

**BEFORE THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

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IN RE:	)	
	)	
MCI Communications Services, Inc. d/b/a	)	
Verizon Business Services,	)	
	)	Docket No. TC08-065
Complainant	)	
	)	
v.	)	Response of Capital Telephone Company
	)	to Complaint of MCI Communications
Capital Telephone Company, Inc.,	)	Services, Inc. d/b/a Verizon Business
	)	Services
Respondent	)	

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**RESPONSE OF CAPITAL TELEPHONE COMPANY, INC. TO  
COMPLAINT OF VERIZON BUSINESS SERVICES**

Capital Telephone Company, Inc. ("Capital") by its undersigned counsel, responds to the Complaint of MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon"), which was filed with this Commission on May 28, 2008 ("Complaint").

**SUMMARY STATEMENT**

**1. The Verizon "Complaint" Is a Transparent Attempt to Gain Leverage In Settlement Negotiations Resolving a Dispute Pending Before the Federal Communications Commission – It Is a Waste of This Commission's Time and Resources**

Verizon correctly states that Capital has been billing Verizon access charges since June of 2007. What Verizon fails to state is that, in the 11 months between Capital's first invoice dated June 20, 2007 until its most recent invoice dated April 2008, Capital has billed Verizon a grand total of \$557.42 in intrastate access charges. That is an average of \$50.67 per month, and

since Capital initiated access billing to Verizon, Capital's bill for intrastate access charges has never exceeded \$80 in any given month.

In contrast, over the same period, Capital has billed Verizon \$326,853.60 in interstate access charges. In other words, 98.3% of the total billings in dispute between the parties are jurisdictionally interstate.

Why has Verizon presented this Commission with a complaint and attachments constituting over 850 pages – a stack of paper 4 inches high – over what is clearly incidental intrastate traffic? The answer apparently is that Verizon is seeking to use a complaint proceeding before this Commission as a source for leverage in negotiating a settlement of its dispute with Capital before the Federal Communications Commission (“FCC”).

Capital does not know when Verizon first approached the FCC and informed the Staff of the FCC's Enforcement Bureau that it intended to file a formal complaint against Capital, but it was before May 19, 2008. On May 19, counsel for both Verizon and Capital spoke together for the first time, and Verizon counsel advised Capital counsel of its intention to file a formal complaint with the FCC, and advised that Verizon had been in contact with FCC staff regarding the intended filing. Counsel for both parties first discussed the prospect of settlement on May 21, and communicated with FCC Staff that settlement discussions were underway on May 22. On May 22, the FCC staff requested that counsel for both parties submit a joint report regarding settlement negotiations, and counsel for Verizon did so on June 2. Capital submitted a formal settlement offer, in writing, to Verizon on May 30, and Verizon submitted a written counter-proposal to Capital on June 11. The most recent telephone conference between counsel for Verizon and Capital to discuss settlement occurred yesterday, June 16. At all times, Capital's

proposal for settlement has been for a comprehensive settlement of all outstanding disputes with Verizon.

Verizon's complaint to this Commission asserts that it attempted to resolve its dispute with Capital, but concluded that "any further attempts to informally resolve this dispute would be fruitless." Complaint at ¶ 49, and generally at ¶¶ 45-49. In so stating, Verizon neglected to inform this Commission of the substantive settlement discussions that took place on May 21 and 22 – before Verizon filed its complaint with this Commission. Verizon has also neglected to inform this Commission of the detailed, written settlement proposals and counter-proposals that have taken place since the filing of its complaint.

Verizon's complaint before this Commission involves a *de minimis* amount of intrastate access charges that constitutes less than 2% of the access amounts in dispute between Verizon and Capital, and is a clear case of the tail wagging the dog. Whether Verizon's complaint is an attempt to tax the resources of a competitor by engaging in harassing litigation, or is a heavy-handed attempt to gain negotiating leverage in the ongoing settlement negotiations relating to its federal complaint, Verizon's complaint before this Commission is an abuse of process and a waste of this Commission's time and resources, and it should not be entertained.

