

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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IN THE MATTER OF THE APPLICATION OF ORBITCOM, INC. AND KNOLOGY OF THE PLAINS, INC. AND KNOLOGY OF THE BLACK HILLS, LLC FOR WAIVER OF SWITCHED ACCESS RULES	TC  <b>APPLICATION FOR WAIVER OF CERTAIN REQUIREMENTS OF A.R.S.D. 20:10:29:10, 20:10:29:12 AND 20:10:29:16</b>
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COME NOW OrbitCom, Inc., Knology of the Plains, Inc. and Knology of the Black Hills, LLC, and pursuant to A.R.S.D. § 20:10:27:02, hereby respectfully submit this joint proposal for a temporary waiver or suspension of the requirements set forth in A.R.S.D. §§ 20:10:29:10, 20:10:29:12 and 20:10:29:16.

**THE PETITIONERS**

1. OrbitCom is a competitive local exchange carrier (“CLEC”) engaged in the provisioning of telephone exchange service in the State of South Dakota pursuant to a certificate of convenience and necessity granted by the South Dakota Public Utilities Commission (the “Commission”). OrbitCom provides local originating and terminating and switched access services pursuant to its Tariff No. 1, effective October 28, 2002. OrbitCom provides local exchange services in those exchange areas served by Qwest Corporation d/b/a CenturyLink and uses the CenturyLink rate as its benchmark rate as is required by A.R.S.D. § 20:10:27:02.01.

2. Knology of the Plains, Inc. is a CLEC engaged in the provisioning of telephone exchange service and exchange access in the State of South Dakota pursuant to a certificate of convenience and necessity granted by the Commission. Knology of the Plains, Inc., provides local originating and terminating switched access services pursuant to its Tariff No. 1, effective December 29, 2007.

3. Knology of the Black Hills, LLC, is a CLEC engaged in the provisioning of telephone exchange service and exchange access in the State of South Dakota pursuant to a certificate of convenience and necessity granted by the Commission. Knology of the Black Hills, LLC provides local originating and terminating switched access services pursuant to its Tariff No. 1, effective November 13, 2007. The Company is a competitive local exchange telephone company that has previously been designated by this Commission as a Competitive ETC. The Company provides local exchange telephone services, including all of the essential services that are included in the federal definition of universal service within its established service area in South Dakota, which area includes Rapid City and all of the Northern Hills.

4. These three CLECs will be collectively referred to as the "Petitioners".

#### **THE ADMINISTRATIVE RULES FOR WHICH SUSPENSION IS SOUGHT**

5. The respective tariffs of all of the Petitioners are reviewed and regulated by this Commission according to its relevant administrative rules, which rules are contained in Chapters 20:10:27, 20:10:28 and 20:10:29 of South Dakota's administrative rules. Chapter 20:10:27 contains the rules governing the filing of intrastate switched access rules for both local exchange carriers ("LECs") and competitive local exchange carriers ("CLECs"). Administrative Rule 20:10:27:02.01 in particular addresses CLECs. Chapter 20:10:28 sets forth the separations procedures for the development and justification of a carrier's switched access rates. Chapter 20:10:29 breaks down the process for the filing of rates even further. This Application seeks a temporary waiver or suspension of certain language contained within the following rules, the full text of each is set forth below:

**A.R.S.D. 20:10:29:10 - Carrier common line element -- Assessment of charge -- Determination of charge -- Equal originating and terminating charges.** A charge that is expressed in dollars and cents per access minute of use is assessed on all users of switched access that use local exchange common line facilities for

the provision of intrastate telecommunications services. However, the charge may not be assessed on interexchange carriers to the extent that they resell message toll service (MTS) or MTS-type services of other common carriers. For purposes of this rule the term "open end" of a call describes the origination or termination of a call that utilizes exchange carrier common line plant. A call may have no, one, or two open ends. All open end minutes on calls with one open end, such as an 800 or foreign exchange call, may be treated as terminating minutes.

A per minute charge is computed by dividing the annual intrastate carrier common line revenue requirement by the annual intrastate carrier common line minutes of use. *The per minute charge is equal for both originating and terminating traffic.*

(emphasis added).

**A.R.S.D. 20:10:29:12 - Local switching element -- Assessment of charge -- Determination of charge -- Equal originating and terminating charges.** A charge that is expressed in dollars and cents per access minute of use is assessed on all users of switched access which use local exchange switching facilities for the provision of intrastate services.

A per minute charge is computed by dividing the annual intrastate local switching revenue requirement by the annual intrastate local switching access minutes of use. *The per minute charge is equal for both originating and terminating traffic.*

(emphasis added).

**A.R.S.D. 20:10:29:16 - Transport element -- Assessment of charge -- Determination of charge -- Charge not distance sensitive -- Equal originating and terminating charges.** A charge that is expressed in dollars and cents per access minute is assessed on all users of switched access that use switching or transmission facilities that are apportioned to the transport element for purposes of apportioning net investment.

