

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

**MIDCONTINENT'S RESPONSE TO  
VERIZON'S MOTION TO COMPEL**

**REDACTED VERSION**

Comes now Midcontinent Communications ("Midcontinent"), by and through its undersigned counsel, and files this Response to Verizon's Motion to Compel. The motion to compel is without merit and should be denied by the South Dakota Public Utilities Commission ("Commission").

Verizon's motion to compel highlights a fundamental disagreement between the parties regarding the scope of this docket and the dispute this Commission is being asked to resolve. Midcontinent has alleged that Verizon is refusing to pay lawfully approved, presumptively reasonable, tariffed intrastate switched access charges on intrastate toll traffic it is sending to and receiving from Midcontinent's network. Verizon does not deny that it is sending and receiving the traffic in question to and from the Midcontinent network. Rather, Verizon contends that such traffic no longer is subject to switched access charges because of a perceived change in the law regarding IP-originated and IP-terminated traffic. The question for the Commission is clear: Under the current state of the law (including, but not limited to, lawfully approved tariffs and a Switched Access Services Agreement between the parties) is Verizon obligated to pay intrastate switched access charges on IP-originated or IP-terminated traffic that it has sent to or received from the Midcontinent network? The answer is either yes or no.

The information sought to be produced in the motion to compel is not relevant to the dispute before the Commission, is overly broad in its scope and unduly burdensome to produce, and in some instances, is confidential information involving Verizon's competitors that Midcontinent is not at liberty to produce.

The gap between the issues in this proceeding and Verizon's discovery requests is illustrated by Verizon's "asymmetrical arbitrage" claim. While Verizon has asserted asymmetrical arbitrage (i.e., that Midcontinent is charging switched access on VoIP traffic but is not paying switched access to Verizon on such traffic) is one of the key "policy" issues in the case, it has asserted no counterclaim alleging that Midcontinent has refused any such payments in South Dakota. In fact, Verizon has yet to produce a single shred of evidence or documentation of any kind, identifying a specific instance where Verizon Business Services, the Respondent in this case, has not been paid switched access charges for termination of Midcontinent traffic, either in this state or any other state.<sup>1</sup> Verizon's entire asymmetrical arbitrage claim is based, yet again, on an "assumption" that because Midcontinent uses a particular IXC to carry its long distance traffic, and that IXC is known to dispute the payment of access charges on VoIP traffic, Midcontinent must be involved in asymmetrical arbitrage. Based solely on this self-serving assumption, Verizon now asks the Commission to allow it to go on a fishing expedition through Midcontinent's confidential agreements with Verizon competitors and Midcontinent's internal financial and investment information in an attempt to establish some factual evidence to back up its heretofore unsubstantiated claims. And even if Verizon could show that Midcontinent was engaging in asymmetric arbitrage, that fact would have no bearing

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<sup>1</sup> Indeed, Verizon Business Services does not appear to have any local exchange customers in South Dakota, so it could not be receiving access traffic from Midcontinent in this state. This means that the claim is entirely irrelevant to this proceeding.

at all on whether Verizon had met its obligations to Midcontinent. It is with this background that Verizon's Motion to Compel should be evaluated.<sup>2</sup>

**VERIZON'S INTERROGATORY NO. 4:**

Verizon contends that Midcontinent has not provided sufficient information in response to subparts (c) and (e) of Interrogatory No. 4. Subpart (c) asked Midcontinent to identify each IXC, other than Verizon, to which Midcontinent customers are subscribed and the number of customers subscribed to each of those carriers.<sup>3</sup> Subpart (e) asked Midcontinent to describe the agreements and arrangements Midcontinent has made with any third parties to deliver interexchange traffic originated by customers subscribed to Midcontinent as their IXC carrier, including the identity of the third parties and the pricing and other terms of the agreements.

Midcontinent has provided subscriber numbers to Verizon. Midcontinent has produced responses showing how many Midcontinent customers are subscribed to Verizon as their IXC, how many are subscribed to Midcontinent as their IXC, and how many are subscribed to "other" carriers. Midcontinent objects to the request that it identify the "other" carriers and objects to providing the number of Midcontinent customers subscribed to each of those "other" carriers. Verizon contends it needs this information to identify whether any of Midcontinent customers are subscribed to the carriers Verizon has identified as (i) carrying traffic from Midcontinent to

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<sup>2</sup> At the recent Open Meeting on the Request for Stay, Verizon claimed that it had been receiving disputes on VoIP traffic from a variety of these other carriers for years and simply ignored them, until it finally decided that it could no longer do so. Then, rather than challenge the carriers that were refusing to pay, Verizon decided to stop paying companies like Midcontinent instead. Midcontinent has nothing to do with the dispute between Verizon and the IXCs in question and should not be forced to suffer the consequences of those carriers' refusal to pay Verizon.

