

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

**IN THE MATTER OF PETITION FOR ARBITRATION)
OF AN INTERCONNECTION AGREEMENT BETWEEN) TC21-124
MIDCONTINENT COMMUNICATIONS AND)
JAMES VALLEY COOPERATIVE TELEPHONE)
COMPANY)**

**JAMES VALLEY COOPERATIVE TELEPHONE COMPANY and SOUTH DAKOTA
TELEPHONE ASSOCIATION JOINT BRIEF ON BIFURCATED ISSUE**

Issue: Is Midcontinent Communications required to obtain a new Certificate of Authority from the SD Public Utilities Commission to provide the services contemplated in the attached Exhibit 1, Proposed Interconnection Agreement?

Preliminary Statement

James Valley Cooperative Telephone Company (“James Valley”) and the South Dakota Telecommunications Association (“SDTA”) hereby submit this Joint Brief in support of their position that Midcontinent Communications (“Midco”) must obtain a Certificate of Authority (“COA”) to provide the services contemplated in the attached Exhibit 1, Proposed Interconnection Agreement (“Agreement” or “Exhibit 1”). Midco’s position that a COA is not required is inconsistent with its prior Stipulations and Commission Orders. Moreover, South Dakota law is clear that no telecommunications company may offer or otherwise provide local exchange service without a COA. Midco’s only assertion on this score is that it is entitled to interconnection as a wholesale provider under FCC’s decision in *Time Warner, Memorandum Opinion and Order*, 22 FCC Rcd 3513 (2007) (“*Time Warner*”). However, as demonstrated below, *Time Warner* expressly preserves the Commission’s authority to require a carrier to obtain a COA. The Commissions’ authority is especially important in this case, as the available evidence indicates that Midco intends to operate in a manner inconsistent with its prior stipulations and Commission Orders and both South Dakota and federal law requiring carriers to

offer services to the public as a prerequisite to engaging the interconnection negotiation and arbitration mechanism under the Telecommunications Act of 1934, as amended, 47 USC §§151 et seq. (the “Act”).

I. Background

On June 3, 2021, Midco requested an interconnection agreement with James Valley “*for the sole purpose of exchanging Local/EAS Traffic and that any exchange of toll traffic will be subject to the appropriate terms and conditions of each Party’s access tariffs.*” Exhibit 1, Paragraph 1.3. Midco requests the local exchange interconnection for purposes of Midco serving the Groton, SD Exchange.

The Groton Exchange is in the James Valley service territory. James Valley is a rural telephone company as defined by 47 USC §153(44). Midco does not have a COA to serve any exchange within the James Valley service territory. James Valley advised Midco it must have a COA, granted pursuant to SDCL 49-31-69, et seq., before Midco can provide service in the Groton Exchange or any other James Valley location. Midco disagreed and as a result, on December 6, 2021, Midco requested the Commission arbitrate the interconnection dispute. On December 29, 2021, the Commission Staff filed a Motion to bifurcate the proceeding to resolve the COA dispute before Commission arbitration of interconnection terms. The agreed to bifurcation and the Motion was granted. SDTA requested intervention which was granted.

In its Petition, Midco argues that wholesaling interconnection service to Midco VOIP (its wholly owned entity) exempts it from Commission regulation. However, neither the law, nor good policy permit Midco to proceed with this scheme. Moreover, Midco’s plan calls into question whether it is acting (a) in good faith based on its prior Stipulations and Commission Orders that require it obtain a COA prior to providing service in rural exchanges in South Dakota

and (b) as a telecommunications company in rendering its service – a threshold requirement to engage the interconnection obligation in §251 of the Act. The Commission should therefore find that Midco must obtain a COA, pursuant to SDCL 49-31-69, before it can offer services in the Groton Exchange and to seek interconnection in the first instance.

