

**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

VERIZON'S MOTION TO
COMPEL MIDCONTINENT TO
ANSWER DISCOVERY

REDACTED VERSION

MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon") respectfully requests that the Commission require Complainant Midcontinent Communications ("Midcontinent") to respond fully to Interrogatory nos. 4-c, 4-e, 7, 8-a, 8-c, 15, and 17 of Verizon's First Set of Interrogatories, and to Document Request nos. 1-a, 1-e, and 2 of Verizon's First Set of Document Requests propounded on January 14, 2011. Without good faith responses from Midcontinent, Verizon will be prejudiced by an inability to develop a full and complete record.

If the Commission does not grant Verizon's pending stay request and instead chooses to go forward with the scheduled hearing, any subsequent decision based on a deficient record would be inherently unable to engage the complex factual and policy issues presented in this proceeding. Yet Midcontinent refuses to provide information central to this case, such as information about Midcontinent's routing of VoIP traffic to Verizon via wholesale providers that dispute the applicability of switched access on VoIP traffic, as well as information relevant to identifying any Midcontinent traffic that is not VoIP and therefore not subject to dispute. Midcontinent is refusing to supply even basic, off-the-shelf information about its operations such as its annual reports and financial statements. Midcontinent is grounding many of its objections

on purported confidentiality concerns which are meritless in light of the strong confidentiality protections the parties have negotiated.

BACKGROUND

Midcontinent and Knology filed their Complaint in October 2010, after Verizon disputed their application of tariffed switched access charges to VoIP traffic originated by and terminated to their end users. The Commission issued a scheduling order on January 31, 2011. The same day, the parties executed a confidentiality agreement to ensure that sensitive business information exchanged in discovery will be kept confidential and will not be used for any purpose other than this proceeding. That confidentiality agreement included a provision contemplating that providers of “highly sensitive” information may request heightened protection for such information. On March 2, 2011, the parties executed an addendum to the confidentiality agreement which creates special protections for “highly confidential” and which provides that third parties harmed by any party’s cause of action shall have a cause of action against that party.

Verizon propounded its initial discovery on January 14 as set forth in the scheduling order. Midcontinent, however, withheld much of the information requested by Verizon on the grounds that it is confidential and/or because it is purportedly not relevant. Midcontinent also objected to every question, including questions asking for off-the-shelf materials that can easily be collected and copied, on the grounds that responding would be “unduly burdensome.” After Verizon raised concerns about Midcontinent’s discovery responses, Midcontinent provided supplemental responses on March 2, 2011. However, Midcontinent continues to refuse to provide a substantial amount of information that Verizon contends is needed to prosecute its defense in this proceeding.

DISCOVERY STANDARD

The scope of discovery in South Dakota is expansive. SDCL 15-6-26(b) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

As the South Dakota Supreme Court has indicated, a “broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.” *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (1989). “This phraseology in the rule implies a broad construction of ‘relevancy’ at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial.” *Id.* at 20.

DISCUSSION

A. Arbitrage and Other Policy Issues.

One of the key factual and policy issues in this proceeding is the extent to which Midcontinent is engaged in asymmetrical arbitrage by charging switched access when terminating long distance VoIP traffic while routing long distance VoIP traffic through interexchange carriers (“IXCs”) that withhold switched access payments on such traffic. As Verizon has explained, Verizon has information that Midcontinent is sending Verizon traffic via

carriers that dispute the application of switched access charges on VoIP traffic.¹ The existence of such asymmetries – where some carriers benefit from avoiding paying switched access on VoIP traffic that they originate while assessing switched access on traffic they terminate – is relevant both to Verizon’s defense here and to the various policy considerations relevant to the issues presented. Indeed, in its recently-issued NPRM, the FCC indicated that the existing uncertainty with respect to VoIP compensation creates “arbitrage opportunities” which it intends to address in an expedited fashion.² The FCC specifically confirmed that there is evidence of “asymmetrical revenue flows” such as where a VoIP provider is “collecting access charges, for example, but refusing to pay them.”³

Verizon is seeking to develop a complete factual record relating to these issues. Many of the facts needed to develop such a complete record are solely in Midcontinent’s possession. For example, while Verizon has the facts needed to ascertain that traffic originating with Midcontinent is terminated to Verizon via long distance carriers that dispute the applicability of switched access on IP-enabled traffic, Verizon does not have other important facts such as the nature of the relationships that Midcontinent has with its wholesale long distance providers, how Midcontinent’s pricing from such carriers is related to the VoIP nature of its traffic, and whether Midcontinent’s wholesale providers may themselves use intermediaries to terminate traffic originated by Midcontinent’s end users.

