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September 10, 2014

### VIA ECFS; Confirmation by Electronic Mail

Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Attn: Ryan Yates, Esq.; Telecommunications Access Policy Division,  
Wireline Competition Bureau

**Re: WC Docket Nos. 10-90, 14-93; DA 14-942; Connect America Fund Phase II;  
Rebuttal of “Subsidized” Classification in Certain South Dakota and North  
Dakota Census Blocks**

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Dear Mr. Yates:

We are writing on behalf of Midcontinent Communications (“**Midcontinent**”) to clarify the status of certain South Dakota and North Dakota census blocks included in the FCC Forms 505 Midcontinent submitted to the Wireline Competition Bureau (the “**Bureau**”) on August 14, 2014.<sup>1</sup>

We understand Mr. Jason Rauscher of Midcontinent contacted you by telephone on August 12, 2014 regarding an apparent misclassification of subsidized competitors on the Commission’s State Level Data Files for Minnesota, North Dakota, and South Dakota.<sup>2</sup> In

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<sup>1</sup> Midcontinent’s FCC Forms 505 and supporting evidence demonstrated the served status of 736 census blocks in Minnesota, North Dakota, South Dakota, and Wisconsin, which were incorrectly listed as unserved in the Bureau’s records. See Wireline Competition Bureau Commences Connect America Phase II Challenge Process, *Public Notice*, 29 FCC Rcd 7986 (rel. June 30, 2014). (<http://www.fcc.gov/wcb/SS20140414CAM411%20Support%20Locations.csv>).

<sup>2</sup> Mr. Rauscher contacted you about this issue immediately after Midcontinent became aware of it and inquired how to correct the data. Mr. Rauscher explained that based on information recently received from state agencies and their independent contractors, Midcontinent became aware that the Commission’s State Level Data Files for Minnesota, North Dakota, and South

(continued...)

researching that issue, however, Midcontinent discovered a second issue; namely, that it has in fact received high-cost support in two (2) North Dakota and eighty (80) South Dakota census blocks included in Midcontinent's August 14, 2014 FCC Forms 505.<sup>3</sup> As demonstrated below, Midcontinent has rebutted the presumption that "any recipient of high-cost support at the time the challenge process is conducted does not meet the literal terms of the definition [of an 'unsubsidized competitor']."<sup>4</sup> The Bureau therefore should waive the "unsubsidized" element of the unsubsidized competitor definition<sup>5</sup> for these eighty-two (82) census blocks because otherwise Phase II support will be "used to overbuild and existing broadband-capable network."<sup>6</sup>

### Background

In the *USF/ICC Transformation Order*, the Commission determined that where an "unsubsidized competitor offers broadband service that meets the broadband performance requirements," those areas are ineligible to receive Phase II support,<sup>7</sup> and it delegated to the Bureau "the task of implementing the specific requirements of this rule."<sup>8</sup> As the Bureau acknowledged in its *Service Obligations Order*, "[t]he Commission's intent in adopting this rule was to preclude support to areas where voice and broadband is available without burdening the federal support mechanisms."<sup>9</sup> The Bureau recognized, however, that the Commission's goals will be frustrated if a "competitive eligible telecommunications carrier that otherwise meets or exceeds the performance obligations . . . and whose high-cost support is scheduled to be eliminated during the five-year term of Phase II" were precluded from challenging the putative unserved status of census blocks where they offer qualifying voice and broadband service.<sup>10</sup> The Bureau therefore provided "an opportunity for the Commission to consider whether to waive

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(. . . continued)

Dakota may contain inaccurate information misclassifying Midcontinent as a subsidized competitor in as many as 4,000 census blocks. Since that time, Midcontinent has been investigating the issue and plans to report the results of that investigation to the Bureau shortly.

<sup>3</sup> The specific census blocks for which Midcontinent has received high-cost support are included for your convenience on the attached spreadsheet. See Exhibit 1. Midcontinent has never maintained subscriber or regulatory records based on census block designations. Midcontinent consequently had no record of the specific census blocks of the locations for which it had received high-cost support until research regarding the apparent misclassification issue led it to identify these high-cost support locations by census block.

<sup>4</sup> Connect America Fund, *Report and Order*, 28 FCC Rcd 7211 at para. 41 (Wireline Comp. Bur. 2013) ("*Service Obligations Order*").

