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August 7, 2009

Patricia Van Gerpen, Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

Re: In the Matter of the Filing by Midstate Telecom, Inc., for an Extension of an Exemption from Developing Company Specific Cost-Based Switched Access Rates
TC09-009

Dear Patty:

Please find enclosed herein a Response to Midcontinent Communication's Motion for Evidentiary Hearing and Uniformity which I ask you to file in regards to the above-referenced matter.

Thank you.

Very truly,

RITER, ROGERS, WATTIER
& NORTHRUP, LLP

BY: Margo D Northrup
Margo D. Northrup

MDN/ed
Enclosure

Cc: Client
David Gerdes
Karen E. Cremer
Terri Labrie Baker

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY MIDSTATE TELECOM, INC., FOR AN EXTENSION OF AN EXEMPTION FROM DEVELOPING COMPANY SPECIFIC COST- BASED SWITCHED ACCESS RATES	TC09-009 **RESPONSE TO MIDCONTINENT COMMUNICATIONS' MOTIONS FOR EVIDENTIARY HEARING AND UNIFORMITY**

COMES NOW Midstate Telecom, Inc. ("Midstate"), by and through its counsel of record, and hereby submits the following response to Midcontinent's Motion to Disapprove Settlement Stipulation and for Evidentiary Hearing and Midcontinent's Motion for Uniformity in Switched Access Rates and for Evidentiary Hearing filed by Midcontinent Communications ("Midcontinent"). Midstate respectfully requests that the Commission deny Midcontinent's request for evidentiary hearing, or in the alternative, delay ruling on these Motions and instead require Midcontinent to define with particularity the issues for consideration, and scope thereof, at the time of any hearing.

BACKGROUND

As has already been well established by the many pleadings in this docket, as well as other dockets, specifically TC09-014, 09-022 and 09-031, the issues raised by Midcontinent's prior and current motions challenge the legitimacy of Midstate's current rate, which rate was initially approved pursuant to Stipulation in docket TC05-60 (See Order dated April 25, 2006) and which has now been approved by this Commission on a temporary basis pursuant to an Order dated June 30, 2009. The current petition filed by Midstate for an extension of its exemption and Stipulation (TC0-009) was not intended to be a rate-making docket, but rather an attempt to preserve the status quo while new access rate rules for CLECs were being developed

in RM 05-002. As such Midcontinent's request for a hearing to determine the validity of that rate is not only a collateral attack on an existing, valid rate, but also an inefficient use of the time and resources of the parties and this Commission.

ARGUMENT AND ANALYSIS

1. The filed rate doctrine precludes Midcontinent from now attacking Midstate's rate.

In its respective Motions, Midcontinent seeks the establishment of a procedural schedule and an order for evidentiary hearing. In its Motion to Disapprove Settlement Stipulations, Midcontinent argues it has suffered disparate treatment and its equal protection rights have been violated. In its Motion for Uniformity in Switched Access Rates and For Evidentiary Hearing, Midcontinent requests an evidentiary hearing in all of the above-referenced dockets "to determine whether the Commission should order that all CLECs, upon expiration of their previously approved switched access rate, mirror the incumbent rate going forward." Midcontinent further requests that the Commission "schedule an evidentiary hearing in the four captioned dockets to determine whether the legal authorities cited in comparable motions in each of the four captioned dockets support the Commission's ruling that all CLECs must adopt the incumbent carrier's switched access rate at the expiration of its current cost study, or that the Commission order other proceedings to establish uniform CLEC switched access rates."

The problem with Midcontinent's requests is that they are based on the incorrect assumption or presumption that Midstate's rate expired and is no longer valid. To the contrary, Midstate had a *stipulation* which expired[1], but its *intrastate access tariff* remains on file with this Commission and has not been invalidated. The filed rate doctrine therefore controls. Under the filed rate doctrine, tariff rates "have the force of law and are absolutely binding upon all users until found invalid in an FCC proceeding or by a federal court." See Maislin Indus. U.S., Inc. v.

[1] Midstate filed the current petition prior to expiration of the Stipulation and in accordance with the terms of the Stipulation.