II. Midco’s Prior Stipulations and Commission Orders

Midco entered into various Stipulations with SDTA (or its predecessor) in various dockets resulting in Commission Orders that require Midcontinent to obtain an amended Certificate of Authority prior to providing service outside “CenturyLink” service areas. Those dockets include:

TC98-148. In this docket, the Order which granted a Certificate of Authority to Sioux Falls Cable (the predecessor of Midcontinent) incorporated language contained in a Stipulation between, among others, Sioux Falls Cable and the South Dakota Independent Telephone Coalition, Inc. (a predecessor of South Dakota Telecommunications Association, also known as SDTA) stated:

Sioux Falls Cable agrees that if at any time it intends to provide local exchange services in the service area of any “rural telephone company” as defined by federal law, it will make further application to the Commission for a certificate of authority to provide local exchange service under SDCL 49-31-71 prior to providing any such services in compliance with state and federal law on that subject, including 47 USC §214(e)(1) and §253(f).

Neither the Stipulation nor the Order in TC98-148 have been modified, amended or set aside.

TC00-085. In this docket, the Commission issued its Order granting the transfer of Midco Communications Certificate and the Sioux Falls Cable Certificate to Midcontinent

Communications. The Order provided "...the Commission shall authorize Midcontinent Communications to offer its local services in those areas in South Dakota where US WEST Communications Inc. is the incumbent local exchange carrier."

TC17-005. On February 10, 2017, Midcontinent filed an Amended Application for an Amended Certificate of Authority to provide local exchange service in the rural exchange area of Ipswich, SD. In its Amended Application at Paragraph 8, Midcontinent confirmed it only has a Certificate of Authority in the following areas:

Midcontinent Communications is currently certified to provide local exchange and long distance services throughout the state of South Dakota in the CenturyLink service areas, the ITC exchanges of Webster and Waubay, Santel's exchange in Wolsey, Knology's exchanges in Gayville and Lennox, Alliance exchanges in Baltic and Crooks, and the Venture exchanges of Bowdle, Roscoe, Selby, and Java.

Also, in TC17-005, Midcontinent traced the history of its corporate status and Certificate of Authority stating at Paragraph 6 of its Amended Application the following:

The present Midcontinent Communications was originally certificated as MidcoTel in 1982 as a provider of interexchange service in South Dakota. MidcoTel became Midco Communications, and Midco Communications filed for and received a certificate to provide resold local exchange service in South Dakota in 1997 and a facilities based certificate in 1999. Midcontinent Media was the parent company of Midco Communications. Another division of Midcontinent Media was Sioux Falls Cable. Sioux Falls Cable filed for and received a certificate as a local exchange carrier in 1999. In 2000, Sioux Falls Cable and Midco Communications merged to Midcontinent Communications and a new certificate was granted September 2000.¹

¹ In 2000, Sioux Falls Cable and Midco Communications merged to form Midcontinent Communications. In **TC00-085**, the Commission issued its Order granting the transfer of Midco Communications Certificate and the Sioux Falls Cable Certificate to Midcontinent Communications. The Order provided " Further Ordered that the Commission shall authorize Midcontinent Communications to offer its local services in those areas in South Dakota where US WEST Communications Inc. is the incumbent local exchange carrier."

Midcontinent has consistently followed the dictates of the Stipulation and Order in TC98-148 and has made application to the Commission to amend its Certificate of Authority prior to providing local exchange service in rural ILEC areas in these Dockets: TC03-068 Webster, TC04-081 Waubay, TC 05-161 Wolsey, TC07-057 Gayville, TC08-105 Baltic and Crooks, TC12-035 Lennox, TC15-063 Bowdle, Roscoe, Roslyn, Selby and Java, TC17-005 Ipswich.

In its Application to Amend its Certificate of Authority in TC17-005 to provide service in Ipswich, Midco proposed providing the following services in Ipswich:

In the Ipswich exchange Midcontinent will use an Internet Protocol (IP) network from its cable plant to provide primary transport for residential telephone services. In addition to providing local exchange services for commercial and residential customers, Midcontinent also provides intrastate interexchange services for commercial and residential customers and interstate interexchange services for commercial and residential customers, which will be available in Ipswich.

