

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

|                                     |   |                      |
|-------------------------------------|---|----------------------|
| In the Matter of                    | ) |                      |
|                                     | ) |                      |
| Access Charge Reform                | ) | CC Docket No. 96-262 |
|                                     | ) |                      |
| Reform of Access Charges Imposed by | ) |                      |
| Competitive Local Exchange Carriers | ) |                      |

**PETITION FOR WAIVER**

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November 12, 2004

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**PETITION FOR WAIVER**

Pursuant to 47 CFR ¶ 1.772 and 47 CFR Part 61, subpart B, PrairieWave Telecommunications, Inc. (“PrairieWave”) respectfully submits this Petition for Waiver of 47 CFR ¶¶ 61.26(b) and (c) regarding the maximum rate that a competitive local exchange carrier (“CLEC”) can charge for interstate switched access services as defined in 47 CFR ¶ 61.26(a)(3); or in the alternative for a waiver of 47 CFR ¶ 61.26(a)(6) which disqualifies a rural CLEC from eligibility for the “rural exemption” if it serves non-rural customers. Special circumstances exist that justify a waiver in this case, and a waiver is consistent with the public interest.

**INTRODUCTION**

PrairieWave is the CLEC subsidiary of PrairieWave Communications, Inc. serving rural markets in Iowa, Minnesota and South Dakota. The attached map (Exhibit A) is a schematic depiction of the communities served and the fiber optic network tying those communities together. The communities served by the CLEC are indicated by the larger blue dots. The solid yellow lines represent the fiber optic network. The dotted

yellow line is a leased fiber route necessary to provide a ring configuration for communities situated north of Interstate Highway 90.

As is evident from Exhibit A, PrairieWave Communications, Inc. also operates a rural incumbent local exchange company subsidiary, PrairieWave Community Telephone Inc. (“ILEC”), serving 14 communities in South Dakota<sup>1</sup>. The ILEC’s Class 4/5 switch is located in Viborg, South Dakota and acts as the interstate tandem for both the ILEC and the CLEC. The Viborg switch is owned and operated by the ILEC. The Viborg switch connects to a Qwest Corporation (“Qwest”) tandem switch located in Sioux Falls, South Dakota. PrairieWave owns and operates a Lucent 5E Class 4/5 switch in Marshall, Minnesota, which connects to the Qwest tandem in Windom, Minnesota, and a Lucent DRM in Storm Lake Iowa with Class 4/5 capability. The relevant LERG entries for PrairieWave are shown in Exhibit B.

PrairieWave is a fully facility-based CLEC. It has not and currently does not buy unbundled network elements from Qwest or other LECs<sup>2</sup> with which it competes, nor does it resell any of Qwest’s or other LEC’s local exchange services.<sup>3</sup> PrairieWave serves 24 very rural communities ranging in population from a few hundred to just over 20,000 inhabitants.<sup>4</sup>

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<sup>1</sup> The ILEC is a NECA member and utilizes the NECA access tariff for its interstate access charges.

<sup>2</sup> PrairieWave also competes with Ft. Randall Telephone in the Centerville and Viborg exchanges in SD, and with Frontier Communications of Minnesota in the Adrian, Currie, Edgerton, Lake Wilson, Slayton and Worthington exchanges in Minnesota.

<sup>3</sup> PrairieWave does have state commission approved interconnection agreements with Qwest (Iowa, Minnesota and South Dakota) and with Frontier (Minnesota) that do include provisions for the purchase of unbundled network elements and resale of incumbent LEC services at a wholesale discount, but PrairieWave has never activated such services using those agreements. The agreement with Ft. Randall (South Dakota) does not have similar wholesale/resale provisions; it is essentially a reciprocal compensation agreement.

<sup>4</sup> The latest census figures for those communities and for Sioux Falls are provided at Exhibit C. The numbers do not include the more rural, occupied farmsteads passed by PrairieWave Communications facilities within the telephone exchange areas that surround the rural towns.

