BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Application of **NORTHERN VALLEY COMMUNICATIONS, L.L.C.** for Approval of Extension of Its Current Exemption from Developing Company-Specific Cost-Based Switched Access Rates	TC 09-031 RESPONSE OF NORTHERN VALLEY COMMUNICATIONS, L.L.C.'S TO MIDCONTINENT COMMUNICATIONS' MOTIONS FOR UNIFORMITY AND EVIDENTIARY HEARING

Northern Valley Communications, L.L.C. ("NVC"), hereby submits this response to Midcontinent Communications' ("Midcontinent") June 18, 2009, Motion for Uniformity in Switched Access Rates and for Evidentiary Hearing.

PRELIMINARY STATEMENT

Midcontinent filed this motion in this docket and in TC09-009, TC09-014 and TC09-022.

ARGUMENT AND LEGAL ANALYSIS

1. SSTELECOM, Inc.'s Response.

On July 20, 2009, SSTELECOM, Inc. ("SSTELECOM") filed a response to Midcontinent's Motion in TC09-014. NVC hereby adopts and incorporates SSTELECOM's response to Midcontinent.

2. Reply of Midcontinent.

In TC09-014, Midcontinent filed a reply to SSTELECOM. Midcontinent's reply is no more instructive as to what it seeks the Commission to do than its original motion. However, it has raised the following two matters:

a. Current Tariffs.

Midcontinent argues that although it has "no quarrel with the Filed Rate Doctrine" it claims that the "viability of SSTELECOM's tariff, [and presumably that of NVC]…is in serious question" because it claims the "Stipulation and Order upon which those rates are based has by its terms expired." Midcontinent can only reach this conclusion if it ignores this Commission's Order of June 30, 2009, which specifically extended NVC's tariffs. Therefore, to the extent

Midcontinent's Motion is based on this argument, the Motion should be denied.

b. Equal Protection Argument.

Midcontinent argues that "the principles of equal protection of the law require that similarly-situated CLECs should be treated consistently under the Commission's switched access rules." Midcontinent misapprehends the legal basis of an equal protection argument. In ***Interest of Z.B.,*** 2008 SD 108, 757 NW2d 595 ¶7, the court stated as follows with respect to the equal protection analysis:

> The equal protection clauses embodied in the Fourteenth Amendment to the United States Constitution and in Article VI, [section] 18 of the South Dakota Constitution guarantee equal protection of the laws to all persons [cite omitted]. To prevail on [an] equal protection claim, [a party] must satisfy a two-part test. First, he must show that the statute creates an arbitrary classification. [cite omitted] Second, if the classification does not involve a fundamental right or suspect [or intermediate] group, we determine whether a rational relationship exists between a legitimate legislative purpose and the classifications created. [cite omitted]
>
> A state's classification scheme will be upheld under rational basis review with a "plausible" or "conceivable" reason for the distinction. [cite omitted]
>
> [Furthermore] a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." … Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

Midcontinent's equal protection argument fails under both tests. First, it has not identified the statute that it claims creates an arbitrary classification.

Second, it has not articulated any basis to claim that this Commission's establishment of different rates for CLEC's having different network characteristics is not "rational". Midcontinent's equal protection argument ignores the substantial body of federal precedent that adopts different access rates for CLECs with different network characteristics. The FCC has recognized, for purposes of determining access rates, that there is a distinction between companies such as NVC and Midcontentent. It created the rural CLEC

classification which is defined in Section 61.26(a) of the Act and the FCC's rules, 47 C.F.R. § 61.26(a), as follows:

> (6) *Rural CLEC* shall mean a CLEC that does not serve (*i.e.*, terminate traffic to or originate traffic from) any end users located within either:
>
> (i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or
>
> (ii) An urbanized area, as defined by the Census Bureau.

Rural CLECs are permitted to charge the NECA rate for interstate traffic. The non-rural CLECs' interstate rate is substantially lower. In the Seventh Report and Order and Further Notice of Proposed Rulemaking (CC Docket No. 96-262) April 26, 2001, excerpted from paragraphs 64 – 81, the FCC expressed the following rationale for its adoption of the rural-CLEC distinction:

> The difficulty [in competing] would likely arise for those CLECs that operate in a rural area served by a price-cap incumbent with state-wide operations. Our rules require such ILECs to geographically average their access rates. This regulatory requirement causes these "non-rural ILECs" effectively to use their low-cost, urban and suburban operations to subsidize their higher cost, rural operations, with the effect that their state-wide averaged access rates recover only a portion of the ILEC's regulated costs for providing access service to the rural portions of its study area. During the course of this proceeding, we became concerned that tying the access rates of rural CLECs to those of such non-rural ILECs could unfairly disadvantage CLECs that lacked urban operations with which they could similarly subsidize their service to rural areas. Accordingly, we sought comment on whether the phenomenon of the non-rural ILEC justified the creation of a "rural exemption" to our benchmark scheme and, if so, how that exemption should be structured.
>
> In adopting the rural exemption, we reject the characterization of the exemption as an implicit subsidy of rural CLEC operations. It is true that an exemption scheme will permit rural CLECs to charge IXCs more for access to their end-user customers than was charged by the non-rural ILECs from whom the CLECs captured their customers. But that does not necessarily justify limiting the rural CLEC to the access rates of the non-rural ILEC.
>
> We thus conclude that the record supports the creation of a rural

