

agreement for the exchange of the traffic; (5) the Commission must first determine whether it has jurisdiction over the traffic before it can award any interim relief; (6) Complainants did not raise any dispute under SDCL §§ 49-31-109 to 49-31-115 and therefore, the interim relief authorized under SDCL § 49-31-114 is not applicable; and (7) if the Commission awards alternative interim relief allowing Complainants to block Verizon traffic, Verizon should be allowed to do the same. Each of these arguments will be addressed in turn.

1. First, Verizon's arguments should not obscure that it now has admitted the underlying factual allegations contained in the Complaint and in the Request for Interim Relief. Verizon admits that it is sending the disputed intrastate, interexchange traffic to Complainants for termination in South Dakota. Verizon admits that it has been paying intrastate switched access charges on this traffic for years. Verizon makes no claim that Complainants began doing something new in July, 2010, with respect to the origination or termination of this traffic. Verizon's sole basis for refusing to pay the intrastate switched access charges (charges other interexchange carriers in South Dakota are paying and which Verizon paid until July, 2010) is a legal conclusion, based on a United States District Court decision from the District of Columbia (which remains on appeal and has no precedential value in South Dakota), that IP-based traffic is not subject to intrastate switched access charges.

2. Second, both Knology and Midcontinent repeatedly have informed Verizon that they originate and terminate traffic to and from Verizon through their South Dakota local exchange switching facilities, in a manner similar to all other South Dakota local exchange telecommunication companies. Under ARSD § 20:10:29:04, a party that uses a carrier's carrier's local exchange switching facilities for the provision of intrastate telecommunications services is to be assessed switched access charges.

3. Third, assuming, for purposes of argument, that all of the traffic in question was, in fact, IP-originated or IP-terminated, neither the Federal Communications Commission (“FCC”), this Commission, the South Dakota state legislature, nor any court in this state have determined that such traffic is exempt from intrastate switched access charges. Verizon now has admitted (at ¶ 2) that it has no facts to support its claim that the traffic is IP-based, but even if it could make such a showing, Verizon’s challenge to the application of switched access charges to that traffic fails. There is no basis in applicable state or federal law exempting such IP-based traffic from the lawfully approved switched access tariffs on file with this Commission.

4. Regarding the burden of proof, Complainants do bear the initial burden to show that Verizon is sending intrastate, interexchange traffic to the Complainants and is not paying the tariffed rate. Based on Verizon’s admissions, Complainants have met their burden of proof on this issue. Verizon has conceded that it has been sending such traffic to Complainants and is not paying the tariffed rate. Verizon’s position that the tariffed rate does not apply is an affirmative defense, and Verizon bears the burden to prove on that issue. This also means that the burden is on Verizon to demonstrate that interim relief is not appropriate.

5. In challenging the requested interim relief, Verizon first states that it is not receiving “free use” of the Complainants networks because it has been paying \$0.0007 per minute for the traffic in question. This argument is meaningless in the context of a request for interim relief. As shown in Complainants’ previously filed Confidential Exhibit A, even considering the miniscule per minute rate Verizon unilaterally decided to pay, the amounts Verizon refuses to pay are substantial and continue to mount month after month. The composite intrastate switched access rate for both Knology of the Black Hills, LLC and for Midcontinent is \$0.052 or 5.2 cents per minute of use. For Knology of the Plains, Inc., the composite intrastate

switched access rate is \$0.077 or 7.7 cents per minute of use. Given the huge difference between the rate Verizon is paying (seven one-hundredths of a cent) and the lawfully established tariffed rates on file and previously approved by this Commission (5.2 cents and 7.7 cents), Verizon is receiving a free ride.¹ Moreover, Verizon's dispute communications with the Complainants make clear that Verizon does not believe it is required to pay anything for the exchange of this traffic absent a commercial agreement between the parties. In Verizon's own view then, it is paying the \$0.0007 voluntarily, rather than out of any legal obligation to do so. As Verizon already has shown its willingness to abruptly stop paying a legally mandated rate, there is no basis to assume they will not simply decide to stop paying the \$0.0007 rate at some point in the future.

6. Verizon's second point (at ¶ 2) in opposition to interim relief is that Verizon does not possess the requisite signaling information to identify the traffic as IP-based and only Complainants know whether the traffic is being terminated (or originated) in IP-format. As noted above, this is a direct admission by Verizon that it had no legitimate basis to dispute the charges in the first instance. It is also an admission by Verizon that it has not been supplying any signaling information that would identify the traffic as anything other than intrastate, interexchange traffic. Simply put, if Verizon does not know whether the traffic is IP-based or not, Verizon had no good faith basis for disputing the charges. The lack of good faith basis upon which to base its refusal to pay charges, combined with Verizon's further admission (at ¶ 3) that some of the traffic may indeed be subject to switched access charges even under its own theory, weighs heavily in favor of granting Complainants' request for interim relief.

¹ The rate Verizon has chosen to pay is not even close to the interstate switched access rates for Knology and Midcontinent. For Knology of the Black Hills, LLC and Midcontinent, the composite interstate rate is \$0.005 or ½ cent per minute of use and for Knology of the Plains, Inc., the composite interstate rate is \$0.007 or 7/10ths of a cent per minute of use.

