

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:

Docket No. TC12-016

MIDCONTINENT COMMUNICATIONS,

Complainant,

ANSWER AND AFFIRMATIVE
DEFENSES OF:

v.

MCLEODUSA TELECOMMUNICATIONS
SERVICES, LLC AND PAETEC
COMMUNICATIONS, INC.

MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC., AND PAETEC
COMMUNICATIONS, INC.

Respondents.

The Respondents herein – McLeodUSA Telecommunications Services, LLC (“McLeodUSA”) and PAETEC Communications, Inc., (“PAETEC”) – respectfully submit the following Answer and Affirmative Defenses to the Amended Complaint and Request for Declaratory Order filed in this Docket and dated February 7, 2012 (the “Amended Complaint”)¹.

INTRODUCTION

Midcontinent Communications (“Midcontinent” or “Complainant”) filed its Amended Complaint against McLeodUSA and PAETEC, alleging that they are engaged in activities designed to deprive the Complainant of its right to recover terminating access charges for telecommunications directed to its end user customers. The Complainant alleges that McLeod accomplishes this alleged goal by: (1) “altering and/or disguising the data in the call signaling stream to mask the true origination point or jurisdiction of the traffic, thereby making the

¹ Midcontinent filed its initial Complaint on January 12, 2012, naming PAETEC Communications, Inc., -- an affiliate of McLeodUSA -- as the Respondent. On February 7, 2012 Midcontinent filed its Amended Complaint (to which this Answer and Affirmative Defenses responds) naming McLeodUSA as the Respondent.

traffic appear as if it is a local telecommunications call not subject to terminating access charges”; and (2) employing certain tactics to prevent calls from being completed, including activities that result in long distance calls “being delayed, dropped, blocked and/or otherwise prevented from terminating to the Midcontinent customer.” Amended Complaint, pp. 1-2.

With specific regard to Midcontinent’s allegation that McLeodUSA is continuing the practice of inserting a Charge Number (“CN”) into the data stream of traffic sent to Complainant, that assertion is simply wrong – while that practice was not uncommon in the telecommunications industry preceding the FCC’s recent *USF-ICC Transformation Order*² -- prior to the effective date of that decision and prior to Midcontinent’s filing of its Amended Complaint, Respondent conformed its practice to the FCC prospective prohibition of that practice, such that it no longer inserts a CN into the data stream of traffic it handles.

ANSWER

1. In answer to Paragraph 1 of the Amended Complaint, Respondents admit that, as of the date of this Answer, the South Dakota Secretary of State’s Office lists Midcontinent as a for-profit South Dakota general partnership and that the Commission lists Midcontinent as a regulated competitive local exchange carrier. Respondents lack knowledge sufficient to admit or deny the remaining allegations set forth in Paragraph 1. Except as expressly admitted herein, Respondents deny each and every remaining allegation set forth in Paragraph 1.

2. In answer to Paragraph 2 of the Amended Complaint, Respondents admit the allegations set forth therein.

3. In answer to Paragraph 3 of the Amended Complaint, Respondents state that it consists of references to various South Dakota statutes and Commission rules, to which no response is required, and the Paragraph otherwise asserts a legal conclusion to which no response is required, but to the extent a response is deemed to be required, the Paragraph is denied. Additionally, Respondents refer to their Motion to Dismiss and/or for Clarification Regarding Commission Jurisdiction, filed simultaneously with this Answer.

² *In the Matter of 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 an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform Mobility Fund*, 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, WT Docket No. 10-208. Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (*USF-ICC Transformation Order*).

4. In answer to Paragraph 4 of the Amended Complaint, regarding the allegations contained in each of the first two sentences thereof, Respondents lack knowledge sufficient to admit or deny the allegations set forth therein. Respondents admit generally the allegations contained in the remainder of the Paragraph.

5. In answer to Paragraph 5 of the Amended Complaint, Respondents admit the allegations set forth therein.

6. In answer to Paragraph 6, Respondents admit the allegations set forth therein, but Respondents affirmatively state that the allegations in Paragraph 6 are irrelevant to the matters addressed in the Amended Complaint.

7. In answer to Paragraph 7 of the Amended Complaint, Respondents affirmatively state that beginning shortly before the effective date of the FCC' recent *USF-ICC Transformation Order* they have not inserted a Charge Number ("CN") into the data stream. Otherwise, Respondents lack knowledge sufficient to admit or deny the allegations set forth therein.

8. In answer to Paragraph 8 of the Amended Complaint, Respondent McLeodUSA admits the allegations contained in the third sentence therein, except to affirmatively state that since December 19, 2011 it has not inserted CNs into the data stream of its traffic sent for termination. Otherwise, Respondent lacks knowledge sufficient to admit or deny the allegations set forth therein.