PrairieWave is certified by three state commissions<sup>5</sup> to provide competitive telecommunications services in Qwest and two other specified LEC service areas in those states. The PrairieWave business plan focuses on attaining a cable TV franchise in a new community and initially building out the cable TV and telephone network consistent with the boundaries of that franchise. PrairieWave has explored and tested, and continues to deploy on a test basis in South Dakota, telecommunications technology using unlicensed radio spectrum to provide telephone and high-speed Internet capability intended to serve residents (primarily farmsteads) and businesses (primarily agribusiness) outside the new community corporate boundaries, in an effort to eventually provide the entire rural incumbent exchange area with life-line telephone and high speed Internet services.

PrairieWave also provides limited local exchange services to residents and businesses in Sioux Falls,<sup>6</sup> a community of over 50,000 inhabitants. PrairieWave was recently certified by the Commission as an Open Video System (“OVS”) operator for Sioux Falls, South Dakota.<sup>7</sup> PrairieWave Communications, Inc. has its headquarters in Sioux Falls. PrairieWave is not certified as an eligible telecommunications carrier (“ETC”) pursuant to 47 U.S.C. 214(e) in any Qwest or other LEC service area. However, Qwest recently began receiving high-cost support in some of its service areas in South Dakota, where PrairieWave competes. PrairieWave is planning to seek ETC designation in selected Qwest service areas and the contiguous Ft. Randall exchanges of Centerville and Viborg. Sioux Falls is not a high cost service area.

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<sup>5</sup> Iowa Utilities Board, Minnesota Public Utilities Commission, and the South Dakota Public Utilities Commission.

<sup>6</sup> Sixty-nine residential and 58 business customers, plus the lines to its headquarters building. Sioux Falls is a Qwest exchange.

<sup>7</sup> *In the Matter of PrairieWave Telecommunications, Inc. Certification to Operate an Open Video System.*, DA 04-68, Memorandum Opinion and Order, 19 FCC Rcd 436 (2004).

## WAIVER AUTHORITY AND STANDARDS

The Commission can waive any of its rules, in whole or in part, if there is “good cause” to do so.<sup>8</sup> A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.<sup>9</sup>

PrairieWave believes it provides sufficient information in this waiver filing which allows the Commission to meet that good cause requirement.

## CLEC ACCESS CHARGE REFORM

PrairieWave is cognizant of the Commission’s discussions, decisions and orders regarding the tariffing of access rates by a CLEC.<sup>10</sup> Attached hereto as Exhibit D is a monograph discussing the rationale of those decisions and the adverse impact on PrairieWave’s ability to recover its legitimate costs and remain financially viable.

Among the matters discussed are:

1. The economic goals for interconnection and compensation set out in the Telecommunications Act of 1996 (“96 Act”)<sup>11</sup> and as implemented by the Commission in its First Report and Memorandum<sup>12</sup> among which are to encourage market entry by CLECs; to reduce the risks of market entry to new entrants; and to encourage efficient levels of investment by eliminating regulatory arbitrage opportunities.

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<sup>8</sup> 47 C.F.R. § 1.3.

<sup>9</sup> *Northeast Cellular Telephone Company, LLP, et al. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>10</sup> *Access Charge Reform*, Seventh Report and Order, CC Docket No. 96-262, 16 FCC Rcd 9923 (2001) (“CLEC Access Order I”); *Access Charge Reform*, Eighth Report and Order, CC Docket No. 96-262, 19 FCC Rcd 9108 (2004) (“CLEC Access Order II”); *AT&T Corp v. Business Telecom, Inc.* Memorandum Opinion and Order, EB-01-MD-001 and EB-01-MD-001, 16 FCC Rcd 12312 (2001) (“BTI Order”).

<sup>11</sup> Publ. L. No. 104-104, 110 Stat. 56, as codified in 47 U.S.C. §§ 151, et seq.

<sup>12</sup> *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (“Local Competition Order”).

