BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF MIDCONTINENT COMMUNICATIONS, KNOLOGY OF THE PLAINS, INC., AND KNOLOGY OF THE BLACK HILLS, LLC, AGAINST MCI COMMUNICATIONS SERVICES, INC. D/B/A VERIZON BUSINESS SERVICES FOR UNPAID ACCESS CHARGES	)	**TC10-096** COMPLAINANTS' BRIEF IN SUPPORT OF OPPOSITION TO VERIZON'S REQUEST FOR STAY OR ALTERNATIVE REQUEST FOR HEARING ON THRESHOLD FACTUAL ISSUES

Come now Midcontinent Communications, Knology of the Plains, Inc., and Knology of the Black Hills, LLC, (collectively "Complainants") by and through their undersigned counsel of record, and file this Brief in Support of Opposition to MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon's) Request for Stay to Permit Settlement Negotiations, or in the Alternative, Request for Hearing on Threshold Factual Issues Related to Jurisdiction.

I. SUMMARY

Complainants have filed a straightforward dispute involving Verizon's failure to pay tariffed intrastate switched access charges for switched access services provided by the Complainants. Verizon contends the traffic on which it is refusing to pay access charges is IP-based traffic and thus, is not subject to the jurisdiction of the South Dakota Public Utilities Commission ("Commission"). Verizon suggests a variety of reasons why the Commission should avoid allowing the complaint to proceed. Yet Verizon's own admissions and affirmative defenses reveal that, by failing to pay switched access charges, it has engaged in self-help at the expense of Knology and Midcontinent.

Verizon has presented no facts or legal support to sustain its "Request for Stay" or alternative "Request for Hearing on Threshold Factual Issues Related to Jurisdiction." These "Requests" were presented by Verizon in the form of affirmative defenses, on which, according

to ARSD § 20:10:01:15.01, Verizon bears the burden of proof. As set forth below, Verizon has failed to meet its burden of proof to justify the relief it seeks. Verizon has failed to present any evidence that the traffic in dispute is, in fact, IP-based and has failed to establish that even if the traffic is IP-based, it is exempt from the application of intrastate switched access charges. As a result, the Commission should deny Verizon's Requests, and instead, set a procedural schedule that will allow this Complaint to move forward in a timely fashion.[1]

II. ARGUMENT

A. Verizon's Position Rests on Misstatements of Both Law and Fact

The essence of Verizon's position boils down to a misstatement of the law and erroneous assumptions of fact. Verizon asserts the legal position that all Voice over Internet Protocol or "VoIP" [2] traffic has officially been declared "jurisdictionally interstate" in nature and that the FCC has preempted the states from regulating such traffic or from applying switched access charges to such traffic. (Verizon Answer at ¶¶ 42-43) As set forth in more detail below, this legal position is inaccurate. Verizon also asserts that all Verizon traffic originating from or terminating to Knology and Midcontinent is either IP-originated or IP-terminated traffic. This

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[1] As will be shown in later sections of this Brief, many state commissions already have rejected claims like those being made by Verizon in this docket and Verizon has been a participant in many of those dockets. In fact, Verizon was concerned enough about a ruling being made by the Georgia Public Service Commission - in a docket in which Verizon was not even a participant- that Verizon filed a letter after the Initial Decision was issued, asking the Georgia PSC to revise its decision so that it had limited applicability to the facts of that case. A copy of Verizon's letter to the Georgia PSC is attached as Exhibit E for the convenience of the Commission.

[2] The Eighth Circuit has explained VoIP as follows: "VoIP is an internet application utilizing 'packet-switching' to transmit a voice communication over a broadband internet connection. In that respect, it is different from the 'circuit-switching' application used to route traditional landline telephone calls. In circuit-switched communications, an electrical circuit must be kept clear of other signals for the duration of a telephone call. Packet-switched communications travel in small digital packets along with many other packets, allowing for more efficient utilization of circuits." *Minnesota Public Utilities Comm'n v. F.C.C.*, 483 F.3d 570, 574 (8th Cir. 2007). The Court went on to note that "'[i]nterconnected VoIP service' is a service in which a call is transferred from VoIP to a landline telephone or from a landline to VoIP." *Id.*

assertion is based on two claims: (1) that because Knology and Midcontinent are cable companies offering IP-based products, the traffic they originate and terminate must be IP-based; and (2) that certain traffic that Verizon delivered to Knology and Midcontinent was "IP-originated" by customers purchasing Verizon's own VoIP service. (Verizon Answer at ¶ 11) Despite these claims, Verizon has failed to provide any evidence that any of the traffic it is disputing was, in fact, either IP-originated or IP-terminated. Simply saying so is insufficient.