9. In answer to Paragraph 9, Respondent McLeodUSA lacks knowledge sufficient to admit or deny the allegations contained in the first sentence thereof. Regarding the second sentence of this Paragraph, Respondent lacks knowledge sufficient to admit or deny the allegation contained in the first phrase of this sentence. The remainder of the sentence contains a conclusion of law to which no response is required; however, to the extent a response is deemed to be required, this allegation is denied. McLeodUSA admits the allegation contained in the third (final) sentence of this Paragraph.

10. In answer to Paragraph 10, Respondent McLeodUSA admits the allegation contained therein but affirmatively states that the McLeodUSA response referred to therein was provided prior to the effective date of the recent FCC *USF-ICC Transformation Order*, and that since shortly prior to that date McLeodUSA has not inserted CNs into the data stream of traffic terminating from its network.

11. In answer to Paragraph 11, Respondents state that the Paragraph consists of an excerpt from the FCC's recent *USF-ICC Transformation Order*, which order speaks for itself, and to which no response is required. Regarding footnote 4, Respondent affirmatively states that

the reference to Windstream's position is irrelevant, since Windstream is not a party in this matter.

12. In answer to Paragraph 12, Respondents state that the Paragraph consists of an excerpt from the FCC's recent *USF-ICC Transformation Order*, which order speaks for itself, and to which no response is required.

13. In answer to Paragraph 13, Respondents affirmatively state that beginning shortly before the effective date of the FCC's recent *USF-ICC Transformation Order* they have not inserted a CN into the data stream. Otherwise, Respondents state that the Paragraph consists of an excerpt from the FCC's recent *USF-ICC Transformation Order*, which order speaks for itself, and to which no response is required.

14. In answer to Paragraph 14, Respondents affirmatively state that they transmit Calling Party Number ("CPN") as an originator of VoIP traffic, and that beginning shortly before the effective date of the FCC's recent *USF-ICC Transformation Order* they have not inserted a CN into the data stream when acting as a transiting carrier. Otherwise, Respondents state that the Paragraph consists of an excerpt from the FCC's recent *USF-ICC Transformation Order*, which order speaks for itself, and to which no response is required.

15. In answer to Paragraph 15, with regard to the first sentence thereof Respondents state that it asserts a legal conclusion to which no response is required. With respect to the second sentence, Respondents admit that the statutory provision (SDCL § 49-31-111) is correctly recited, but Respondents otherwise deny each and every allegation set forth therein. Additionally, Respondents affirmatively state that they transmit CPN as an originator of traffic covered by the cited statutory provision.

16. In answer to Paragraph 16, Respondents admit that the statutory provision (SDCL § 49-31-112) is recited accurately. Additionally, Respondents affirmatively state that they transmit CPN as a transiting carrier for traffic covered by the cited statutory provision, and further affirmatively state that beginning shortly before the effective date of the FCC's recent *USF-ICC Transformation Order* they have not inserted a CN into the data stream when acting as a transiting carrier.

17. In answer to Paragraph 17, Respondent McLeodUSA states that it consists of a legal conclusion to which no response is required; however, to the extent a response is deemed to be required, the paragraph is denied. Additionally, Respondent affirmatively states that beginning shortly before the effective date of the FCC's recent *USF-ICC Transformation Order* it has not inserted a CN into the data stream.

18. In answer to Paragraph 18, Respondent McLeodUSA denies the assertions contained in the first two sentences thereof. Respondent also specifically denies that footnote 8 is an accurate characterization of the FCC's enhanced services exemption from access charges. The third sentence of the paragraph also consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the sentence is denied.

19. In answer to Paragraph 19, Respondent McLeodUSA lacks knowledge sufficient to admit or deny the allegations contained in the first sentence thereof. Regarding the second sentence of the Paragraph, Respondent admits that the disputed traffic is delivered to the tandem-carrier in TDM format (because that is required by the tandem-carrier). Regarding the third sentence of the Paragraph, Respondent affirmatively challenges Complainants contention that the fact that Respondents convert the traffic to TDM before handing it off to the tandem-carrier is relevant to the application of the access charge exemption to this traffic.

20. In answer to Paragraph 20, Respondent McLeodUSA admits the allegation contained in the first sentence thereof. Regarding the second sentence, Respondent states that they are willing to engage in a joint effort with Complainant to identify or estimate the portion of the traffic that is TDM rather than VoIP-originated. However, Respondent affirmatively states that any access charges that may be due on such traffic must be collected from the originator of the traffic. Respondent otherwise denies each and every allegation contained in the Paragraph.

21. In answer to Paragraph 21, Respondent PAETEC lacks knowledge sufficient to admit or deny the allegations contained therein. Respondent specifically denies that it has taken any action to create "dead air" on calls destined to Complainants' end user customers. Respondent affirmative states that it is willing to engage in a joint effort with Complainant to trouble-shoot any service issues to determine the actual source of the problem.

