

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

IN THE MATTER OF THE PETITION OF MIDSTATE TELECOM FOR APPROVAL OF ITS COST BASED SWITCHED ACCESS RATES AND FOR A PHASE-IN	TC12-133 RESPONSE TO MOTION TO DISMISS AND REQUEST FOR A WAIVER OF ARSD 20:10:27:14
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COMES NOW Midstate Telecom, Inc. (Midstate Telecom) and submits this Response to Staff's Motion to Dismiss or Staff's alternative Motion that the Commission issue an Order to Comply, filed on October 24, 2012. Midstate Telecom requests that the Commission (1) deny the motion to dismiss; (2) deny Staff's alternative request that the Commission enter an Order to Comply; and (3) grant Midstate Telecom a Waiver of ARSD 20:10:27:14 by granting an extension of the six month filing period. In support thereof, Midstate Telecom states as follows:

FACTS

1. A. Midstate Telecom was granted a Certificate of Authority by this Commission in April of 2001 (TC01-007). Its initially approved switched access rate was 13.25 cents per minute.

B. A tariffed rate of 11.5 cents per minute was approved by this Commission on April 25, 2006, with an effective date of March 20, 2006 (TC05-060), as a result of a Settlement Stipulation¹ between Staff and Midstate Telecom.

¹ The Settlement Stipulation between Staff and Midstate Telecom, among other things, froze Midstate Telecom's rate for three years, but authorized Midstate Telecom to request extension of the rate following expiration of the freeze. Midstate Telecom did so in 2009, and the Commission approved Midstate Telecom's 11.5 cent rate on June 30, 2009 (TC09-009).

C. In May of 2011, this Commission adopted new rules with regard to CLECs switched access rates that (1) adopted the RBOC rate and (2) allowed CLECs to file a Cost Study if they believe a higher rate is warranted.

D. On June 22, 2011, Midstate Telecom filed a Cost Study (TC11-075), thus availing itself of the “exemption” to the RBOC rate set forth in the Commission’s new rules. Midstate Telecom did not revise its tariff pages at that time, pending the outcome of its cost study filing.

E. On November 18, 2011, the FCC released its Order in FCC 11-161 which arguably caps Midstate Telecom’s originating rate at 11.5 cents.

F. On June 5, 2012, Midstate Telecom withdrew its cost study and the docket was closed. At the time of withdrawal of the cost study, Midstate Telecom indicated in its filing, and the Commission acknowledged in its Order, its intent to file a transitional rate filing, in accordance with FCC Order 11-161, with regard to terminating access rates.

G. On June 22, 2012, Midstate Telecom filed revisions to its tariff to comply with the terminating access rate reductions mandated by the FCC 11-161 Order. A lengthy argument ensued before the Commission in TC12-102.

H. On September 10, 2012, Midstate Telecom re-filed its cost study (TC12-133).

I. On October 5, 2012, the Commission approved Midstate Telecom’s transitional terminating intrastate switched access rate in TC12-102. The Commission further ordered Midstate Telecom to re-file its tariff with the originating rate at the RBOC rate, effective as of the date its first cost study was withdrawn.

J. On October 24, 2012, Staff filed a Motion to Dismiss or alternatively, a Motion requesting Midstate Telecom comply with ARSD 20:10:27:14 in this docket.

ARGUMENT

Staff argues that the Commission should dismiss Midstate Telecom's Petition for Approval of its cost study because the historical test year does not meet the requirements of ARSD 20:10:27:14, and that the cost study filed by Midstate Telecom is "outdated" for purposes of establishing a switched access rate that is fair and reasonable. Staff notes that a 2010 test year is "too stale" to make it a reasonable basis upon which to establish rates for a future period, and that there have been "many changes" since the end of 2010 that make the investments, costs and revenues non-representative of conditions in 2013 and beyond. Staff does not, however, articulate what those changes might be. Staff's position appears to be that the only way to establish a "fair and reasonable" originating switched access rate is to ignore everything that has transpired to date and start the entire process over again, regardless of judicial inefficiencies or costs to the parties.

Midstate Telecom respectfully disagrees with Staff's position, for several reasons. First of all, dismissal of a petition is a drastic remedy that should be exercised by a court or commission only in extreme circumstances. Furthermore, the language of the rule itself affords the Commission a more reasonable and realistic alternative by allowing the Commission to waive strict adherence to the time restrictions in the rule. Given the unique background of this case and the regulatory changes that have occurred in this process, this is clearly a case where waiver of the time restrictions of the rule is justified. Staff is certainly capable of determining any changes in investments, costs and revenues Midstate Telecom has undergone since 2010, and what impact (if any) such changes would have on the cost supported rate, to the extent that is relevant, without the necessity of starting over with a new cost study. To order Midstate Telecom to file a new cost study, undergo and be assessed for a new analysis, and then revise the

study would fly in the face of judicial efficiency, would work an undue hardship on Midstate Telecom, and would not result in a different outcome. For these reasons, Midstate Telecom resists Staff's Motion in chief and Staff's alternative motion.

