

**BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA**

**MIDCONTINENT COMMUNICATIONS
DOCKET NO. TC07-117**

**TESTIMONY OF KEITH A. SENGER
ON BEHALF OF THE COMMISSION STAFF
JULY 15, 2008**

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1 **Q. Please state your name and business address for the record.**

2 A. Keith Senger, Bureau of Finance and Management, State Capitol Building, 500 East
3 Capitol Ave., Pierre, South Dakota 57501.

4

5 **Q. By whom are you employed and in what position?**

6 A. I am currently employed as the Director of Accounting Analysis and Financial Reporting
7 for the Bureau of Finance and Management (BFM) for the State of South Dakota.

8

9 **Q. Please describe your education and work experience.**

10 A. I graduated from Northern State University in May 1992, with a Bachelor's Degree in
11 Business Administration with an emphasis in Accounting and minors in both Economics
12 and Computer Management Information Systems.

13

14 In June of 1992, I started my employment with the State of South Dakota as an auditor
15 for the Department of Legislative Audit. In January 1998, I accepted employment as the
16 Audit and Compliance Manager for the South Dakota Department of Transportation. In
17 January 1999, I joined the Public Utilities Commission as a Utility Analyst. In March
18 2008, I became the Director of Accounting Analysis and Financial Reporting for BFM.

19

20 **Q. On whose behalf are you presenting this testimony?**

1 A. I am presenting this testimony on behalf of the Public Utilities Commission (PUC) Staff.
2 The information and opinions I am presenting within this testimony is solely on behalf of
3 the PUC Staff and not on behalf of BFM or the Executive Branch of the State of South
4 Dakota.

5

6 **Q. Why is it that you are sponsoring testimony for the PUC in this docket?**

7 A. While employed by the PUC, I was the PUC staff utility analyst assigned to docket
8 TC07-117. Because of the work that I performed on this docket during my employment
9 with the PUC, my knowledge of the industry, and work performed on various switched
10 access dockets and issues before the PUC, I am being utilized by the PUC Staff to work
11 with existing staff to develop and present Staff's position on this docket.

12

13 **Q. Briefly describe your duties and responsibilities while you were a utility analyst
14 for the PUC.**

15 A. While employed by the PUC, I was responsible for processing a variety of dockets
16 concerning a variety of issues. Maybe most importantly, I was responsible for the cost of
17 service for many natural gas, electric and intrastate switched access rate cases that
18 were filed before the PUC.

19

20 **Q. Approximately how many switched access dockets have you worked on while you
21 were employed by the PUC?**

22 A. Without counting, I estimate that I have worked on between 40 to 60 switched access
23 cost studies and an additional 25 to 40 requests for exemption from filing a switched
24 access cost study.

25

26 **Q. Have you prepared testimony in other rate proceedings before the PUC?**

27 A. Yes. I have prepared testimony on behalf of Commission Staff in approximately 10 rate
28 proceedings before the Commission.

29

30 **Q. Do you have any professional designations or memberships?**

31 A. Yes, I do. I am a Certified Public Accountant in accordance with the South Dakota
32 Board of Accountancy, a member of the American Institute of Certified Public
33 Accountants and a member of the South Dakota CPA society.

34

1 **Q. Are you familiar with Commission docket TC07-117 - In the Matter of the Petition**
2 **of Midcontinent Communications for Approval of its Switched Access Rates?**

3 A. Yes. I have reviewed Midcontinent Communications' (Midco) petition, issued data
4 requests, reviewed Midco's responses, discussed issues with Midco, and am submitting
5 prefiled testimony related to this docket.
6

7 **Q. Briefly describe Midco's filing.**

8 A. Midco filed a very brief 2 page petition essentially asking that the Commission grant an
9 extension to the previous approved exemption from filing a cost study. Under the
10 previous exemptions granted by the Commission, Midco implemented and mirrored the
11 ILEC Qwest intrastate switched access rate. As stated in the petition, Midco competes
12 against Qwest. However, in this most recent request for an exemption, Midco is asking
13 "to mirror switched access rates of similarly situated CLECs doing business in the state."
14 However, nowhere in the petition does Midco identify the CLECs they are referring to nor
15 the rate elements they are requesting. In fact, the rate elements in the tariffs attached to
16 the Petition, for which Midco is requesting Commission approval, are left blank.
17

18 **Q. Please identify the intrastate switched access rates of other similarly situated**
19 **CLECs serving South Dakota.**