22. In answer to Paragraph 22, Respondent PAETEC lacks knowledge sufficient to admit or deny the allegations contained therein.

23. In answer to Paragraph 23, Respondent PAETEC categorically denies the allegations contain therein. Respondent affirmatively states that it is willing to engage in a joint effort with Complainant to trouble-shoot any service issues to determine the actual source of the problem.

24. In answer to Paragraph 24, Respondent PAETEC denies the allegations contained therein.

25. In answer to Paragraph 25, Respondent PAETEC denies the allegations contained therein. To the extent this paragraph alleges violations of SDCL § 49-31-10 and 11, the allegation constitutes a legal conclusion to which no response is required, but if a response is deemed to be required, the allegation is denied.

26. In answer to Paragraph 26, Respondents state that the paragraph accurately recites a portion of SDCL § 49-31-10, which speaks for itself and to which no response is required.

27. In answer to Paragraph 27, Respondents state that the paragraph accurately recites a portion of SDCL § 49-31-11, which speaks for itself and to which no response is required.

COUNT I

28. In response to Paragraph 28, the answers in paragraphs 1-27 are incorporated as if fully repeated here.

29. In answer to Paragraph 29, Respondent McLeodUSA denies the allegations contained therein. Additionally, Respondent affirmatively states that beginning shortly before the effective date of the FCC's recent *USF-ICC Transformation Order* it has not inserted a CN into the data stream.

30. In answer to Paragraph 30, Respondent PAETEC denies the allegations contained therein.

31. In answer to Paragraph 31, Respondents state that the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the paragraph is denied. Respondents deny that Complainant is entitled to any of the relief requested in Paragraph 31 or any other relief requested against Respondents elsewhere in the Complaint. Moreover, Respondent denies that insertion of a CN on pre-FCC *USF-ICC Transformation Order* traffic was improper.

32. In answer to Paragraph 32, Respondents state that the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the paragraph is denied. The Respondents deny that Complainant is entitled to any of the relief requested in Paragraph 32 or any other relief requested against Respondents elsewhere in the Amended Complaint. Moreover, to the extent this Paragraph may be construed as alleging that Respondents have been engaged in "the practice of deliberately delaying or preventing the

delivery or termination of toll traffic to Midcontinent end users in South Dakota..." that allegation is denied.

COUNT II

33. In response to Paragraph 33, the answers in paragraphs 1-32 are incorporated as if fully repeated here.

34. Respondent McLeodUSA denies that Complainant is entitled to any of the relief requested in Paragraph 34 or any other relief requested against Respondent elsewhere in the Amended Complaint. Additionally, Respondent affirmatively states that beginning shortly before the effective date of the FCC' recent *USF-ICC Transformation Order* it has not inserted a CN into the data stream. Respondent otherwise denies the allegations contained in this paragraph.

35. Respondent PAETEC denies that Complainant is entitled to any of the relief requested in Paragraph 35 or any other relief requested against Respondent elsewhere in the Amended Complaint. Additionally, Respondent affirmatively states that it has not engaged "in any activity that delays or prevents the delivery or termination of toll traffic to Midcontinent end users."

COUNT III

36. In response to Paragraph 36, the answers in paragraphs 1-35 are incorporated as if fully repeated here.

37. In response to Paragraph 37, Respondents state that the referenced statutory provision speaks for itself, and to which no response is required, and otherwise contains a legal conclusion, to which no response is required.

38. In response to Paragraph 38, Respondent McLeodUSA denies the allegation contained therein.

39. In response to Paragraph 39, Respondents state that the referenced statutory provisions speak for themselves, and to which no response is required, and otherwise contains a legal conclusion, to which no response is required..

40. in response to Paragraph 40, Respondent McLeodUSA denies that Complainant is entitled to the relief requested in this Paragraph.

41. In response to Paragraph 41, Respondent PAETEC denies that Complainant is entitled to the relief requested in this Paragraph.

Count IV

42. In response to Paragraph 39 (42), the answers in paragraphs 1-41 are incorporated as if fully repeated here.³

43. In response to Paragraph 40 (43), Respondent McLeodUSA states that the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the paragraph is denied.

44. In response to Paragraph 41 (44), Respondent McLeodUSA states that the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the paragraph is denied.

45. In response to Paragraph 42 (45), Respondent McLeodUSA states that the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the paragraph is denied.

46. In response to Paragraph 43 (46), Respondent McLeodUSA states that the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the paragraph is denied. Additionally, without otherwise conceding that Complainant has been damaged in any way by Respondent's actions, Respondent affirmatively denies that Complainant "continue (sic) to be damaged" by any actions of Respondent, and affirmatively states that beginning shortly before the effective date of the FCC' recent *USF-ICC Transformation Order* it has not inserted a CN into the data stream.