<sup>3</sup> To put Verizon's discovery questions in context, it originally demanded this information monthly back to January, 2006. In fact, most of Verizon's discovery questions that were "time bound" sought information back to January, 2006, over two and a half years before this dispute began. It was not until Midcontinent objected and discussed the overly broad and unduly burdensome nature of these requests that Verizon agreed to back off from its January, 2006 dates.

Verizon's local exchange carriers and (ii) disputing the applicability of switched access charges on such traffic.

Initially, both of these interrogatories are irrelevant because they have nothing to do with the merits of this proceeding. No matter what information Midcontinent provided, it would not affect the question of whether Verizon is obligated to pay Midcontinent's access charges for Verizon traffic in South Dakota.

Moreover, simply put, there is no connection between Verizon's asymmetrical arbitrage claim and the information it seeks in Interrogatory 4(c). Midcontinent is an equal access provider. Midcontinent has no choice but to allow its customers to subscribe to their carrier of choice. Midcontinent has no control over a customer's PIC choice and has no control over whether that carrier ultimately pays Verizon terminating switched access charges on the traffic it terminates to Verizon. If a Midcontinent customer is subscribed to a carrier other than Verizon or Midcontinent, any call originated by that customer is delivered by Midcontinent directly to that carrier through an access tandem (and the carrier has no knowledge of whether the call is originated as an IP or TDM call). This is the only relationship that Midcontinent has with those IXCs as to this traffic. No charges are incurred by Verizon in that process. Verizon has nothing to do with that exchange. If the customer's chosen carrier then delivers that call to Verizon, whether that carrier ultimately pays Verizon terminating access charges is completely outside of Midcontinent's control. In any event, Midcontinent would not be assessing any originating or terminating charges on Verizon in this situation. Therefore, Verizon's assertion that this information is relevant to its asymmetrical arbitrage claim is simply not true. Verizon may have a complaint against the other carrier for failure to pay access charges, but that matter is strictly between Verizon and the other carrier.

With respect to subpart (e) of this Interrogatory, Verizon contends that it is entitled to know about the relationship between Midcontinent and the IXCs Midcontinent uses to carry its long distance traffic. Verizon contends this information is relevant to whether Midcontinent gets any benefit from these other IXCs' refusal to pay terminating access charges to Verizon on VoIP traffic.<sup>4</sup> In fact, Verizon now has all of the information it needs.

**BEGIN CONFIDENTIAL INFORMATION:**

**END CONFIDENTIAL INFORMATION.**

**VERIZON'S DOCUMENT REQUEST NO. 2**

This document request seeks contracts and communications with Midcontinent's wholesale interexchange carriers.

**BEGIN CONFIDENTIAL INFORMATION:**

**END CONFIDENTIAL INFORMATION.**

**FACTUAL ISSUES RELEVANT TO VOIP:**

Verizon is now taking inconsistent positions regarding the basis for its decision to dispute Midcontinent's switched access charges. Verizon itself objected to many of Midcontinent's interrogatories on the grounds that Verizon was not disputing access charges based on the type of service the Verizon customer received. For instance, in response to Midcontinent's Interrogatory

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<sup>4</sup>The elephant in the room that must be addressed at some point is that Verizon admits that its own LECs continue to charge intrastate switched access charges for VoIP traffic. In its Supplemental Answer to Interrogatory No. 21 from Midcontinent, Verizon stated that "in some instances its local exchange affiliates assess switched access on VoIP traffic to the extent that the carrier has not identified the traffic in question as VoIP and has not entered into a commercial agreement with Verizon governing the exchange of IP traffic." Despite this flagrant contradiction in its position, Verizon continues to assert that it is not proper for Midcontinent to charge switched access charges for VoIP traffic in South Dakota. If Verizon believes that switched access charges are not appropriate for VoIP traffic, why does it allow its own LECs to continue to charge switched access rates for that traffic? If switched access rates are inappropriate and a rate of \$0.0007 is the correct rate, as asserted by Verizon, Verizon's LECs should be lowering their rate accordingly.

