

**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

OPPOSITION TO
MIDCONTINENT'S MOTION TO
AMEND COMPLAINT

MCI Communications Services, Inc. d/b/a Verizon Business Services (“Verizon”), by and through its counsel of record, files this opposition to the Motion to Amend Complaint (“Motion to Amend”) filed by Midcontinent Communications (“Midcontinent”) on February 3, 2011. Verizon requests that the Motion to Amend be denied, or, in the alternative, that the schedule be adjusted to avoid the prejudice created by Midcontinent’s decision to file it on the eve of the final round of discovery.

BACKGROUND

Midcontinent filed its Complaint on October 27, 2010. After the parties had briefed and argued certain procedural and other issues, the Commission directed the parties to develop a procedural schedule with two rounds of discovery. The first round of discovery began on January 14, 2011, and the deadline for submitting follow-up discovery is February 22, 2011. *See* Order Setting Procedural Schedule (Jan. 31, 2011).

Midcontinent filed its Motion to Amend on February 3, 2011. Midcontinent stated that it “seeks to add a claim of breach of contract based on a Switched Access Service Agreement (“Agreement”) between Verizon and Midcontinent dated March 7, 2007.” Motion to Amend at

¶ 3. Midcontinent has provided no explanation why it waited until after the principal discovery deadline passed to assert its breach of contract claim for this four-year-old contract.

The dispute resolution provision in the Agreement requires Midcontinent to attempt to resolve any dispute regarding the interpretation of the Agreement through “good faith negotiation between the Parties in the first instance.” *See* Motion to Amend Complaint, Confidential Exhibit No. 12 (“Agreement”), at ¶ 9. Midcontinent does not assert that it has complied with that obligation, and has provided no justification for choosing not to comply.

ARGUMENT

A. The Proposed Amendment Would Be Futile Because Verizon’s Contract with Midcontinent Does Not Resolve the Legal Questions on Which This Proceeding Will Turn.

Under the plain terms of the Agreement, switched access charges only apply to VoIP traffic “if and to the extent that the subject VOIP ... traffic is of a nature that is subject to access charges pursuant to applicable law.” *See* Agreement, ¶ 1.8. Although Midcontinent quotes this portion of paragraph 1.8 in its proposed Amended Complaint (¶ 45), it ignores this critical language. The Agreement is plainly not a promise by Verizon to pay tariffed switched access charges for VoIP traffic irrespective of whether Verizon is legally required to pay such charges. Instead, the contract makes clear that “applicable law” — and not the terms of the contract — will govern whether Verizon must pay those tariffed charges for VoIP traffic. But that is precisely the legal question that is already before the Commission. The new contract claim adds nothing to Midcontinent’s pending claim that Verizon must pay its tariffed charges; if Midcontinent cannot prevail on that existing claim (and it cannot), the new breach-of-contract claim it proposes to add will fail as well. Moreover, because the contract expressly ties Verizon’s payment obligation to the requirements of “applicable law,” whatever they are, there is

no merit to Midcontinent's new claim (Am. Compl. ¶¶ 46-50) that Verizon was required to invoke the contract's change-of-law provision. In short, leave to amend should be denied, because Midcontinent's new claim fails as a matter of law, so amendment would be futile.

B. The Motion is Premature Because Midcontinent Intentionally Failed to Comply with the Dispute Settlement Provisions of the Contract it Asserts Governs the Traffic at Issue.

Even if there were some doubt about the plain terms of the contract — and there is none — Midcontinent's motion should be denied for a further reason. In order to enforce the terms of the agreement, Midcontinent must comply with paragraph 9 of the Agreement, which requires Midcontinent to engage in "good faith negotiation" prior to seeking other remedies.