1. Verizon's Assumption That the Disputed Traffic is IP-Based Traffic is Erroneous.

In order to substantiate its position that it properly refused to pay intrastate switched access charges, Verizon bears the burden to establish that the traffic in dispute is subject to some other regulatory treatment or some intercarrier compensation scheme other than traditional intrastate switched access charges. At the heart of Verizon's position in that regard are two assumptions that have no basis in fact: First, Verizon states that "upon information and belief" Complainants are not paying switched access charges on their own IP-enabled traffic and, therefore, Verizon should not have to pay either. (Verizon Answer at ¶¶ 1, 9) Second, as noted above, Verizon asserts that the traffic in question in this dispute was originated or terminated in IP format because the Complainants are cable companies that use IP technology to provide voice communications. (Verizon Answer at ¶11) Verizon also claims that certain of the traffic that Complainants terminated for Verizon was from Verizon's own VoIP customers. (Verizon Answer at ¶ 11) Verizon has provided no evidence to support this claim, either in its original disputes or in its Answer in this Complaint proceeding, yet is asking the Commission to accept the claim as true and dismiss this matter in favor of federal jurisdiction. From the perspective of Knology and Midcontinent, to the extent any of the traffic from Verizon was IP-originated, it

was indistinguishable from, and was terminated in exactly the same manner as, all other TDM originating and terminating traffic and is subject to intrastate switched access charges.

First, Verizon apparently has confused Midcontinent and Knology for other providers with which it exchanges traffic. Contrary to Verizon's "information and belief," both Midcontinent and Knology continue to pay tariffed switched access rates for originating and terminating traffic, whether such traffic was originated or terminated via IP-based technology or not.[3]

Second, it is indisputable that the disputed traffic sent to and from Verizon is TDM traffic, in TDM format. Whatever form the traffic might have taken at some other point during transmission, the interface between Verizon on one hand, and either Midcontinent or Knology on the other hand, requires that traffic be transmitted as TDM. It does not matter whether that traffic took some other form at a different point in the transmission process (such as at an originating provider) because the transmission over Verizon's long distance network as TDM traffic establishes that access charges are applicable.

Next, Verizon's assumption that Midcontinent and Knology, as cable companies, use an IP-based technology to provide voice communications to segments of their customer base, does not, in and of itself, justify a conclusion that any of the traffic originated or terminated from Verizon is IP-based, let alone that all of it is. Given that Verizon's entire position rests on the notion that the disputed traffic is IP-based, Verizon should be immediately ordered to provide proof that the traffic is, in fact, IP-based, and be ordered to pay all outstanding switched access

[3] Verizon's assertion "upon information and belief" that Knology and Midcontinent use "traffic routing practices" to dispute the application of tariffed access charges on IP-enabled traffic (Verizon Answer at ¶ 9) has no basis in reality. Neither Knology nor Midcontinent engages in any such "traffic routing practices." Knology and Midcontinent pay the proper switched access rates on all traffic.

charges on any traffic that is not IP-based. The resolution of the dispute before the Commission can then move forward solely on the issue of the proper payment for the traffic that is IP-based.