## **2. The Allegations of Unlawful "Traffic Pumping" that Are the Sole Basis for the Verizon Complaint Have Already Been Rejected Repeatedly By the FCC**

Verizon bases its complaint on the assertion that Capital's service constitutes a "traffic pumping scheme" that is somehow illegal, and asserts that Capital's traffic does not constitute "switched access service." These claims, however, have been repeatedly rejected by the FCC. The FCC has on no fewer than four occasions rejected arguments that services asserted to be "traffic pumping" violate the Communications Act. Three of these rulings rejected formal complaints brought by AT&T against rural LECs that provided chat line services identical to the

services provided by Capital. *AT&T Corp. v. Jefferson Telephone Co.*, 16 FCC Rcd 16130 (2001); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002); *AT&T v. Beehive Telephone Co.*, 17 FCC Rcd 11641 (2002).

The FCC's most recent decision in this line of cases was issued last October in *Qwest Communications Corporation v. Farmers & Merchants Mutual Telephone Company*, 22 FCC Rcd 17973 (Oct. 2, 2007). In that proceeding, Qwest filed a formal complaint, asking the FCC to find that "traffic pumping schemes" – in which a rural LEC partnered with chat line and conference operators in order to generate access revenues – violated the Communications Act. The FCC rejected Qwest's arguments. In its decision, the FCC refused to find that "traffic pumping" constituted an unreasonable or unlawful practice (indeed, the FCC has never used the term "traffic pumping" in any context), and the FCC repeatedly found that the chat/conference traffic constitutes terminating access traffic, to which access charges properly apply.

In addition, at the behest of Verizon and other long distance carriers, the FCC initiated Wireline Competition Bureau Docket 07-135 to consider whether it should, on a prospective basis, make changes to its existing rules concerning how access rates are computed, and whether it should impose any restrictions on LECs' provision of chat line or conferencing services, or other methods of "access stimulation." That proceeding was initiated expressly to consider the issues that Verizon raises in its complaint before this Commission, and Verizon is actively participating in the FCC's rulemaking proceeding.

This substantial body of precedent – four decisions since 2001, all reaching the same conclusion – demonstrates that Capital's operations are, and at all times relevant to this case have been, lawful under the FCC's rules and the federal Communications Act. Moreover, the pendency of the FCC's rulemaking proceeding, which is considering whether any new

regulations should be placed on “access stimulation” activities by LECs, demonstrates that the FCC has comprehensively occupied the field on these matters. Under SDCL 49-31-1, the federal law is dispositive of the fact that Capital’s conduct is, and at all times has been, lawful.

### **3. Verizon Has Provided No Basis for Revoking Capital’s Certificate**

As Capital describes in its Answers and Affirmative Defenses below, Capital is a CLEC in good standing with this Commission, and has set its rates according to the same rules that apply to all CLECs in South Dakota. Verizon has cited no precedent to support its call for the revocation of Capital’s certificate, and cites no precedent to support its conclusion that Capital’s network configuration and transport routes are unlawful. In fact, Verizon cannot cite any relevant rulings by this Commission because no such precedent exists. Capital has at all times relevant to the instant case been fully compliant with the Commission’s rules and relevant statutes.

### **4. The Commission Should Summarily Reject the Verizon Complaint**

As discussed above, and in the Answers and Affirmative Defenses submitted below, Capital demonstrates that the dispute raised by Verizon is inherently an interstate dispute, that the FCC has already occupied the field in adjudicating the substance of Verizon’s allegations – and has already rejected them. Verizon’s attempt to bring a complaint before this Commission as a tool to provide Verizon with negotiating leverage in its federal case is clearly an abuse of process and a profound waste of this Commission’s time and resources. Capital therefore respectfully requests that the Commission summarily reject the Verizon complaint.

In the following sections, Capital provides specific answers to the Verizon allegations, and affirmative defenses.

