

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

IN THE MATTER OF REVISIONS
AND/OR ADDITIONS TO THE
COMMISSION'S SWITCHED ACCESS
RULES CODIFIED IN A.R.S.D. 20:10:27
THROUGH 20:10:29

RM05-002

**COMMENTS OF
SSTELECOM, INC.**

COMES NOW SSTELECOM, INC. ("SSTELECOM") and pursuant to the invitation of the South Dakota Public Utilities Commission in an Order dated November 24, 2010, hereby respectfully submits these comments to the proposed rules regarding switched access rates for competitive local exchange carriers of the same date.

BACKGROUND

By Order of the Commission dated December 14, 2005, a rulemaking docket was opened to consider revisions and/or additions to the existing switched access rules contained in Sections 20:10:27 through 20:10:29 of the Administrative Rules of South Dakota. See RM05-002, *Order Opening Docket*. Following the submission of comments regarding the direction which the docket should take, the Commission, by Order dated January 27, 2010, opened a docket pursuant to SDCL § 49-34-4.1 to investigate whether price regulation is the appropriate means by which to regulate switched access services provided by competitive local exchange carriers ("CLECs"). See Docket TC10.014, *Order Opening Docket, Notice of Intervention; and Notice of Procedural Schedule*.

The parties, including SSTELECOM, which intervened in Docket TC10-014 filed direct testimony on the issue of whether price regulation was a better method than rate of return regulation for the regulation of a CLEC's services. As evidenced by the testimony filed in the docket, the parties, as a general matter, agreed that price regulation was and is appropriate for CLECs. A hearing to determine the next steps in the docket was held on April 20, 2010, at which time the Commission determined that price regulation for CLECs "will have a positive impact on universal service and is more reasonable and fair than rate of return regulation." See Docket TC10-014, *Order Finding Pricing Regulation Appropriate for CLECs' Switched Access Services; Order Denying in Part and Granting in Part Qwest's Motion; Order Taking Judicial Notice; and Order Closing Docket*. The Commission and parties further agreed that the previously opened rulemaking docket was the appropriate vehicle by which to implement rules related to CLEC price regulation.

On June 1, 2010, in Docket RM05-002, the South Dakota Public Utilities Commission ("Commission") issued draft rules regarding switched access rates for competitive local exchange carriers. Following the filing of initial and reply comments by interested parties, the Commission through an Order dated November 16, 2010, initiated a formal rulemaking proceeding to finalize switched access rules for CLECs. See RM05-002, *Order Proceeding to Formal Rulemaking*. Revised proposed rules were issued on November 24, 2010 (the "Proposed Rules"), at which time the Commission notified interested parties

and the public of its intention to hold a public hearing on the proposed rules on January 20, 2011. The hearing occurred at the scheduled time and a number of parties, including SSTELECOM, voiced comments regarding the Proposed Rules.

THE PROPOSED RULES

The Proposed Rules at issue address switched access costs. In order to provide long distance service, a long distance or interexchange carrier (“IXCs”) requires the use of a local network. Local exchange carriers (“LECs”), whether incumbent or competitive in nature and name, provide the facilities for long-distance calls. The connection between the LEC and the long-distance carrier is what is referred to as switched access. See SDCL § 49-31-1(27) (defining switched access as “any exchange access service purchased for the origination and termination of interexchange telecommunications services which includes central office switching and signaling, local loop facility, or local transport[.]”). LECs thus charge interexchange carriers a certain rate for the switched access services provided.

The Proposed Rules were drafted in order to “fill in the gap” apparent in the existing switched access rate-making structure, which as a general matter, was primarily intended to address rate making and regulation for Incumbent Local Exchange Carriers (“ILECs”). As an initial matter, *incumbent* local exchange carriers, as the name implies, are those carriers which are the current and incumbent provider in a particular area. ILECs provide service in a certificated service territory or local exchange area as defined by the Public Utilities Commission. See SDCL § 49-31-1(12) (defining local exchange area). Federal law requires that an ILEC provide service to all customers within its exchange. This obligation is also commonly referred to as a “carrier of last resort” obligation. The implications of this requirement are particularly significant in a state such as South Dakota which has many sparsely populated areas. These areas require greater monetary and network investment on the part of the ILEC to serve. Simply stated, ILECs must provide services to all customers regardless of geography and cost.

Historically, ILECs have recovered the costs incurred in the provision of switched access services to long distance carriers through rate of return regulation, which process requires the development and approval of rates through detailed cost studies. The cost study process is defined by the FCC. See 47 C.F.R. §§32.1 – 32.9000. The purpose behind rate of return regulation is the promotion of investment in ILEC networks to insure future sustainability of telecommunications services for urban and rural citizens alike.