Accordingly, Verizon respectfully requests that the Commission require Midcontinent to provide

¹ See, e.g., Verizon’s Answer to Complaint, Request for Stay to Permit Settlement Negotiations, or, in the Alternative, Request for hearing on Threshold Factual Issues Related to Jurisdiction (Nov. 18, 2010), ¶¶ 1, 9.

² See *Connect America Fund; a National Broadband Plan for Our Future, Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC docket No. 96-45, WC Docket No. 03-109 (“Notice”), ¶ 603. (Feb. 9, 2011).

³ *Id.*, ¶ 610.

full and complete answers to each the following:

VERIZON'S INTERROGATORY NO. 4

Interrogatory No. 4. Please refer to second sentence of paragraph no. 18 of the Complaint filed by Midcontinent Communications, Knology of the Plains, Inc., and Knology of the Black Hills, LLC on October 27, 2010 ("Complaint"). Please:

- a. Explain the process under which Midcontinent customers may "select [] Verizon as their interexchange carrier." If any Midcontinent customers are not able to select Verizon as their interexchange carrier, please identify such customers and explain why they are not able to select Verizon.
- b. Identify the number of Midcontinent customers that have "selected Verizon as their interexchange carrier" for every month since January 2006, as well as the total number of Midcontinent voice service customers for each of those months.
- c. Identify each carrier other than Verizon that Midcontinent customers subscribed to as their interexchange carrier for every month since January 2006, and the number of Midcontinent customers subscribed to each of those carriers for each of those months.
- d. Identify the number of Midcontinent customers that purchased interexchange voice service from Midcontinent for every month since January 2006.
- e. Describe the agreements and arrangements Midcontinent has made with any third parties to deliver interexchange traffic originated by such customers described in subpart d above, including the identity of each such third party and the pricing and other terms of such arrangements and agreements.

MIDCONTINENT'S INITIAL ANSWER TO INTERROGATORY NO. 4:

Midcontinent objects to this Interrogatory on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence. Midcontinent specifically objects to the extent it seeks information dating back to January, 2006. Midcontinent further objects on the grounds that it seeks information related to Verizon's competitors that is competitively sensitive and is not relevant to these proceedings. Pursuant to Verizon's response number 4 to Midcontinent's First Set of Interrogatories, "[t]he only traffic in dispute in this proceeding is traffic exchanged between Midcontinent and Verizon." Therefore, any information related to number of Midcontinent customers that have subscribed to a carrier other than Verizon is irrelevant.

Notwithstanding the objections and without waiving the same, Midcontinent states:

- a. Every customer has the opportunity to choose a long distance (LD) carrier in accordance with the rules of the FCC. Customers who choose Midcontinent's Digital Phone package are automatically subscribed to Midcontinent's LD service. All other customers may choose any carrier that made interconnection arrangements with Midcontinent. If the customer chooses Verizon as the LD carrier, that information is entered into Midcontinent's system and the customer is referred to Third Party Verification to validate the customer's choice of providers.
- b. See objection above. See enclosed CD for Confidential information from June, 2010 forward.
- c. See objection above.
- d. See objection above.
- e. See objection above. In addition, according to Verizon's Answer to Interrogatory number 3 from Midcontinent, "Verizon is disputing Midcontinent's application of tariffed switched access charges to the traffic at issue because it originates from a customer's premises in IP format or terminates at a customer's premises in IP format. . . ." Based on this statement of the dispute by Verizon, how or by whom the disputed traffic is routed or transported after it is originated by Midcontinent or before it is terminated by Midcontinent is not relevant. Notwithstanding the objection and without waiving the same, Midcontinent provides the following information:

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MIDCONTINENT'S SUPPLEMENTAL RESPONSE PROVIDED 3/2/2011:

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VERIZON ARGUMENT REGARDING INTERROGATORY NO. 4: Midcontinent

refused to answer subparts c and e. The information requested in subpart c is needed by Verizon

to confirm that at least some of the carriers which Verizon has identified as (i) carrying traffic from Midcontinent to Verizon's local exchange carriers, and (ii) disputing the applicability of switched access charges on such traffic, are carriers with which Midcontinent has a wholesale relationship. For example, if some of those carriers are instead ones that Midcontinent's *end users* have chosen as their interexchange carriers, that fact would be relevant to this litigation. Midcontinent clearly has the information requested, which it might choose to use offensively to the extent it may help its case, yet it refuses to provide it to Verizon. Midcontinent instead chose to stand on its boilerplate objections. Midcontinent, however, does not present any support for its assertions that the interrogatory is "vague and ambiguous," "overly broad," or "unduly burdensome."⁴

Midcontinent's response to subpart e is even more problematic because the information sought is directly relevant to the benefit Midcontinent derives based on the fact that its wholesale providers dispute the applicability of access charges on VoIP traffic. But Midcontinent's response to subpart e provides information relating only to Midcontinent's relationship with *Verizon*, not the "pricing and other terms" of its arrangements with third parties that carry interexchange traffic on its behalf. Each of the objections Midcontinent advances is meritless. The relevancy objection is meritless because the information sought about Midcontinent's relationships with such third parties is obviously relevant to assessing to what extent Midcontinent benefits from an asymmetrical arbitrage scheme. Midcontinent provides no support for its assertion that the information sought is "vague and ambiguous," "overly broad," or "unduly burdensome." Nor does Midcontinent's objection on the ground that the information sought is "competitively sensitive" withstand scrutiny, given that the parties have negotiated a

⁴ With respect to Midcontinent's further objection to the fact that the request seeks information dating back to January 2006, Verizon advised Midcontinent during the meet and confer process that it was willing to narrow the dates.

confidentiality agreement which includes heightened protections for particularly sensitive material. Similarly, Midcontinent's quotation of an objection from a Verizon discovery response is a red herring because it is both out of context and irrelevant to a Commission determination that Verizon's discovery request seeks non-privileged information that falls within the broad scope of relevant discovery under SDCL 15-6-26(b).

* * *

VERIZON'S DOCUMENT REQUEST NO. 2

Document Request No. 2. Please provide copies of all documents, including all contracts and all internal and external communications, relating to any entity that provides wholesale interexchange services to Midcontinent, including, but not limited, to Sprint, Level 3, AT&T, Global Naps, 01 Communications, Inc., XO Communications, Infotelecom, CommPartners, and OneCommunications.

MIDCONTINENT'S INITIAL RESPONSE TO DOCUMENT REQUEST NO. 2:

Midcontinent objects to this Request on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence. Midcontinent further objects on the grounds that the Request seeks information that is competitively sensitive. In its Answer to Interrogatory number 4 from Midcontinent, Verizon stated that the only traffic in dispute in this proceeding is traffic exchanged between Midcontinent and Verizon. Therefore, whether Midcontinent has wholesale interexchange services agreements with other interexchange carriers and the terms of those agreements are not relevant to these proceedings.

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On February 4, 2011, Sprint was ordered by the Iowa Utilities Board to pay switched access charges on VoIP traffic to Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom. See Iowa Utilities Board Docket No. FCU-2010-0001.

MIDCONTINENT'S SUPPLEMENTAL RESPONSE PROVIDED 3/2/2011:

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VERIZON ARGUMENT REGARDING DOCUMENT REQUEST NO. 2: This request asks for documents relating to Midcontinent's relationships with third party wholesale long distance providers. Such documents – including contracts with such providers and communications with them – are central to the asymmetrical arbitrage issue. To the extent Midcontinent has informed wholesale providers of the VoIP nature of its traffic, or to the extent it has sought, or receives, pricing benefits based on the fact that the providers do not pay switched access to the terminating carrier, such information is directly relevant. But Midcontinent's response simply makes vague assertions about Midcontinent's relationship with one of the third parties that terminates long distance traffic on behalf of Midcontinent. Midcontinent has provided no documents – no contracts, no communications – relating to its relationship with any of its wholesale providers.”

Midcontinent has advised Verizon that it is seeking permission from *one* of its wholesale providers (**BEGIN CONFIDENTIAL** **END CONFIDENTIAL**) to produce its contract with that provider. However, Midcontinent has refused to provide any of its correspondence or other communications with that wholesale provider, such as discussions about whether the traffic

at issue is VoIP and whether Midcontinent derives a pricing benefit based on the fact that the wholesale provider withholds switched access payments when terminating VoIP traffic to operating companies such as Verizon. Moreover, Midcontinent indicated in a different discovery response that it also relies on **BEGIN CONFIDENTIAL**

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As with the previous response, Midcontinent provides no support for its assertion that the information sought is “vague and ambiguous,” “overly broad,” or “unduly burdensome.”

