BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

REPLY OF JAMES VALLEY COOPERATIVE TELEPHONE COMPANY TO STAFF'S AND MIDCO'S RESPONSES TO MOTION TO DISMISS

Both Staff and Midco have now responded to James Valley's Motion to Dismiss Midco's petition as untimely. Those responses should be unpersuasive to the Commission for the following reasons.

1. Staff and Midco position that Midco's letters constitute different requests is incorrect. Both letters explicitly requested interconnection.

On June 3, 2021, Midco wrote to James Valley: "The purpose of this letter is to request an interconnection agreement with James Valley Cooperative Telephone Company ("James Valley") for the purpose of *facilities based interconnection, the exchange of traffic, number portability and other customary arrangements in the Groton, South Dakota, exchange*." (Midco Petition, Exhibit 2; emphasis added.) In that language, Midco not only referred to "facilities based interconnection," which could refer to Section 251(c)(2) or 251(a)(1), but it also referred to the duties of Section 251(b)(2), "number portability," along with "other customary arrangements," implicating Sections 251(a), (b), and (c). Midco also specified that it was making the request under Section 251(c). In short, Midco requested interconnection, intended to trigger the time periods, and it referred to the language of several subsections in Section 251 to do so.

Midco also specifically stated its interconnection request was "intended to trigger the time periods for negotiation and arbitration under Section 252 of the Act."

In a June 18, 2021, letter, James Valley responded that Midco first needed a certificate of authority. (Midco Petition, Exhibit 2.)

In a July 16, 2021, letter, Midco counsel J.G. Harrington, then responded to James Valley, stating on page 3 that, "[s]ince the rural exemption covers only Section 251(c) interconnection, ARSD 20:10:32:37 *does not apply to Section 251(a) and (b) interconnection requests like the one made in the June 18 Letter*." (Midco Petition, Exhibit 2; emphasis added.) Clearly, the reference to the "June 18 Letter" is a typo that actually refers to Midco's June 3rd letter; after all, the June 18th letter was James Valley's, and it made no interconnection requests. As such, Mr. Harrington acknowledged that the earlier Midco letter had made "Section 251(a) and 251(b) interconnection requests."

So Midco's June 3rd interconnection request has been variously described – by Midco – as being made under Section 251(a), 251(b), and 251(c). Regardless, Midco was requesting *interconnection*, whatever the statutory basis for it. Thus, Staff and Midco's argument that the request made via the July 16 Letter was a new and different request has been ably countered by Midco itself. Further, Staff and Midco must acknowledge that whatever subsection the Midco letters rely on to begin the time period for negotiation and arbitration, they sought the same end: interconnection with James Valley.

There is no statutory criteria dictating that a request for interconnection must reference a specific subsection under Section 251. And when a request for interconnection is made, Section 252(a)(1) makes clear that the ultimate, binding agreement can disregard "the standards set forth in subsections (b) and (c) of section 251." In other words, it does not matter whether a letter

requesting interconnection refers to 251(a), (b), or (c), because the resulting interconnection agreement can disregard any of them, so long as it suits the parties. *US W. Commc'ns, Inc. v. Minnesota Pub. Utilities Comm'n*, 55 F. Supp. 2d 968, 972 (D. Minn. 1999) ("Once an incumbent LEC receives a request for an interconnection agreement from a new carrier, the parties can negotiate and enter into a voluntary binding agreement without regard to the majority of the standards set forth in § 251 of the Act.") (citing 47 U.S.C. § 252(a)).

Nor does it matter to Section 252(b)(1) whether a letter requesting interconnection refers to 251(a), (b), or (c). Section 252(b)(1) is only concerned that "an incumbent local exchange carrier receives a request for negotiation under this section. . . ." Midco's June 3 letter did just that: "We look forward to negotiating and reaching an acceptable interconnection Agreement with James Valley for the Groton exchange."

The argument that in the June and July letters, Midco made "new and different request[s]" (Staff Response, p. 2.) and that the "July 16 Letter was an independent, distinct request . . ." (Midco Opposition, p. 7) is incorrect.