A per minute charge is computed by dividing the annual intrastate transport revenue requirement by the annual intrastate transport minutes of use. The per minute charge is not distance sensitive. *The per minute charge is equal for both originating and terminating traffic.*

(emphasis added).

As evidenced by the language of the above-cited rules, originating and terminating rates must necessarily be treated as identical.

## BACKGROUND AND ANALYSIS

6. Petitioners make their request in response to the Federal Communications Commission's ("FCC") November 29, 2011 Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Connect America Fund, et al., Order on Reconsideration*, WC Docket 10-90, FCC 11-161 (the "CAF Order").

7. In the CAF Order, the FCC adopted a bill-and-keep compensation methodology for all intercarrier compensation traffic. See CAF Order at ¶736. The FCC has explained that its adoption of such bill-and-keep methodology was and is to be implemented in a gradual manner, thereby resulting in a logical "end state". Id. at ¶739.<sup>1</sup> The current defined transition period focuses primarily on terminating end office switching and transport rate elements. Id. Specifically, the FCC has ordered that the time frame for the transition to bill-and-keep will begin on July 1, 2012, but will differ depending upon whether the affected carrier operates as a "price-cap carrier" or a "rate-of-return carrier". CLECs which benchmark their rates to "price cap carrier" rates shall have six years to transition their terminating switched end office and transport rates to bill-and-keep. CLECS which benchmark their rates to "rate-of-return carriers"

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<sup>1</sup> Paragraph 739 provides:

We also adopt in this section a gradual transition for terminating access, providing price cap carriers, and competitive LECs that benchmark to price cap carrier rates, six years and rate-of-return carriers, and competitive LECs that benchmark to rate-of-return carrier rates, nine years to reach the end state. We believe that initially focusing the bill-and-keep transition on terminating access rates will allow a more manageable process and will focus reform where some of the most pressing problems, such as access charge arbitrage, currently arise. Additionally, we believe that limiting reform to terminating access charges at this time minimizes the burden intercarrier compensation reform will place on consumers and will help manage the size of the access replacement mechanism adopted herein. We recognize, however, that we need to further evaluate the timing, transition, and possible need for a recovery mechanism for those rate elements—including originating access, common transport elements not reduced, and dedicated transport—that are not immediately transitioned; we address those elements in the FNPRM. The transition we adopt sets a default framework, leaving carriers free to enter into negotiated agreements that allow for different terms.

shall have nine years to transition their terminating switched end office and transport rates to bill-and-keep. Id.

8. As set out above, all CLECS must make their first access rate reductions on or before July 1, 2012. On or before July 1, 2013, all “intrastate terminating switched end office and transport rates” and “reciprocal compensation rates” must be reduced to parity with interstate access rates. Id. at pp. 272-273, Figure 9.

9. The primary focus of the FCC’s Order and initial transition plan is on terminating, not originating, access rates. The FCC has not yet defined any transition period for originating switched access rates. Id. at ¶739.

10. In its CAF Order, the FCC acknowledged that while it has addressed a transition mechanism for certain terminating access rates, it has not yet provided such guidance in regard to “other rate elements, *including originating switched access[.]*” Id. at ¶1297 (emphasis added). To that end, the FCC has provided a Future Notice of Proposed Rulemaking, through which the FCC intends to address additional rate issues and in particular originating access rates. Id. at ¶1297. Specifically, the FCC stated:

Other than capping interstate originating access rates and bringing dedicated switched access transport to interstate levels, the Order does not fully address the complete transition for originating access charges. Instead, it provides on an interim basis that interstate originating switched access rates for all carriers are to be capped at current levels as of the effective date of the rules adopted pursuant to this Order. As we acknowledge in the Order, section 251(b)(5) does not explicitly address originating charges. We determine, therefore, that such charges should be eliminated at the conclusion of the ultimate transition to the new intercarrier compensation regime. Below, we seek comment on that final transition for *all* originating access charges.

Id. at ¶1298 (emphasis added). In its following paragraph, the FCC requested comment on issues related to a transitional period for originating access and identified a number of questions for which it sought comment. It stated:

Beyond the interim steps set forth in the Order, we seek comment on the need for an additional multi-year transition for originating access as part of the final transition to bill-and-keep. . . . Should any final transition of originating access be made to coincide with the final transition for terminating access adopted today? Should a separate transition schedule be established for originating access only after the transition we adopt today for terminating access is complete? If a separate transition schedule is established after the transition above is complete, would a two-year transition beginning in year 2018 for price cap carriers and 2020 for rate of return carriers be an appropriate time period? If not, what other time period should be considered and when should it commence? Should rate of return carriers be given additional time to transition such rates? If so, how much? How should reductions of originating access rates be structured? Should rates be reduced in equal increments over a period of years? Should the timing of rate reductions vary by type of carrier? We seek comment on an appropriate schedule, and the timing of any necessary interim steps.