Midcontinent makes no allegation that it complied with that provision, nor did Midcontinent engage Verizon in any such negotiations. Indeed, Midcontinent's refusal to comply with its contractual dispute resolution obligation is surprising (and egregious) in light of Verizon's repeated requests – throughout this proceeding and before it began – to enter into negotiations to attempt to settle or narrow the dispute between the companies. *See, e.g.*, 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), at ¶¶ 1, 54-56. The Commission should not permit Midcontinent to assert a contract-based claim when Midcontinent has ignored the dispute resolution provisions of the very contract on which it relies.

C. In the Absence of an Extended Procedural Schedule, Granting the Motion Would Result in Prejudice to Verizon.

The late-filed nature of the Motion to Amend, combined with the fact that the Commission has granted intervenor status to three entities that purport to represent the interests of dozens of individual carriers, would result in substantial prejudice to Verizon with respect to its ability to develop the factual record necessary to prosecute its defense in this complex

proceeding. If the Commission accepts Midcontinent's Amended Complaint, Verizon intends to develop a full factual record relating to the Agreement and the circumstances of its negotiation, to bolster its arguments that the contract does not commit Verizon to pay tariffed access charges for VoIP traffic if "applicable law" does not so require. Midcontinent knew about the Agreement long before the Commission approved the parties' procedural schedule at the end of January, yet it intentionally waited until after the initial discovery deadline had passed to file the Motion to Amend.¹

Midcontinent asserts that "Verizon will not be prejudiced" by its additional claim because Midcontinent had made Verizon aware back in December 2010 that it was considering asserting such a claim. *See* Motion to Amend, ¶ 4. In fact, Midcontinent's decision to tell Verizon about the possible amendment in December, and then to not amend its complaint prior to the initiation of discovery, strongly implied that Midcontinent had concluded that the claim was meritless – a conclusion which (as discussed above) would have been eminently reasonable. Verizon therefore had no reason to propound discovery relating to a potential amendment. The procedural schedule provided for two rounds of discovery; Verizon would be prejudiced if the

¹ Midcontinent implies that it could not have made its contract claim before Verizon "acknowledged the existence of the Agreement" and informed Midcontinent of its "position on the applicability of such Agreement" in discovery responses. (Motion at 2.) This is not a legitimate reason for Midcontinent's failure to bring the contract claim sooner. As noted, the Agreement has been in effect for four years, so Midcontinent should have known about it when its Complaint was filed in October of last year. Moreover, Midcontinent's counsel told Verizon's counsel on December 6 that Midcontinent believed the Agreement applied and it was considering amending its Complaint to add a contract claim. Verizon told Midcontinent the same thing it did in discovery—that the Agreement does not require payment of tariffed access charges on VoIP traffic. Verizon added that it expected Midcontinent to comply with the Agreement's dispute resolution provisions if Midcontinent intended to try to enforce the agreement as Midcontinent interprets it. In the two months since then, Midcontinent neither amended its complaint nor sought the negotiations required under the dispute resolution provisions of the Agreement, so Verizon reasonably assumed Midcontinent agreed with Verizon's conclusion that the Agreement does not apply to this dispute.

Commission allowed Midcontinent to amend its complaint at this late date and, thereby, to inject into this proceedings new factual issues regarding the contract, while denying Verizon the right to take two rounds of discovery on those issues.²

WHEREFORE, Verizon asks that the Commission deny the Motion to Amend.

Alternatively, if the Commission chooses to grant Midcontinent's Motion to Amend, it should simultaneously extend the procedural schedule to include the same discovery opportunity (an initial round of 30 days and a follow-up round of 21 days) initially agreed upon by the parties in order to ensure that Verizon has the opportunity to develop a full factual record.

Dated February 9, 2011.

MAY, ADAM, GERDES & THOMPSON LLP



BY: _____

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² The same consideration applies with respect to the recently granted intervention of South Dakota Network, South Dakota Telecommunications Association and the Local Exchange Carriers Association. Unless the schedule is amended, including extension of the discovery period to allow two rounds of discovery, Verizon will be denied the ability to develop an adequate factual record.

CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 9 day of February, 2011, 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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