<sup>5</sup> See 47 C.F.R. § 54.5. Under the Commission's rules, "[a]n 'unsubsidized competitor' is a facilities-based provider of residential fixed voice and broadband service that does not receive high-cost support." *Id.*

<sup>6</sup> *Service Obligations Order* at para. 41 (footnote omitted).

<sup>7</sup> Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, 17729 at para. 170 (2011) ("*USF/ICC Transformation Order*"), petitions for review denied *sub nom. Direct Communications Cedar Valley v. FCC*, \_\_\_ F.3d \_\_\_ (No. 11-9900, 10th Cir., May 23, 2014).

<sup>8</sup> *Id.*

<sup>9</sup> *Service Obligations Order* at para. 41.

<sup>10</sup> *Id.* (footnote omitted).

application of the ‘unsubsidized’ element of the unsubsidized competitor definition in situations that would result in Phase II support being used to overbuild an existing broadband-capable network.”<sup>11</sup> This case represents the precise situation about which the Bureau expressed concern.

### Discussion

The Bureau should waive the unsubsidized element of Section 54.5 of the Commission’s rules for the eighty-two (82) North and South Dakota census blocks set forth on Exhibit 1 because: (i) Midcontinent is an Eligible Telecommunications Carrier (“ETC”) that has incontrovertibly demonstrated it substantially exceeds the Commission’s voice and broadband performance obligations; (ii) Midcontinent’s high-cost support in North Dakota and South Dakota, which is *de minimis* in any case, is scheduled to be eliminated during the five-year term of Phase II; and (iii) absent a waiver, Phase II support will be used to overbuild Midcontinent’s advanced broadband network contrary to the Commission’s intent “to preclude support to areas where voice and broadband is available.”<sup>12</sup> Pursuant to well-established Commission precedent regarding the issuance of waivers, therefore, the circumstances here “warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.”<sup>13</sup>

First, Midcontinent is an ETC in both North and South Dakota that substantially exceeds the Commission’s voice and broadband performance obligations.<sup>14</sup> The evidence attached to Midcontinent’s FCC Forms 505 demonstrated that its internet service plans, which are offered in all the challenged North and South Dakota census blocks, substantially exceed the performance standards established in the Commission’s Connect America Fund proceeding. For example, Midcontinent’s internet service plans provide average speeds ranging from 149.95 Mbps upstream/19.79Mbps downstream to 12.99Mbps upstream/1.43Mbps downstream, impose no limits or “caps” of any kind on customers’ data usage, and have an average latency of 8 to 10ms (depending on the specific service plan). Midcontinent’s broadband service, therefore, substantially exceeds the Commission’s performance standards. Midcontinent’s voice and broadband services similarly exceed the Commission’s “reasonably comparable” pricing standards because Midcontinent offers uniform rates for the most part throughout North and South Dakota, and those prices in any case are less than the Commission’s interim benchmark

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<sup>11</sup> *Id.* (footnote omitted); see also FCC Form 505 Instructions at n.1.

<sup>12</sup> *Service Obligations Order* at para. 41.

<sup>13</sup> *Comsat Corp.*, 12 FCC Rcd 12059, 12066, para. 14 (1997); see also, e.g., *Intel Corp., et al.*, 25 FCC Rcd 7539, 7542, para. 7 (2010); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157(D.C. Cir. 1969).

<sup>14</sup> The North Dakota Public Service Commission granted Midcontinent ETC status on July 28, 2005 in Docket PU-05-272. The North Dakota PSC filed its most recent annual certification with the FCC on December 5, 2013, and Midcontinent submitted its most recent re-certification request with the PSC on August 19, 2014, which is now pending approval. The South Dakota Public Utilities Commission granted Midcontinent ETC status on June 29, 2004 in Docket TC04-003. See Public Utilities Commission of South Dakota, *Order Granting Eligible Telecommunications Designation*, TC-04-003 (June 29, 2004). The South Dakota PUC approved Midcontinent’s last annual recertification on August 25, 2014.

prices. Midcontinent consequently is a “competitive eligible telecommunications carrier that otherwise meets or exceeds the performance obligations.”<sup>15</sup>

Second, the *de minimis* amount of high-cost support Midcontinent does receive in North Dakota and South Dakota is scheduled to be eliminated during the five-year term of Phase II. Midcontinent’s high-cost support will terminate on July 1, 2016 pursuant to the Commission’s *USF/ICC Transformation Order*,<sup>16</sup> which will be during the five-year term of Phase II support. Midcontinent therefore satisfies the termination of high-cost support condition set forth in the Bureau’s *Service Obligations Order*.<sup>17</sup> In any case, the amount of high-cost support Midcontinent receives in North and South Dakota is inconsequential. Midcontinent currently receives only \$3.02 per line for 732 lines in North Dakota (a total of \$2,212 in monthly support), and only \$1.02 per line for 6,977 lines in South Dakota (a total of \$7,115 in monthly support). Given the annual \$3,000 per line limit the Commission established in the *USF/ICC Transformation Order*,<sup>18</sup> the amount of high-cost support Midcontinent receives in North and South Dakota truly is *de minimis*, and provides no persuasive basis for precluding Midcontinent’s challenges to these eighty-two census blocks.