This is the same service Midco proposes to provide in the interconnection agreement with James Valley which provides, among other things, the following:

To allow the parties to “interconnect their facilities and exchange telecommunications traffic” - *ICA page 1*

The parties to physically connect their respective networks at the James Valley central office – *ICA/Interconnect Attachment page 4, Section 3*

The parties provide local number portability, query, routing, and transport services in accordance with rules and regulations as prescribed by the FCC and the guidelines set forth by the North American Numbering Council. – *ICA/Local Number Portability Attachment*

Midcontinent’s request for an Interconnect Agreement with James Valley violates its own Stipulations and Commission Orders which require it to obtain a Certificate of Authority.

III. Under South Dakota Law Midco's Interconnection Request Requires a COA

Under South Dakota law a telecommunication company must obtain a COA before it may “offer or otherwise provide local exchange service in this state.” SDCL 49-31-69 sets forth this requirement:

No telecommunications company may begin the construction of a telecommunications facility intended to provide local exchange service, commence operating a telecommunications facility for the purpose of providing local exchange service, or offer or otherwise provide local exchange service in this state prior to receiving a certificate of authority to provide the service from the commission. A company may not extend an existing telecommunications facility outside its local exchange service area for the purpose of providing local exchange service in a service area in which it is not certified without applying to the commission for authority to do so. Any telecommunications company seeking to amend or alter its authorized local exchange service territory shall apply for an amended certificate of authority. An application for an amended certificate is subject to the same requirements as an application for an initial certificate. The commission has the exclusive authority to grant a certificate of authority.
SDCL 49-31-69 (emphasis added).

Midco requests, through interconnection with James Valley, to provide local exchange services in the Groton Exchange. Therefore, Midco must comply with the statutory requirements of SDCL 49-31-69.

Midco clearly sets forth the purpose of its request in Section 1.3 of the proposed interconnection agreement; that purpose is to exchange Local/EAS Traffic². Midco seeks to interconnect with James Valley for the purpose of originating and/or terminating End User Customer traffic within the James Valley, Groton RLEC Exchange. This type of service is, as a matter of law, defined as local exchange. South Dakota defines “local exchange service” as “the access to and transmission of two-way switched telecommunications service within a local

² “Local/EAS Traffic” is defined in the Agreement as: any call that originates from an End User Customer physically located in one exchange and terminates to an End User Customer physically located in either the same exchange or other mandatory local calling area associated with the originating Customer’s exchange. Glossary of Terms, 2.28.

exchange area.” SDCL 49-31-1(13). Through the interconnection request, Midco seeks access to and transmission of two-way switched service within the Groton Exchange. Specifically, its interconnection request includes, among other details, the following described purposes:

“for the sole purpose of exchanging Local/EAS Traffic and that any exchange of toll traffic will be subject to the appropriate terms and conditions of each Party’s access tariffs.” Exhibit 1, Paragraph 1.3.

To allow the parties to “interconnect their facilities and exchange telecommunications traffic” – Exhibit 1, page 1

The parties to physically connect their respective networks at the James Valley central office – Exhibit 1, Attachment page 4, Section 3

The parties provide local number portability, query, routing, and transport services in accordance with rules and regulations as prescribed by the FCC and the guidelines set forth by the North American Numbering Council. – Exhibit 1, *Number Portability Attachment*

Midco’s only assertion in the record is that it is somehow exempt or excused from SDCL 49-31-69 because of the FCC’s decision in *Time Warner*. However, as demonstrated below, Midco is incorrect; on the contrary, the *Time Warner* decision expressly preserves the Commission’s authority to require a COA.

IV. *Time Warner* Supports, Rather Than Overrules, COA Requirements

Midco's Petition for Arbitration reflects its position that it needs no South Dakota PUC-issued certificate of authority in order to obtain interconnection from James Valley. See Petition for Arbitration at pp 2-3. Midco claims that federal law requires this result, *id.* at p 3, and relies upon the FCC's decision in *Time Warner* for the proposition that, "... the only requirement to obtain interconnection for wholesale service is to be a provider of telecommunications service in in the state." See Letter from J.G. Harrington to James Groft dated July 16th, 2021, attached hereto as Exhibit 2.