Similarly, Midcontinent’s quotation of an objection from a Verizon discovery response is both out of context and irrelevant to a Commission determination that Verizon in this discovery request seeks non-privileged information that falls within the broad scope of relevant discovery under SDCL 15-6-26(b).

B. Factual Issues Relevant to Identifying and Quantifying VoIP and Non-VoIP Traffic.

Obviously a threshold issue in this proceeding is what traffic exchanged between Verizon and Midcontinent is IP-originated or IP-terminated. 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. Verizon 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. Yet Midcontinent, remarkably, has been consistently evasive with respect to

requests that it provide the information needed to ensure that all of the traffic disputed by Verizon is VoIP traffic.⁵

Accordingly, Verizon respectfully requests that the Commission require Midcontinent to provide a full and complete answer to the following interrogatories:

VERIZON'S INTERROGATORY NO. 7

Interrogatory No. 7. Please describe in detail what traffic Midcontinent contends it terminates and originates in IP format and what traffic Midcontinent contends it terminates and originates in TDM format. For each type of traffic on Midcontinent's network (*e.g.*, IP-terminated, IP--originated, TDM-originated, TDM-terminated), please:

- a. Describe the facilities that Midcontinent uses to handle the traffic, including a detailed description of where calls are converted to/from TDM to IP format.
- b. Describe the charges (switched access or other types of charges) charged by Midcontinent or charged to Midcontinent.
- c. State Midcontinent's total minutes of use (MOUs) and revenue for each month since January 2006.

MIDCONTINENT'S ANSWER INTERROGATORY NO. 7:

Midcontinent objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence. Pursuant to Verizon's Answer to Interrogatory number 4 to Midcontinent's First Set of Interrogatories, "[t]he only traffic in dispute in this proceeding is traffic exchanged between Midcontinent and Verizon." Therefore, any information related to number of Midcontinent's total minutes of use or revenue for each month since January 2006 is not relevant to these proceedings. Notwithstanding the objections, and without waiving the same, Midcontinent states:

- a. Midcontinent and Verizon exchange traffic via a direct connection. All traffic, whether originated or terminated by Midcontinent, is exchanged with Verizon in

⁵ Midcontinent's persistent unwillingness to provide the information needed to possibly narrow the scope of the dispute is ironic in light of Midcontinent's criticism of Verizon for allegedly inappropriately withholding payment on non-VoIP traffic. *See, e.g.*, Opposition to Request for Stay (Feb. 28, 2011), at 2-3 (arguing that "a substantial portion of the traffic in dispute in this case is traditional TDM traffic"). Verizon has [BEGIN CONFIDENTIAL] over 40 [END CONFIDENTIAL] disputes with carriers regarding the applicability of switched access charges to VoIP, and no other carrier that claims to have non-VoIP traffic has refused to provide the data needed to narrow the scope of the dispute. To the contrary, other cable companies have entered into discussions with Verizon to provide Verizon with the information necessary to ensure that Verizon pays switched access charges on all properly-billed non-VoIP traffic.

TDM format. **BEGIN CONFIDENTIAL INFORMATION:**

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- b. Midcontinent's switched access charges are set forth in its tariff on file with the Public Utilities Commission. Midcontinent mirrors the Qwest switched access rate in South Dakota and charges that rate to carriers terminating to Midcontinent customers. Qwest charges Midcontinent the Qwest switched access rate for any traffic carried over their network. Individual independent phone companies charge either their tariffed rates or the LECA rate to Midcontinent for traffic into their rural markets. For traffic terminated to local carriers that do not have direct interconnection with Midcontinent, e.g., traffic carried by long distance carriers on Midcontinent's behalf, Midcontinent does not make direct payments to the local carriers, and therefore is not aware of the specific arrangements made by Verizon and Midcontinent's other long distance providers.