1. Grant of a Motion to Dismiss is a Harsh and Premature Remedy

The purpose of a Motion to Dismiss is to test the legal sufficiency of the Petition. The motions are viewed with disfavor and seldom prevail. North American Truck & Trailer, Inc. v. MCI Communications Services, Inc. 751 NW2d 7102); Elkjer v. City of Rapid City, 2005 SD 45, ¶ 6, 695 N.W.2d 235, 238). Pleadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action. “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* For these reasons a Motion to Dismiss is a harsh remedy and should be denied by this Commission.

2. Plain Language of the Rule Authorizes an Alternative

It is important to keep focused on the goal of this docket, which is to determine the appropriate intrastate originating access rate for Midstate Telecom. The goal is not to punish Midstate Telecom for exercising its option under the rules to file a cost study, or to make the process so cost-prohibitive as to make the option to file a cost study meaningless. Midstate Telecom has steadfastly maintained that the RBOC rate is not the appropriate intrastate originating access rate for Midstate Telecom. In support thereof, Midstate Telecom originally filed this cost study in June of 2011 (Docket TC11-075), with a historical test year of 2010, which conforms with ARSD 20:10:27:14. There have been numerous circumstances and processes that have occurred since June of 2011, but those changes support the continued analysis of the cost study that has been refiled in this docket, rather than starting afresh with a

new study. To proceed with further and final review of the current study not only makes sense from a judicial efficiency and economic standpoint, but is in fact specifically authorized by the rule itself. The rule provides that “[a] carrier’s carrier may request and the commission may grant an extension of the six month filing period.” ARSD 20:10:27:14. Midstate Telecom is requesting such a waiver, as it is Midstate Telecom’s position that the unique regulatory posture of this docket provides compelling reasons to grant such a waiver.

3. Unique Regulatory Framework

In May of 2011, the Commission adopted ARSD 20:10:27:02.01 and 20:10:27:02.02, which dramatically affected the intrastate access charges of CLECs in South Dakota. Per said rules, a CLEC was faced with two options: (1) charge the RBOC rate for switched access services; or (2) file a cost study. Midstate Telecom chose the second option and filed a cost study on June 22, 2011. The Commission’s cost study rules indicate that the purpose of a cost study is to determine the fully allocated cost of providing switched access services (emphasis added) ARSD 20:10:27:02.02. Midstate Telecom’s study showed that its intrastate access rates not only exceeded the RBOC rate, but also Midstate Telecom’s tariffed rate of 11.5 cents.

Thereafter, on November 29, 2011, the Federal Communications Commission (FCC) issued a Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Connect American Fund, et al., Order on Reconsideration, WC Docket 10-90, FCC 11-161 (FCC 11-161 Order). In that Order, the FCC adopted a bill-and-keep compensation methodology for all intercarrier compensation traffic over a period of time. See FCC 11-161 Order at ¶ 736. The FCC implemented a transition period focusing primarily on terminating end office switching and transport rate elements. Additionally, the FCC Order capped originating rates at the tariffed rate in effect on December 29, 2011, and identified that originating access service remains subject to

state rate regulation. FCC 11-161, §51.911(a)(2). The effect of the FCC 11-161 Order was to in essence change the rules of the game with regard to cost studies. Instead of determining the fully allocated cost of providing switched access services and implementing a rate in support thereof, a cost study now must only support a rate of 11.5 cents, because of the cap imposed by the FCC.

With the issuance of the FCC Order, the posture of the cost study filing changed such that Midstate Telecom merely has to provide a compelling case that it can support an 11.5 cent rate. Midstate Telecom believes that it can do so with the data and cost study currently on file. Midstate Telecom's operations have not changed significantly since 2010. Midstate Telecom has made large capital investments in its fiber project, but there have been no significant changes in minutes of use. If the Commission ordered Midstate Telecom to file a new cost study with a more recent historical test year, Midstate Telecom could certainly make a case that that would support even higher fully allocated costs than its current study supports. But there is no reasonable basis to require that, since Midstate Telecom's rate is capped at 11.5 cents. Midstate Telecom believes its current cost study supports at least the capped rate of 11.5 cents, and a new cost study would support a rate higher than the capped rate of 11.5 cents. It is pointless to require a new study, when the issue is support of the 11.5 cent rate, rather than a higher rate. Staff has argued that using the current data will not result in a fair and reasonable rate. The fact of the matter is that "fair and reasonable" is no longer the standard; the standard is an 11.5 cent ceiling. Staff can certainly determine whether Midstate Telecom's rate hits the ceiling or somewhere below, based on what is currently filed. This cost study was pulled in June and resubmitted just three months later. Based on an analysis of this study, Staff opined that in its opinion, there were adjustments that needed to be made and that the study did not support an 11.5 cent rate. It seems disingenuous that this same data would suddenly become so "stale" in

three months that it is unusable. This is just not the case. Through appropriate data requests, Staff can ascertain any adjustments to revenues, investments, and minutes of use that may support or negate an 11.5 cent rate. Midstate Telecom's consultants do not believe submission of a new cost study with more current data would change the analysis or the outcome of the analysis.