20 A. Per my review, with the help of other Commission Staff employees, as of November 13,
21 2007, (approximately 13 days after the filing of Midco's petition), I was able to identify 30
22 CLECs who have approved switched access tariffs in South Dakota. One of those
23 CLECs actually filed a switched access cost study and has cost based rates set at
24 6.8621 cents per MOU. Twenty-two had approval to charge rates that either mirror or
25 are lower than the Qwest rate which is currently at \$0.06042 per MOU [Carrier Common
26 Line Access Service per Access Minute - \$0.03842; Local Switching (End Office) per
27 Access Minute - \$0.00861; and Local Transport per Access Minute - \$0.01339]. Two
28 CLECs had approval to mirror the current LECA Plus rate of 12.25 cents per MOU. One
29 CLEC had approval to mirror an old 1999 LECA plus rate of 8.08 cents per MOU. The
30 remaining four had settlement rates of 11.50 cents per MOU.
31

32 Since Midco filed its petition, one of the two CLECs with approval to charge the current
33 LECA Plus rate has voluntarily withdrawn its tariff and no long has authority to charge
34 intrastate switched access rates in South Dakota leaving 29 intrastate switched access

1 tariff approved CLECs. The other CLEC with approval to charge the current LECA Plus
2 rate is finalizing a settlement agreement with Staff to phase its rates down to the Qwest
3 rate over the next two years. So currently 22 of the 29 CLECs are currently mirroring or
4 are lower than Qwest with the 23rd CLEC (or 79%) to be following shortly.

5
6 **Q. Have you had communications with Midco inquiring what they are asking for?**

7 A. Yes, both written data requests and various face to face meetings with Midco.
8

9 **Q. Please explain specifically what Midco is asking for?**

10 A. Based on those communications, it is my understanding that Midco is asking for a level
11 playing field. They want comparable rates among the LECs they are competing against.
12 To accomplish this, Midco is requesting they get what the other CLECs are getting.
13 Midco is requesting the intrastate switched access rate of the ILEC owned CLECs in the
14 state. Specifically, I believe Midco is targeting Northern Valley Communications LLC,
15 Sancom, Inc. d/b/a Mitchell Telecom, SStelecom, Inc., Midstate Telecom, Inc., and RC
16 Communications, Inc. d/b/a RC Services. Mitchell Telecom is the CLEC who has
17 recently agreed to a two year phase in of the Qwest rate. The remaining 4 all have a
18 settlement rate of 11.5 cents per MOU. Midco has indicated they want a level playing
19 field and want what these competitors are getting.
20

21 **Q. Do you believe Midco should get the 11.5 cent settlement rate?**

22 A. Absolutely not.
23

24 **Q. Why not?**

25 A.. First of all, Midco is not at all similar to, or competing against, SStelecom, Inc., Midstate
26 Telecom, Inc., and RC Communications, Inc. d/b/a RC Services. All three of these
27 companies are CLECs serving very small communities within South Dakota which Midco
28 is not currently providing service in. Additionally, at least one if not all three of these
29 CLECs are either currently or planning to build out and provide service to customers in
30 the very remote parts of their exchanges, something Midco is not doing. I believe that
31 Midco acknowledges and agrees with these facts and is not asking for the rate of
32 SStelecom, Inc., Midstate Telecom, Inc., and RC Communications, Inc. d/b/a RC
33 Services. That leaves Northern Valley Communications (NVC) LLC, and Sancom, Inc.
34 d/b/a Mitchell Telecom, Inc. (Sancom).

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Second, Staff does not believe that Midco's costs are similar to NVC's or Sancom's costs. Both NVC and Sancom have completely overbuilt their respective exchanges from scratch in order to offer a package of services, including POTS and intrastate switched access. Midco, on the other hand, upgraded an existing cable TV plant to provide POTS and intrastate switched access. These are different technologies with different costs. Furthermore, Midco is serving in South Dakota's two biggest (and likely lowest cost) exchanges - Sioux Falls and Rapid City. Neither NVC nor Sancom are serving those exchanges. Clearly, Midco's cost structures and densities are different from NVC and Sancom. This would not be the level playing field that Midco claims they are asking for.

Third, Midco is ignoring the fact that 22 of the remaining 28 other CLECs that Midco is potentially competing against are mirroring or are lower than the Qwest rate. Allowing Midco to charge 11.5 cents per minute ignores the fact that it would put them at a competitive advantage over the other CLEC, not to mention the ILEC Qwest, Midco's biggest competitor.

