

**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

REQUEST FOR STAY

MCI Communications Services, Inc. d/b/a Verizon Business Services (“Verizon”) asks the Commission to stay this proceeding. In a Notice of Proposed Rulemaking released last week, the FCC confirmed that it intends to decide, on an expedited schedule, what intercarrier compensation obligations apply to Voice over Internet Protocol (“VoIP”) traffic.¹ This is the same issue Midcontinent Communications, Knology of the Plains, Inc., and Knology of the Black Hills, LLC (collectively, “Complainants”) have asked this Commission to decide. It would make no sense for this Commission to expend its time and resources trying to resolve an issue that is within the FCC’s jurisdiction and that the FCC intends to decide in the near term. Verizon, therefore, requests a stay of this proceeding, pending FCC action in its Rulemaking.

I. BACKGROUND

Midcontinent and Knology filed their Complaint in October, after Verizon disputed their application of tariffed switched access charges to the VoIP traffic originated by and terminated to their end users. Complainants did not admit that they

¹ *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”), ¶¶ 603-619 (Feb. 9, 2011).

were originating or terminating any VoIP traffic, but argued that, even if they were, VoIP calls were no different, for intercarrier compensation purposes, from traditional voice calls that originate or terminate in time division multiplexing (“TDM”) format. Under this theory, Complainants asserted that their tariffed intrastate access charges apply to VoIP calls that, based on the telephone numbers of the parties on either end of the call, appear to originate and terminate to end users in different South Dakota exchanges. (Complaint, ¶ 14.) They claimed that the FCC had said nothing to “warrant treating intrastate TDM traffic differently from intrastate IP-based traffic for intercarrier compensation purposes.” *Id.* ¶ 15.

Verizon’s Answer to the Complaint explained that the FCC had, in fact, found that IP traffic is interstate traffic for jurisdictional purposes; because state commissions lack jurisdiction over interstate services, this Commission is foreclosed from applying a state tariff to interstate, IP traffic.² Verizon also pointed out that two federal courts had denied efforts by competing local exchange carriers to apply their tariffed access charges to VoIP traffic.³ Verizon told the Commission that the FCC, as part of its National Broadband Plan (“NBP”), intended to initiate an intercarrier compensation rulemaking that would include the treatment of VoIP.⁴ Verizon, therefore, argued that even if this Commission had subject matter jurisdiction over the Complaint (and it does not, to the extent the Complaint involves VoIP traffic), it would not be efficient to devote resources to a proceeding that may be curtailed by FCC action and risks inconsistency with FCC

² Answer to Complaint, Request for Stay to Permit Settlement Negotiations, or, in the Alternative, Request for Hearing on Threshold Factual Issues Related to Jurisdiction (“Answer”), ¶ 42 (Nov. 18, 2010).

³ Answer, ¶ 43, citing *PAETEC Comm., Inc. v. CommPartners, LLC*, No. 08-cv-397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010); *Manhattan Telecomm. Corp. v. Global NAPs, Inc.*, No. 08-Civ-3829, 2010 WL 1326095 (S.D.N.Y. mar. 31, 2010).

⁴ Answer, ¶ 53, citing FCC, *Connecting America: The National Broadband Plan*, <http://download.broadband.gov/plan/national-broadband-plan.pdf> (March 16, 2010), at 159 n. 53.

rulings. Verizon also emphasized that a stay would permit the parties to try to negotiate a commercial agreement for VoIP compensation. *See Answer*, ¶¶ 54-56.

Complainants opposed Verizon's stay request, arguing that there was no factual or legal support for it—specifically, that there was no evidence that the disputed traffic is IP-based and no legal justification for treating VoIP calls any differently from traditional calls for intercarrier compensation purposes.⁵

The Commission did not act on the stay request in Verizon's Answer. In the meantime, Complainants' responses to Verizon's discovery have confirmed that Midcontinent and Knology are originating and terminating IP traffic.⁶ And last week, the FCC initiated the intercarrier compensation Rulemaking anticipated in the NBP. That Rulemaking proposes to modernize the federal universal service fund and reform the intercarrier compensation system. The FCC will, however, address the most urgent intercarrier compensation issues – including VoIP compensation – on an expedited schedule, ahead of its larger effort to reform the existing intercarrier compensation regime. *See Notice*, ¶ 603-04. The FCC confirmed that, although the VoIP compensation issue had long been pending before it, it had not yet determined what compensation, if any, applies to VoIP traffic. *Notice*, ¶ 608. It recognized that the absence of an intercarrier compensation framework for VoIP had given rise to numerous disputes, making it important for the FCC to act quickly to give carriers the certainty

⁵ Complainants' Brief in Support of Opposition to Verizon's Request for Stay or Alternative Request for Hearing on Threshold Factual Issues, at 1-2, 4-6 (Dec. 8, 2010)..

⁶ As Verizon made clear in its Answer, it is disputing application of access charges only to the traffic it identified as VoIP, not to traditional traffic originated and terminated in TDM format. In cases where a carrier questions Verizon's characterization of certain traffic as VoIP, Verizon works with the carrier to come to a mutual understanding of the scope of the dispute. Although the Complaint suggested that some of the traffic in dispute here might not be IP-based, Complainants refused to enter into discussions with Verizon to narrow the scope of the dispute, as other carriers have, before they filed their Complaint. Based on information Verizon recently obtained in discovery, Verizon is now working with Knology to agree on the scope of the parties' dispute.

needed to address such disputes. *Id.*, ¶ 614. The FCC observed that “some commercial arrangements apply a specific rate for VoIP traffic”—citing a Verizon agreement applying the same \$0.0007 per minute to VoIP traffic that Verizon has applied to Complainants’ VoIP traffic—and emphasized that nothing in the *Notice* should be read to encourage disruption of such arrangements during the pendency of the FCC’s rulemaking. *Id.*, ¶¶ 614, 616 n. 929.

