

**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

REPLY TO
COMPLAINANTS' REQUEST
FOR INTERIM RELIEF

MCI Communications Services, Inc. d/b/a Verizon Business Services (“Verizon”), by and through its counsel of record, files this reply to the Request for Interim Relief (“Request”) filed by Midcontinent Communications (“Midcontinent”), Knology of the Plains, Inc., and Knology of the Black Hills, LLC (together, “Knology”; collectively, “Complainants”) on December 21, 2010.

There is no basis for the Commission to grant the *primary* relief that Complainants request: an interim order requiring Verizon to pay switched access charges even on IP-terminated and/or IP-originated traffic. Complainants’ request is based on key factual errors — Verizon is not receiving “free” use of Complainants’ networks, nor do Complainants need information from Verizon to know whether they are originating or terminating their customers’ traffic in IP format — that simply highlight the need for discovery in this proceeding. The Commission also could not issue such an award without first establishing its jurisdiction over this dispute, which requires resolution of that key, threshold factual dispute among the parties.

However, Verizon does not object to the *alternative* relief that Complainants request: an order authorizing Complainants to cease providing what it contends is intrastate switched access services to Verizon. Any such order must be even handed and authorize Verizon to cease

carrying intrastate interexchange traffic that is originated by or destined for Complainants' end users.

As grounds for its partial opposition to Complainant's request, Verizon states as follows:

1. As an initial matter, Complaints are simply wrong in claiming (at 4) Verizon is enjoying "free use of the networks of Knology and Midcontinent." Verizon has paid and continues to pay Midcontinent and Knology at a rate of \$0.0007 per minute for the traffic for which Complainants have billed Verizon. In the absence of evidence that the traffic in question is both originated and terminated in time division multiplexing ("TDM") format — and, as explained below, Midcontinent and Knology have exclusive control over certain of that evidence, but continue to refuse to disclose it — that is a fair proxy rate for traffic that appears to be predominantly originated and/or terminated in Internet Protocol ("IP") format, to which the tariffed access charge regime does not apply. *See, e.g., PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-cv-397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010). Indeed, the \$0.0007 per minute rate is the same one that the FCC has found is a reasonable rate for ISP traffic, as well as certain wireline and wireless voice traffic.

2. Complainants are also wrong in asserting (at 2) that Verizon has failed to provide necessary signaling information. When Verizon hands off a call to Midcontinent or Knology for delivery to one of their end users, it is *Midcontinent* and *Knology* — *not* Verizon — that know whether that call is being terminated in IP-format to a VoIP subscriber. Complainants do not need signaling information from Verizon to know that they are terminating the traffic in IP-format; nor would Verizon possess such information to include in the signaling stream. Similarly, when Verizon receives a toll-free 8YY (*e.g.*, 800, 877, 888) call from Midcontinent or Knology, it is *Midcontinent* and *Knology* — *not* Verizon — that know whether that call is being

originated in IP-format by a VoIP subscriber. Again, Complainants do not need Verizon to signal information about the manner in which they serve their own customers; moreover, because those companies originate the call, they are passing signaling information to Verizon. *See* SDCL § 49-31-111.

3. Complainants' latest filing, moreover, simply reconfirms the need for discovery to resolve the factual dispute between the parties regarding the nature of the traffic they exchange (including whether Complainants themselves are paying tariffed access charges on IP traffic they send to Verizon) before the Commission addresses the jurisdictional issues regarding IP. It is possible that some of that originates and terminates in TDM format; Verizon has repeatedly made clear that it will pay Complainants' tariffed rates for such traffic. But Midcontinent and Knology continue to refuse to address the nature of the services that they provide to their end-user customers, and whether they originate and terminate traffic in IP or TDM format. That information is squarely — indeed, exclusively — in the possession of Complainants. Their persistent coyness on this issue suggests that the majority (perhaps the overwhelming majority) of the traffic at issue is originated or terminated in IP-format. But discovery, rather than inferences from filings that dodge the central factual issue presented, is the proper way to resolve that question.

