LAW OFFICES
MAY, ADAM, GERDES & THOMPSON LLP
503 SOUTH PIERRE STREET
P.O. BOX 160
PIERRE, SOUTH DAKOTA 57501-0160
SINCE 1881
www.magt.com

DAVID A. GERDES
CHARLES M. THOMPSON
ROBERT B. ANDERSON
TIMOTHY M. ENGEL
MICHAEL F. SHAW
NEIL FULTON
BRETT KOENECKE
CHRISTINA L. FISCHER
BRITTANY L. NOVOTNY

OF COUNSEL
THOMAS C. ADAM
RETIRED
WARREN W. MAY
GLENN W. MARTENS 1881-1963
KARL GOLDSMITH 1885-1966
BRENT A. WILBUR 1949-2006
TELEPHONE
605 224-8803
TELECOPIER
605 224-6289
E-MAIL
dag@magt.com

August 10, 2007

E-FILED

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

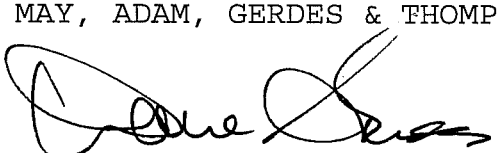
RE: **MIDCONTINENT COMMUNICATIONS; IN THE MATTER OF REVISIONS AND/OR ADDITIONS TO THE COMMISSION'S TELECOMMUNICATIONS RULES**
DOCKET RM07-001
Our file: 0053

Dear Patty:

Enclosed is a letter to the Commission with Midcontinent's comments in this rulemaking docket, which please file. Thank you very much.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP



DAVID A. GERDES
DAG:mw
Enclosure
cc/enc: Mary Lohnes
Nancy Vogel

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August 10, 2007

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

RE: **MIDCONTINENT COMMUNICATIONS; IN THE MATTER OF REVISIONS AND/OR ADDITIONS TO THE COMMISSION'S TELECOMMUNICATIONS RULES**
DOCKET RM07-001
Our file: 0053

Dear Commissioners:

Thank you for the opportunity to comment on the Commission's proposed rules. As you know, I am Midcontinent's regulatory counsel, and I provide these comments from Midcontinent on the proposed rules. I was present at the rules hearing and was able to offer comments at the hearing. I will identify the proposed rule to which reference is made, followed by my comments on behalf of Midcontinent Communications.

1. **ARSD 20:10:24:02. Certificate of Authority for Interexchange Service - Application Requirements.** Midcontinent suggests that subparagraph (2) be amended to request both the legal and organizational structure of the applicant company, so that the paragraph as amended would read "A description of the legal and organizational structure of the applicant's company; . . ."

As the Commission knows, Midcontinent is a partnership. Since general partnerships are not required to obtain a certificate of authority from the Secretary of State, the

Commission would be left with no knowledge of the legal structure of the corporation, based upon the current language requested in the rule. Other business organizations would likewise not file with the Secretary of State, such as joint ventures. This would be a simple way to make sure the Commission obtained all the information it presumably needs.

Midcontinent also believes that subparagraph (14) of the rule should be amended for a couple of reasons. In my experience, at least, the correct terminology is "material adverse change", rather than the terminology presently in the rule. This is also more grammatically correct, since materially is the adverb form of the word, and in the usage in this sentence it is modifying the noun "change", thus calling for the adjective "material."

More important, we believe the term "material adverse change," requires definition. This is partially addressed by the amendment to ARSD 20:10:34:10, dealing with a notification of increase in rates. However, one must ask what is a material adverse change in a term, or in a condition? It certainly cannot reasonably mean that the customer, subjectively, did not like the change, since this could result in a proliferation of complaints and in any event, would not be a realistic standard. Thus, we believe that a definition in the definitions section of the rules is in order. I have attached a worksheet as Exhibit A for background and a recommended definition.

Finally, the last unnumbered paragraph of the rule states that the Commission may require audited financial statements, while new language added to paragraph (9) above states that the applicant must provide audited financial statements if available. Presumably the latter language is intended to apply in addition to the language in paragraph (9) and could be clarified.

2. **ARSD 20:10:32:03. Certificate of authority for local exchange service - Application requirements.** The

comments made in paragraph 1 would apply to the comparable subparagraphs in this section.