Fourth, allowing Midco to charge 11.5 cents would violate ARSD 20:10:27:06. That rule prohibits a LEC from charging rates above its costs. Although Midco's petition states that "Midcontinent does not have the internal expertise or resources necessary to determine company-specific cost-based intrastate switched access rates" and that Midco "has found that even by employing the services of outside consultants it would nonetheless be unable to establish switched access rates satisfactory to either Commission Staff or the Commission," Midco did provide Staff with Midco's versions of a cost study they did perform. In fact as recent as one day before Staff's prefiled testimony is due, Midco has petitioned the Commission to approve its cost study. That cost study shows cost at **begin confidential** **end confidential**, well below the requested 11.5 cents requested. Midco is asking the Commission to approve an intrastate switched access rate that is in excess of Midco's claimed costs.

Fifth, allowing Midco to charge 11.5 cents would contradict everything that Commission Staff has been pushing for the past 5 plus years as well as contradict what the FCC has done with CLEC access rates.

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Q. Explain what the FCC has done for interstate rates.

A. In FCC 01-146 Seventh Report and Order and Further Notice of Proposed Rulemaking, the FCC ordered a number of big changes for CLEC's interstate switched access rates. I will not review the entire Order, but in general, the FCC found that the market structure for access services prevented competition from effectively functioning and have failed to drive switched access rates to market level pricing. The FCC found that many CLECs were unjustly wielding their monopoly power over the IXC and charging unjust and unreasonable switched access rates. To address this issue, the FCC prohibited CLECs from filing cost studies and mandated the CLECs to phase in access rates to a level equal to or lower than the ILEC rates for whom they were competing against.

Q. How were CLECs able to exert monopoly power over IXCs?

A. The FCC found that many CLECs who were competing against the ILEC for end-user customers, despite the potential higher costs, were offering basic local service to end-users at prices lower than the ILEC. By undercutting the ILEC price for local exchange services to the end-user, the CLEC won the local service customers, a natural and expected result of competition. These end-users are the customers who have a competitive choice of providers (either the ILEC or the CLEC). However, by gaining an end-user customer, the CLEC also captures the IXC picked by the end-user (for originating access) and the IXC of any end-user that calls the CLEC's end-users (for terminating access) as captive customers. Unlike the end-user, the IXCs have no choice. The IXC is a captive customer of the CLEC's monopoly access rate. For every local service end-user customer the CLEC "wins" from the ILEC, the end-users sees a decrease in the basic local service rate, but the IXC sees an increase in access rates if the CLEC access rates are higher than the ILEC. The FCC found this to be inappropriate.

Many CLECs argued their costs to provide service are higher than the ILEC's costs. Although a logical conclusion, that fact did not persuade the FCC. The FCC weighed in on the issues of high CLEC costs and the CLEC's monopoly power. In its order, the FCC concluded that the IXCs are subject to the monopoly power of the CLECs and found it necessary "to constrain the extent to which the CLECs can exercise their monopoly

1 power and recover an excessive share of their costs from the IXC.”¹ To do this, the
2 FCC limited the CLEC’s access rate to that of the ILEC. The FCC further concluded that
3 the high costs of a CLEC may be reasonable but that is not justification for tariffing an
4 access tariff rate in excess of the ILEC. If the CLEC’s costs were higher than the ILEC,
5 then how can the CLEC provide basic local service to end-users at rates that are less
6 than ILEC’s basic service rates? The FCC refused to let the CLECs subsidize their local
7 service offering through access rates. In support, the FCC stated that under normal
8 market conditions, market entry is gained by offering service at a price lower than that of
9 the competitors. By limiting the CLEC access rate to that of the ILEC, the FCC is
10 mimicking normal market entry for access rates and limiting the monopoly power the
11 CLEC wields over the IXC. Essentially if a CLEC is going to compete with the ILEC for
12 the end-user customer, it should not be at the expense of the IXCs, because the IXC
13 was not seeing any better service or benefit from originating or terminating to the CLEC
14 versus the ILEC.

15
16 **Q. Did the FCC allow CLECs to raise rates during the mandatory rate phase down**
17 **period if the CLEC was already at the ILEC rates prior to the FCC order requiring**
18 **CLECs to phase in ILEC rates?**

19 A. No. In fact, the FCC expressly prohibited any low rate CLECs to raise rates during the
20 rate phase down period.

21
22 **Q. Explain the FCC’s Safe Harbor rates.**

23 A. The FCC in its order also created a “Rural Exemption” which allows certain “rural”
24 CLECs to tariff the NECA rate instead of the ILEC rate for interstate access in some
25 rural service territories. The FCC allowed a “CLEC competing with a non-rural ILEC
26 where no portion of the CLEC’s service area falls within (1) any incorporated place of
27 50,000 inhabitants or more, based on the most recently available population statistic of
28 the Census Bureau or (2) an urbanized area, as defined by the Census Bureau”² to
29 charge the NECA rates.