Count V

47. In response to Paragraph 44 (47), the answers in paragraphs 1-46 are incorporated as if fully repeated here.

48. In response to Paragraph 45 (48), Respondent McLeodUSA states that the first two sentences of the paragraph consists of legal conclusions to which no response is required, but if a response is deemed to be required, those sentences are denied. Additionally, Respondent specifically challenges the characterization that it "disguised' traffic as local traffic.

³ At the beginning of Count IV, the Complaint's paragraphs are mis-numbered – what is actually Paragraph 42 is listed as Paragraph 39, actual paragraph 43 is identified in the Complaint as paragraph 40, etc. In this Answer, the responses will refer to both the numbering as contained in the Complaint and (in parenthetical) to the corrected paragraph numbering.

49. In response to Paragraph 46 (49), Respondent McLeodUSA states the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the Paragraph is denied.

50. In response to Paragraph 47 (50), Respondents state that the cited statutory provision speaks for itself, and to which no response is required.

51. In response to Paragraph 48 (51), Respondent McLeodUSA denies that Complainant is entitled to the relief requested in this Paragraph.

52. In response to Paragraph 49 (52), Respondent McLeodUSA states that the cited statutory provisions speak for themselves, and to which no response is required. Additionally, Respondent denies that Complainant is entitled to the relief requested in this Paragraph.

Count VI

53. In response to Paragraph 50 (53), the answers in paragraphs 1-52 are incorporated as if fully repeated here.

54. In response to Paragraph 51 (54), Respondent PAETEC states that the cited statutory provision speaks for itself, and to which no response is required, and that the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the Paragraph is denied. Additionally, Respondent affirmatively denies Complainant's characterization of "failure to use care and diligence" as contained in this Paragraph.

55. In response to Paragraph 52 (55), Respondent PAETEC states that the cited statutory provision speaks for itself, and to which no response is required, and that the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the paragraph is denied. Additionally, Respondent affirmatively denies Complainant's characterization as to its alleged "delay in delivering, and failure to deliver, telecommunications traffic..."

56. In response to Paragraph 53 (56), Respondent PAETEC states that the cited statutory provision speaks for itself, and to which no response is required, and that the paragraph consists of a legal conclusion to which no response is required, but if a response is deemed to be required, the paragraph is denied. Respondent specifically denies that that Complainant is entitled to the relief requested in this Paragraph.

PRAYER FOR RELIEF

1-9. In response to Paragraphs 1-9, Respondents state that the cited statutory provisions speak for themselves, and to which no response is required, and that the Paragraphs contains various legal conclusions to which no response is required, but if a response is deemed to be required, the Paragraphs are denied. Respondent specifically denies that that Complainant is entitled to the relief requested in these Paragraphs or any other relief requested against Respondent elsewhere in the Amended Complaint.

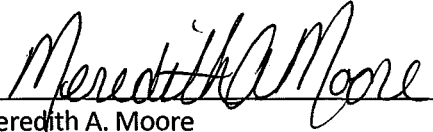
AFFIRMATIVE DEFENSES

For its affirmative defenses to the Amended Complaint, Respondents assert the following:

1. The Complaint fails to state a claim upon which relief can be granted against Respondents.
2. The Amended Complaint erroneously fails to acknowledge that any issues or concerns it has asserted regarding insertion of a CN by Respondents in the SS7 data stream have been mooted prospectively because Respondents discontinued that practice shortly before the effective date of the FCC's recent *USF-ICC Transformation Order*.
3. The Complainant has failed to mitigate its alleged damages by, among other things, failing to pursue investigate efforts with Respondents regarding alleged call completion issues.
4. The Complainant has failed to allege specificity with respect to the jurisdiction of the traffic – specifically, to support that the traffic in question is intrastate in nature and within the Commission's jurisdiction. To the extent Complainant fails to allege with specificity that the traffic complained of is intrastate in nature, such traffic is beyond the subject matter jurisdiction and authority of the Commission.
5. To the extent that any of the Respondents' affirmative statements set forth above in answer to the Complaint are more properly denominated as affirmative defenses, such statements are incorporated herein by reference.
6. Respondents reserve the right both to amend these responses as may be appropriate and to plead further in this matter as they deem necessary, including with respect to asserting additional defenses.

Respectfully submitted this 28th day of February, 2012.

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CERTIFICATE OF SERVICE

The undersigned attorney for the Defendant hereby certifies that on February 28, 2012, a true and correct copy of Respondents' Answer and Affirmative Defenses was served by electronic mail on the following individuals:

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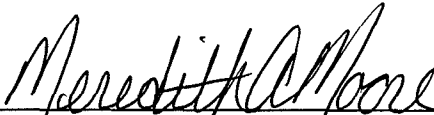
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