2. Staff's and Midco's interpretation of Section 252(b)(1) will lead to a procedural quagmire.

Section 252(b)(1) provides a 25-day window within which a party requesting interconnection may petition for arbitration on open issues:

> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Under Staff's and Midco's interpretation of that statute, they advocate for a procedure in which a party requesting interconnection can simply move the 25-day window by sending a new request for interconnection. Such a procedure will lead to greater confusion, not less.

Imagine a revolving door of interconnection requests: a June letter relying on 251(a); then a July letter relying on 251(b); next, August, with 251(c); and in September, back again to 251(a). Four months' time yielding four resets of the time period for negotiation and arbitration, and all for the same goal, interconnection. With such conduct, a requesting company could lock its counterpart into a perpetual period of negotiation and bar the counterpart from ever receiving the benefit of arbitration, a benefit denied because the 25-day window is repeatedly moved out of reach. This absurd result is not what the statute permits. Rather, it permits a company to request interconnection, whatever the rationale, and starts the 135 to 160 day countdown to the time arbitration may be requested. If the 160th day passes with no petition for arbitration, then the request is dead.

And none of this changes the 9-month deadline that Section 252(b)(4)(C) places on the Commission. That statute mandates:

> The State commission . . . shall conclude the resolution of any unresolved issues *not later than 9 months after the date on which the local exchange carrier received the request under this section*.

(Emphasis added.)

Under Staff and Midco's moving-window interpretation of Section 252(b)(1) – that a requesting party can repeatedly move the 25-day window – a situation could arise in which the 9-month deadline for the Commission to resolve all issues has passed, but the 25-day window in which a party may petition for arbitration is never reached. Again, this is an absurd application of the statute.

A more reasonable procedure is that once a request for interconnection is made the 25-day window is set and cannot be moved, or at least not moved without approval of all parties or the Commission This procedure comports with the Section 252(b)(1)'s language, which says

nothing about being able to move the window, and it avoids the quagmire the Commission would face under its obligation to wrap up an interconnection request within 9 months.

3. The procedural deficiency of Midco's June 3 letter has no bearing on whether Midco requested interconnection therein.

Staff and Midco argue that James Valley cannot at the same time claim the June 3 letter was "procedurally deficient" and that it triggered the applicable timeline. Staff and Midco misstate James Valley's position. James Valley's conviction about the procedural deficiencies of Midco's letters has nothing to do with whether those letters contained requests for interconnection, which James Valley has never denied and James Valley's characterization of the request as "procedurally deficient" does not change that fact.

And here, Midco argues a point similar to Staff's position. Midco believes that because James Valley considered the June 3 letter deficient, James Valley cannot, at the same time, claim that it started the clock running. Midco explained that, "If the June 3 Letter was not a valid interconnection request, it could not have started the arbitration clock." (Midco Opposition, p. 5.) Midco's argument is self-defeating for three reasons.

First, Midco through its experienced regulatory counsel J. G. Harrington in his July 16, 2021, letter rejected James Valley's claim of procedural deficiency. He stated "Your [James Valley's] claim that Midcontinent's request is procedurally defective because it does not comply with ARSD 20:10:32:37 also is incorrect." So, if Staff and Midco are correct that James Valley cannot have it both ways, clearly the same applies to Midco and it cannot on one hand claim the benefit of James Valley's characterization of the June letter as "procedurally defective" and on the other hand take the opposite position. If the June 3 letter was not procedurally deficient as its counsel concedes, then the time clock started.

Second, Harrington's July 16 letter merely reiterated Midco's already-stated position. It was not as a new interconnection request.

Third, even if James Valley considered the July 16 letter to be a second interconnection request, it was also invalid and procedurally deficient because Midco still had no COA in hand. After all, James Valley also responded to Midco's July 16 letter by stating Midco needed a COA as a prerequisite to a proper interconnection request. (Midco Petition, Ex. 2, James Valley letter of August 6, 2021.) Therefore, relying on Midco's logical premise (that if James Valley considers the request invalid, it cannot have started the arbitration clock), the July 16 letter no more started the arbitration clock than did the June 3 letter, and thus Midco's Petition for Arbitration is not timely because the clock has not started on the July 16 request.