Third, Midcontinent’s advanced communications network deployed throughout North and South Dakota is undeniably “an existing broadband-capable network” in each of the eighty-two census blocks included in Exhibit 1. In fact, Midcontinent has built an extensive fiber-optic network to some of the most rural areas in the nation, is the leading provider of state-of-the-art cable television, high-speed broadband, and advanced communications services in North and South Dakota, and offers advanced communications services to 97% of its current homes passed and to all the census blocks included in the attached Exhibit 1. Absent a waiver, therefore, Phase II support will be used to overbuild Midcontinent’s competitive voice and broadband network contrary to the Commission’s expressed policy of “preclud[ing] support to areas where voice and broadband is available without burdening the federal support mechanisms.”<sup>19</sup> Given these circumstances, a waiver of the “unsubsidized” element of the unsubsidized competitor definition<sup>20</sup> for these eighty-two census blocks “would better serve the public interest than would strict adherence to the general rule.”<sup>21</sup>

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<sup>15</sup> *Service Obligations Order* at para. 41.

<sup>16</sup> See 26 FCC Rcd at 17832, para. 519. Pursuant to the Commission’s *USF/ICC Transformation Order*, Midcontinent’s high-cost support was frozen at the 2011 baseline for the January 1, 2012 through June 30, 2012 period and decreases in twenty percent steps each of the following years through June 30, 2016, after which no further support is available.

<sup>17</sup> *Service Obligations Order* at para. 41.

<sup>18</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 17831, para. 516.

<sup>19</sup> *Service Obligations Order* at para. 41; see also *USF/ICC Transformation Order*, 26 FCC Rcd at 17729, para. 170.

<sup>20</sup> 47 C.F.R. § 54.5.

<sup>21</sup> *Comsat Corp.*, 12 FCC Rcd at 12059, para. 14. Midcontinent observes that all but ten of the eighty-two census blocks included on Exhibit 1 are located in communities where WOW!/Knology offers competitive broadband, voice, and cable television services.

Conclusion

Midcontinent submits the foregoing demonstrates that the Bureau should deem Midcontinent an unsubsidized competitor in each of these eighty-two census blocks for purposes of its Phase II challenge proceeding. Please contact us if you have any questions or require additional information in connection with this matter.

Respectfully submitted,



Gary S. Lutzker  
Counsel for Midcontinent Communications

GSL/sdj

cc: Ms. Carol E. Matthey (Acting Chief, Wireline Competition Bureau)  
Mr. Jeffrey S. Lanning (CenturyLink)  
Mr. Michael Saperstein (Frontier)

