

**BEFORE THE
SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION**

Petition of MCC Telephony of the Midwest, LLC)
For Waiver of ARSD 20:10:29:10, 20:10:29:12)
and 20:10:29:16 in Connection with the Company's) Docket No. TC _____
Access Services Tariff)

MCC Telephony of the Midwest, LLC ("MCC," or the "Company"), by its counsel, respectfully petitions the South Dakota Public Utilities Commission ("Commission") for exemption from ARSD §§ 20:10:29:10, 20:10:29:12 and 20:10:29:16 in connection with MCC's telecommunications access services tariff¹ insofar as these regulations require that the Company tariff equal rates for originating and terminating intrastate switched access services in South Dakota. The Company is submitting proposed tariff revisions concurrent with this request and seeks these waivers in order to tariff its switched access services at rates consistent with the relevant 2011/2012 access charge reform decisions of the Federal Communications Commission ("FCC").²

I. PETITIONER

MCC Telephony of the Midwest, LLC is authorized by the Commission as a competitive provider of intrastate telecommunications services in South Dakota.³ The Company provides a full range of local and long distance services to residential and small business customers.

Correspondence regarding this petition and MCC's access tariff filing should be directed

¹ S.D. P.U.C. Tariff No. 1.

² *Connect America Fund et al.*, WC Docket No. 10-90, et al.: Report and Order, 26 FCC RCD. 17663 (2011) ("ICC/USF Order"); Second Order on Reconsideration, 27 FCC RCD. 4648 (2012) ("Second Order on Reconsideration"); and Order, 27 FCC RCD. 5986 (2012).

to the Company's regulatory counsel:

Winafred R. Brantl
KELLEY DRYE & WARREN LLP
3050 K Street, NW #400
Washington, DC 20007
202-342-8819
202-342-8451 (fax)
wbrantl@kelleydrye.com

II. REQUEST FOR WAIVERS

Background

The backdrop to MCC's waiver request is familiar to the Commission. In November, 2011, the FCC issued a major decision in its ongoing intercarrier compensation/universal service reform proceeding.⁴ That order initiated the gradual reduction of switched access rates towards an eventual bill-and-keep regime. For price-cap carriers (and clecs that benchmark to them), intrastate terminating switched access rates are scheduled to reach parity with functionally equivalent interstate switched access rates by June 2013. As a first step, by July, 2012, carriers were required to reduce their intrastate terminating switched access rates as necessary to effectuate a fifty percent cut in the intrastate-interstate rate differential.⁵ No reduction of intrastate originating switched access rates was required and, indeed, the FCC expressly left the reduction of originating switched access rates to future consideration.⁶

The FCC's *ICC/USF Order* schedule for reduction of switched access rates presents an

³ MCC was granted authority to provide competitive services throughout South Dakota except in areas served by rural telephone companies on October 3, 2006 in TC06-046. Subsequently, the Company was granted authority to provide local exchange service in the Brookings rural exchange on Oct. 3, 2008 in TC06-188.

⁴ *ICC/USF Order*.

⁵ The FCC provided a formula by which to calculate these reductions, using demand MOU from FY2011 and intrastate/interstate rates as of December 2011.

⁶ The FCC issued a Further Notice of Proposed Rulemaking in connection with the *ICC/USF Order*. Among the issues presented for industry comment was the appropriate method for reduction of intrastate originating access rates. See, e.g. *ICC/USF Order* at paras. 1296-1305.

extra challenge to competitive carriers operating in South Dakota. Compliance with the FCC's rules compels these carriers to reduce their intrastate South Dakota terminating switched access rates (unless already at or below interstate levels). At the same time, certain South Dakota regulations require parity between the carriers' terminating and originating switched access rates. Absent the relief of a waiver from the South Dakota regulations, these carriers are left with no choice but to reduce their intrastate originating switched access charges along with the terminating rate reductions, notwithstanding that neither the FCC nor the Commission has issued an affirmative requirement for reduction of these originating rates.

MCC's South Dakota Switched Access Services Tariff

In the *ICC/USF Order*, the FCC also issued a directive regarding the prospective application of access charges to IP-PSTN (VoIP) traffic. The *ICC/USF Order* confirmed that going forward, access charges would apply to IP-PSTN traffic; however, it also mandated that each carrier's access service rates for intrastate IP-PSTN traffic – both terminating and originating – be set at or below its interstate rates. In December 2011 and through the first half of 2012, carriers accordingly began to tariff new language and rates to address intrastate IP-PSTN traffic in this manner. Based upon the mandate of the *ICC/USF Order*, and anticipating a predominant volume of IP-PSTN traffic, MCC decided to simplify its intrastate rate position and reduce its terminating and originating intrastate rates to interstate levels in one step. These reductions were filed in February 2012.