Competitive local exchange carriers, as the name implies, seek to compete in an ILEC’s exchange and request authority to do so from the Commission. CLECs do not have an obligation to provide telecommunications services throughout the entirety of the local exchange area in which they choose to complete. CLECs have had no similar method, at either the Federal or State level, by which to develop their respective rates. CLECs have thus been left with an option of either negotiating a rate with the Commission or adopting the benchmark rate which, in South Dakota, is the Qwest rate. In order to address what was viewed as an unsatisfactory process and to identify a reasonable and simpler process by which CLECs can establish their rates, the Commission issued the Proposed Rules.

The Proposed Rules in their current form set forth a tiered rate structure for CLECs. Specifically, Administrative Rule of South Dakota 20:10:27:02.01 provides:

A competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the rate of 6.042 cents per minute if 15 percent or more of the competitive local exchange carrier's total access lines in South Dakota are in communities of 10,000 inhabitants or more. The switched access rate shall be the same in each of the competitive local exchange carrier's service areas.

A competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the rate of 9 cents per minute if 85 percent or more of the competitive local exchange carrier's total access lines in South Dakota are in communities with populations of less than 10,000 inhabitants. The switched access rate shall be the same in each of the competitive local exchange carrier's service areas.

See Docket RM05-002, *Notice of Public Hearing to Adopt Rules, Proposed Rules*, Proposed A.R.S.D. 20:10:27:01.01.

In the event a CLEC believes a higher rate than what is permitted under A.R.S.D. 20:10:27:02.01 is justified, the addition of new rule 20:10:27:02.02, coupled with the Commission's willingness to waive the cumbersome separations procedures required for carriers which use GAAP accounting practices (A.R.S.D. 20:10:27:04), permits a CLEC to file a cost study in support of a different rate.

POLICY CONSIDERATIONS

Throughout not only this docket, but also Docket TC10-14 related to CLEC price regulation, the primary issue as it relates to the development of switched access rules for CLECs remains whether all CLECs should be treated equally for purposes of determining their access rates. This is an issue of critical importance to CLECs such as SSTELECOM, Inc. which provides service in only one small community, Milbank, South Dakota.

SSTELECOM recognizes and acknowledges that the primary purpose of the Telecommunications Act of 1934, as amended by The Telecommunications Act of 1996 P.L. No. 104-104, 110 Stat. 56 (1996), was and is to promote competition. While a CLEC chooses to compete in the area of an existing ILEC, thereby tacitly acknowledging that it may or may not recover all of the costs of providing service, not all CLECs are the same. The Proposed Rules recognize that a distinction may and should be drawn between those rural CLECs which make an investment in rural, high-cost areas and those urban CLECs which serve the largest markets in South Dakota and seek only to serve the more populated and lower cost, "town" portions of ILEC markets where it suits their existing business model and infrastructure. The realities of providing service in a town of 1,000, 5,000 or 10,000 residents is dramatically different than providing service in a town of

30,000, 60,000 or more. It is difficult to separate a small community of 3,000 residents into urban and rural when the population and location make the whole of that community rural.

The establishment of the proposed tiered rating system provides those CLECs which choose to compete and offer service in the whole of an ILEC's exchange or in a rural ILEC exchange an opportunity to recover their costs so that they are better able to make the necessary investment to bring new technology to an area which might not otherwise have such options. Such a compensation scheme also preserves the significance of the rural exemption and therefore maintains the necessary distinction between ILECs which have the obligation to provide the entirety of each of their exchanges, regardless of population density and profit center, and CLECs which do not.

Detractors to the Proposed Rules in their current form remain. Arguments have been advanced by CLECs and IXCs alike that it is poor public policy to allow a CLEC which provides service throughout the entirety of the territory or chooses to compete in a predominantly rural area to obtain a higher rate than one which either does not choose to provide service in a predominantly rural area or one which provides service to only the town customers of the local exchange area in which they choose to compete. In other words, the argument is that a CLEC is a CLEC is a CLEC, regardless of where it serves and to whom it provides services. These detractors have suggested that the proposed tiered structure is discriminatory and therefore in violation of the provisions of Title 49 of the South Dakota Code. The remedy proposed by these parties is to redraft the Proposed Rules to allow a CLEC to mirror the rate, and only that rate, charged by the ILEC operating in the area in which the CLEC chooses to compete. These objections and arguments, however, ignore established and beneficial public policy.