No. 6, Verizon stated: “Beginning with July 2010 traffic, Verizon has disputed Midcontinent’s switched access charges on all of the traffic Verizon has delivered to Midcontinent for termination to its end user customers, because the traffic terminates in IP format.” In response to Midcontinent’s Interrogatory No. 16, Verizon stated: “Verizon is disputing Midcontinent’s charges because Midcontinent’s end users are served by VoIP, a fact that does not depend on signaling and does not depend on whether the call was originated by a Verizon customer that is served by VoIP.” Finally, in response to Midcontinent’s Interrogatory No. 17, Verizon stated: “Because Verizon believes that all of Midcontinent’s end user voice customers are VoIP customers, all traffic that Verizon exchanges with Midcontinent is either IP-originated or IP-terminated. The type of service that the Verizon customer that originated the call purchases from Verizon is not relevant because regardless of what type of service the Verizon customer has, the Midcontinent customer is served by VoIP; therefore, all calls to those customers will be IP-terminated.”

Despite repeatedly objecting to data requests from Midcontinent on the grounds that it is only disputing charges because Midcontinent customers are served by VoIP, Verizon now takes the position, on page 10 of its Motion to Compel, that “Verizon has withheld interstate and intrastate switched access payments from Midcontinent *based both on the fact that a portion of the traffic originated on Verizon’s network is VoIP*, and partly on Verizon’s understanding – relying on Midcontinent’s public statements and its filings with this Commission – that Midcontinent originates and terminates VoIP traffic on its cable network in South Dakota.” (emphasis added). Midcontinent points out this inconsistency here only to state that Verizon should not be allowed, in the context of a Motion to Compel, to insert a claim that it is disputing charges based on the fact that some of its own traffic is VoIP, when it has adamantly denied that

it is disputing charges on those grounds when objecting to Midcontinent's discovery questions.<sup>5</sup>

To allow Verizon to continue to play fast and loose with the asserted basis for disputing the charges leaves Midcontinent shooting at a moving target.<sup>6</sup>

**VERIZON'S INTERROGATORY NO. 7:**

Despite Verizon's claims that Midcontinent's responses to Interrogatory No. 7 are deficient and/or are nonresponsive, Midcontinent has provided information responsive to this request. The only information not provided is the Minutes of Use, which Midcontinent believes is irrelevant and unduly burdensome to produce. Setting this aside, Verizon's claim that the information requested in Interrogatory No. 7 is relevant to the dispute is directly contrary to its own response to Midcontinent's Interrogatory Nos. 18 and 19. Midcontinent's Interrogatory No. 18 asked Verizon to "[i]dentify the specific components of Midcontinent's network that Verizon believes are utilized for the origination and termination of a traditional intrastate toll call."

Verizon responded as follows:

Verizon objects to this question on the grounds that it is irrelevant. Verizon is not disputing the charges at issue in this proceeding because of network architecture. Verizon is disputing the charges because Midcontinent's end users are served via VoIP, and therefore, calls to and from those customers are either IP-originated or IP-terminated, or in some cases both.

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<sup>5</sup> Even if Verizon had not claimed in discovery that the type of service the Verizon customer has is irrelevant, the fact of the matter is that Midcontinent has no way of knowing how the traffic it is receiving from Verizon was originated. Verizon delivers all traffic to Midcontinent in TDM format and does not provide any information to Midcontinent to distinguish VoIP originated traffic. As noted above, Verizon has stated that its own local exchange affiliates also assess switched access charges on VoIP traffic to the extent that the carrier delivering the traffic has not identified the traffic in question as VoIP. If such actions by the Verizon local exchange affiliates are appropriate, why then are they not appropriate for Midcontinent?

<sup>6</sup> Verizon also asserts that it has "made clear that it has no interest in withholding any switched access payments from Midcontinent to the extent Midcontinent has properly billed switched access charges on non-VOIP traffic." Motion at 10. While Verizon makes that claim (and has made it before), it continues to withhold payment for all traffic despite having received data showing that Midcontinent has a substantial number of TDM customers, and has made no approach to Midcontinent about paying for TDM traffic.

Interrogatory No. 19 asked Verizon to “[i]dentify the specific components of Midcontinent’s network that Verizon believes are utilized for the origination and termination of an IP-based intrastate toll call.” Verizon responded by referring back to its answer to Interrogatory No. 18.