Even if some portion of the traffic Verizon is disputing is, in fact, IP-originated or terminated, this makes no difference for purposes of determining whether switched access charges apply. IP is a technology, not a service. The FCC has held that calls via interconnected VoIP services are "indistinguishable" from ordinary calls from the perspective of the end user. Thus, the fact that calls originate or terminate in IP format does not mean they are exempt from access charges as "information service" calls. All traffic delivered by Verizon to Midcontinent and Knology for termination to end users, whether IP-based or not, arrives in the same manner and requires the use of the same network facilities to be terminated to an end user as circuit switched traffic. From a LEC's perspective, the functions they perform to terminate calls to end users are the same and the network costs are the same, regardless of the technology used by the originating caller. Such costs do not magically disappear when the traffic originates or terminates as a VoIP call. Moreover, even the FCC's exemption for information service providers applies only to permit those information service providers to purchase local telephone service to terminate calls.[4] It does not exempt any interexchange traffic to or from the information service providers from access charges.

The definitions of "interexchange telecommunications service," "switched access" and "telecommunications service" in South Dakota confirm that there is no legal basis on which to distinguish traffic that is IP-originated or terminated. SDCL § 49-31-1(10) defines "interexchange telecommunications service" as telecommunications service between points in two or more exchanges. SDCL § 49-31-1(27) defines "switched access" as any exchange access

[4] *See* Memorandum Opinion and Order, *MTS and WATS Market Structure,* 97 F.C.C.2d 682, 715 (1983), aff'd, NARUC v. FCC, 737 F.2d 1095, 1137 (D.C. Cir. 1984).

service purchased for the origination and termination of interexchange telecommunications services which includes central office switching and signaling, local loop facility, or local transport. Finally, SDCL § 49-31-1(29) defines "telecommunications service" as the transmission of signs, signals, writings, images, sounds, messages, data, or other information of any nature by wire, radio, light-waves, electromagnetic means, or other similar means. . . . Nothing about IP-originated or terminated traffic excludes it from these South Dakota specific definitions.[5] Verizon's unsubstantiated assertion that the traffic upon which it is refusing to pay access charges is IP-based, without more, is insufficient to meet Verizon's burden of proof. Verizon must provide some evidence of its claim that the traffic is IP-based. To date it has not done so. The Commission does not even need to address whether IP-based traffic is subject to intrastate switched access charges unless and until Verizon meets that burden.[6]

2. Verizon's Legal Conclusions Are Misleading and Inaccurate.

Assuming Verizon could substantiate its position that the disputed traffic is IP-based, there is no legal justification for treating such traffic differently from an inter-carrier compensation perspective than it has always been treated. Verizon claims the law is settled that IP-based traffic is jurisdictionally "interstate" in nature and therefore, not subject to intrastate switched access charges.[7] Verizon's position, which it has repeated around the country, relies

[5] It is important to note in this context that the South Dakota definition of "telecommunications service" is not the same as the definition in the Federal Communications Act. *Compare* SDCL § 49-31-1(29) *with* 47 U.S.C. § 3(46) (federal definition of telecommunications services).
[6] Under SDCL §§ 49-31-110 and 49-31-111, it would be Verizon's burden, as the originating carrier, to provide the necessary signaling information to the terminating carriers (Midcontinent and Knology) to allow them to appropriately classify its traffic for billing purposes. On the disputed traffic in this case, Verizon failed to provide any signaling information that would have identified the traffic as being subject to anything other than intrastate switched access charges.
[7] This does beg the question why, if Verizon truly believes the law is settled that IP-based traffic is jurisdictionally interstate in nature, it continued to pay intrastate switched access charges on that traffic for years, until its recent cessation of such payments in June, 2010.

on the *Vonage* decision[8] for the notion that traffic that uses Internet Protocol at any point is an "information service" and therefore, jurisdictionally interstate in nature and not subject to regulation by state public utility commissions. Verizon asserts that, in *Vonage,* the Federal Communications Commission ("FCC") ruled that IP traffic is interstate traffic for jurisdictional purposes and that states are preempted from regulating such traffic. (Verizon Answer at ¶ 42) Verizon also cites the *PAETEC and MetTel* decisions, two district court decisions with limited precedential value, for the proposition that tariffed access charges do not apply to IP-based traffic.[9]

Public Utility Commissions around the country have rejected claims like those being made by Verizon about the impact of the *Vonage, PAETEC and MetTel* decisions. For instance, in a decision dated October 27, 2010, the Maine Public Utilities Commission specifically found that neither Congress nor the FCC has preempted that state's statutory authority: "[T]he FCC has not exercised its Title 1 authority to declare that VoIP is an information service." [10]

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[8] *See* Verizon Answer at ¶ 42, citing Memorandum Opinion and Order, *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* 19 F.C.C.R. 22404 (2004), *petitions for review denied, Minnesota Pub. Utils. Comm'n v. FCC,* 483 F.3d 570 (8th Cir. 2007) (hereinafter "*Vonage Order*").