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Since the signing of this Agreement in 2007, Verizon has paid tariffed switched access charges on Telecommunications Toll Traffic, including VoIP traffic, as required by the Agreement. It was not until approximately June, 2010, that Verizon abruptly stopped paying for VoIP traffic. Prior to that time, Verizon had made no claim or assertion under the Agreement that VoIP traffic was not subject to switched access charges. According to Verizon's Answer to Interrogatory number 13, it now considers that traffic to be "information services traffic that is interstate in nature" and not subject to intrastate switched access charges. Yet, Verizon, in its most recent Ex Parte meeting with the FCC, asserts that "the record is clear that the FCC has not

decided the proper compensation regime for IP traffic” Verizon’s position, then, cannot be based on any FCC decision as it has asserted repeatedly that no such FCC decision exists.

In comments during the hearing on Midcontinent’s Request for Interim Relief, Verizon stated that it was disputing payment of intrastate switched access charges on the traffic based on recent “changes in law.” Mr. Koenecke, speaking on behalf of Verizon stated: “The status of the matter is that two Federal District Courts on the Eastern Seaboard, in Washington, DC, and New York City, made a decision that tariff rates don’t apply to what we believe to be the traffic in question here. Verizon has conducted its business then accordingly.” Similarly, Mr. Curtis Groves stated: “But, earlier this year, the laws started to shift a little bit, started to change a little bit, and started to become a bit more clearer, with the two District Court decisions, one out of the DC District, the other out of the Southern District of New York, both of which concluded that access tariffs do not apply to VoIP traffic.” Putting Verizon’s nationwide comments together, then, it is clear that Verizon is relying solely on the two district court decisions just mentioned for its claim that there has been a “change in law” with respect to IP traffic.

Despite Verizon’s contention that there has been a “change in law” regarding VoIP traffic, Verizon failed to comply with the provisions of section 10 of the Switched Access Services Agreement with Midcontinent by withholding payment. **BEGIN CONFIDENTIAL INFORMATION**

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Based on the foregoing, Midcontinent’s tariffed intrastate switched access charges continue to apply to the traffic in dispute and Verizon is in breach of that Agreement due to its failure to continue to pay the rates in effect immediately prior to the claimed “change of law” event. Verizon is also in breach for its failure to follow the specific Notice provisions of the agreement related to a change of law event.

- c. Midcontinent’s total minutes of use and revenue for each month since 2006 is not relevant to these proceedings and the request for such data is overly broad and unduly burdensome. The minutes of use billed to Verizon since June, 2010, are set forth on the detailed invoices sent each month to Verizon, which already are in Verizon’s possession.

MIDCONTINENT’S SUPPLEMENTAL RESPONSE PROVIDED 3/2/2011:

See attached Confidential Exhibit setting forth the exchanges served by Midcontinent and the

number of customers by type of service in each exchange.

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a.

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VERIZON'S ARGUMENT REGARDING INTERROGATORY NO. 7: Midcontinent's lengthy initial response and supplemental response are almost entirely nonresponsive to the interrogatory. The initial response mostly regurgitates arguments about the parties' Switched Access Service Agreement which Midcontinent made in support of its Motion to Amend Complaint, and the supplemental response *only* describes the traffic that Midcontinent admits is VoIP. But the supplemental response is completely silent with respect to Verizon's reasonable request that Midcontinent describe in detail – for “each” type of traffic (which obviously includes traffic Midcontinent contends is non-VoIP) – the “facilities that Midcontinent uses to handle the traffic, including a detailed description of where calls are converted to/from TDM to IP format.”

An equally glaring deficiency is that Midcontinent, while asserting that some of its traffic is purportedly TDM, refuses to respond to Verizon's request detail regarding *which* traffic it contends is TDM and *which* traffic it contends is IP-originated or IP-terminated. For example, Midcontinent ignored Verizon's request (subpart c) for the minutes of use associated with each type of traffic. Such data is crucial for Verizon to ensure that it withholds switched access

payments only on VoIP traffic.⁶

* * *

VERIZON'S INTERROGATORY NO. 8

Interrogatory No. 8. For each local exchange in which Midcontinent offers voice service, please describe and diagram the path of interexchange calls originated by Midcontinent end users, starting with (and including) the retail customer's premises and ending with (and including) the point where another carrier unaffiliated with Midcontinent receives the call. For each discrete segment of the call path (between any two pieces of equipment or between any two points where a cost is incurred by any person or entity responsible for the call charges), please:

- a. Describe in detail the facility or equipment over which the call is routed, including the technology used to route the call (*e.g.*, TDM, Internet Protocol);
- b. Indicate who owns and controls the facility or equipment (if ownership and control are different for a given segment, please explain in full);
- c. Describe the equipment that converts the call to/from TDM to IP format, including precisely where that equipment is located in the call path;
- d. State what charges are incurred and received by every entity and person that incurs or pays a charge (*e.g.*, Midcontinent affiliates, Midcontinent's end users, third-party local exchange carriers, other carrier) for the call, including usage - based as well as non-usage based charges;
- e. State to whom the charges identified in response to subpart c are assessed, to whom they are paid, and the amount (per minute, per month, or other applicable measure) of such charges;
- f. Describe the legal basis for each of the charges identified in response to subpart c (*e.g.*, interconnection agreement, contract, tariff) and provide copies of all documents that Midcontinent contends supports them.

⁶ The confidential exhibit referred to in Midcontinent's supplemental response is attached hereto as Confidential Exhibit A. In that exhibit, Midcontinent admits that [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL].

See Confidential Exhibit A. However, Midcontinent refused to provide any information, such as the identity of the purported non-VoIP customers or the minutes of use associated with them, that would be relevant to narrowing the dispute.

If any of the above information changes or has changed for different types of calls, different types of customers, or different periods of time, please provide a separate description and diagram for each type of situation, including any changes in call routing methods since January 1, 2006.

MIDCONTINENT'S INITIAL ANSWER TO INTERROGATORY NO. 8:

Midcontinent objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence. Midcontinent further objects to the extent the question seeks to impose a burden on Midcontinent to produce call diagrams that it does not keep or maintain in the ordinary course of business. Notwithstanding the objection, and without waiving the same, Midcontinent states:

- a. According to Verizon's Answer to Interrogatory number 18 from Midcontinent, "Verizon is not disputing the charges at issue in this proceeding because of network architecture." Therefore, the facilities or equipment used by Midcontinent is irrelevant.
- b. Ownership and control over portions of Midcontinent's network is irrelevant and beyond the scope of these proceedings. With the exception of resold facilities, Midcontinent owns and controls all of the equipment and cable plant from the customer premise to the switch, up to and including the handoff point to third parties.
- c. **BEGIN CONFIDENTIAL INFORMATION:**

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- d. Midcontinent's switched access charges are set forth in its tariff on file with the Commission.
- e. Charges are assessed to all providers who utilize the portions of Midcontinent's network or services set forth in the tariff.
- f. Midcontinent's switched access charges are based on its tariff on file with the Commission. In addition, with respect to Verizon, Midcontinent has a valid, legally binding, Switched Access Services Agreement which mandates the application of Midcontinent's intrastate switched access tariffed rates to intrastate traffic received from Verizon.

MIDCONTINENT'S SUPPLEMENTAL RESPONSE PROVIDED 3/2/2011:

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VERIZON'S ARGUMENT REGARDING INTERROGATORY NO. 8: The only disputes regarding this interrogatory are over subparts a and c. Those subparts seek the technical information relevant to assessing Midcontinent's assertion that some of its traffic is not VoIP traffic. For each segment of the path of an interexchange call, Verizon requested information about the equipment over which the call is routed (subpart a), the technology used (subpart a),

and where in the call path any protocol conversions take place (subpart c).⁷

After initially ignoring subparts a and c, Midcontinent provided its supplemental response on March 2. Only the middle paragraph of that response relates to the traffic that Midcontinent contends is non-VoIP traffic. But that middle paragraph provides no information whatsoever about the discrete segments of the call path. There is no information, for example, about what format the traffic takes at different segments of the call path, or about whether (and where) a protocol conversion (i.e., between TDM and IP or vice-versa) takes place.⁸ To the extent Midcontinent provides information showing that some portion of its traffic is non-VoIP, Verizon would withdraw its dispute with respect to that traffic. But Midcontinent has deliberately avoided providing such information, and the Commission should not countenance such gamesmanship.

* * *

VERIZON'S INTERROGATORY NO. 17

Interrogatory No. 17. Please describe what protocols Midcontinent uses to support voice coding, session management, call signaling and control, and multimedia transport and control for voice services.

MIDCONTINENT'S INITIAL ANSWER TO INTERROGATORY NO. 17:

Midcontinent objects to this Interrogatory on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding the objection, and without waiving the same, Midcontinent states that it uses several industry standard protocols.

