Mr. Christopher W. Madsen
cwmadsen@bgpw.com

Mr. George Baker Thomson Jr.
george.thomson@qwest.com

Mr. Jeffrey D. Larson
jdlarson@santel.net

Mr. Richard D. Coit
richcoit@sdtaonline.com

Mr. Talbot Wieczorek
tjw@gpnalaw.com

Ms. Darla Pollman Rogers
dprogers@riterlaw.com

Ms. Margo D. Northrup
m.northrup@riterlaw.com

Mr. Brett Koenecke
brett@magt.com

Ms. Bobbi Bourk
bobbi.bourk@state.sd.us

on this 8th day of April, 2011.