## ANSWER TO SPECIFIC VERIZON ALLEGATIONS

1. Unless specifically and expressly admitted herein, Capital denies each and every allegation within the Complaint.
2. With respect to paragraphs 1 and 2 of the Complaint, Capital admits that it is a competitive local exchange carrier (“CLEC”) and is headquartered in Las Vegas, Nevada. Capital does not have enough information to admit or deny Verizon’s service offerings or pricing. Capital denies all other allegations in this paragraph.
3. Capital denies the allegations of paragraph 3.
4. With respect to paragraph 4, Capital acknowledges that the FCC did suspend the tariffs of several incumbent local exchange carriers. Capital, however was not one of the carriers affected. In fact, the FCC’s suspension order only affected incumbent LECs that set access rates according to Part 61.39 of the FCC’s rules. Part 61.39 of the FCC’s only governs ratemaking practices of ILECs – as a competitive LEC, Capital never had the ability to set its rates using Rule 61.39, and this ratemaking practice is clearly inapplicable to Capital. Further, the issues raised in this Complaint have already been addressed by the FCC in the case of *Qwest Communications Corporation v. Farmers and Merchants Telephone Co.*, 22 FCC Rcd. 17973 (2007), *AT&T Corp. v. Jefferson Telephone Co.*, 16 FCC Rcd 16130 (2001); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002); *AT&T v. Beehive Telephone Co.*, 17 FCC Rcd 11641 (2002). Under SDCL 49-31-1, the Commission has “general supervision and control of all telecommunications companies offering common carrier services within the state *to the extent such business is not otherwise regulated by federal law or regulation.* (emphasis added). Because the FCC has already issued four orders that expressly

address the “traffic pumping” allegations that constitute the basis of Verizon’s complaint, the FCC rulings occupy the regulatory field, and this Commission cannot hear Verizon’s complaint.

5. Capital denies the allegations in paragraph 5, and notes that the FCC has ruled on the majority of issues raised by this Complaint and therefore has occupied the field on these matters. Further, the Parties are currently in the process of negotiating a settlement under the supervision of FCC staff, given that the majority of the amount in controversy is based upon interstate switched access charges.<sup>1</sup>

6. Capital does not have enough information or knowledge regarding Verizon’s service offerings to admit or deny the statements in paragraph 6.

7. Capital admits that it is a corporation organized under the laws of Nevada and admits headquartered at 8635 West Sahara Avenue, Suite 498, Las Vegas, Nevada 89117. Capital also admits that it was granted a Certificate of Authority to operate as a local exchange carrier from this Commission in January, 2007.

8. Capital denies the Commission has jurisdiction over this case as the admission requires a conclusion of law. The Commission has jurisdiction over common carrier services only to the extent that the business is not otherwise regulated by federal law or regulation.<sup>2</sup> Thus, the Commission is precluded from addressing the issues raised by Verizon because the FCC has occupied the field with regards to the issues raised in this Complaint under the four cases cited in paragraph 4, *supra*.

9. The assertions in paragraph 9 do not require a response.

10. The assertions in paragraph 10 do not require a response.

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<sup>1</sup> The intrastate amount in controversy is \$557.42 (or 1.7% of the total amounts in dispute), whereas the interstate portion is approximately \$326,853.60 (or 98.3% of the amounts in dispute).

<sup>2</sup> See SDCL 49-31-1.

11. The assertions in paragraph 11 do not require a response.
12. Capital denies the allegations in paragraph 12. Capital admits that the FCC and the Commission have jurisdiction over interstate and intrastate switched access rates respectively.
13. Capital admits the allegations in paragraph 13.
14. The assertions in paragraph 14 do not require a response.
15. The assertions in paragraph 15 do not require a response. Capital confirms that it does offer services to business end users.<sup>3</sup>
16. The assertions in paragraph 16 do not require a response.
17. Capital admits that the Commission granted Capital a Certificate of Authority to operate as a local exchange carrier on January 16, 2007. Capital is providing local service to end users within the State of South Dakota, in accordance with its Certificate of Authority. Capital does not have enough information to admit or deny the other allegations contained in paragraph 17.
18. Capital admits that the Commission did approve its switched access tariff in TC06-196. Capital admits that the rates contained in its intrastate switched access tariff match those of the incumbent LEC Qwest.<sup>4</sup>
19. Capital denies the allegations contained in paragraph 19.

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<sup>3</sup> Under ARSD 20:10:29:07, the definition of an end user is "A customer of an intrastate telecommunications service that is not a carrier is an end user."