> exemption to the benchmark scheme that we adopt for CLEC access charges. Under this exemption, a CLEC that is operating in a rural area, as defined below, and that is competing against a non-rural ILEC may tariff access rates equivalent to those of NECA carriers.
>
> We conclude that the rural exemption to our benchmark limitation on access charges will be available for a CLEC competing with a non-rural ILEC, where no portion of the CLEC's service area falls within: (1) any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or (2) an urbanized area, as defined by the Census Bureau. Thus, if any portion of a CLEC's access traffic originates from or terminates to end users located within either of these two types of areas, the carrier will be ineligible for the rural exemption to our benchmark rule.
>
> Our definition adopts 50,000, rather than 10,000, as the population cut-off for incorporated places because we are concerned that, without the statute's remaining three portions of the definition as a way for a company to attain rural status, the 10,000-person threshold would be unduly restrictive and deny the exemption to companies operating in areas that would generally be viewed as rural.
>
> It is also necessary to discuss briefly the type of carrier with which a CLEC must be competing in order to qualify for the rural exemption. Our intent is that this exemption will permit a CLEC to tariff access rates above the competing ILEC's only when the competing ILEC has broad-based operations that include concentrated, urban areas that allow it to subsidize its rural operations and therefore charge an artificially low rate for access to its rural customers.
>
> The final question with respect to the rural exemption is what the access service benchmark is for those carriers that qualify. We adopt the NECA tariff for switched access service as the standard that is the most appropriately reflective of the considerations that should go into pricing the access service of rural CLECs.
>
> We adopt the NECA access rate because it is tariffed on a regular basis and is routinely updated to reflect factors relevant to pricing rural carriers' access service.

Just as the FCC has articulated a rational basis for not treating all CLEC's the same, this Commission can likewise establish different access rates

using the FCC's rural CLEC distinction without violating the equal protection clause.

Finally, Midcontinent misapprehends the nature of this docket and the companion dockets (TC09-009, TC09-014 and TC09-022). In each of those dockets, the CLECs have sought temporary extension of their access rates until this Commission establishes new rules in docket RM 05-022. Therefore, to the extent any "equal protection" or other "uniformity" argument exists, those claims and any associated evidentiary hearing, should be presented in RM 05-022.

CONCLUSION

NVC requests that Midcontinent's Motion for Uniformity in Switched Access Rates and for Evidentiary Hearing be denied.

Dated this 7th day of August 2009.

BANTZ, GOSCH & CREMER, L.L.C.

James M. Cremer

James M. Cremer
Attorneys for Northern Valley Communications, L.L.C.
305 Sixth Avenue SE
P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232
605-225-2497 (fax)
jcremer@bantzlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 7th day of August 2009 upon the following:

Ms. Patricia Van Gerpen
Executive Director
SD Public Utilities Commission
500 East Capitol Avenue, 1st Fl.
Pierre, SD 57501-5070
605-773-3201
patty.vangerpen@state.sd.us

Mr. David A. Gerdes
May, Adam, Gerdes & Thompson, LLP
P.O. Box 160
Pierre, SD 57501-0160
605-224-8803
dag@magt.com

Ms. Karen E. Cremer
Staff Attorney
SD Public Utilities Commission
500 East Capitol Avenue, 1st Fl.
Pierre, SD 57501-5070
605-773-3201
karen.cremer@state.sd.us

Mr. Jon Thurber
Staff Analyst
SD Public Utilities Commission
500 East Capitol Avenue, 1st Fl.
Pierre, SD 57501-5070
605-773-3201
jon.thurber@state.sd.us

Mr. Tim Binder
Staff Analyst
SD Public Utilities Commission
500 East Capitol Avenue, 1st Fl.
Pierre, SD 57501-5070
605-773-3201
tim.binder@state.sd.us

Mr. Thomas J. Welk
Mr. Christopher W. Madsen
Boyce, Greenfield, Pashby & Welk, L.L.P.
101 N. Phillips Avenue-Ste 600; P.O. Box 5015
Sioux Falls, SD 57117-5015
605-336-2424; 605-334-0618 (fax)
tjwelk@bgpw.com
cwmadsen@bgpw.com

Mr. William M. Van Camp
Olinger, Lovald, McCahren & Reimers, P.C.
117 E. Capitol, P.O. Box 66
Pierre, SD 57501-0066
605-224-8851; 605-224-8269 (fax)
bvancamp@olingerlaw.net