7. Verizon next contends (at ¶ 3) that, before the Commission can address jurisdictional issues, discovery is necessary to resolve the factual dispute between the parties regarding the nature of the traffic. First, as noted above, this position assumes there is a jurisdictional question to be addressed. Verizon has yet to point to a single decision of the FCC, the PUC, the South Dakota state legislature, or any court in South Dakota, stating that IP-based traffic is exempt from state Commission regulation or the application of switched access charges.² Second, both Knology and Midcontinent repeatedly have asserted that they originate and terminate traffic to and from Verizon through their South Dakota local exchange switching facilities, in a manner similar to all other South Dakota local exchange telecommunication companies. There is no “factual issue” to be resolved. Third, it is difficult to understand how the need for discovery, if there is one, weighs against the award of interim relief. The statute allowing for interim relief, SDCL § 49-31-114, specifically contemplates an award of such relief while the proceeding is still pending – that is what makes the relief “interim.” Complainants are not asking the Commission to rule immediately on the underlying substantive issues in the complaint. They are seeking an order for interim payments *until* a final Commission decision is made in the case. Verizon’s admission that some of the traffic it has disputed may be subject to

² Moreover, against the federal district court case that Verizon cites, there are multiple determinations to the contrary by other state commissions with far greater expertise on these issues than any federal court. See *Investigation into Whether Providers of Time Warner “Digital Phone” Service and Comcast “Digital Voice” Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service*, Docket No. 2008-421, Order (October 27, 2010, ME PUC) at p. 18; *Investigation into regulation of Voice over Internet Protocol (“VoIP”) services*, Docket No. 7316, Board Order RE Phase I (October 28, 2010, VT PSB) at pp. 26; *Petition of AT&T Wisconsin for Declaratory Ruling that Its “U-verse Voice” Service is Subject to Exclusive Federal Jurisdiction*, Docket No. 6720-DR-101, Final Decision (September 24, 2010 Wisc. PSC) at pp. 12; *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*, 21905-U, Order Adopting in Part and Modifying in Part the Hearing Officer’s Initial Decision (July 31, 2009, GA PSC) at 4;

switched access charges weighs heavily in favor of the interim relief sought. Complainants should not be required to continue to forego payment when Verizon itself admits that it may not have properly disputed some or all of the charges.

8. Verizon's claim about the need for discovery, coupled with its proposed procedural schedule set forth in its Reply to Complainants' Request for Procedural Schedule, is yet another factor in favor of the need for interim relief. Verizon has proposed a procedural schedule that would delay a Commission decision in this case until the end of July, 2011, a full year after Verizon began disputing the switched access charges. By July, 2011, Complainants collectively will have been deprived of approximately \$775,000.00 in revenue for switched access services rendered to Verizon. Such a deprivation constitutes a significant burden to Knology and Midcontinent and has the potential to harm all of Complainants' South Dakota customers.³

9. Verizon repeats its mantra (at ¶ 4) that the parties should negotiate a commercial resolution to this dispute and that an award of interim relief would eliminate any incentive for Knology and Midcontinent to engage in negotiations. What Verizon means is that it wants to maximize its own leverage because not receiving access charge revenue is a much more significant burden on Complainants than paying those charges would be on Verizon. Verizon is one of the largest telecommunications companies in the world. When Verizon came to the conclusion, sometime before June of this year, that it believed switched access charges should not apply to IP-based traffic, rather than take the proper step of discussing those issues with carriers like Knology and Midcontinent in advance of cutting off payments and/or proactively

³ Even if the Commission adopts Complainants' proposed procedural schedule, a decision will not be reached in this case until late April or early May, 2011. By that time, the outstanding payments due the Complainants will be well over \$500,000 collectively.

filing an appropriate proceeding at either the state or federal level to confirm their position, Verizon simply stopped paying. Verizon did not continue to pay and send a letter requesting negotiations. Verizon stopped paying and demanded negotiations. Now, Verizon is asking the Commission to assist in the shakedown by refusing interim relief.⁴ The Commission should reject Verizon's invitation.

10. What is more astonishing is that Verizon admits (at ¶ 4) that a "regulatory vacuum" exists with respect to IP traffic. Verizon claims that commercial negotiations are the soundest solution to this regulatory vacuum. Yet Verizon goes on (at ¶ 5) to flatly state that the Commission does not have subject-matter jurisdiction to impose state tariffed rates on IP-originated and/or IP-terminated traffic. Given that Verizon admits there is a regulatory vacuum with respect to IP-based traffic, how can it substantiate its claim that the law is settled with respect to the Commission's jurisdiction (or, as Verizon claims, lack of jurisdiction) over IP-based traffic? Setting aside this blatant contradiction in Verizon's arguments, the existence of factual and legal issues for the Commission to decide during the course of the complaint proceeding is *not* a basis on which to deny interim relief. As mentioned, interim relief, by its very nature, is awarded prior to consideration of the merits of a case.