<sup>4</sup> Indeed, many competitive local exchange carriers routinely seek, and are granted, waiver from developing specific switched access rates and Capital's request is not extraordinary, but rather a typical filing by a newly formed competitive local exchange carrier. See, by way of example *In the Matter of the Filing by Ionex Communications North, Inc. For Approval of its Intrastate Switched Access Tariff and for an Exemption from Developing Company Specific Cost-Based Switched Access Rates*, Docket No. TC06-202, Dated January 24, 2007; *In the Matter of the Filing by 1-800-Reconex, Inc. d/b/a USTel for an Extension of an Exemption from Developing Specific Cost-Based Switched Access Rates*, Docket No. TC06-199, Dated January 31, 2007; *In the Matter of McLeodUSA Telecommunications Services, Inc. for Approval of its Intrastate Switched Access Tariff and for an Exemption from Developing Company Specific Cost-Based Switched Access Rates*, TC06-30, Dated June 19, 2007; *In the Matter of Sprint Communications Company L.P. for Approval of its Intrastate Switched Access Tariff and for an Exemption from Developing Company Specific Cost-Based Switched Access Rates*, Docket No. TC07-091, Dated October 2, 2007; *In the Matter of XO Communications Services, Inc. for an Extension of an Exemption from Developing Company Specific Cost-Based Switched Access Rates*, Docket No. TC07-108, Dated December 28, 2007.



20. Capital denies the allegations contained in paragraph 20.
21. The location of Capital's network facilities and network configuration are irrelevant. Capital denies all other allegations in paragraph 21.
22. The assertions in paragraph 22 are irrelevant.
23. The assertions in paragraph 23 do not require a response.
24. Capital denies the allegations paragraph 24, as they are irrelevant. Allegations in paragraph 24 on any party's position on "traffic pumping" are denied.
25. Capital denies the allegations paragraph 24, as they are irrelevant. Allegations in paragraph 24 on any party's position on "traffic pumping" are denied.
26. Capital denies the allegations contained in paragraph 26.
27. Capital admits issuing its first access bill to Verizon in July 2007. Capital does not have enough the requisite knowledge of Verizon's analytical processes to admit or deny the other allegations contained in paragraph 27.
28. Capital does not have enough information of Verizon's in-house processes and policies to admit or deny the allegations contained in paragraph 28.
29. With respect to paragraph 29, Capital does not have enough information of Verizon's in-house processes and policies to admit or deny the allegations herein.
30. Capital does not have enough information of Verizon's in-house processes or analysis to admit or deny the allegations outlined in paragraph 30.
31. Capital denies the allegations in paragraph 31.
32. Capital does not have enough information of Verizon's in-house processes or analysis to admit or deny the allegations in paragraph 32.

33. Capital does not have enough information of Verizon's in-house processes or analysis to admit or deny the allegations in paragraph 33.
34. Capital does not have enough information of Verizon's in-house processes, experience with other carriers, and/or analysis to admit or deny the allegations in paragraph 34.
35. Capital denies the allegations of paragraph 35.
36. Capital denies the allegations of paragraph 36.
37. The assertions in paragraph 37 are irrelevant.
38. With respect to paragraph 38, Capital admits that it represented to the Commission that it had, and continues to maintain, a switch at Redfield at the time its Application for Certificate of Authority was filed with the Commission. Capital does not have the information or knowledge required to admit or deny the rest allegations contained in paragraph 38.
39. Capital denies the allegations in paragraph 39.
40. The assertions in paragraph 40 are irrelevant.
41. The assertions in paragraph 41 are irrelevant.
42. Capital denies the assertions regarding the legitimacy of network engineering in paragraph 42. The assertions are also irrelevant.
43. Capital denies the assertions regarding the legitimacy of network engineering in paragraph 43. The assertions are also irrelevant.
44. Capital denies the assertions regarding the legitimacy of network engineering in paragraph 44. The assertions are also irrelevant.
45. Capital does not have enough information regarding Verizon's in-house processes to comment on its analysis. Capital otherwise denies the allegations in paragraph 45.
46. Capital admits the description of Verizon's correspondence in paragraph 46.

47. Capital denies the allegations in paragraph 47 to the extent that Verizon has not received a response to its dispute letter.

48. Capital denies the allegations in paragraph 48 to the extent that Verizon has not received a response to its April 14, 2008 letter. Indeed, Capital has responded to the letter and the Parties currently are attempting to resolve their interstate and intrastate disputes concurrently under the supervision of FCC Staff.