Primary Steel, Inc., 497 U.S. 116, 127, 110 S.Ct. 2759, 2766, 111 L.Ed.2d 94 (1990) (defining filed rate doctrine). See also Verizon Delaware, Inc. v. Covad Communications Co., 377 F.3d 1081, 1087 (9th Cir. 2004) (quoting that "[n]o one may bring a judicial proceeding to enforce any rate other than the rate established by the filed tariff.") (quoting Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166, 1170 (9th Cir. 2002); see also Am. Tel. and Tel. Co. v. Central Office Telephone Inc., 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (holding that a carrier's duly filed rate is the only lawful charge and that deviation from such rate is not permitted upon any pretext); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2d Cir.1994) (holding that "the legal rights between a regulated industry and its customers with respect to rates are controlled by and limited to the rates filed with and approved by the appropriate regulatory agency"). "In addition to barring suits challenging filed rates and suits seeking to enforce rates that differ from the filed rates, the filed-rate doctrine also bars suits challenging services, billing or other practices when such challenges, if successful, would have the effect of changing the filed tariff." Brown, 277 F.3d at 1170.

Under the filed rate doctrine, Midcontinent is precluded from now attacking Midstate's rate. The time at which to do so would have been in 2005 when Midstate filed its petition for extension of exemption. Midcontinent did not intervene in that docket and it cannot do now what it may wish it did then.

Given that Midcontinent cannot challenge the validity of Midstate's existing rate there is no need for a hearing. Contrary to those statements made in its current motions, Midcontinent has not defined with particularity the scope of the issues to be presented at the hearing. Midstate opened this docket. If a scheduling order is established, presumptively, Midstate bears the burden of providing pre-filed testimony and, simply stated, making its case. However, under the

current rules, Midstate is without guidance as to what it needs to prove. Again, this docket is not a rate-making docket.

While Midcontinent asks for a hearing on the issues it has defined, neither of its Motions truly defines the scope of this Commission's review and what Midstate and the other CLECs will be required to prove. Moreover, to what standard will Midstate be held? This petition was filed pursuant to ARSD 20:10:27:11 which states:

> "A telecommunications company may petition the commission to be exempted from the requirements of developing intrastate switched access rates based on company-specific costs. The burden of proof is on the company to show that it lacks the necessary financial, technical, or managerial resources needed to determine company-specific cost-based intrastate switched access rates or that the additional costs associated with developing company-specific cost-based intrastate switched access rates outweigh any benefit to the consumer or customer."

Midstate asserts that this is not the proper proceeding for Midcontinent to now come forward and challenge a valid filed tariff that has been in effect since April 25, 2006. This proceeding is merely to determine if Midstate is entitled to an exemption pursuant to the administrative rules. Midstate has alleged that developing a cost study before the Commission establishes a cost study methodology for CLECS would be a hardship. Pursuant to administrative rule, Midstate only needs to show that the additional costs associated with developing cost-based rates outweigh any benefit to the consumer or customer.

Requiring an evidentiary hearing only compounds the problems that already exist as to how to proceed from this date. What Midcontinent continues to ignore in each of the above-referenced dockets is that the CLECs at issue have a valid rate which was established several years ago. Midcontinent's own filing was not done until 2007 and its proposed rate was never approved by this Commission. Therefore, it is not currently being treated differently from the other CLECs. While the undersigned understands the frustration expressed by Midcontinent,

holding a hearing on a rate that has already been deemed valid is neither an efficient nor economical use of any parties' time at this juncture.

2. Midcontinent does not have a valid Equal Protection claim.

Midstate asserts that this is not the proper docket to assert an equal protection argument and such an argument should have been raised in the initial Midstate docket, Midcontinent's own docket, or the rule making docket. Nonetheless, Midcontinent has alleged that it was denied equal protection of the laws of both the United States Constitution and the Constitution of the State of South Dakota. Primarily it alleges that it has been subjected to disparate treatment because the Commission has routinely approved switched access rates for CLECs owned by rural incumbent local exchange carriers at rates comparable to the LECA plus rate authorized by ARSD Ch. 20:10:27, the "settlement rate" of $0.1150 cents per minute, or a step-down rate arrived at by negotiation and has used the Qwest rate for non-RLEC owned CLECs.

In general, the Equal Protection Clause requires that state actors treat similarly situated people alike. Habhab v. Hon, 536 F.3d 963, 967 (8th Cir 2008). "State actors may, however, treat dissimilarly situated people dissimilarly without running afoul of the protections afforded by the clause." Id. In other words, the Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. Vacco v. Quill, 521 U.S. 793, 799.