II. A STAY WILL PREVENT WASTE OF RESOURCES AND AVOID CONFLICT WITH FEDERAL LAW

The *Notice* confirms what Verizon said in its Answer to the Complaint: it is the FCC’s job to determine intercarrier compensation for VoIP traffic, and the FCC intends to do so in the near term. Answer, ¶ 53. Contrary to Complainants’ legal theory, the *Notice* makes clear that VoIP calls are *not* just like any other calls for intercarrier compensation purposes and application of tariffed access charges to VoIP calls is *not* the status quo. Application of the existing access regime is, instead, just one option that the FCC has presented for consideration--and it is clearly not the FCC’s favored option, given its recognition of “the need to move away from today’s intercarrier compensation system” for other voice traffic as part of its comprehensive intercarrier compensation reform. *See id.*, ¶ 613.

The *Notice* leaves no doubt that the FCC intends to determine what compensation applies to all VoIP calls, not just those that cross state boundaries, so there is no “intrastate” aspect of VoIP compensation that this Commission could or should address. The determination of what compensation applies to VoIP traffic must be made by the FCC (or, in the interim, by a federal court interpreting the current scheme), and that is exactly what the FCC is considering now. This is the very same question the Complaint

presents—that is, what compensation applies to VoIP traffic--and it is slated to do so on about the same timetable established for this case.

The FCC has established an accelerated, 45-day comment cycle for resolving the VoIP compensation issue. Once that cycle ends, probably sometime in the spring,⁷ the issue will be ripe for decision. Initial testimony is not due in this case until May 17, with the hearing scheduled for June 29-30. Briefing will likely run into August, with a decision no earlier than the fall. Reconsideration requests would further extend the schedule (and any decision setting VoIP compensation would almost certainly be appealed). Therefore, if the Commission proceeds on this Complaint, its deliberations on the VoIP compensation issue will lag the FCC's.

It makes no sense for the Commission and its Staff (or the parties) to waste their time and limited resources trying to resolve the same VoIP compensation as the FCC at the same time, especially when that issue lies within the federal jurisdiction. Although dismissal of the Complaint for lack of subject matter jurisdiction would be justified, if the Commission is reluctant to take that course, a stay pending completion of the FCC's VoIP compensation Rulemaking would be appropriate. Now that Complainants' discovery responses have established that they are, in fact, originating and terminating IP traffic, and now that the FCC has confirmed that VoIP traffic is not the same as other voice traffic for intercarrier compensation purposes, Complainants' earlier criticisms about the lack of factual and legal support for a stay have evaporated.

Although Verizon has disputed the application of tariffed access charges on VoIP traffic with companies around the country, this proceeding is one of only two that have

⁷ The exact timing of the Comment deadlines depends on the date of publication of the Notice in the Federal Register.

been initiated with state Commissions, and it is procedurally well ahead of the other one. If the Complaint proceeds, it promises to be one of the most controversial and vigorously litigated proceedings the Commission is likely to handle, with the attendant drain on resources. A stay would save the Commission and its Staff from wasting these resources on a proceeding that would be truncated (with invalidation of any decision) once the FCC issues its VoIP compensation ruling, while allowing the Commission to assure itself that the result of the FCC's Rulemaking addresses the parties' dispute. In the meantime, Verizon still hopes to engage Complainants in negotiation of a commercial agreement, as it has tried to do all along.

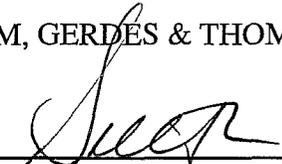
III. CONCLUSION

Verizon asks the Commission to stay this proceeding pending the FCC's resolution of the VoIP compensation issue the FCC has identified for expedited treatment in its Rulemaking. While the case is stayed, Verizon will continue its efforts to engage Midcontinent and Knology, respectively, in discussions to settle the Complaint.

Respectfully submitted on February 18, 2011.

MAY, ADAM, GERDES & THOMPSON LLP

BY:


BRETT KOENECKE

Attorneys for MCI Communications
Services, Inc. d/b/a Verizon Business
Services
503 S. Pierre Street
PO Box 160
Pierre, SD 57501
(605) 224-8803

CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 18 day of February 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:

MS PATRICIA VAN GERPEN
EXECUTIVE DIRECTOR
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
500 EAST CAPITOL
PIERRE SD 57501
patty.vangerpen@state.sd.us

MS KARA SEMMLER
STAFF ATTORNEY
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
500 EAST CAPITOL
PIERRE SD 57501
kara.semmler@state.sd.us

MS BOBBI BOURK
STAFF ANALYST
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
500 EAST CAPITOL
PIERRE SD 57501
bobbi.bourk@state.sd.us

MS KATHRYN FORD
ATTORNEY AT LAW
DAVENPORT EVANS HURWITZ & SMITH LLP
PO BOX 1030
SIOUX FALLS SD 57104
kford@dehs.com

Ms. Darla Pollman Rogers
Riter, Rogers, Wattier & Northrup, LLP
P.O. Box 280
Pierre, SD 57501-0280
dprogers@riterlaw.com

Mr. Richard D. Coit
SDTA
P.O. Box 57

Pierre, SD 57501-0057
richcoit@sdtaonline.com

Mr. William P. Heaston
VP, Legal & Regulatory
SDN Communications
2900 W. 10th St.
Sioux Falls, SD 57104

A handwritten signature in cursive script, appearing to read "Brett Koenecke", written in black ink. The signature is positioned above a solid horizontal line.

BRETT KOENECKE