3. **ARSD 20:10:32:31.01. Participation by non-parties.** We believe that an interested person who is not a party to the proceeding but who may in any event file written comments and make oral argument to the Commission in an arbitration proceeding, can put one or the other of the parties at a disadvantage. The parties to the proceeding have no ability to cross-examine the observer, question the information in the written comments or call their own witnesses to rebut information presented in this fashion. Further, ARSD 20:10:32:31 states that arbitration is to be conducted as a contested case. The contested case statutes appear in SDCL Chapter 1-26. As to persons interested in a contested case, SDCL § 1-26-17.1 provides as follows:

> A person who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency's order made upon the hearing may become a party to the hearing by intervention, if timely application therefor is made.

Based upon the clear meaning of the foregoing statute, it would appear that this rule as written would violate the terms and conditions of the Administrative Procedures Act, because the participation by the "observer", even though interested, is not as provided in the statute.

4. **ARSD 20:10:33:22. Maintenance service interruptions - Notification.** This rule changes the requirement of prior notification of local service interruptions from that related to "extended maintenance requirements" to any interruption. Clearly, this will place an increased burden upon local exchange carriers concerning the number of notices that will be issued for operations that may only be momentary. As discussed at the rules hearing, a

guideline based on number of affected customers, or duration of outage would make this more workable.

5. **ARSD 20:10:34:02.02. Exception for acquisition of subscriber base—Notification requirements.** We believe that the second and third lines of subparagraph (2) of the rule should be changed to read ". . . any material change to the required information develops, the acquiring carrier shall file written notification of any change with the Commission . . .." As presently written the phrase does not recognize the fact that the adjective "any" contemplates the plural and the pluralization of the modified nouns is superfluous.

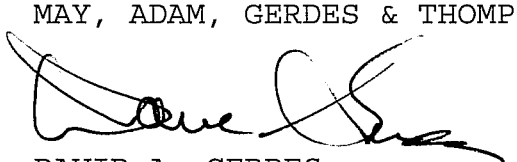
Also subparagraph (3) subparagraph (e) should be amended in the first line to read "That all subscribers receiving the notice, including those who have arranged . . .." The change maintains the continuity established by the introductory phrase stating what must be included.

6. **ARSD 20:10:34:10. Notification of increase in rates.** The term "materially adverse change" should be changed to "material adverse change" as discussed in paragraph 1.

Thank you for considering these proposed changes. We believe that the proposed rules improve the Commission's ability to do its job.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP



DAVID A. GERDES
DAG:mw
Enclosure
cc: Mary Lohnes
Nancy Vogel

Exhibit A to Midcontinent's written comments concerning the Commission's proposed rules noticed to be heard at 9:00 a.m. on August 2, 2007, in room 413.

Midcontinent believes that the term, Material Adverse Change, as used in proposed Commission Rules, needs to be defined. A review of returns from a Google inquiry indicates that the term is used almost exclusively in merger and acquisition, venture investment and asset purchase situations. Thus, the term in the Commission Rules needs a definition in a telecommunications context to be workable.

Abstract of an article at:
http://vcexperts.com/vce/library/encyclopedia/documents_view.asp?document_id=620.

Home page is: http://vcexperts.com/vce/.

"The term Material Adverse Change (or "MAC"; also sometimes called Material Adverse Effect or "MAE"). an occurrence, event or condition that could or would likely cause a long-term and significant diminution in the earnings power or value of a business. The phrase is commonly used in venture investment or M&A transactions in connection with a closing condition whereby the investor/acquiror has the benefit of a 'walk' right if the target company experiences a serious adverse change between the date the contract is signed and the transaction closing date. The concept is also used in connection with standard representations and warranties.1 Two decisions out of the Delaware Chancery Court, IBP, Inc. v. Tyson Foods, Inc.2 and Frontier Oil Corporation v. Holly Corporation3, have examined MAC clauses and are instructive to lawyers and other venture or M&A professionals who, before these cases, often believed that adding the seemingly magic "MAC" words to a definitive agreement would provide an escape hatch from a deal that turned bad because of changes or events affecting the target business. While these cases shed light on court construction of MAC clauses in M&A contexts, for reasons stated below, it remains to be seen whether a court would apply the same standards in connection with investment transactions."

Recommended definition for Commission rules:

Material adverse change in relation to a telecommunications service means any change which increases a rate, or which modifies a term or condition making it more burdensome as determined from the perspective of a reasonable person in the average customer's position.