49. Capital denies the allegations contained in paragraph 49. Capital and Verizon are in active negotiations to resolve this dispute with FCC Staff overseeing the efforts, and have been since May 21<sup>st</sup> – before the instant complaint was filed.

50. With regards to paragraph 50, Capital admits that, in general, the Commission has jurisdiction over intrastate telecommunications services and reasonableness of rates. However, in this case, the Commission approved Capital's switched access rates in Docket TC06-196 on January 18, 2007, thereby demonstrating that Capital's intrastate switched access rates are just and reasonable. Capital denies that its practices are unreasonable.

51. Capital denies the allegations contained in paragraph 51.

52. Capital denies the allegations contained in paragraph 52.

53. Capital denies the allegations contained in paragraph 53. Under ARSD 20:10:29:07, "end users" are defined as "a customer of an intrastate telecommunications services that is not a carrier...".<sup>5</sup> Chat line providers, by definition, do not offer telecommunications services, and are not carriers. Therefore, chat line Providers are customers under the Commission's own rules.

54. Capital does not have the information or knowledge regarding Verizon's operations or calling plans to respond to the allegations contained in paragraph 54.

55. Capital denies the allegations set forth in paragraph 55.

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<sup>5</sup> See ARSD 20:20:29:07.

56. Capital denies the allegations contained in paragraph 56.
57. Capital denies the allegations contained in paragraph 57.
58. Capital denies the allegations in paragraph 58.
59. Capital denies the allegations in paragraph 59.
60. Capital denies the allegations in paragraph 60.
61. The assertions of paragraph 61 do not require a response.
62. Capital denies the allegations contained in paragraph 62.
63. Capital denies the allegations contained in paragraph 63.
64. With respect to paragraph 64 of the Complaint, Capital admits that it represented to the Commission that it lacked resources necessary to determine its own company-specific cost-based switch access rates and therefore requested it be permitted to charge the same rates as Qwest. This is a routine practice in South Dakota. Indeed, a large number of other competitive carriers have sought, and been granted, permission to mirror the Qwest switched access rates.<sup>6</sup> To imply that Capital's request to mirror Qwest switched access rates prove impropriety is incorrect. Capital denies the other allegations contained in paragraph 64.
65. Capital does not have the requisite knowledge to admit or deny the possible actions of Verizon or other carriers in matters pending before the Commission, as alleged in paragraph 65. Capital denies all other allegations contained in paragraph 65.

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<sup>6</sup> See *In the Matter of the Filing by Ionex Communications North, Inc. For Approval of its Intrastate Switched Access Tariff and for an Exemption from Developing Company Specific Cost-Based Switched Access Rates*, Docket No. TC06-202, Dated January 24, 2007; *In the Matter of the Filing by 1-800-Reconex, Inc. d/b/a USTel for an Extension of an Exemption from Developing Specific Cost-Based Switched Access Rates*, Docket No. TC06-199, Dated January 31, 2007; *In the Matter of McLeodUSA Telecommunications Services, Inc. for Approval of its Intrastate Switched Access Tariff and for an Exemption from Developing Company Specific Cost-Based Switched Access Rates*, TC06-30, Dated June 19, 2007; *In the Matter of Sprint Communications Company L.P. for Approval of its Intrastate Switched Access Tariff and for an Exemption from Developing Company Specific Cost-Based Switched Access Rates*, Docket No. TC07-091, Dated October 2, 2007; *In the Matter of XO Communications Services, Inc. for an Extension of an Exemption from Developing Company Specific Cost-Based Switched Access Rates*, Docket No. TC07-108, Dated December 28, 2007.

66. The assertions in paragraph 66 do not require a response.
67. Capital denies the allegations contained in paragraph 67.
68. Capital denies the allegations outlined in paragraph 68.
69. Capital denies the allegations contained in paragraph 69.

### **AFFIRMATIVE DEFENSES**

70. The Commission has approved Capital's switched access rates for intrastate services as just and reasonable.

71. The Commission does not have jurisdiction over this complaint, because the FCC has occupied the field with four dispositive orders and a pending rulemaking proceeding, all addressing the same issues that Verizon raises in its complaint. Under SDCL 49-31-3, the Commission has jurisdiction over common carriers operating within the state "only to the extent such business is not otherwise regulated by federal law and regulation."