4. Midco's estoppel argument misses the main issue.

On pages 5 and 6 of its Opposition Brief, Midco argues that it relied on James Valley's assertion that the June 3 interconnection request was invalid, and so "changed its position by sending a new request . . . ." But that does not change the main issue, which is whether, under the statutory language of 252(b)(1), the arbitration clock began running with Midco's June 3 letter. Whether the clock started on June 3 is a matter of law, not of fact, and Midco's alleged reliance on James Valley's factual conduct has nothing to do with it.

4. Commission Declination of James Valley's Petition for Declaratory Ruling and Midco's October 11, 2021, Letter.

Midco claims that James Valley's failure to respond to its October 21, 2021, letter is an indication that it had no "objection to Midco characterizing the July 16 letter as the underlying request for interconnection." (Midco Opp. 7). Midco's characterization misses the mark. Its October 11 letter was in response to the Commission's September 29, 2021, email to the parties

which advised them it declined to accept James Valley's Petition for Declaratory Ruling on the issue of a Certificate of Authority. That email stated:

> Moreover, ARSD 20:10:32:38, provides relief better suited to the situation than a declaratory ruling. Once Midco provides the commission notice of the request, within ten days of receiving the request, James Valley shall inform Midco and the commission if James Valley is disputing whether the request is a bona fide request. If James Valley disputes that the request is bona fide, the commission shall determine if the request is a bona fide request. If James Valley does not dispute that the request is a bona fide request, the commission shall initiate a proceeding to determine if the rural telephone company shall comply with the request unless the rural telephone company receiving the request waives its exemption.
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> Upon receiving Midco's notice, a filing, seeking determination of an interconnection request pursuant to ARSD 20:10:32:38, is the recommended and ideal vehicle for determining the specific issue presented in the declaratory ruling petition. That process, as outlined in rule, will provide an answer to the inquiry: whether a COA is required prior to a bona fide request. To date, the commission has not received any notice from Midco.

James Valley did not respond because it agreed with the procedure set out in the email, which by not responding, would result in the Commission initiating a proceeding to determine if "a COA is required prior to a bona fide request". This was the issue James Valley sought to be determined in its Petition for Declaratory Ruling.

4. Conclusion.

Because of the foregoing problems with Staff and Midco's arguments, their responses to James Valley's motion to dismiss should be unpersuasive to the Commission. James Valley respectfully urges the Commission to grant the Motion to Dismiss.

Dated: December 30, 2021.

Bantz, Gosch & Cremer, L.L.C

/s/Josh Wurgler

Josh Wurgler, Esq.
305 Sixth Avenue SE; P.O. Box 970
Aberdeen, SD 57402
Tel: (605) 789-7777
jwurgler@bantzlaw.com

CERTIFICATE OF SERVICE

I hereby certify that an original of the foregoing REPLY OF JAMES VALLEY COOPERATIVE TELEPHONE COMPANY TO STAFF'S AND MIDCO'S RESPONSES TO MOTION TO DISMISS, dated December 30, 2021, filed in PUC Docket TC21-124 was served upon the PUC electronically, directed to the attention of:

Ms. Patty Van Gerpen, Executive Director
South Dakota Public Utilities Commission
patty.vangerpen@state.sd.us

A copy was also sent by e-mail to each of the following individuals:

Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
kristen.edwards@state.sd.us

Brittany Mehlhaff
Staff Analyst
South Dakota Public Utilities Commission
brittany.mehlhaff@state.sd.us

Andrea Livingston
Regulatory Reporting Manager
Midcontinent Communications
andrea.livingston@midco.com

Patrick J. Mastel
Vice President and General Counsel
Midcontinent Communications
pat.mastel@midco.com

J.G. Harrington - Cooley LLP
jgharrington@cooley.com

Kara Semmler
SDTA General Counsel
karasemmler@sdtaonline.com

Dated: December 30, 2021.

Bantz, Gosch & Cremer, L.L.C

/s/Josh Wurgler
Josh Wurgler, Esq.
305 Sixth Avenue SE; P.O. Box 970
Aberdeen, SD 57402
Tel: (605) 789-7777
jwurgler@bantzlaw.com