[9] *See* Verizon Answer at ¶ 43, citing *PAETEC Communications, Inc. v. CommPartners, LLC,* No. 08-cv-397, 2010 WL 1767193 (D.D.C Feb. 18, 2010) (hereinafter "PAETEC") and *Manhattan Telecommunications Corp. v. Global NAPs, Inc.*, No. 08-CIV-3829, 2010 WL 1326095 (S.D.N.Y. Mar. 31, 2010) (hereinafter "MetTel"). Neither the PAETEC nor the MetTel decisions have any precedential value in South Dakota and both are the subject of pending appeals. Unsurprisingly, Verizon's argument that these cases are controlling has been rejected by numerous state utility commissions.

[10] *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 (hereinafter "*Maine Decision*"). A copy of the Maine decision is attached as Exhibit A for the convenience of the Commission.

Similarly, the Vermont Public Service Board has held that state action concerning VoIP services is ***not*** preempted by federal law.[11]

In September, 2010, the Wisconsin Public Service Commission denied AT&T's petition for a declaratory ruling that its U-verse Voice offering is subject to the exclusive jurisdiction of the FCC because the offering was either an "information service" under federal law, or an offering subject to the preemptive effect of the *Vonage Order*, or both. In denying the declaratory ruling sought by AT&T, the Wisconsin PSC stated:

> The Commission concludes that ***the FCC has declined to classify fixed, interconnected VoIP, such as U-verse, as an "information service" under federal law.*** 47 U.S.C. § 153(20). In five different decisions, the FCC has indicated that it was refraining from taking up the classification of VoIP as either a telecommunications or an information service, an issue it originally identified for consideration in 2004. The FCC has identified the issue as not being decided in cases involving nomadic VoIP, universal service fund contributions by VoIP providers, customer proprietary network information by VoIP providers, E911 service in VoIP offerings, and discontinuation of service notices by VoIP-based eligible telecommunications carriers (ETCs) under 47 U.S.C. § 214. Finally, in the appendices of the *Mandamus Remand Order*, the FCC set forth proposed draft orders that would declare interconnected VoIP to be subject to federal regulation, thereby reasonably implying that it had not yet taken such action.
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> The Commission also concludes that fixed, interconnected VoIP is not subject to the *Vonage Order*, because "state regulation of fixed VoIP remains an open issue." *Minn. Pub. Utils. Comm'n v. FCC,* 483 F.3d 570, 581-82 (8th Cir. 2007) (Hobbs Act review of the FCC's *Vonage Order).*
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> Consequently, the Commission concludes that AT&T has not shown that the FCC has preempted state regulation of fixed, interconnected VoIP offerings as telecommunications services. The petition for declaratory ruling is therefore denied.[12]

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[11] *See 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 (hereinafter "*Vermont Order*"). A copy of the Vermont decision is attached as Exhibit B for the convenience of the Commission.

[12] *See 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 (citations omitted)(emphasis added) (hereinafter "Wisconsin Order"). A copy of the Wisconsin decision is attached as Exhibit C for the convenience of the

In yet another decision, the Georgia Public Service Commission ruled that traffic delivered to the public switched telephone network (PSTN), whether IP-enabled or not, is subject to intrastate switched access tariffs. The Georgia proceeding began in November, 2005, when Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC sought payment of intrastate access charges for traffic delivered to them by Global NAPs. The Georgia PSC ruled the traffic being terminated by GNAPs to the networks of the Petitioners was and is subject to its jurisdiction, and as such, the traffic was subject to the rates, terms and conditions of each of the Petitioners' respective intrastate access tariffs. The PSC noted that, while the factual record in the case demonstrated the traffic was not Enhanced Service Provider (ESP) traffic, the PSC's "jurisdiction over the subject matter is not altered as a result of whether the traffic delivered for termination to the PSTN by GNAPs is or is not ESP traffic delivered to the PSTN for termination or IP-enabled traffic." The PSC went on to state:

> [T]he Commission is not preempted from ordering access charges for the intrastate calls included in the subject traffic. First, Global NAPs did not demonstrate that the traffic at issue was ESP. Second, persuasive record evidence indicated that the traffic at issue was traditional voice traffic. Third, relevant decisions of the FCC indicate that the Commission is not preempted from determining that access charges are due for intrastate calls terminated to the PSTN, even if the subject traffic was ESP traffic. [13]

Commission. Verizon participated in the Wisconsin proceeding, filing comments as amicus curiae, or friend of the commission. Notably, Verizon made the same arguments in the Wisconsin proceeding regarding the impact of the *PAETEC* and *Vonage* decisions as it is making in this case and further encouraged the Wisconsin PSC to hold the action in abeyance pending federal action on the issues. The Wisconsin PSC rejected Verizon's arguments.

[13] *See 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 (hereinafter "Georgia Order"). A copy of the Georgia decision is attached as Exhibit D for the convenience of the Commission.

The Georgia PSC concluded that its decision was consistent with federal policy. "The FCC has stated that 'any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.'"[14] Importantly, the Georgia PSC also noted that GNAPs (like Verizon in this case) had the burden of proof to demonstrate that the Commission was preempted and that GNAPs did not make a showing that the subject traffic was ESP traffic. Rather, GNAPs "merely presented unsubstantiated claims regarding the nature of the traffic."[15] Verizon is making similar unsubstantiated claims in this case.

In addition to the Maine, Vermont, Wisconsin and Georgia commissions, other state commissions have expressed similar positions in the recent proceeding initiated by Global NAPs (GNAPs) at the FCC.[16] In the Public Notice for that proceeding, the FCC sought comment on, among other issues, whether federal law prohibits state commissions from subjecting VoIP traffic to intrastate tariffs.[17] The Arizona Corporation Commission argued that:

> . . . while the FCC preempted state jurisdiction over pure "nomadic" VoIP traffic in the *Vonage* order because it was not possible to distinguish between interstate and intrastate nomadic VoIP calls, the *Vonage* decision and subsequent FCC decisions never preempted state regulation of non-nomadic VoIP traffic, which constitutes the vast majority of VoIP traffic nationwide. This includes VoIP

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[14] *Id.* at 8-9 (citing *In the Matter of IP-Enabled Services,* WC Docket No. 04-36, released March 10, 2004 at ¶ 33).
[15] *Id.* at 7.
[16] *See In the Matter of Global NAPs Petition for Declaratory Ruling and Alternative Petition for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions,* WC Docket No. 10-60, Submitted March 5, 2010, available at http://fjallfoss.fcc.gov/ecfs/proceeding/view?z=95ozh&name=10-60.
[17] Commission March 18, 2010 Public Notice, *"Pleading Cycle Established for Comments on Global NAPs Petition for Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions*, available at http://fjallfoss.fcc.gov/ecfs/document/view?id=7020397244 (Public Notice).

> offerings of cable companies and other providers who own their own networks and who offer VoIP over those networks.
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> . . . Many of the parties filing comments in this proceeding agree that it is important that state utility commissions have the authority to rule on issues such as those raised before the State Commissions involving Global NAPs associated with intrastate traffic. If the FCC takes any action in this proceeding, it should be to clarify that the State Commissions are not precluded from addressing issues such as those raised by Global NAPs based upon existing law.[18]

Comments of other state utility commissions and numerous industry groups in this FCC docket are in accord. For instance, the Pennsylvania Public Utilities Commission said:

> The Pa PUC maintains its position that any interexchange traffic that is transported by Global NAPs and indirectly terminates at the facilities of another telecommunications common carrier is subject to the appropriate jurisdictional carrier access charges, irrespective of whether such traffic was at some point initiated in IP-enabled protocol.[19]