30
31 **Q. Does Midco qualify for the Safe Harbor rates on the interstate side?**

¹ FCC 01-146 – Seventh Report and Order and Further Notice of Proposed Rulemaking, paragraph 39.

² Ibid. Paragraph 76.

1 A. No. Midco is serving in the Sioux Falls and Rapid City exchanges. These exchanges
2 exceed the 50,000 inhabitants and thus Midco does not qualify for the ability to charge
3 the NECA rates of interstate jurisdiction. It must charge the ILEC or lower rates for the
4 interstate jurisdiction.
5

6 **Q. Are the FCC interstate rules binding upon this Commission for intrastate rates?**

7 A. No. Staff clearly acknowledges that fact. However, the PUC rules regarding switched
8 access have typically followed that of the FCC access cost studies. In fact, ARSD
9 20:10:28 and 29 are near replicas of old FCC rules regarding interstate switched access
10 cost studies. Although the FCC's rules regarding interstate access are not binding on
11 this Commission regarding intrastate access, the rationale and actions can and should
12 be used as a guide.
13

14 **Q. What do the PUC rules say regarding intrastate switched access?**

15 A. I think the rules clearly speak for themselves, but in review, the rules address LECs.
16 Generally, the PUC rules require a LEC to file a cost study every three years. The rules
17 detail allocation of costs for filing a cost study. ARSD 20:10:27:11 allows a LEC who is
18 able to meet certain criteria to file for an exemption from filing a cost study. Under that
19 exemption, a LEC is allowed under ARSD 20:10:27:12 to charge the statewide average
20 rate of all LECs with less than 100,000 access line – often referred to as the LECA Plus
21 rate.
22

23 **Q. Do these rules apply to CLECs?**

24 A. That is unclear. I believe that ARSD 20:10:27:12 is clearly intended to be used by
25 ILECs. The intent was to allow small, extremely high cost, rural South Dakota ILECs a
26 waiver from filing an expensive cost study. In return, that small, high cost ILEC can use
27 the LECA Plus rate, which in theory, should be a lower rate than had they filed a
28 company specific cost based rate. If ARSD 20:10:27:12 is extended to CLECs, it is
29 possible for a CLEC providing service to low cost customers and whose company
30 specific cost based rate would be less than that of the LECA PLUS rate, to simply apply
31 for the 20:10:27:11 exemption and receive access revenue in excess of its costs. Based
32 on Midco's filing and responses to Staff data requests, it appears that is exactly what
33 Midco is doing. In response to data request 1-5, Midco is asking for 11.5 cents. In

1 response to data request 1-3, Midco believes its costs are about *begin confidential*
2 *end confidential*.

3
4 Additionally, ARSD 20:10:27:12 became effective January 31, 1993. That is more than
5 three years prior to the implementation of the Telecommunications Act of 1996 which
6 allowed CLEC activity. When enacted, ARSD 20:10:27:12 did not envision the
7 emergence of CLECs. Furthermore, ARSD 20:10:27:12 indicates that the rate is "based
8 on the cost of all the telecommunications companies with less than 100,000 access
9 lines." The statewide average LECA Plus rate includes the rural ILECs with less than
10 100,000 access lines but excludes the CLECs in South Dakota serving fewer than
11 100,000 access lines giving even more support to my position.

12
13 Furthermore, if the Commission accepts the agreed upon settlement in TC07-128
14 (Sancom, Inc. d/b/a Mitchell Telecom, Inc.), there will be no CLEC in South Dakota
15 charging the LECA Plus rate as determined by ARSD 20:10:27:12. Thus, the actions of
16 other CLECs support my position.

17
18 **Q. Do you believe that Midco's costs are *begin confidential* *end confidential* as**
19 **Midco indicates?**

20 A. Although Midco is asking for a waiver from filing a cost study, Midco did provide to Staff
21 sheets A through U of the Commission's cost study model. These sheets did contain
22 amounts. Also attached were about 15 additional worksheets. Staff by no means is in
23 any position to accept this as a cost study. Typically a cost study must contain more
24 support. Accordingly, Staff is unable to comment regarding what Midco's costs are.