It is difficult to understand how Verizon can claim, in response to Midcontinent’s interrogatory, that network architecture is irrelevant, yet move to compel the same information from Midcontinent. Midcontinent already has agreed that some of its customers are served via IP. Midcontinent has provided Verizon a breakdown of the number of customers that are served via TDM and those that are served via IP, as well as the communities in which those customers reside. Midcontinent has informed Verizon that the majority of its TDM customers and all of its IP customers are served by the same switch. In its Supplemental Answer to Interrogatory No. 8, Midcontinent described in depth both a TDM call and an IP call and the facilities used to handle each type of call. There simply is no additional information to provide to Verizon in response to this request.

Regarding the minutes of use, Midcontinent does not track its minutes of use by type of call. Calls by all of Midcontinent’s customers are all treated the same in Midcontinent’s network and, aside from a few TDM customers served by its

**BEGIN CONFIDENTIAL INFORMATION:**

**END CONFIDENTIAL INFORMATION.** Programming the switch to isolate minutes of use based on phone numbers would require an inordinate and unduly burdensome amount of manual programming. Midcontinent should not be required to undertake such a burdensome study unless the Commission ultimately determines that IP based traffic is not subject to switched access charges. If the Commission determines that IP based traffic is subject to switched access charges (as Midcontinent contends), the breakdown of the minutes of use between IP and TDM



traffic is irrelevant. If the Commission determines that IP based traffic is not subject to switched access charges, Midcontinent would, at that point, have to develop a method to isolate its TDM traffic from the IP based traffic in order to get paid for the TDM traffic.

Further, Verizon's assertion that Midcontinent has not described the facilities used by Midcontinent to handle its traffic is utterly wrong. As shown in the motion, Midcontinent described its call path for both IP and TDM traffic in detail, and provided a diagram as well. The diagram shows that the overwhelming majority of the facilities used to serve IP and TDM customers are identical, including all of the transmission facilities and, for nearly all customers, the switch. It is not clear what else Verizon could want.

**VERIZON'S INTERROGATORY NO. 8:**

Verizon contends that Midcontinent has not been fully forthcoming in response to subparagraphs (a) and (c) of Interrogatory No. 8. In particular, Verizon contends Midcontinent has failed to identify, "for each segment of the path of an interexchange call" (1) the equipment over which the call is routed, (2) the technology used, and (3) where in the call path any protocol conversion takes place. Midcontinent believes it has responded to these questions. Midcontinent's supplemental Answer to this Interrogatory is very specific, providing the type of equipment used and the discrete segments of the call path for an IP originated call and a TDM originated call. The response indicates where the conversion takes place as well. Verizon made no attempt, after receiving this supplemental response, to contact Midcontinent and indicate that it believed the supplemental response was still deficient.

Setting aside that Midcontinent believes it has already answered the question, it must again note the disparity between Verizon's position when responding to Midcontinent's interrogatories and its position when propounding interrogatories. Verizon was specifically

asked to identify the components of Midcontinent's network that Verizon believed were used in the origination and termination of a traditional toll call as well as an IP-based call. Verizon objected and explicitly asserted: "Verizon is not disputing the charges at issue in this proceeding because of network architecture." If Verizon is not disputing charges based on network architecture, its claim that it needs all of this detailed information from Midcontinent about equipment, technology, and call path is insupportable and should be rejected.

**VERIZON'S INTERROGATORY NO. 17:**

In this interrogatory, Verizon asked the following: "Please describe what protocols Midcontinent uses to support voice coding, session management, call signaling and control, and multimedia transport and control for voice services." In its supplemental answer, Midcontinent provided a list of all of the protocols used. Verizon now contends that the response was insufficient because Midcontinent did not specifically provide any linkage regarding which protocol is used for the different functions listed in the question. Frankly, the problem is not in Midcontinent's answer, but in the drafting of the question. The question did not specify that each protocol identified had to be linked to one of the specific functions listed. The question asked to identify the protocols used and Midcontinent provided the list.<sup>7</sup> As with the prior question, Verizon did not attempt to contact Midcontinent after receiving the supplemental answer to indicate that it was deficient.

Setting aside the foregoing, the protocols used for voice coding, session management, call signaling and control, and multimedia transport are not relevant to this dispute.

