

**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’S RESPONSE TO  
MIDCONTINENT COMMUNICATIONS’ MOTION TO STRIKE**

James Valley Cooperative Telephone Company (“James Valley”) herby submits its Response to Midcontinent Communications’ (“Midco”) Motion to Strike.

Midco’s motion to strike should be denied for two reasons. First, a motion to strike may be used against pleadings, not against filings like James Valley’s *Reply to Midco’s List of Disputed Issues* (the “Reply”).

Second, Midco argues that James Valley raised new issues in its Reply, so it should be struck. There are terminal problems with Midco’s idea. The scheduling order did not require James Valley to raise disputed *issues* along with detailed explanations. It only required James Valley to identify the disputed *provisions* in the interconnect agreement, which James Valley did. Midco then filed its Response listing what Midco considered to be the remaining issues. James Valley then replied to Midco’s characterization of the issues. James Valley raised no new disputed provisions. Next, Midco was aware of James Valley’s position on the issues it claims to have been blindsided by in the Reply.

**Brief Procedural History**

- March 31, 2022: *Order Establishing Procedural Schedule*, including these deadlines:
  - James Valley List of Disputed Agreement Provisions Due, April 11, 2022
  - Midco Response to James Valley, April 19, 2022

- April 11, 2022: James Valley filed its *Disputed Provisions in Interconnect Agreement With Midcontinent Communications*
- April 19, 2022: Midco filed its *Response to James Valley's List of Disputed Issues*
- April 25, 2022: James Valley filed its *Reply to Midco's List of Disputed Issues*

**I. A motion to strike is not available to Midco because the Reply is not a pleading.**

Midco's first argument for striking is that the Reply is an "unauthorized pleading." Midco cited no law discussing which pleadings are "unauthorized." Regardless, the Reply is not a pleading under the civil procedure rules.<sup>1</sup> Motions to strike are controlled by SDCL 15-6-12(f). A motion to strike may only be used against pleadings: "Upon motion made by a party . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." SDCL 15-6-12(f). Because the Reply is not a pleading, the Commission should not strike it.

The South Dakota Supreme Court considered a similar situation in *Flugge v. Flugge*, where it interpreted SDCL 15-6-12(f). There, one party moved to strike the other party's motion for summary judgment, and the Court noted that "SDCL 15-6-12, by its terms does not provide grounds for striking Barbara's motion for summary judgment." 2004 S.D. 76, ¶ 28, 681 N.W.2d 837, 844. "A motion for summary judgment is not a pleading." *Id.*, 2004 S.D. 76, ¶ 28, 681 N.W.2d at 845. The Court also affirmed the trial court's denial of the motion to strike because the motion did not identify any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" as required by SDCL 15-6-12(f). *Id.*

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<sup>1</sup> SDCL 15-6-7(a) defines what are considered pleadings: "There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of § 15-6-14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer." The list does not include replies to disputed issues.

The same should apply here. The Reply is not a pleading, and Midco does not argue that the Reply raises an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Rather, Midco's only support for its argument is that the "schedule does not include any provision for a reply to Midco's response to James Valley's disputed issues list." Midco is correct: the scheduling order is silent on the matter and so did not forbid James Valley from filing a reply about the remaining disputed issues.

Further, filing the Reply was necessary in this situation. Replies are standard practice when parties are presenting their positions on a matter. If a reply will assist a tribunal with understanding the parties' positions, it should be welcome. Because Midco filed its characterization of the outstanding issues without any input from James Valley, James Valley filed its reply to clarify its position. James Valley believed that the best way to highlight the interconnect negotiations was to file the redline version of the interconnect agreement so the Commission can see exactly what the parties are thinking. If it is useful to the Commission, good. If not, then the Commission can disregard it. Either way, Midco's motion should be denied.

**II. James Valley's Reply did not raise any new disputed provisions or any new issues.**

Midco moves to strike James Valley's Reply claiming that James Valley improperly raised new *issues* in its Reply. With respect to Midco, Midco misunderstands the scheduling order.

**A. James Valley complied with the scheduling order by filing its disputed provisions.**

The scheduling order required James Valley to identify its disputed *provisions*, nothing more. James Valley was not required to specifically identify any issues that must be decided by the Commission. On April 11, 2022, James Valley identified the provisions that the parties

disputed as of that date. The scheduling order did not require detailed explanations why the provisions were disputed and what language the parties preferred. Midco then filed its Response with a list of issues that it alone composed. There Midco described the issues without any input from James Valley on the language. James Valley disagreed with Midco's characterization of the issues, so James Valley was justified in filing a reply so as not to be charged with waiving its position. Its Reply raised no new disputed *provisions*. Midco argues James Valley raised new *issues* (they really are not new as described below), but it was Midco that unilaterally composed a list of issues on April 19, 2022, in its Response to James Valley.

**B. Midco was aware of James Valley's position on the issues before filing its Response.**

Midco stated in its Response that it had developed its issues list and descriptions of the same “[f]ollowing review of the Disputed Issues List and correspondence between the parties . . . .” If Midco reviewed the correspondence between the parties, it must have reviewed James Valley's April 15, 2022, email<sup>2</sup> to Midco in which James Valley sent its comments in another iteration of the redlined interconnect agreement. There, James Valley specifically noted that,

JVT rejects Midco's use of this Agreement to provide wholesale internet services to other providers unless the other providers obtain a COA. If this agreement is revised to include that requirement, this section would be appropriate.<sup>3</sup>

Despite James Valley's clear position, Midco took license to state in its Response that Issue No. 3 is “Whether Midco would be permitted to provide wholesale services under the agreement.” So as not to waive the issue, James Valley filed its Reply to state its position. For the same reason, James Valley replied to Midco's unilateral statement of Issue No. 2.

Midco now complains that James Valley did not like Midco's one-sided characterization

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<sup>2</sup> A copy of James Valley's April 15, 2022, email with redlined interconnect is attached hereto as Exhibit 1.

<sup>3</sup> See Exhibit 1, James Valley's comment to *General Terms and Conditions*, Sections 16, 22.2.2, etc.

of the issues. Midco did not have the right to speak for James Valley, so James Valley was justified in filing its Reply. Striking the Reply would be inappropriate under these circumstances.

**Conclusion**

Midco's motion to strike should be denied. Midco cannot seek to strike James Valley's Reply because the Reply is not a pleading. Midco's motion should also be denied because Midco's arguments are based on a misreading of the scheduling order, which only required James Valley to present its disputed provisions, not its disputed issues. Further, Midco has suffered no surprise about James Valley's position because James Valley made it clear in the redlined interconnect agreement that the parties have been exchanging.

Dated: May 11, 2022.

**Bantz, Gosch & Cremer, L.L.C**

*/s/ Josh Wurgler*

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**CERTIFICATE OF SERVICE**

I hereby certify that an original of the JAMES VALLEY COOPERATIVE TELEPHONE COMPANY’S RESPONSE TO MIDCONTINENT COMMUNICATIONS’ MOTION TO STRIKE and 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  
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A copy was also sent by e-mail to each of the following individuals:

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Dated: May 11, 2022.

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