The National Association of State Utility Consumer Advocates reached the same conclusion:

> It should suffice to remind the Commission of NASUCA's longstanding position that carriers that use other carriers' networks should pay for such use. ***And it really does not matter if some (or all) of that traffic is VoIP; compensation should be due.***
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> . . .
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> And we also reject Verizon's assertion that all VoIP traffic is jurisdictionally interstate and thus subject only to FCC jurisdiction. Although Verizon never comes out and says so –referring only generically to intercarrier compensation – this would mean that intrastate access charges could not apply to VoIP traffic, despite the fact that, as Verizon admits, telephone numbers remain an effective means of identifying the beginning and end points of a telephone call. ***And if a call begins in one state and ends in the same state, it is an intrastate call; if the call is also an interexchange call, intrastate access charges should be paid.***[20]

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[18] Reply Comments of the Arizona Corporation Commission available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7020408857.

[19] Reply Comments of the Pennsylvania Public Utility Commission available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7020408819. Comments of the various industry groups are also available at: http://fjallfoss.fcc.gov/ecfs/proceeding/view?z=95ozh&name=10-60.

[20] Reply Comments of the National Association of State Utility Consumer Advocates available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7020408811. (citations omitted)(emphasis added)

Similarly, a large group of associations, which include among others, the National Exchange Carriers Association (NECA), representing rural incumbent local exchange carriers (ILECs) throughout the United States, urged the FCC to deny the GNAPS petition and confirm that access charges are applicable to VoIP traffic.[21]

Verizon's own comments in this same FCC docket acknowledged that the FCC has not formally ruled that VoIP services are interstate for jurisdictional purposes or that they are subject to the FCC's exclusive jurisdiction.[22] Indeed, in those same FCC comments, Verizon took GNAPs to task for its refusal to pay any compensation on IP-based traffic, stating:

> Notably, not a single commenter supports granting the rulings that GNAPs seeks. And while there is uncertainty about the intercarrier compensation rules that apply to VoIP and IP-based traffic, there is no question whatsoever that LECs may bill their tariffed access charges for the termination of traditional TDM traffic. ***GNAPs' decision to intermingle supposed VoIP traffic with TDM traffic cannot free GNAPS from its obligations to pay appropriate charges for TDM traffic.*** Similarly, GNAPs' purported "enhancements" of ordinary TDM traffic – which, at best, make that traffic "IP-in-the-middle" – provide no basis for exempting GNAPs from terminating access charges. And where GNAPS is contractually bound by interconnection agreements with another carrier to pay intercarrier compensation on VoIP or other traffic, GNAPs must be held to its contractual obligations, regardless of the regulatory classification of the traffic at issue.[23]

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[21] See Comments Of The National Exchange Carriers Association, (NECA), National Telecommunications Cooperative Association (NTCA), Independent Telephone and Telecommunications Alliance (ITTA), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), Eastern Rural Telecom Association (ERTA), Western Telecommunications Alliance (WTA), Telecommunications Association of the Southeast, Arizona Local Exchange Carrier Association, Rural Arkansas Telephone Systems, Colorado Telecommunications Association, Georgia Telephone Association, Indiana Exchange Carrier Association, Minnesota Independent Coalition, Minnesota Telecom Alliance, Montana Telecommunications Association, North Carolina Telecommunications Industry Association, Oklahoma Telephone Association, Oregon Telecommunications Association, Tennessee Telecommunications Association, Washington Independent Telecommunications Association, and Wisconsin State Telecommunications Association available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7020400409 .

[22] Reply Comments of Verizon available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=7020408825. (citations omitted)

[23] *Id.* (citations omitted)

Verizon is not practicing what it preaches. Verizon has, itself, "intermingled" supposed VoIP traffic with traditional TDM traffic and is refusing to pay access charges as a result. Verizon attempts to soften the look of its refusal and distinguish itself from GNAPS by "offering to negotiate" new rates and terms for this traffic. In reality, though, the impact of Verizon's self-help measures, i.e., refusing to pay, are no different than those of GNAPS.