⁷ A separate interrogatory (Interrogatory No. 9) asked for identical information about the call path where traffic *terminates* (as opposed to *originates*) on Midcontinent's network. Midcontinent indicated that terminating calls simply follow the reverse path of originating calls. There is no dispute about that response.

⁸ In response to interrogatory no. 9, Midcontinent provided a diagram of its network architecture. That diagram is attached hereto as Confidential Exhibit B. The diagram, however, does not provide any of the information requested in subparts a or c. In fact, the diagram conflates traffic that is undisputedly VoIP with traffic that Midcontinent asserts is non-VoIP, rather than providing separate diagrams for "different types of customers" as clearly requested in the interrogatory.

MIDCONTINENT'S SUPPLEMENTAL RESPONSE PROVIDED 3/2/2011:

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VERIZON'S ARGUMENT REGARDING INTERROGATORY NO. 17 After initially ignoring Verizon's request, the supplemental response Midcontinent provided on March 2 simply listed a number of protocols used by Midcontinent, but did not provide any linkage regarding which protocol is used for the different functions that Verizon specifically asked about (voice coding, session management, call signaling and control, and multimedia transport and control for voice services). Without providing Verizon with information sufficient to understand where in Midcontinent's network the protocol is employed, such information is useless.

C. Basic Financial and Business Information.

This dispute raises various financial and economic issues, including ones relating to Midcontinent's costs (and margins) associated with terminating traffic in IP format, any damages Midcontinent may claim based on Verizon's withholding, the financial impact that a reduction in

terminating revenue will have on Midcontinent, and, possibly, evidence relevant to any claim that Midcontinent's switched access revenue may subsidizes any universal service commitments. *See, e.g.*, Complaint, ¶¶ 16-21 (asserting that Midcontinent's tariffed rates are "fair and reasonable" for VoIP traffic and that Midcontinent has been "damaged in an amount to be proven at hearing"); Complainant's Request for Interim Relief (Dec. 21, 2010), ¶ 9 (asserting that Midcontinent is "essentially being forced to subsidize the free ride of Verizon, resulting in uncompensated use of their network"); Verizon's Answer to Complaint, Request for Stay to Permit Settlement Negotiations, or, in the Alternative, Request for hearing on Threshold Factual Issues Related to Jurisdiction (Nov. 18, 2010) ("Answer"), ¶ 46 (disputing that Verizon has failed to provide adequate compensation for the services Midcontinent provides when originating and terminating IP-enabled traffic). Yet Midcontinent has refused to provide even basic information about its finances, investments, or operations.

Accordingly, Verizon respectfully requests that the Commission require Midcontinent to provide full and complete answers to each of the following:

VERIZON'S INTERROGATORY NO. 15

Interrogatory No. 15. Please describe and quantify all investments Midcontinent has made since January 2, 2006 to deploy facilities or equipment enabling Midcontinent to provide VoIP services, including, but not limited to, any and all investments in soft switches, media gateways, routers, any technology or equipment purchased from Metaswitch Networks, and customer premises equipment, including cable modems and analog telephone adapters.

MIDCONTINENT'S ANSWER TO INTERROGATORY NO. 15: Midcontinent objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence. According to Verizon's Answer to Interrogatory number 18 from Midcontinent, "Verizon is not disputing the charges at issue in this proceeding because of network architecture." Therefore, the investments made by Midcontinent, and the costs of those investments, are irrelevant.

VERIZON ARGUMENT REGARDING INTERROGATORY NO. 15: This request asks for basic information about investments Midcontinent has made to deploy its IP network in South Dakota. In addition to being relevant to costs associated with that network (including its termination costs), this request is relevant to the fundamental issue of ascertaining whether Midcontinent's claims to be a TDM provider have merit.

VERIZON'S DOCUMENT REQUEST NO. 1

Document Request No. 1. Please provide copies of:

- a. All financial statements and annual reports of Midcontinent since January 1, 2006.
- b. All of Midcontinent's articles of incorporation and bylaws, as well as any documents that have amended or modified them.
- c. All interconnection agreements or other agreements between Midcontinent and any other carriers.
- d. All certificates or other permissions relating to the provision of voice service in South Dakota.
- e. All franchises and other permissions necessary for the provision of cable service in South Dakota.
- f. All inter-affiliate agreements, contracts, or other arrangements, including any interconnection agreements between any affiliate and Midcontinent.
- g. All transcripts of all conferences or analyst calls where Midcontinent employees have discussed voice services or traffic routing practices.