But, this is an extravagant and demonstrably incorrect reading of the *Time Warner* decision. *Time Warner* involved a business plan whereby Time Warner Cable (TWC) purchased wholesale interconnection services from third party providers such as MCI and Sprint. *Time Warner* at ¶¶2-3. Unlike the present facts, TWC acted as the retail provider to end users, rather than as Midco does here as the wholesale provider.

In *Time Warner*, TWC's attempt to bypass the rural incumbent LECs (via MCI and Sprint) ran aground where at least two state commissions decided that such CLECs, providing wholesale telecommunication services to other service providers, were not “telecommunications carriers” entitled to Section 251 interconnection under the Federal Act. *Time Warner* at ¶3. In response, TWC sought an FCC declaration that telecommunications carriers are entitled to ILEC interconnection in order to provide wholesale telecommunications services to other service providers. *Id.* at ¶4. The FCC granted TWC's requested ruling by clarifying that wholesale telecommunications carriers may engage in interconnection and traffic exchange with ILECs under section 251 of the act. *Id.* at ¶8.

It is against this background that Midco's claim must be measured regarding an alleged carve-out of this Commission's COA authority. It is plainly evident from the *Time Warner* decision that no such FCC declaration exists. Indeed, if any inference were to be drawn from *Time Warner*, it would auger in favor of this Commission's jurisdiction.

In this respect, the FCC made clear that it was not addressing or opining as to state commission evidentiary determinations “in an arbitration or other proceeding” as to “whether a carrier offers telecommunications service.” *Id.* at ¶14. As a “telecommunications company” is only permitted to obtain COA authority in South Dakota and as a “telecommunications carrier” (which is substantially the same as the parallel COA definition) may only qualify for Section 251

interconnection, Midco's failure to acknowledge this language is striking. Indeed, in defining compliance obligations of wholesale carriers the FCC noted, as an example, state technical requirements. *Id.* at ¶16. The *Time Warner* Order contains a footnote on this point, which turns out to be an ex parte filing on the elements of COA requirements under South Carolina laws. *Id.* at ¶16 n. 45.

In sum, Midco's proffered interpretation of *Time Warner* does not carry the load which *Midco* has placed upon it. Not only does the decision fail to support Midco's position regarding the necessity of state COA authority, but the FCC's discussion of state jurisdiction actually supports the imposition of COA authority here. As discussed below, significant doubts exist as to whether Midco is actually a telecommunications company at all under applicable statutory authority and administrative rules - a question which must be examined in the COA proceeding itself. If this Commission agrees, as it should, that its authority has not been overridden by *Time Warner*, this docket should be held in abeyance until Midco carries its required showing in a threshold COA proceeding.

V. A COA Proceeding is Necessary

Midco may be able to avail itself of §251's requirements as a wholesale provider, but only if it can prove that it is a "telecommunication company" under state law. The record indicates that Midco wholesale will be providing services only to a Midcontinent VOIP entity. As such, it appears that Midco will be acting as a private carrier, and not a common carrier, and may not be entitled to either a COA or interconnection under the Act. SDTA respectfully submits that this creates a threshold issue for the Commission to determine before proceeding with Midco's requested arbitration proceeding.

A telecommunications carrier is, ‘any provider of telecommunications services.’ 47 USC §153(51). The FCC determined that, telecommunications services are intended to “encompass only telecommunications provided on a common carrier basis.” (emphasis added) *Universal Service Order*, 12 FCC Rcd at 9177-8, para 785. A common carrier is one that, “holds himself out to serve indifferently all potential users.” *National Ass’n of Regulatory Utility Com’rs v. FCC*, 533 F.2d 601, 608 (CA10 1976). Under Midco’s business structure, utilizing the proposed interconnection agreement, it intends to exclusively provide services Midco VOIP (and perhaps similar businesses) on individual terms and conditions, rather than “indifferently to all potential users.” As discussed below, this individualized dealing is the hallmark of private carriage, and not the public offering required under South Dakota law.