# EXHIBIT 1

**Midcontinent Communications**

**Exhibit 1**

Census Blocks where Midcontinent has Received High-Cost Support

Included in FCC Form 505 Served to Unserved Challenges

Filed August 14, 2014

Census Block 15 Digit FIPS Code	State	Name of Entity Providing Service	FRN used to File Form 477 (if challenge being filed by the service provider)
460199677001045	SD	Midcontinent Communications	0002621951
460199677002016	SD	Midcontinent Communications	0002621951
460199677002089	SD	Midcontinent Communications	0002621951
460199677004001	SD	Midcontinent Communications	0002621951
460599757001011	SD	Midcontinent Communications	0002621951
460599757002005	SD	Midcontinent Communications	0002621951
460599757002028	SD	Midcontinent Communications	0002621951
460599757002043	SD	Midcontinent Communications	0002621951
460799602002004	SD	Midcontinent Communications	0002621951
460799602003000	SD	Midcontinent Communications	0002621951
460799602003044	SD	Midcontinent Communications	0002621951
460799602004057	SD	Midcontinent Communications	0002621951
460799602004084	SD	Midcontinent Communications	0002621951
460819661001119	SD	Midcontinent Communications	0002621951
460819661001131	SD	Midcontinent Communications	0002621951
460819661001152	SD	Midcontinent Communications	0002621951
460819661002139	SD	Midcontinent Communications	0002621951
460819661002144	SD	Midcontinent Communications	0002621951
460819661003001	SD	Midcontinent Communications	0002621951
460819661003012	SD	Midcontinent Communications	0002621951
460819661003025	SD	Midcontinent Communications	0002621951
460819661003030	SD	Midcontinent Communications	0002621951
460819661004000	SD	Midcontinent Communications	0002621951
460819661004009	SD	Midcontinent Communications	0002621951
460819662002003	SD	Midcontinent Communications	0002621951
460819663011015	SD	Midcontinent Communications	0002621951
460819663023009	SD	Midcontinent Communications	0002621951
460819663023011	SD	Midcontinent Communications	0002621951
460819663023020	SD	Midcontinent Communications	0002621951
460819666001006	SD	Midcontinent Communications	0002621951
460819666001008	SD	Midcontinent Communications	0002621951
460819666001013	SD	Midcontinent Communications	0002621951
460819666001038	SD	Midcontinent Communications	0002621951
460819666001191	SD	Midcontinent Communications	0002621951
460819666001192	SD	Midcontinent Communications	0002621951
460819666001200	SD	Midcontinent Communications	0002621951
460819666004023	SD	Midcontinent Communications	0002621951
460819666004030	SD	Midcontinent Communications	0002621951
460830101044022	SD	Midcontinent Communications	0002621951
460830101044032	SD	Midcontinent Communications	0002621951
460830101061000	SD	Midcontinent Communications	0002621951
460830101062017	SD	Midcontinent Communications	0002621951
460830101071001	SD	Midcontinent Communications	0002621951

**Midcontinent Communications**

**Exhibit 1**

Census Blocks where Midcontinent has Received High-Cost Support

Included in FCC Form 505 Served to Unserved Challenges

Filed August 14, 2014

Census Block 15 Digit FIPS Code	State	Name of Entity Providing Service	FRN used to File Form 477 (if challenge being filed by the service provider)
460830101072041	SD	Midcontinent Communications	0002621951
460830101073006	SD	Midcontinent Communications	0002621951
460830101073065	SD	Midcontinent Communications	0002621951
460830101081002	SD	Midcontinent Communications	0002621951
460830101081005	SD	Midcontinent Communications	0002621951
460830101081015	SD	Midcontinent Communications	0002621951
460830101081037	SD	Midcontinent Communications	0002621951
460830101081041	SD	Midcontinent Communications	0002621951
460830102001008	SD	Midcontinent Communications	0002621951
460830102001029	SD	Midcontinent Communications	0002621951
460830102003051	SD	Midcontinent Communications	0002621951
460930203011033	SD	Midcontinent Communications	0002621951
460930203011035	SD	Midcontinent Communications	0002621951
460930203011041	SD	Midcontinent Communications	0002621951
460930203012054	SD	Midcontinent Communications	0002621951
460930203012082	SD	Midcontinent Communications	0002621951
460930203012088	SD	Midcontinent Communications	0002621951
460930203022012	SD	Midcontinent Communications	0002621951
460930203022019	SD	Midcontinent Communications	0002621951
460930203022062	SD	Midcontinent Communications	0002621951
460930203022063	SD	Midcontinent Communications	0002621951
460930203022098	SD	Midcontinent Communications	0002621951
460930203022105	SD	Midcontinent Communications	0002621951
460930203023056	SD	Midcontinent Communications	0002621951
460930203023101	SD	Midcontinent Communications	0002621951
460930204004032	SD	Midcontinent Communications	0002621951
460930204006014	SD	Midcontinent Communications	0002621951
460930204006052	SD	Midcontinent Communications	0002621951
461030109031002	SD	Midcontinent Communications	0002621951
461030113001004	SD	Midcontinent Communications	0002621951
461030116002029	SD	Midcontinent Communications	0002621951
461150002003010	SD	Midcontinent Communications	0002621951
461150002003015	SD	Midcontinent Communications	0002621951
461179601001210	SD	Midcontinent Communications	0002621951
461179601001229	SD	Midcontinent Communications	0002621951
461179601002013	SD	Midcontinent Communications	0002621951
461179601002115	SD	Midcontinent Communications	0002621951
380899640001095	ND	Midcontinent Communications	0002621951
380899640001193	ND	Midcontinent Communications	0002621951