MIDCONTINENT'S RESPONSE TO DOCUMENT REQUEST NO. 1:

Midcontinent objects to this Request and each of its subparts on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is neither relevant, nor reasonably calculated to lead to the discovery of admissible evidence.

- a. Not relevant. Midcontinent is a privately held company and its financial statements and annual reports are confidential and have no bearing on this dispute regarding switched access charges with Verizon.

- b. Not relevant. Midcontinent is a privately held company and its articles of incorporation and bylaws are confidential and have no bearing on this dispute regarding switched access charges with Verizon.
- c. Interconnection agreements are on file with the Commission. See enclosed CD.
- d. Not relevant. See Answer to Interrogatory number 5.
- e. Not relevant.
- f. Not relevant. Notwithstanding, no such agreements exist with respect to the provision of switched access services in South Dakota.
- g. Not relevant. Midcontinent is a privately held partnership.

VERIZON ARGUMENT REGARDING DOCUMENT REQUEST NO. 1: Subparts a and e of this document request are the only ones for which the companies have not reached agreement. Subpart a asks for Midcontinent’s annual reports and financial statements, which of course are routine, off-the-shelf documents about Midcontinent’s operations and finances. Such documents are essential to developing a basic understanding of Midcontinent and its operations. They are relevant, *inter alia*, to the role switched access revenue plays in Midcontinent’s overall operations and to the profit Midcontinent receives for switched access. Without such basic facts, it will not be possible, for example, to evaluate whatever evidence Midcontinent presents to support its assertion that Verizon is engaged in “unjust enrichment” by paying compensation that is lower than Midcontinent’s switched access rates, or to assess Verizon’s defense that the interim rate it is paying is not unreasonable.⁹

Of course, Midcontinent argument that producing its financial statements is “unduly burdensome” is frivolous. Verizon is not asking that it undertake a special study, but rather than it produce off-the-shelf financial documents. There is similarly no merit to Midcontinent’s assertion that it should not be required to produce its financial statements because they are

⁹ The Commission, as Verizon explained in its Answer, does not have authority to decide Midcontinent’s unjust enrichment claim because it is a traditional legal doctrine sounding in equity which can be granted only by a court. However, a full factual record will be crucial on any appeal because the appropriate relief under an unjust enrichment theory is an inherently factual issue. *See, e.g., Manhattan Telecommunications Corp. v. Global NAPS*, 2010 U.S. Dist. LEXIS 32315 (S.D.N.Y. 2010), at 11-12 (holding that an IXC’s failure to pay anything for termination of VoIP traffic constituted unjust enrichment, but making clear that the appropriate rate is below the LEC’s tariff-based switched access rates, which are “too high” for VoIP traffic).

“confidential.” The parties have entered into a confidentiality agreement, and Verizon is producing substantial amounts of confidential information in response to Midcontinent’s discovery requests. There is no reason why Midcontinent should not produce basic financial information subject to appropriate confidentiality protections.

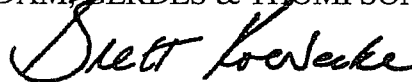
Finally, subpart e of the document request asks for copies of Midcontinent’s “franchises and other permissions necessary for the provision of cable service in South Dakota.” While it may eventually turn out that Midcontinent is correct that such documents are not relevant, Verizon has requested them so that it can understand, *inter alia*, the representations Midcontinent has made about the nature of its operations, the nature of the rights-of-way over which Midcontinent has constructed its cable network, and other details about Midcontinent’s operations that may be relevant to this case or that may “lead to the discovery of admissible evidence.” SDCL 15-6-26(b). Especially given that Midcontinent has no *bona fide* argument that producing its franchise agreements is “unduly burdensome,” this request falls within the broad scope of permissible discovery in South Dakota.

CONCLUSION

As discussed above, Verizon respectfully requests that the Commission require Midcontinent to respond fully to Interrogatory nos. 4-c, 4-e, 7, 8-a, 8-c, 15, and 17 of Verizon’s First Set of Interrogatories, and Document Request nos. 1-a, 1-e, and 2 of Verizon’s First Set of Document Requests propounded on January 14, 2011.

Dated March 8, 2011.

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CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 8 day of March 2011, he electronically filed or 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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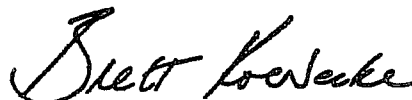
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