Based on the decisions from multiple state commissions around the country, and Verizon's own comments at the FCC, it is evident that Verizon's assertions in this case regarding the state of the law related to treatment of IP-based traffic are inaccurate. The FCC has not determined that IP-based traffic is jurisdictionally interstate in nature and, as many other commissions have determined, intrastate switched access charges do apply to such traffic. It is in this context that Verizon's Request for Stay or alternative Request for Hearing on Threshold Factual Issues Related to Jurisdiction must be evaluated.

B. The Commission Should Reject Verizon's Request for Hearing on Threshold Factual Issues Related to Jurisdiction

In its Second Affirmative Defense, Verizon suggests that, because there is a question about whether the Commission has jurisdiction over IP-based traffic, the Commission should order an investigation of the nature of the services provided by Midcontinent and Knology and hold a proceeding under SDCL 15-6-12(d) to determine the scope of the Commission's jurisdiction. First, Verizon should have had proof (i.e. something more than a mere allegation) that the traffic in question was, in fact, IP-based before it disputed the invoices from Midcontinent and Knology. To now claim that a factual investigation is warranted to investigate the "nature of the services being provided" shows that Verizon had no such proof. Verizon has not even presented proof that its own traffic was IP-originated. Second, as noted above, there is no question about the Commission's authority or jurisdiction to decide a dispute regarding the

application of tariffed switched access rates to intrastate telecommunications traffic, regardless of whether such traffic was originated or terminated using IP technology. Therefore, no special proceeding on jurisdictional issues is warranted.

Moreover, Verizon admits that such a "jurisdictional" hearing would entail discovery, sworn testimony, and an evidentiary hearing to "settle the factual dispute about whether any of the disputed traffic was both TDM-originated and TDM-terminated." (Verizon Answer at ¶¶ 46-47) Given that the underlying issue in the Complaint is whether or not Verizon is properly disputing the invoices of Midcontinent and Knology, it is difficult to understand what, if any, economies would be gained by conducting discovery, holding an evidentiary hearing and taking sworn testimony solely on "jurisdiction." The ordinary evolutions of this complaint proceeding will ultimately show whether or not Verizon was justified in disputing the switched access charges.

C. The Commission Should Reject Verizon's Request for a Stay to Permit Settlement Negotiations

Throughout its Answer, Verizon repeatedly asserts that it "invited Midcontinent and Knology to enter negotiation of commercial agreements to establish reciprocal rates, terms and conditions to resolve their existing compensation disputes, but Midcontinent and Knology rejected this invitation." (Verizon Answer at ¶¶ 12, 24, 25, 31, 55) In its Eighth Affirmative Defense, Verizon suggests that, even if the Commission has jurisdiction over the traffic in dispute, the Commission should stay this matter and "order the parties to try to achieve a voluntarily negotiated solution to their dispute over VoIP compensation." (Verizon Answer at ¶ 56) It is true that after Verizon abruptly stopped paying for both intrastate and interstate access traffic, Midcontinent and Knology rejected Verizon's attempt to "renegotiate" the rates for the switched access services they already had rendered to Verizon to amounts of less than [one-

tenth] of the charges under their tariffs, and at rates far lower than even the rates that the *MetTel* court proposed. While Verizon now asks the Commission to "order" Midcontinent and Knology to negotiate with Verizon, it has given no indication that there is a better offer on the table.

Moreover, ordering a negotiation of the rates, terms and conditions for the exchange of the disputed traffic presumes that there are not and were not valid, existing rates, terms and conditions already in effect when the services were provided. There are and there were. They are found in the switched access tariffs of Midcontinent and Knology and, until June of this year, Verizon was paying those rates. Verizon now refuses to pay those rates for services already rendered and Midcontinent and Knology continue to believe the tariffed rates apply. Given this impasse, ordering a "negotiation" would be fruitless.

