BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF MIDCONTINENT COMMUNICATIONS, KNOLOGY OF THE PLAINS, INC., AND KNOLOGY OF THE BLACK HILLS, LLC, AGAINST MCI COMMUNICATIONS SERVICES, INC. D/B/A VERIZON BUSINESS SERVICES FOR UNPAID ACCESS CHARGES	)	**TC10-096** MIDCONTINENT'S REPLY TO VERIZON'S OPPOSITION TO MOTION TO AMEND COMPLAINT

Comes now Midcontinent Communications ("Midcontinent"), by and through its undersigned counsel, and files this Reply to Verizon's Opposition to Motion to Amend Complaint.

Midcontinent seeks permission of the Public Utilities Commission ("Commission") to amend the Complaint in this matter to include one additional count of breach of contract against MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon"). As noted in the Motion to Amend, pursuant to ARSD 20:10:01:16, if a responsive pleading has been filed, a pleading may be amended upon application of a party and at the discretion of the commission. The additional count of breach of contract is based on a Switched Access Service Agreement ("Agreement") between Verizon and Midcontinent dated March 7, 2007, as amended by Amendment Number One to the Agreement dated March 3, 2010. Verizon filed an opposition to the Motion to Amend on the grounds that the amendment would be futile, that the motion is premature, and that the amendment would result in prejudice to Verizon absent an extension of the procedural schedule.

According to ARSD 20:10:01:01.02, absent a conflict with another stature or the Commission's own rules, the rules of civil procedure, as used in the circuit courts of this state, apply in actions before the Commission. Both the Commission's rules (ARSD 20:10:01:16) and

state statutes (SDCL § 15-6-15(a)) allow a party to amend its pleading with permission, following the service of a responsive pleading. In South Dakota, leave to amend shall be freely given when justice so requires. *Prairie Lakes Health Care Sys., Inc. v. Wookey* 1998 SD 99, ¶ 28, 583 N.W.2d 405, 417. "A trial court may permit the amendment of pleadings before, during, and after trial without the adverse party's consent." *Klutman v. Sioux Falls Storm*, 2009 SD 55, ¶14, 769 N.W.2d 440, 446 (quoting *Dakota Cheese, Inc. v. Ford*, 1999 SD 147, ¶24, 603 N.W.2d 73, 78). The most important consideration when deciding whether a party's motion to amend should be granted is whether the nonmoving party will be prejudiced by the amendment. *McDowell v. Citicorp Inc.*, 2008 SD 50, ¶16, 752 N.W.2d 209, 214.

Two of the three claimed bases for denying the Motion to Amend (futility and prematurity) are dependent on Verizon's own interpretation of the substantive language in the Switched Access Services Agreement. In other words, Verizon is asking the Commission to skip directly to a decision on the proposed breach of contract claim, determine that Verizon's interpretation of the Agreement language is correct, and on that basis, deny the Motion to Amend. This is not a proper basis upon which to deny a Motion to Amend. Midcontinent's proposed breach of contract claim is neither futile nor premature. It is true that the parties disagree about the interpretation of the language in the Agreement, particularly the language that requires Verizon to pay intrastate switched access charges on VoIP traffic. That disagreement does not make Midcontinent's proposed amended complaint futile. The amended complaint seeks resolution of the disagreement by the Commission.

Midcontinent's amended complaint is also not premature, as argued by Verizon. Verizon contends that Midcontinent has failed to comply with the dispute resolution provisions of the Agreement. Midcontinent believes Verizon has failed to follow the provisions of the Agreement

on dispute resolution as it relates to a Change in Law claim. The fact that the parties disagree about which provision of the Agreement applies and which party is in breach is not a basis on which to deny a Motion to Amend the complaint.

Verizon's claim that it will be prejudiced by the Amended Complaint if the procedural schedule is not extended should also be rejected. As noted in the Motion to Amend, Verizon was made aware in early December, 2010, of Midcontinent's belief that the Agreement language controls the obligations of the parties. Thereafter, on December 29, 2010, Midcontinent served discovery on Verizon and specifically asked Verizon to identify any agreements between the parties related to switched access services. On January 4, 2011, Verizon announced in the hearing on interim relief that it had based its decision to start refusing to pay switched access charges for VoIP traffic on two district court opinions which it viewed as a change in the law. Verizon then responded to Midcontinent's discovery on January 28, 2011, identifying this Agreement, but claiming it does not apply because it is not traffic that is subject to access charges pursuant to applicable law. It was the comments at the hearing on interim relief and Verizon's responses to discovery received at the end of January that ultimately prompted Midcontinent to move forward with an Amended Complaint. The assertion that Midcontinent intentionally waited until after the initial discovery deadline had passed to file the Motion to Amend is as offensive as it is baseless.

Moreover, Verizon's contention that it now needs additional discovery to develop a factual record relating to the Agreement is also red herring.[1] Verizon has had ample opportunity

[1] Verizon's first claim in opposition to the Motion to Amend was that the amendment was "futile" because it raised the very question already before the Commission, i.e., whether applicable law subjects this traffic to tariffed switched access charges. If, as Verizon contends, the new contract claim "adds nothing" to the claims already before the Commission, it is difficult to see how Verizon could be prejudiced by its inclusion.

to serve discovery on Midcontinent to date. Verizon has another opportunity to serve discovery on Midcontinent on February 22, 2011. To the extent it needs to develop a factual record relating to the agreement, it can certainly do so in the next round of discovery.

Verizon has failed to establish that it would be prejudiced by the inclusion of the breach of contract claim. Moreover, it is premature to decide that additional time should be added to the schedule as a result of the inclusion of the claim. Verizon has an upcoming opportunity to serve additional discovery on Midcontinent and can include discovery related to the Switched Access Services Agreement. If additional discovery is deemed necessary beyond that point, the Commission could take up the issue of modification to the schedule at that time.

CONCLUSION

Verizon's arguments in opposition to Midcontinent's Motion to Amend are without merit. Midcontinent respectfully requests that the Commission grant the Motion to Amend.

Respectfully Submitted this 16th day of February, 2011

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Complainants, hereby certifies that a true and correct copy of the foregoing "Midcontinent's Reply to Verizon's Opposition to Motion to Amend Complaint" was served via email upon the following:

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