Midco confirms it would not be on a common carrier basis in its responses to discovery requests, even if it were to offer service to other carriers. Specifically, in response to Interrogatory No. 5, Midco states that it “would enter into negotiations to determine whether it could reach an agreement with [any] service provider.” Responses of Midcontinent Communications to Joint Discovery Requests of James Valley Cooperative Telephone Company and SDTA, Docket No. TC21-124, at p. 3. Individually negotiated contracts are one of the hallmarks of private carriage. *See In the Matter of Norlight, Declaratory Ruling*, 2 FCC Rcd 132, 133-34 (1987). Entering into contracts with sophisticated business entities, and tailoring contracts and services to the special requirements of those entities, are other indicia of private carriage. *Id.*

In light of the forgoing, it is clear that Midco does not intend to operate as a telecommunications common carrier and, accordingly, it is not entitled to interconnection under 47 USC §251.

VI. Public Policy Considerations Support the COA Requirement

While Midco's scheme to avoid state regulation is creative, it is bad public policy. If Midco wants a different set of laws to govern this plan, then it should utilize the legislative process. The creation of internal business relationships for the purpose of regulatory avoidance is not proper and should not be sanctioned by the Commission.

South Dakota's legal process to obtain a COA is neither complicated nor onerous, and has been used frequently by Midco. The process, established and used by the Commission since 1998, contains due process protection for all parties. See SDCL 41-31-69 through 49-31-75 and ARSD 20:10:32:01 through 20:10:32:19. The Commission should follow the process established in law.

Rural local exchange telecommunications companies (such as James Valley) cover approximately 75% of South Dakota's geographic area, consisting of an area of approximately 57,837 square miles. The average customer density, taking into account the entirety of the SDTA member company service areas, is approximately 1.8 subscribers per square mile. In most cases, the RLECs were the first companies to provide basic telephone services to the rural communities that they serve, and they have existed in these areas as the "Carrier of Last Resort" ("COLR") for fifty (50) years or more. Many rural areas are unable to support one provider absent financial support, let alone two providers. SDCL 49-31-73, recognizes the challenges that come with rural service.

South Dakota Administrative rules further describe the process the Commission must engage in prior to granting a COA to a local exchange carrier in a rural area. ARSD 20:10:15:32:15. Most notably, the rules provide a waiver process Midco can use if it believes the rural protections set forth in state law are unnecessary. ARSD 20:10:32:18. Midco's scheme

to avoid regulation by use of its wholly owned unregulated entity (Midco VOICE) is not supported in law and should not be supported from a policy perspective.

The Commission's role to protect consumers is two-fold. First, as discussed above, the Commission has a legal obligation to review an entity desiring to serve in any given area. The Commission has authority to obtain information regarding the prospective service provider and the geographic area it desires to serve. Second, the Commission has authority under Chapter ARSD 20:10:33 to regulate how an entity provides services after it is granted authority to serve. Midco also attempts to escape this Commission's service standards regulation. The Commission should not advance Midco's attempt to void the Commission's role in consumer protection.

VII. Conclusion

Midco should be required to meet its obligations consistent with its prior Stipulations and Commission Orders. Consistent with such Stipulations and Orders, Midco is obligated under SDCL 49-31-69 to apply to the Commission and receive a COA before it can serve in the Groton Exchange located in the James Valley rural service territory. Nothing in the FCC's *Time Warner* decision obviates or otherwise affects this baseline requirement; on the contrary, the FCC's reasoning supports the COA requirement here. Moreover, available evidence suggests that Midco's intended business plans are just the sort of operations the COA requirement was meant to prevent. Good public policy likewise supports the COA requirement here. Accordingly, James Valley and SDTA respectfully submit that the Commission should answer the stipulated question affirmatively:

Yes, Midcontinent Communications is required to obtain a new Certificate of Authority from the SD Public Utilities Commission to provide the services contemplated in the attached Exhibit 1, Proposed Interconnection Agreement.

Dated: February 17, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an original of the Joint Brief on Bifurcated Issues dated February 17, 2022 filed in PUC Docket TC21-124 was served upon the PUC electronically, directed to the attention of:

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Dated this 17 day of February 2022

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