D. The Remaining Affirmative Defenses Are Without Merit

Ordinarily, no response from the Complainants would be necessary to a standard "Answer" to a Complaint, even if the answer included affirmative defenses. Because Verizon combined its Answer and affirmative defenses with its Request for Stay or alternative Request for Hearing on Threshold Factual Issues, however, it is difficult to ascertain where the Answer and affirmative defenses end and the Requests begin. Many of the assertions made in Verizon's Answer and affirmative defenses are factual in nature and their accuracy and relevance will be illuminated in the course of this complaint proceeding. Suffice it to say, Knology and Midcontinent disagree with Verizon's claims and do not believe Verizon will be able to sustain its burden of proof on those affirmative defenses.

Similarly, Verizon makes a host of legal claims in its affirmative defenses that, ultimately, will be proven inaccurate. One in particular bears noting here. Verizon claims in its Seventh Affirmative Defense that Counts II and III of the Complaint should be dismissed

because they are beyond the scope of the Commission's jurisdiction. (Verizon Answer at ¶ 52) Verizon is wrong. Under SDCL §§ 49-13-1, 49-13-1.1, and 49-13-14, the Commission is specifically empowered by statute to resolve complaints by any person claiming to have been damaged by any telecommunications company, including anything done or omitted by any telecommunications company, and to award damages therefore. Those statutes provide:

> **49-13-1. Application to commission by interested party – Direct damage unnecessary – Rules prescribing form and procedure for complaints**
> Any person complaining of anything done or omitted by any telecommunications company or motor carrier subject to the provisions of this title in contravention of the provisions thereof, may apply to the commission for relief. No complaint may at any time be dismissed because of the absence of direct damage to the complainant or petitioner. The commission may make rules of practice prescribing the form and procedure for complaints in accordance with chapter 1-26.
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> **49-13-1.1. Complaint to commission or suit by private person – Election of remedies**
> Any person claiming to be damaged by any telecommunications company or motor carrier may either make complaint to the commission or may bring suit on his own behalf for the recovery of damages in any court of competent jurisdiction in this state, but no person may pursue both remedies at the same time.
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> **49-13-14. Determination of damages – Order directing payment**
> The commission may determine the extent of any injury or damage which it finds to have been sustained by any person, telecommunications or motor carrier. If the commission determines that any person is entitled to reparation or to an award of damages, the commission shall make an order directing the telecommunications company or motor carrier to pay such person the sum of money to which he may be entitled, on or before a named day.

In addition to the foregoing, SDCL § 49-31-3 grants the Commission general supervision and control over all telecommunications companies offering common carrier services within the state, to the extent not otherwise regulated by federal law or regulation. According to that statute, "[t]he commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies." The statute further provides that, "[t]he commission may exercise powers necessary to properly supervise and control such

companies." Counts II and III of the Complaint merely set forth alternative justifications for the recovery of the damages Midcontinent and Knology have suffered as a result of Verizon's refusal to pay lawfully applied intrastate switched access charges. Verizon, as a common carrier in this state, is subject to the governance of the commission, including any complaints filed at the commission against it. Each of the counts in the Complaint asserts a claim for Verizon's failure to comply with its legal obligation to pay for switched access services rendered by two other common carriers in the state, a matter squarely within the Commission's jurisdiction. The Commission is empowered to exercise its authority to determine whether Verizon is liable for damages, whether such damages are the result of breach of contract, breach of implied contract, or unjust enrichment.

III. CONCLUSION

WHEREFORE, Complainants respectfully request that the Commission deny Verizon's Request for Stay to Permit Settlement Negotiations, as well as its alternative Request for Hearing on Threshold Factual Issues Related to Jurisdiction. Verizon has failed to show there is any basis, legal or factual, to question the Commission's jurisdiction over the intrastate telecommunications traffic in dispute. Moreover, given the impasse between the parties on the legal and factual issues, there is no basis to stay these proceedings and order the parties to negotiate a commercial agreement. Complainants request that the Commission establish a procedural schedule for the timely completion of discovery and conduct of an evidentiary hearing on this Complaint.

Respectfully Submitted this 8th day of December, 2010

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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' Brief in Opposition to Verizon's Request For Stay or Alternative Request for Hearing on Threshold Factual Issues was served via email upon the following:

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