Two months later, however, in response to petitions from several carriers ⁷, the FCC revised its IP-PSTN access charge holding. The *Second Order on Reconsideration*, issued in April 2012, affirmed that the *ICC/USF Order* had required application of rates at or below

⁷ See, e.g., *Frontier Communications Corp. and Windstream Communications, Inc. Petition for Reconsideration and/or Clarification*, WC Docket Nos. 10-90, et al. (filed Dec. 29, 2011).

interstate-levels for both terminating and originating intrastate IP-PSTN traffic. Nevertheless, citing additional information gathered in the course of the petition comment cycle, the FCC then proceeded to revise the timetable under which this mandate would apply to intrastate originating IP-PSTN traffic. Under the April holding, carriers are permitted to continue charging intrastate-level originating access rates for intrastate IP-PSTN traffic through June 30, 2014, following which interstate-level rates will apply.

Following the *Second Order on Reconsideration*, which took effect mid-summer 2012, the Company has determined that it should return its intrastate originating switched access rates to their former levels. In effect, the proposed revisions simply undo the reduction of originating access service rates that MCC filed in February. At that time, the reduction of these rates made sense pursuant to then-effective FCC rules. Following the FCC's about-face in April, however, the reductions no longer make sense and the Company should be permitted to return them to their prior levels.

Need for Waivers

Approval of the proposed revisions requires that the Commission grant this request for waiver of the cited administrative rules concerning parity of terminating and originating switched access rates. Compliance with the FCC's mandate to file reductions in terminating intrastate switched access rates, as outlined in the *ICC/USF Order*, triggers the issue of disparity between terminating and originating rates. MCC was not required to address this issue earlier in 2012 because of its strategic decision to accommodate expected intrastate IP-PSTN traffic with a complete rate step-down. As the Commission knows, however, other carriers did raise the issue in connection with their mid-year terminating rate reduction filings, requesting waivers of the

requirement for parity between their terminating and originating intrastate switched access rates.⁸ These waiver requests, and the Commission's orders granting them, clearly acknowledge that "the FCC mandated reductions in terminating intrastate switched access rates but left issues regarding originating intrastate switched access for further proceedings."⁹

MCC understands that deliberate policy considerations underpin the parity requirements imposed by the identified South Dakota regulations. However, the FCC's scheme for industry-wide access rate reductions represents an unforeseen and profound change to the workings of the telecommunications marketplace. The financial impact of the required terminating rate reductions is considerable. A concurrent requirement to reduce South Dakota intrastate originating rates as well – and to the same degree -- notwithstanding the absence of findings that such reductions are necessary at this time, will materially increase the burden already shouldered by carriers. The merits of this waiver request are stronger for the fact that even had South Dakota policymakers foreseen significant new FCC intervention into intrastate access charge rate-setting, it is unlikely that they would have anticipated specifically that the FCC program would be structured in such manner as to unintentionally trigger South Dakota regulations to necessitate carrier rate reductions above and beyond the significant cuts required by the FCC.

Grant of this request is appropriate and consistent with the public interest. The proposed tariff revisions simply return MCC's intrastate originating switched access rates to their prior levels, which are at or below the rates tariffed by Qwest Communications. The Company cannot raise its intrastate terminating switched access rates without violating federal law. Without grant


⁸ See, e.g., *Application of Local Exchange Carriers Association and its Members for Waiver of Switched Access Rules*, Docket No. TC 12-027 (filed Mar. 2, 2012) (including the South Dakota Telecommunications Association, on behalf of its members, and Qwest Corporation d/b/a CenturyLink QC); *Application of OrbitCom, Inc. and Knology of the Plains, Inc. and Knology of the Black Hills, LLC for Waiver of Switched Access Rules*, Docket No. TC12-065 (filed May 29, 2012).

⁹ *Joint Application of the OrbitCom, Inc., Knology of the Plains, Inc. and Knology of the Black Hills, LLC for Waiver of ARSD §§ 20:10:29:10, 20:10:29:12, and 20:10:29:16*, Order Granting Interventions and Waiver/Suspension Requests, Docket No. TC12-065 (July 9, 2012).

of the requested waiver, MCC will be required to apply interstate-level originating switched access rates to its South Dakota access traffic. In short, the Company will be compelled to absorb the costs and competitive disadvantages of below-market originating switched access rates.

WHEREFORE, MCC Telephony of the Midwest, LLC respectfully petitions the Commission for waiver of ARSD §§ 20:10:29:10, 20:10:29:12 and 20:10:29:16 with respect to required parity between the Company's originating and terminating intrastate switched access services and for such other relief as the Commission may deem appropriate.

Respectfully submitted this 30th day of November, 2012.

By: 

Winafred R. Brantl
Kelley Drye & Warren, LLP
3050 K Street, NW #400
Washington, DC 20007
202-342-8819
202-342-8451 (fax)
wbrantl@kelleydrye.com

Counsel for MCC Telephony of the Midwest, LLC