11. Next, Verizon contends that the Commission has no authority to award interim relief because such relief is available only if a complaint is brought seeking enforcement of SDCL §§ 49-31-109 to 49-31-115. Verizon contends the Complaint did not raise any dispute over the quality and nature of the signaling information. Contrary to Verizon's assertion, the first paragraph of the Complaint noted the following: "This Complaint is filed pursuant to

⁴ Indeed, Verizon's demand for negotiations presupposes that there is something to negotiate and that it should be permitted to pay less for intrastate access than any of the other carriers that purchase the same service.

A.R.S.D. § 20:10:01:07.01 and SDCL Chapters 49-13 and 49-31.” Clearly §§ 49-31-109 to 49-31-115 are included in Chapter 49-31. Moreover, paragraph 13 of the Complaint states that if the traffic exchanged between the parties was IP-based, it was indistinguishable from other traffic as exchanged.⁵ Verizon’s own Answer acknowledged that the “indistinguishable” nature of the traffic was one of the allegations in the Complaint. (See Answer at ¶ 13). More importantly, Verizon’s affirmative defenses bring the issue of lack of signaling information squarely into play. Verizon contends the traffic in question should be treated differently for billing purposes from other intrastate toll traffic. Knology and Midcontinent are entitled to argue, in opposition to that affirmative defense, that the statutes in question require Verizon, as the originating carrier, to provide information that distinguishes the traffic for billing purposes. Thus, the Commission is empowered and authorized by SDCL § 49-31-114 to order interim payments or other appropriate relief pending resolution of this complaint proceeding. Interim payments are appropriate to compensate for Verizon’s past and continued use of Complainants’ networks. Ordering timely payment for services rendered does not create a burden on Verizon. Non-payment, on the other hand, creates an unjust burden on local exchange carriers such as Knology and Midcontinent and constitutes a continuing violation of the applicable tariffs on file with the Commission.

12. Verizon does not challenge the alternative relief sought by the Complainants –an order allowing Knology and Midcontinent to discontinue providing intrastate switched access services to Verizon. However, Verizon contends any such order should be reciprocal. This quid pro quo is insupportable. Whereas Verizon has admitted that it is refusing to pay switched access charges, Knology and Midcontinent are not refusing to pay the appropriate rates to

⁵ Complainants also raised this issue in their brief in opposition to Verizon’s request for stay (see p.6, at n.6).

Verizon, and any claim by Verizon to the contrary is without basis in fact. This is yet another attempt by Verizon to enlist the Commission in its efforts to put pressure on Knology and Verizon to “negotiate” where no negotiation is warranted. Moreover, Verizon’s comparison of this dispute to traffic pumping is specious and unwarranted. Traffic pumping involves charging for terminating traffic that is not, in fact, terminating to an end user in the exchange of the charging carrier and typically is generated solely for the purpose of charging terminating access. There is no claim in this instance that the traffic in question was not terminated by Knology and Midcontinent to real end users in their respective exchanges in South Dakota. Verizon’s analogy is irresponsible and serves only to hinder legitimate efforts to put an end to such illegitimate schemes.

13. Finally, the Commission should consider the precedent it would be setting if it refuses interim relief. Verizon is only one of many carriers doing business in South Dakota. If Verizon is allowed to unilaterally stop paying a tariffed rate, which forces Knology and Midcontinent to bring a dispute before the Commission that Verizon then proposes not be resolved for over a year, it will have successfully deprived two much smaller companies of close to a million dollars. With this precedent in place, there would be nothing to stop any carrier from making a claim - meritorious or not - and simply refusing to pay. In fact, there would be nothing to stop Verizon from refusing to pay all other local exchange carriers in this state that, as noted above, use their local exchange switching facilities to originate and terminate traffic to and from Verizon in the same manner as Knology and Midcontinent. The Commission should not condone these methods as acceptable. As mentioned above, if Verizon believed its claim that there is a “regulatory vacuum” regarding IP-based traffic, the proper procedure would have been to seek negotiations while continuing to pay and, if such negotiations were unsuccessful, to seek

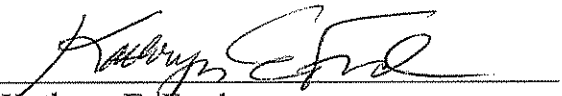
a definitive ruling at the Commission or the FCC regarding whether intrastate switched access charges are applicable to IP-based traffic. Verizon did not do that. It should not now be rewarded for its actions by being allowed to continue to withhold lawfully imposed, presumptively reasonable tariffed rates while this dispute is pending.

CONCLUSION

Verizon's arguments in opposition to Complainants Request for Interim Relief are individually and collectively without merit. Complainants respectfully request that the Commission order Verizon to pay all outstanding switched access invoices and to continue to make such payments pending resolution of this complaint proceeding. Alternatively, Complainants request authorization from the Commission to immediately cease providing intrastate switched access services to Verizon. In the event the Commission awards the alternative interim relief, Complainants request that the Commission deny Verizon's request for a reciprocal order.

Respectfully Submitted this 3rd
day of January, 2011

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Complainants, hereby certifies that a true and correct copy of the foregoing "Complainants' Reply to Verizon's Response to Request for Interim Relief was served via email upon the following:

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