4. Judicial Efficiency and Economic Hardship

As indicated, one primary purpose of Midstate Telecom in re-filing the cost study was to put itself in a position to formally request the analysis prepared in the first docket to address the concerns Staff might have about its study. Midstate Telecom went to considerable expense to develop a cost study, and Midstate Telecom has also expended considerable dollars to pay for the review of its cost study by the Commission's consultant. Midstate Telecom believes that it is entitled to review and respond to the analysis done to date in TC11-075 and that by knowing the processes that Staff believes are inaccurate it may be able to stream-line the process in this docket. In response to questions from the Commission with regard to the cost study, Staff referred to ten potential adjustments to Midstate Telecom's cost study, recommended by the Staff-retained expert analyst, which would result in an access rate of less than 11.5 cents. Despite repeated informal requests for a copy of this analysis of Midstate Telecom's cost study, and despite having been charged by the Commission over \$13,000 for the analysis, Midstate Telecom has not been provided a copy of any documentation pertaining to the adjustments the consultant recommended to Midstate Telecom's cost study². There should be no concerns about continued confidentiality of the information as there is a Confidentiality Agreement in place between the parties. If Midstate Telecom is forced to prepare a new cost study without knowing what procedures Staff believes are inaccurate, how can judicial economy be satisfied?

² Midstate has served written interrogatories on Staff requesting this analysis.

If this Commission proceeds in the manner outlined by Staff, it would impose a significant financial burden on Midstate Telecom. Midstate Telecom would have to pay for a new cost study, at an estimated cost of \$30-40,000. Staff would then undoubtedly require a new analysis of the new study, which could result in another \$13,000 of costs assessed to Midstate Telecom. If Staff had the same adjustments, Midstate Telecom and Staff would review these proposed adjustments, and Midstate Telecom would need to make any appropriate adjustments to its cost study, at additional costs.

Alternatively, granting the waiver requested by Midstate Telecom would result in judicial efficiencies and economies of scale. Staff and Midstate Telecom could immediately proceed to review of Staff's recommended adjustments and then to the step of making any adjustments to its cost study, without incurring the additional costs outlined above. The ceiling is 11.5 cents, not fully allocated costs. Staff is certainly capable of determining whether that ceiling is supported by the cost study as filed, or some rate less than the ceiling, and a new cost study based on a more recent test year would not significantly change that analysis or the ultimate outcome.

Midstate Telecom has also filed revised tariff pages that reflects the 11.5 cent rate and requests that the Commission approve this rate immediately, subject to a refund. This should also put a timeline in effect in which this docket shall be resolved. Another year cannot go by without Commission action.

Conclusion

Midstate Telecom requests that the Commission deny the Motion to Dismiss or request for an Order to Comply. Midstate Telecom respectfully requests the Commission to grant its request for a waiver of the time restraints found in ARSD 20:10:27:14 and provide Midstate Telecom with a path to reasonably and expeditiously resolve this dispute.

Respectfully submitted this 15th day of November, 2012.

RITER, ROGERS, WATTIER
& NORTHRUP, LLP

BY: *Darla Pollman Rogers*
Darla Pollman Rogers
Margo D. Northrup

Attorneys for Midstate Telecom

CERTIFICATE OF SERVICE

I, Darla Pollman Rogers, certify that a true and correct copy Response to Motion to Dismiss and Request for a Waiver of ARSD 20:10:27:14 was mailed to the following on the 15th day of November, 2012:

Ms. Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
karen.cremer@state.sd.us
(605) 773-3201 – voice
(866) 757-6031 – fax

Mr. Patrick Steffensen
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patrick.steffensen@state.sd.us
(605) 773-3201 - voice
(866) 757-6031 - fax

Mr. William VanCamp - Representing
AT&T Communications of the Midwest, Inc.
Olinger, Lovald, McCahren & Reimers, P.C.
117 East Capitol
P. O. Box 66
Pierre, South Dakota 57501-0066
bvancamp@olingerlaw.net
(605) 224-8851 - voice

Darla Pollman Rogers
Darla Pollman Rogers