2. The need for a common, unifying economic theory to determine costs and prices for mandated interconnection access services in a competitive environment.
3. The appropriateness of forward-looking economic costs (“FLEC”) as the model for setting fair, reasonable and nondiscriminatory prices for interconnection services.
4. The lack of any cost-basis for setting benchmark access charges for CLECs. The lack of any filing by any CLEC of a FLEC study that could inform the Commission of the reasonableness of any CLEC benchmark.
5. The market distortions caused by relying on an incumbent rate as the benchmark, not the least of which is the improbable suggestion that the CLEC has cost recovery opportunities from its end user customers that the incumbent does not, or that somehow carriers would have any incentive to enter into agreements for rates higher than the benchmark.
6. The unfairly low CLEC access prices based on an incumbent benchmark, which effectively subsidize access to the competing ILEC network allowing that ILEC to further reduce prices for services in its LEC markets.

PrairieWave has prepared a FLEC study for the Commission to review and to provide the economic basis for its proposed access charges.<sup>13</sup> The study demonstrates that the cost-based, per-minute switching rate for the interstate jurisdiction to be \$0.014942 and for transport \$0.035937, for a composite per minute rate of \$0.050879. The comparable NECA rates for the ILEC are \$0.019328 for switching<sup>14</sup> and an effective

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<sup>13</sup> The study narrative is provided at Exhibit E. The study itself is provided at Exhibit F and marked as Proprietary and Confidential. PrairieWave requests that the study be appropriately protected from disclosure.

<sup>14</sup> 47 C.F.R. § 61.26(e). The ILEC is also Rate Band 8.

ILEC per minute average rate for transport of \$0.034913<sup>15</sup>, for a composite rate of \$0.054241. The composite rate for the incumbent Qwest for all elements is \$0.0066<sup>16</sup>, which is the rate PrairieWave was obliged to charge effective June 20, 2004 pursuant to CLEC Order I<sup>17</sup> and as codified in 47 C.F.R. ¶ 61.26(c). The difference in the cost-based pricing, whether demonstrated by the FLEC study or the NECA tariff, and the arbitrarily selected incumbent benchmark, is staggering.<sup>18</sup> It is also significant that whether viewed from the NECA cost methodology or a FLEC methodology, the cost of providing access services in the rural areas served by PrairieWave is approximately the same.

In CLEC Access Order II, the Commission briefly responded to a petition to allow a CLEC to charge “cost-justified” tariffed access rates,<sup>19</sup> citing ¶ 41 of its CLEC Access Order I. The underlying justification in the paragraph depended in part on the “legal and practical difficulties” when measuring a CLEC’s prices to any objective standard of reasonableness and the regulated and detailed accounting requirements imposed by the Commission on the ILEC which yields “presumptively just and reasonable access rates for the ILEC.”<sup>20</sup> PrairieWave maintains and accounts for its costs in the same manner as an ILEC using the same FCC rules. PrairieWave has endeavored to conduct the appropriate cost studies based on its understanding of and compliance with

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<sup>15</sup> This is derived from an analysis of the NECA monthly rates for Direct Trunk Transport (Facility and Termination) as applied to the average revenue for those elements and the average minutes plus the NECA per minute rates for tandem switched transport.

<sup>16</sup> The composite rate was provided in an email from Qwest in response to a PrairieWave request earlier this year. PrairieWave is entitled to the full benchmark rate as it provides the carrier access to the PrairieWave end user. CLEC Access Order II, ¶¶ 9, 13 and 15.

<sup>17</sup> CLEC Access Order I, ¶ 52.

<sup>18</sup> The stark differences between the cost-based rates and the arbitrary benchmark rate could provide a basis for a constitutional takings claim as discussed in *Verizon v. FCC*, 535 U.S. 467, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002). The FCC is now presented with the consequences of specific rate orders as applied to PrairieWave and at least the federal court’s belief that the FCC would be “more hospitable” to such claims especially where, as discussed in the attached monograph, the reduced rate jeopardizes the financial integrity of PrairieWave. *Id.*, at 523-8 (citations omitted).

<sup>19</sup> CLEC Access Order II, ¶¶ 57-58.

<sup>20</sup> CLEC Access Order I, ¶41 and n. 93.