73. The Commission does not have jurisdiction over this Complaint as the thrust of the issues raised by Verizon relate primarily to interstate switched access services. The bills in question show that only 1.7% of the services rendered were intrastate, whereas 98.3% of the services were interstate in nature and therefore fall under the jurisdiction of the FCC.

74. All the questions raised by Verizon in this instance have been adjudicated by the FCC or are under active consideration in FCC Docket No. 07-135. Therefore, the FCC has already occupied the field on these issues.

75. The FCC has stated in four separate orders that chat line providers are indeed end users. Additionally, chat line providers are considered to be end users under the Commission's own Rules.

76. Capital has been compliant with the Laws of South Dakota and the Rules of the Commission at all times relevant to this case.

THEREFORE, Capital Telephone Company, Inc. prays for relief as follows:

1. That Petitioner's claims be dismissed and Petitioner takes nothing thereby;
2. For such other and further relief as the Commission may deem just and equitable.

Dated this 17<sup>th</sup> day of June, 2008.

Respectfully Submitted,

CAPITAL TELEPHONE COMPANY, INC.



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Ronald A. Parsons, Jr.  
Kimberly Lanham  
Johnson, Heidepriem, Janklow,  
Abdallah, & Johnson, L.L.P.  
Falls Center  
431 N. Phillips Avenue, Suite 400  
Sioux Falls, SD 57104-5933  
Telephone: (605) 338-4304  
Facsimile: (605) 338-4162  
E-mail: [ron@jhaj.com](mailto:ron@jhaj.com)

Attorneys for the Respondent

Of Counsel:

Jonathan E. Canis  
Katherine E. Barker Marshall  
Womble Carlyle Sandridge & Rice, PLLC  
1401 Eye Street NW, Seventh Floor  
Washington, DC 20005  
Telephone: (202) 857-4493  
Facsimile: (202) 261-0093  
E-mail: [jcanis@wcsr.com](mailto:jcanis@wcsr.com)  
E-mail: [kamarshall@wcsr.com](mailto:kamarshall@wcsr.com)

## Certificate of Service

Ronald A. Parsons, Jr. of Johnson, Heidepriem, Janklow, Abdallah & Johnson, L.L.P. hereby certifies that on the 17<sup>th</sup> day of June, 2008, he served electronically a true and correct copy of the foregoing Response in the above-captioned action to the following at its last known e-mail address, to-wit:

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

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

Mr. Harlan Best  
Staff Analyst  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501  
harlan.best@state.sd.us  
605-773-3201 – voice  
866-757-6031 – fax

Ms. Terri Labrie Baker  
Staff Analyst  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501  
terri.labriebaker@state.sd.us  
605-773-3201 – voice  
866-757-6031 – fax

Ms. Margo D Northrup  
Attorney at Law  
Riter Rogers Wattier & Brown LLP

PO BOX 280  
Pierre, SD 57501-0280  
m.northrup@riterlaw.com  
605-224-5825 – voice  
605-224-7102 – fax

Mr. Randy Houdek  
General Manager  
Venture Communications Cooperative  
PO BOX 157  
Highmore, SD 57345-0157  
rhoudek@venturecomm.net  
605-852-2224 – voice

Ronald A. Parsons, Jr. of Johnson, Heidepriem, Janklow, Abdallah & Johnson, L.L.P. hereby certifies that on the 17<sup>th</sup> day of June, 2008, he served via first-class mail a true and correct copy of the foregoing Response in the above-captioned action to the following at its last known address, to-wit:

David A. Gerdes  
May Adam Gerdes & Thompson LLP  
P.O. Box 160  
503 South Pierre Street  
Pierre, SD 57501-0160  
Telephone: (605) 224-8803  
Facsimile: (605) 224-6289

David Haga  
Assistant General Counsel  
Verizon  
1515 N. Courthouse Rd., Suite 500  
Arlington, VA 22201-2909  
Telephone: (703) 351-3065  
Facsimile: (703) 351-3658



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Ronald A. Parsons, Jr.