4. Such discovery could also assist with the negotiation of commercial agreements to establish reciprocal rates, terms and conditions for the exchange of IP-originated and/or IP-terminated traffic, which would resolve the parties' existing compensation dispute. Verizon remains interested in negotiating with Midcontinent and Knology, as it is currently negotiating with carriers. The interim award that Complainants seek would eliminate any chance that those

companies will reconsider their refusal to negotiate, despite the fact that such negotiations provide the soundest solution to the regulatory vacuum that exists with respect to IP traffic.

5. Nor could the Commission issue such an award without first establishing that it has jurisdiction over all of the traffic at issue in this dispute. As Verizon has explained, the Commission does not have subject-matter jurisdiction to impose state tariffed rates on interstate traffic, such as the IP-originated and/or IP-terminated traffic that appears to constitute a significant proportion of the traffic at issue here. But before the Commission can determine its jurisdiction, it must first resolve the factual dispute about the extent to which the traffic at issue is *not* IP traffic. Given the parties' threshold dispute on this threshold factual question, the Commission should order a thorough investigation of the nature of the services that Knology and Midcontinent provide to their customers, *see* SDCL § 15-6-12(d), before considering the merits of the Complaint (much less awarding damages on it).

6. The Commission also has no authority to order relief to the Complainants as requested. The Complainants' reliance (at 1) on SDCL § 49-31-114 is entirely misplaced and the provisions of that section are inapplicable to this dispute. Sections 109 through 115 were adopted by the 2004 Legislature requiring originating carriers to provide signaling information which meets commonly accepted industry standards. SDCL 49-31-109 through 115. The Legislature also provided that the Commission could order interim payments to carriers damaged by non-compliance with these sections. SDCL 49-31-114. However, that provision authorizes the Commission to order interim payments *only* with respect to "a complaint . . . filed seeking enforcement of any of the provisions in §§ 49-31-109 to 49-31-115, inclusive." *Id.* Here, the Complaint did not raise any dispute over the quality and nature of the signaling information provided by Verizon, but only a dispute about intercarrier compensation. The complaint Knology

and Midcontinent filed is based on SDCL § 49-13-12.1 and nowhere mentions any of the provisions in §§ 49-31-109 through 49-31-115. The Complainants have not complained on the necessary basis for Section 114 to operate, and for that reason alone, the Commission must deny the Complainants' Request. No provision of law gives the Commission the authority to grant relief as requested.

7. Finally, as noted at the outset, Verizon does not object to Complainants' alternative request for relief, so long as any order permitting Complainants to cease carrying traffic to or from Verizon also authorizes Verizon to do the same. As the Commission is well aware from its experience in the traffic pumping context, victims of arbitrage schemes (such as Verizon in this case) derive no benefit from switched access "services" which they are unable to avoid and for which they are improperly billed switched access charges. Currently Verizon is unable to avoid being billed switched access charges for Complainants' "services," even though such "services" are not subject to Complainants' switched access tariffs where the traffic in question is IP-originated and/or IP-terminated. Accordingly, if the Commission is inclined to authorize Complainants to cease providing intrastate switched access "service" to Verizon, the relief should be a two-way street: the Commission should also authorize Verizon to protect itself by blocking intrastate interexchange traffic to or from Complainants' end users.

WHEREFORE, Verizon asks that the Commission deny the Complainants' motion, and renews its request for the Commission to stay this proceeding to encourage the parties to enter into negotiations, or in the alternative, set this matter for a hearing under SDCL § 15-6-12(d) to resolve the threshold disputed issues of material fact relating to the Commission's jurisdiction

over the Complaint.

Dated December 30, 2010.

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CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 30 day of December, 2010, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above captioned action to the following at their last known addresses:

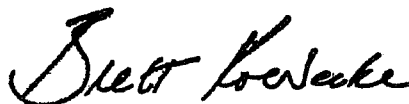
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