Commission rules. Contrary to the assertion in the last sentence in ¶ 41 of the Commission's CLEC Access Order I, PrairieWave has no objection to the Commission adopting the same legacy regulatory approach for PrairieWave as it would apply to the competing ILEC.

PrairieWave has no alternative to recovering its legitimate access costs. No rational carrier would ever consider negotiating access prices higher than the Commission benchmark, despite the Commission's discussion to the contrary.<sup>21</sup> PrairieWave seeks not to set access charges arbitrarily; or to cover a substantial portion of its start-up and build-out costs;<sup>22</sup> or to shift its costs unreasonably on to the long distance market. PrairieWave is not a start-up and while it continues to grow its regional, rural market coverage, it recovers its costs through a combination of rates for local and long distance service, add-on services like voice mail and desirable switch-based features, broadband services, and a reasonable contribution from carriers who use the PrairieWave network to get to their customers for competing and additional value-added services.

PrairieWave has done the appropriate cost analysis and provided the necessary cost studies. PrairieWave is not aware that any other similarly situated, rural CLEC has provided evidence to the Commission of what a cost-based access rate is. PrairieWave is unique, and provides the Commission with a unique opportunity to allow appropriate and reasonable cost recovery through cost-based rates.

PrairieWave believes that it has presented the Commission with the special circumstances requiring an exception to 47 C.F.R. §§ 61.26(b) and (c) allowing

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<sup>21</sup> *Id.*, ¶¶ 82-7.

<sup>22</sup> *Id.*, ¶¶ 33, 36



PrairieWave to file tariffed access rates consistent with its costs. The specific public interest concerns are discussed, *infra*.

### **RURAL EXEMPTION**

To the extent that the Commission deems it inappropriate to provide a waiver of 47 C.F.R. §§ 61.26(b) and (c) allowing PrairieWave to tariff cost-based access rates, PrairieWave asks that it be allowed to apply NECA tariffed rates as an exception to 47 C.F.R. § 61.26(a)(6) and consistent with 47 C.F.R. § 61.26(e). PrairieWave serves predominantly rural customers in very rural areas of Iowa, Minnesota and South Dakota.<sup>23</sup> South Dakota in particular is a predominantly rural state.

LEC service in Sioux Falls was never in the business plan of the original Irene, South Dakota based cooperative, Dakota Telecommunications Cooperative and its successor Dakota Telecommunications Group, Inc. (“DTG”). Prior to DTG entering the CLEC market in 1997, it did resell long distance services and provide dial-up Internet in Sioux Falls<sup>24</sup> and continues to do so as PrairieWave today. DTG then merged with McLeodUSA Incorporated (“McLeodUSA”), who had placed facilities in and around Sioux Falls, and who was providing LEC services to residences and businesses using a combination of those facilities and the leasing of network elements from the incumbent Qwest. When McLeodUSA sold the PrairieWave operations in 2002, some of those facilities and customers, those that were facilities-based, came to PrairieWave.

The headquarters building in Sioux Falls was built when PrairieWave was a part of McLeodUSA. As is readily apparent from Exhibit A, the Sioux Falls location is a geographic center of PrairieWave’s rural, regional operations. The Sioux Falls building

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<sup>23</sup> See Exhibits A and C, attached hereto.

<sup>24</sup> The addition of the long distance and Internet capability came primarily through the acquisition of existing businesses.

does have a Lucent 5E switch that is owned and operated by McLeodUSA to provide LEC services in the region only for McLeodUSA. PrairieWave utilizes the ILEC's Lucent Class 4/5 switch in Viborg, South Dakota, has its own Lucent 5E Class 4/5 switch in Marshall, Minnesota, and a Lucent DRM in Storm Lake Iowa with Class 4/5 capability.<sup>25</sup> The Viborg switch serves the Sioux Falls area. PrairieWave has two 10,000 number blocks for Sioux Falls (605-965-xxxx and 605-306-xxxx).