25
26 **Q. Is Midco requesting the Commission's approval of this cost study?**

27 A. It appears so. One day prior to Staff having to file its testimony, Midco amended its
28 petition and requested the Commission, in the alternative, to accept its cost study.

29
30 **Q. What is Staff's position on this recent amendment to Midco's petition?**

31 A. First of all, Staff is already at a huge disadvantage. In every other rate proceeding that
32 has advanced to hearing that I have been a part of, the Petitioner has filed its case and
33 testimony. Staff has then had ample time to issue data requests, and develop its case.
34 In this proceeding, Midco provided a two page petition. Essentially, Staff has no

1 information to base its case and positions on. Second, in order to help expedite this
2 filing, Staff agreed to file concurrent first round testimony with Midco. However this puts
3 the burden on Staff to support its case without even knowing what Midco is proposing.
4 Third, this 11th hour amended petition allows no time to review. Fourth, Midco is asking
5 the Commission's approval of the cost study, but has never filed anything with the
6 Commission.

7
8 **Q. What are you recommending the Commission do in regard to the amended
9 petition asking for approval of the cost study?**

10 A. Based on Midco's petition alone, the Commission should deny approval of the cost
11 study. Paragraph 4 of the petition and the amended petition states the study is
12 unsatisfactory. Furthermore, Midco's response to data request 1-2 indicates the study
13 uses "numerous approximations and broad gauge allocations." Additionally, it omits
14 various allocations required by Commission rule such as DEM. That and the fact that
15 the Commission has nothing before them to approve, the Commission should deny
16 Midco's request to approve the cost study. If the Commission does wish to give the cost
17 study some consideration, the Commission should order Midco to file it with the
18 Commission, order Midco to provide all supporting documentation, suspend the
19 procedural schedule and give Staff adequate time to conduct its discovery as is required
20 in all ILEC cost study proceedings.

21
22 **Q. Why didn't Staff review the cost study when it received it?**

23 A. Staff did give the study a cursory review. However, Midco's original petition and its
24 responses downplayed the value of the study and indicated it could not be relied upon
25 for rate setting purposes. Staff was using it as a tool not as a valid cost study. Staff had
26 no idea Midco was going to request the Commission accept it.

27
28 **Q. What are you recommending in regard to Midco's request for exemption?**

29 A. I recommend the Commission grant the exemption to Midco on the same grounds it has
30 in the past.

31
32 **Q. What are you recommending the Commission approve for an intrastate switched
33 access rate?**

1 A. I recommend the Commission continue to follow the FCC lead regarding CLEC access
2 rates, continue to support Commission Staff's approach at attempting to create
3 competitive based switched access rates in a non-competitive arena, and approve
4 an intrastate switched access rate for Midco that mirrors or is lower than the ILEC Qwest
5 rate on the same grounds the Commission has done in the past.

6
7 **Q. Do you have any alternative recommendations regarding Midco's intrastate**
8 **switched access rate?**

9 A. Staff strongly recommends the Commission use the Qwest rate. If the Commission uses
10 another rate, it will open the door for all CLECs in the state to come back before the
11 PUC and request rates that are above their costs. I also continue to strongly
12 recommend the Commission, in order to eliminate CLEC abuse of monopoly power, not
13 require or request CLECs to file cost studies, but instead follow the FCC lead and
14 prohibit the filing of CLEC cost studies and implement a competitive method for CLEC
15 rates that are not based on the CLEC's costs but instead on the ILEC rates, thus
16 controlling the CLEC's monopoly power.

17
18 However, if the Commission is unable to impose the Qwest rate, I suggest the
19 Commission strongly encourage Midco to adopt the Sancom Settlement rates as
20 currently agreed to between Staff and Sancom in TC07-128 for the Mitchell and
21 Aberdeen exchanges while continuing to use the Qwest rate in all other Qwest
22 exchanges. If Midco truly wants equity with its competitors, such an agreement will
23 provide such. In fact, it will put Midco at an advantage over Qwest in those two
24 exchanges but it will create equity with NVC and Sancom in the Aberdeen and Mitchell
25 exchanges and maintain equity with other CLECs in all other exchanges.

26
27 If the Commission grants a rate other than the Qwest rate, I recommend the
28 Commission immediately open a separate rule making docket to address the CLEC
29 access rate issues. I believe this docket must be separate from the existing switched
30 access rule making docket. Opening a second and separate docket will assure that the
31 CLEC access rate issues get addressed quickly.

32
33 **Q. Does this end your testimony?**

34 A. Yes.