Midcontinent has admitted that it provides IP-based service to some customers. Verizon claims that without identifying where in the network each protocol is used, the information is useless.

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<sup>7</sup> In any event, specific protocols generally are associated with specific functions, so Verizon should have no difficulty connecting the dots.

What Verizon hasn't explained is why having the information would be "useful" in resolving the dispute. Unless Verizon can explain why the information is relevant to the dispute, the motion to compel should be denied.

**VERIZON'S INTERROGATORY NO. 15:**

Verizon contends that it is entitled to receive information on the type and quantity of all investments Midcontinent has made since January, 2006, to deploy facilities or equipment enabling Midcontinent to provide VoIP services, including, but not limited to, investments in soft switches, media gateways, routers, Metaswitch Networks purchases, customer premise equipment, cable modems and analog telephone adapters. Despite Verizon's assertions to the contrary, Midcontinent's investment information is not relevant and Verizon is not entitled to see it. The rates Midcontinent charges for intrastate switched access services are set and approved by the Commission. Currently, Midcontinent mirrors the Qwest switched access rates, and that rate level has been found to be reasonable by the Commission. By statute, those rates, which are contained in lawfully approved tariffs, are presumptively reasonable.

This is not a rate proceeding, nor is it a switched access rulemaking proceeding. The Commission is not being asked to establish a new rate for VoIP traffic based on Midcontinent's finances or investments. The Commission is being asked to decide solely whether the current switched access rates apply. Even in the context of Midcontinent's quantum meruit claim, the value of the services being performed by Midcontinent is best measured by the rates for comparable services, that is, switched access. No legitimate argument can be made that Midcontinent's investment information is relevant to the determination of whether IP-based traffic is subject to intrastate switched access charges.

The notion that Midcontinent must provide financial and investment information to Verizon to be able to argue that it is entitled to compensation for the use of its network or that failure to compensate has a negative financial impact is ridiculous. As the FCC has noted:

As a policy matter, we believe 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.

*IP-Enabled Services*, WC Docket No. 04-36, “Notice of Proposed Rulemaking,” 19 FCC Rcd. 4863 (rel. March 10, 2004). Midcontinent can certainly make the policy argument, without providing financial and investment information, that Verizon is sending traffic to the PSTN, specifically Midcontinent’s network, and should be required to compensate Midcontinent accordingly, just as all other carriers are required to do.

#### **VERIZON’S DOCUMENT REQUEST NO. 1**

Subparagraph (a) of this request seeks financial statements and annual reports from Midcontinent dating back to January 1, 2006. Verizon contends these are “routine, off-the-shelf documents about Midcontinent’s operations and finances.” First, Midcontinent is not a publicly traded company. Unlike Verizon, financial statements and “annual reports” are not routine, off-the-shelf type documents that are made available to anyone that wants to look at them.

Midcontinent is a privately held partnership. It does not file annual reports with the SEC. It does not hold live investor conferences or allow public access to its internal financial statements.

Second, Midcontinent’s financial statements would not address the kinds of issues that Verizon seems to believe would be relevant. Midcontinent is not required to, and does not, keep the kind of “regulatory” books that would provide the level of detail necessary to determine

Midcontinent's costs for access services, even if those costs were deemed to be relevant. Indeed, such information would not appear in any annual report or company-wide financial statement.

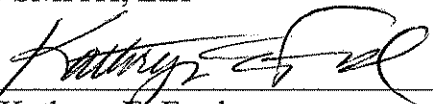
Subpart (e) of this request seeks copies of each of Midcontinent's cable franchises across the state. Midcontinent's cable franchise information has no bearing on this proceeding and Verizon's claim that those agreements may lead to some admissible evidence is specious. Verizon is on a fishing expedition and doesn't even know what it is looking for. Verizon makes vague references to needing to understand "rights-of-way" issues and other details about Midcontinent's operations, but fails to explain how any of that information would be relevant to the question before the Commission. The question before the Commission deals with voice services. The Commission does not have jurisdiction over cable franchise issues. Midcontinent's cable franchise agreements are wholly irrelevant to this proceeding and the motion to compel those agreements should be denied.

### CONCLUSION

Based on the foregoing, Midcontinent respectfully requests that the Commission deny Verizon's Motion to Compel in its entirety.

Respectfully Submitted this 14th  
day of March, 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 Midcontinent's Response to Verizon's Motion to Compel (REDACTED) was served via email upon the following:

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