The DTG/PrairieWave business plan, as described *supra*, was and is to place its own facilities in the rural community to provide telephone, cable TV, and high-speed data and Internet services to consumers in those communities. PrairieWave does this primarily by bringing fiber optic technology to the neighborhood and then both copper and coaxial facilities to the residence or business. PrairieWave is completing its Watertown construction (about 93% complete) but is two years behind schedule. Sioux Falls was and is too large a community and too large a financial commitment to be considered by PrairieWave as a legitimate target for its business plan in the same manner as its other rural communities.

However, in the past two years Sioux Falls has begun to expand its corporate boundaries south and west in the direction of PrairieWave operations and facilities in the Tea and Harrisburg areas. To protect its investment and to allow PrairieWave to provide cable TV services in areas to be annexed, PrairieWave approached Sioux Falls to request a limited cable TV franchise area for areas where it already had backbone facilities. Reacting to political pressure from the incumbent cable provider, Midcontinent Communications ("Midco"), and what attorneys for the city determined to be "level

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<sup>25</sup> See Exhibit A for rural locations, Exhibit B for the LERG data, and Exhibit C for the size of the three communities.

playing field” commitments made by the city to Midco,<sup>26</sup> the city initially rejected the limited franchise concept<sup>27</sup>. PrairieWave then sought OVS operator certification in the hopes that such status would trump any franchise requirement to build throughout the city.<sup>28</sup> That hope was not realized, and although Sioux Falls has passed an enabling ordinance and PrairieWave and the city have negotiated a draft OVS license, PrairieWave has not signed the license and continues its efforts to eliminate the build-out requirement. Thus any current effort to provide service in Sioux Falls is stymied, but not dead, and efforts and planning to provide competitive telephone, cable TV and Internet services in limited areas of Sioux Falls continue.

Be that as it may, PrairieWave does not believe that the formulation of the rural CLEC definition fairly considered the South Dakota situation or the particular circumstances of a PrairieWave CLEC operation. Unlike the situation in the SouthEast petition for waiver,<sup>29</sup> PrairieWave has no dilemma. PrairieWave provides LEC service to customers in rural South Dakota in and around Sioux Falls. PrairieWave believes that to apply the 50,000 inhabitant cut-off in South Dakota is arbitrary and unnecessary.

The creation of the rural exemption for rural CLECs is based on the conclusion that limiting CLECs to the higher of the benchmark rate or the access rate of the ILEC competitor “could prove rather harsh” for rural CLECs, and the circumstance would

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<sup>26</sup> The commitment in the Midco franchise is the requirement to build anywhere in the city where there is a customer request for service and it is financially feasible to meet that request. Any decision by PrairieWave or Midco not to build as requested can be appealed to the city.

<sup>27</sup> The city later returned to a discussion of a limited franchise for five years

<sup>28</sup> PrairieWave believes that while the *City of Dallas* case (*City of Dallas v. FCC*, 165 F.3d 341 (5<sup>th</sup> Cir. 1999)) preserved Sioux Falls’ franchise authority to protect city rights-of-way, it did not allow a city like Sioux Falls to impose a requirement to provide service to all households within a reasonable time as provided for in 47 U.S.C. 541(a)(4)(A).

<sup>29</sup> *Petition of SouthEast Telephone, Inc. for Waiver of CLEC Access Charge Rules*, CC Docket No. 96-262, Public Notice, DA 04-936 (rel. April 2, 2004) (“SouthEast”). See also, CLEC Access Order II, ¶ 33 and n. 117.

likely arise where a CLEC operates in a rural area served by a price-cap ILEC.<sup>30</sup> Qwest is a price-cap ILEC. The Commission's concern was that tying PrairieWave's access rates to Qwest's could unfairly disadvantage CLEC operations that lack urban operations to subsidize rural operations in the manner that Qwest does.<sup>31</sup>

As the Commission found in ¶ 66 of its CLEC Access Order I, PrairieWave is more likely to deploy better technology and advanced services in rural areas if PrairieWave has the ability to recover the costs of doing so.<sup>32</sup> The Commission also noted that allowing the rural exemption for rural CLECs did not create an implicit subsidy opportunity,<sup>33</sup> and that it had a comfort level in doing so because it would apply to a very small number of rural CLECs and rural access lines.<sup>34</sup> The Commission concluded by pointing out that the exemption was a "transitional" mechanism while the Commission examined the broader questions of inter-carrier compensation.<sup>35</sup>