When addressing an equal protection argument, the Commission must determine which test applies depending upon the nature of the interest involved. The strict scrutiny test applies only to fundamental rights or suspect classes; intermediate or substantial relation test applies to legitimacy issues and gender and the rational basis test applies to all other classes. State v. Krahwinkel, 2002 SD 160, ¶ 19, 656 NW2d 451, 460. Clearly the rational basis test applies to

this analysis. This means that the Commission must determine (1) whether the rule does set up arbitrary classifications among various persons subject to it, and (2) whether there is a rational relationship between the classification and some legitimate legislative purpose. Cid v. South Dakota Dept. of Social Services, 1999 SD 108, 598 NW2d 887.

Under the first prong, the Commission must determine that the statutory framework applies equally to all people. Midcontinent has not identified clearly which statutes and administrate rules have been inappropriately applied but appears to argue that the statutory framework and administrative rules set up arbitrary classifications between CLECs owned by rural incumbent local exchanges carriers and other non-RLEC owned CLECs. These classifications are certainly not identified specifically in the statutes or the administrate rules and this classification argument must fail[2].

There is absolutely no showing that the Commission's rules set up an arbitrary classification between CLECs. This Commission is granted the authority to promulgate procedures and requirements for filing applications for new or revised rates or tariff changes. SDCL 49-1-11. They have done this in ARSD 20:10:27. These tariffed rates are determined by analyzing the specific costs to a company when providing this service. The actual procedure in place allows all CLECs to either file a cost study to approve rates or request an exemption to filing a cost study. Every CLEC in South Dakota is allowed to choose how it wishes to proceed. Midcontinent has availed itself to ARSD 20:10:27:11 through 13 and provided a cost study.[3] Midstate, on the other hand, has availed itself of ARSD 20:10:27:11 and has received an exemption from providing a cost study. After receiving the exemption, the rate is determined by

[2] An examples of an administrate rule that does set up arbitrary classifications can be found in Cid v. South Dakota Dept. of Social Services, 1999 SD 108, 598 NW2d 887. In that case the administrative rule denied benefits to aliens who had not lived in the United States for five years unless certain exceptions were met. Clearly, aliens were treated differently so a classification had been set up by the rule.

[3] The Cost Study was ultimately deemed not acceptable by the Commission (TC07-117).

ARSD 20:10:27:12 and was reached by Stipulation of the parties. It is not the Commission or the administrative rules that has created different categories of CLECs but the CLECs that have followed different procedures to arrive at their rates. The administrative rules apply equally to all CLECs.

Midcontinent appears to be arguing that every CLEC in South Dakota should have the same rate. This philosophy is contrary to current federal and state law. CLECs owned by rural incumbent local exchange carriers by nature of the areas they serve are subject to higher costs to provide service. For sake of argument, if the Commission determines the statutory framework sets up arbitrary classifications as alleged by Midcontinent, there is clearly a rational relationship between the classification and some legitimate legislative purpose. It is evident that CLECs owned by rural incumbent local exchange carriers and other non-RLEC owned CLECs have different costs associated with providing service. A non-RLEC owned CLEC has the ability to spread its costs over a larger customer base. The important point is that this is not the proper forum for arguing these policy issues. The arguments are appropriate for the current Rule Making docket opened for this exact purpose.

3. Midcontinent should be required to define issues for an evidentiary hearing.

If the Commission orders an evidentiary hearing in this matter as well as the other similar dockets, Midstate requests that Midcontinent file a statement of issues so that Midstate can determine what evidence, if any, need be presented in response. Further, if there is an evidentiary hearing it should be limited to issue presented in Midstate's petition and focus solely on whether a further exemption is warranted. Whether there exists legal authority for the use of Midstate's rate is a question of law, and not one of fact for which evidence would be introduced. As such, if Midcontinent seeks a hearing, it is only fair to all involved, including the

Commission, for Midcontinent to better define what it seeks to have Midstate and other CLECs prove.

CONCLUSION

Midcontinent's request that Midstate be required to justify its existing rate at an evidentiary hearing is premature and, ultimately, unsustainable. Accordingly, Midstate requests that this Commission deny Midcontinent's request. In the alternative, Midstate requests that this Commission hold Midcontinent's motions in abeyance until such time as Midcontinent better defines those issues to be heard at the time of the hearing.

Dated this 7 day of August, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 9 day of August, 2009, upon the following:

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