Id. at ¶ 1299.

11. As an acknowledgment of the significant financial impact that its mandated bill-and-keep methodology will have on the terminating access revenues of local exchange carriers, the FCC adopted a “transitional recovery mechanism,” known as the “Connect America Fund.” See id. at ¶¶850-853. The Connect America Fund is intended to serve as a recovery mechanism for some of the revenues lost from reductions in terminating access revenue. Significantly, however, CLECS “will not be eligible for CAF support to replace reductions in ICC revenues[.]” Id. at ¶853. The FCC explained that CLECS “have greater freedom in setting rates and determining which customers to serve”, such that these distinctions justify exclusion of CLECs from participating in the CAF fund. Id. at ¶853. The FCC has stated that LECs and CLECs alike should look first to their end user customers to address lost revenue. No decisions have yet been made regarding the extension of the existing CAF Fund to serve as a recovery mechanism for originating access rates.

## GOOD CAUSE EXISTS FOR THE GRANT OF A TEMPORARY WAIVER

12. The FCC's CAF Order leaves open for interpretation and discussion, at both the federal and state level, myriad issues related to the further transitioning of intrastate originating access charges and the development of potential future recovery mechanisms for revenue loss related to the same. There have also been questions raised, both informally and formally through the appellate process, with regard to whether the FCC has jurisdiction over intrastate rate issues. Accordingly, it is of critical importance that this Commission recognize the still-evolving issues related to access rates in its analysis and application of its own intrastate access rules.

13. As it currently stands, the FCC's Order contemplates that LECs and CLECs alike will raise rates that are being charged to residential and business end users for basic local exchange services. However, in a competitive environment and in order to remain competitive, it is not sustainable to shift too much of this cost. The significant impact that the reductions in the terminating access rates will have on the Petitioners' respective bottom lines will be further magnified by any interpretation of the Commission's existing administrative rules that will require a CLEC to reduce both its originating and terminating rates at this time. The Petitioners respectfully submit that such an interpretation is inconsistent with the FCC's analysis in its CAF Order and request for further comment in regard to the establishment of a transitional period for any changes to be made to originating access rates. While the FCC did contemplate that a state commission could take action to address a potential transitional period for the reduction of originating access rates, it further states that the states may also need to provide a mechanism for recovery of that originating revenue because of such action.<sup>2</sup>

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<sup>2</sup> In Footnote 1542 of its CAF Order, the FCC states:

To the extent that states have established rate reduction transitions for rate elements not reduced in this Order, nothing in this Order impacts such transitions. *See, e.g.*, Letter from John R. Liskey,

14. The Commission's current administrative rules, some of which were modified and adopted in the last year, may be fairly interpreted to require uniform treatment of certain elements of intrastate originating and terminating access rates for both LECs and CLECs. See A.R.S.D. §§ 20:10:29:10, 20:10:29:12, and 20:10:29:16. Even though certain of the relevant administrative rules for CLECs are the result of a lengthy and thorough rule-making docket in which many carriers had the opportunity to participate, they were approved prior to the issuance of the FCC's CAF Order and simply could not anticipate the action taken by the FCC in its Order. See generally RM 05-002. The referenced administrative rules can remain in full force and effect so long as the appropriate action is taken to temporarily eliminate the requirement that originating and terminating rate elements must be identical.

15. Simply stated, Petitioners respectfully submit that there are too many uncertainties at this time such to justify any identical treatment of originating and terminating rates as set forth in the referenced administrative rules.

16. This Commission granted a similar request to that contained in this Petition in Commission Docket TC 12-027, which request for waiver or suspension was filed by the South Dakota Telecommunications Association ("SDTA"), the Local Exchange Carriers Association ("LECA") and Qwest Corporation d/b/a CenturyLink QC ("CenturyLink"). See Order dated May 1, 2012. In that docket, the Commission agreed that a waiver of certain language within A.R.S.D. §§ 20:10:29:10, 20:10:29:12 and 20:10:29:16 was appropriate until such further time as the Commission took action.

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Executive Director, MITA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51 at 2 (filed Oct. 17, 2011). Nor does this Order prevent states from reducing rates on a faster transition provided that states provide any additional recovery support that may be needed as a result of a faster transition.

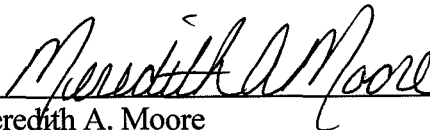


## CONCLUSION

Accordingly, Petitioners respectfully submit that good cause exists to justify the grant of a temporary waiver or suspension of certain requirements contained within the existing administrative rules is necessary. Petitioners respectfully request that this Commission grant a temporary waiver of suspension of those provisions of A.R.S.D. §§ 20:10:29:10, 20:10:29:12 and 20:10:29:16 until further action or order of this Commission.

Dated this 29 day of May, 2012.

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