PrairieWave does not argue with or challenge those conclusions. However the Commission also came to these conclusions and decisions without any real-world evidence or experience as PrairieWave is now able to present – evidence and experience that is applicable solely to PrairieWave providing LEC services in rural areas of rural states, to include Sioux Falls, which is as "urban" as South Dakota gets.<sup>36</sup> The 50,000 limitation, arbitrarily applied to PrairieWave, results in the "harsh consequences" the Commission sought to avoid.

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<sup>30</sup> CLEC Access Order I, ¶ 64.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, ¶ 66.

<sup>33</sup> *Id.*, ¶ 67.

<sup>34</sup> *Id.*, ¶ 68.

<sup>35</sup> *Id.*, ¶ 72.

<sup>36</sup> The relative line density per mile is also telling. As of December 31, 2003, based on data maintained by the staff of the South Dakota Public Utilities Commission, Qwest in South Dakota has an average of 17.59 lines per square mile and the PrairieWave ILEC has 5.89 lines per square mile. Using the same methodology PrairieWave averages 6.67 lines per square mile over its three state service area.

PrairieWave's cost studies take into consideration the Sioux Falls' situation. PrairieWave is not in the position to add significantly to its subscriber base in more urbanized, higher density areas within the corporate boundaries of Sioux Falls in the foreseeable future. While Sioux Falls continues to experience strong economic growth and a steady increase in population (to include the annexing the populations of existing PrairieWave rural service areas), the overall population is still less than 140,000 and PrairieWave realistically has or would seek access to only a small percentage of that population base because of its underlying rural service philosophy and its overall capital constraints. PrairieWave does not have a Comcast as a partner as does Midco, nor does it have the financial wherewithal of a Qwest.

PrairieWave is not a start-up, rural CLEC. After seven years, the company is a mature, competitive provider of services. Its focus and efforts remain in the rural communities. The growth and annexation activities of Sioux Falls have pushed PrairieWave into protecting its existing investment and into considering additional line extensions into limited areas of the city. PrairieWave has experienced stiff political and legal resistance from the incumbent cable services provider who is also providing competitive LEC services through a combination of its own facilities and the lease and resale of Qwest wholesale services. It is frankly inconceivable given the current and even anticipated size of Sioux Falls, that granting a waiver and allowing PrairieWave to qualify for the rural exemption would unfairly subsidize PrairieWave's more rural

operations or violate the Commission's comfort level that only a very small number of companies and access lines qualify for the exemption.<sup>37</sup>

### **PUBLIC INTEREST**

Regardless of which method of relief the Commission deems appropriate, the public interest served is the same. PrairieWave is able to charge for access services in a manner and at a level that properly reflects the cost of providing those services allowing PrairieWave to continue as a viable, fully facility-based competitor of Qwest and Frontier in rural exchanges in three states. The 96 Act and the Commission's implementation of that law seeks to encourage and foster facilities-based competition, especially in rural areas against more urban-focused incumbents such as Qwest and Frontier. Those companies tend to ignore the rural in favor of more urban, more populated, lower cost local service areas. Where PrairieWave is willing and able to demonstrate its cost, the ability of PrairieWave to recover that cost serves the best in the public interest for rural communities.

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<sup>37</sup> See n. 36, *supra*. . There is no practical way PrairieWave will ever amass the densities within Sioux Falls necessary to produce any appreciable subsidies of more rural competitive activities outside of Sioux Falls through access charges.

## CONCLUSION

For the foregoing reasons PrairieWave believes it has met its burden qualifying it for a waiver of the Commission's rules governing access charge reform for CLECs. PrairieWave respectfully requests that the Commission either review and approve the cost study provided with this filing and allow PrairieWave to tariff the access charges supported by the study, or allow PrairieWave to qualify for the rural exemption and tariff the appropriate rates set by NECA.

Respectfully submitted,

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