It bears repeating that ILECs cannot choose the territory in which they will provide service. As alluded to above, ILECs have carrier of last resort obligations. It is for this reason that ILECs engage in rate of return regulation so as to enable them to recover the costs associated with providing new and more advanced technology and services to rural areas. Allowing a carrier to recover its costs incents it to invest in the area in which it serves. CLECs do not possess this same obligation and can choose the area in an ILEC's exchange in which it wants to compete. It can choose to provide to the whole of the area or it can choose to provide service only in the more densely populated and profitable "town" areas of a particular exchange, a practice known as cherry picking. A CLEC which chooses to provide service in the more densely populated areas of the larger communities in South Dakota or, what is better described as non-rural ILEC areas, can, if it receives the ILEC rate, effectively compete with the ILEC at a lower cost. A CLEC can achieve the same advantage in a more rural area by choosing to serve only the lower cost, "town" customers rather than the whole of the exchange. The fallacy of the "CLEC is a CLEC is a CLEC proposition" becomes evident when one changes the geography and population in which the CLEC provides service from a town such as Sioux Falls or Rapid City to Webster, which had a population as of the 2000 census of 1,952. If the same CLEC which provides service in Sioux Falls also chooses to provide service in Webster, but chooses to provide service only to the lower-cost, "town"

customers in Webster, it should not be rewarded by receiving the same rate as the ILEC. Not only was the ILEC rate developed based upon the cost to provide service to all customers in Webster, but it is relied upon by a rural ILEC which provides service in an exchange which itself is far smaller than Sioux Falls or Rapid City. In other words, a CLEC which chooses to compete in multiple areas and chooses to provide to only lower cost, town customers, can achieve a far greater profit margin than the ILEC ever can. Such a result stands in stark contrast to the promotion of universal service.

CLECs which choose to invest in and serve exchanges which are predominantly rural, whether by location or population, should receive the benefit of the Commission's proposed higher rate. It is these carriers which choose to advance the goals of universal service in high cost, rural areas. Such an act is wholly consistent with the provisions of SDCL § 49-31-76, which addresses the "competitive provision of local exchange service[.]" Most significantly, the statute emphasizes the significance of preserving and advancing universal service, characterizing that objective as a "primary concern". See SDCL § 49-31-76.

The justification for the distinction between CLECs in the Commission's Proposed Rules is further borne out by the FCC's own rules and policies. The FCC has recognized a "Rural Exemption" in the context of CLECs. See Commission Docket TC 10-014, *In the Matter of the Investigation of Pricing Regulation for Switched Access Services Provided by Competitive Local Exchange Carriers*, Testimony of Dan Davis on behalf of SDTA dated April 1, 2010, p. 8, lines 6-18. As explained by Mr. Davis, the distinction was drawn in order to "give some recognition to the different costs experienced by rural CLECs competing in truly rural, high-cost areas versus those that have operations in the lower-cost areas of larger price cap regulated incumbent carriers." *Id.* at lines 7-10. As outlined in Mr. Davis' testimony, the FCC further recognized that a CLEC may be entitled to a higher rate so long as it provides service in an area of fewer than 50,000 inhabitants. The simple fact that there are only two cities in South Dakota which have a population of greater than 50,000 makes it impractical to impose an identical framework in this state. However, it is instructive and the same rationale, with modifications, can be implemented here. The Proposed Rules account for the unique geographic and population characteristics of South Dakota by defining its rate demarcation according to not only population, but also line count.

Establishing a regulatory scheme in which every CLEC, regardless of any distinguishing structural characteristics and the nature and extent of the territory in which it chooses to compete, is treated in the exact same manner potentially provides a CLEC the opportunity to take advantage of an ILEC or RLEC's rates. Simply allowing any and every CLEC to avail itself of the unfettered option to use an ILEC or RLEC's rate without imposing the same requirements upon the CLEC for the provision of its service is wrong and unsupportable.

CONCLUSION

All CLECs are not created equal. If they wish to be treated equally, then they need to provide service in the exact same manner as the ILEC in the territory in which they choose to compete. However, until all CLECs do exactly so, the Proposed Rules provide a workable format for establishing CLEC rates. They further account for the distinctions between CLECs in South Dakota and do so in a way which is consistent with the key rural safeguard concept inherent in state and federal law. Accordingly, SSTELECOM respectfully requests that the Commission approve the Proposed Rules in their current form and take the steps necessary to have the Proposed Rules formally approved.

In the event that the comments provided by the various parties to this docket precipitate changes to the Proposed Rules, SSTELECOM respectfully requests an opportunity to provide further comment.

Dated this 31st day of January, 2011.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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