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**

JAMES VALLEY COOPERATIVE TELEPHONE COMPANY AND SOUTH DAKOTA TELEPHONE ASSOCIATION JOINT REPLY 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?*

Answer: *Yes. Midcontinent Communications is not exempt or otherwise excused from SD law and therefore must comply with SDTA 49-31-69. Midcontinent Communications must obtain a Certificate of Authority before providing the services contemplated in the attached Exhibit 1.*

James Valley Cooperative Telephone Company ("James Valley") and the South Dakota Telecommunications Association ("SDTA") (jointly referred to as "Rural Providers") hereby submits this joint response to the briefs submitted by Midcontinent Communications ("Midco") and the Commission Staff ("Staff"). The Rural Providers maintain their position that a Certificate of Authority ("COA") from the SD Public Utilities Commission ("Commission") is necessary to provide services contemplated in the attached Exhibit 1, Proposed Interconnection Agreement ("Agreement" or "Exhibit 1").

As a preliminary matter, the Rural Providers recognize the difficulty in analyzing the noticed question in a vacuum. The business Midco seeks to establish in South Dakota raises various legal and fact-based questions. However, the parties agreed on *the question* to brief in this proceeding. Despite that agreement, Midco raised a different question and focused its argument on whether a COA is necessary *before negotiation of an interconnection agreement*. The timing issue is not the noticed question. The decision Midco requests the Commission make

falls outside the scope of this narrow proceeding[1]. The Rural Providers urges the Commission to narrowly focus its ruling so as not to impact the other disputed issues of fact or law.

The Initial Brief of Midco[2] describes a remarkable attempt to circumvent the Commission's COA rules governing competition in rural companies' local exchange areas – in this case, James Valley. At a high level, Midco has structured a network plan in which it will resell local exchange interconnection obtained from James Valley to its voice over internet protocol ("VoIP") affiliate, Midco Voice, LLC ("Midco Voice"). [3]In its Initial Brief, Midco argues that Midco Voice is unregulated as a matter of law and that Midco itself is beyond the realm of this Commission's COA authority. Midco Initial Brief at p. 4. Midco attempts to advance a scheme whereby none of its offerings to South Dakota's rural consumers pursuant to this plan will be subject to the common carrier protections contained in the COA rules, nor those that apply with particular emphasis to rural telephone company customers. *See,* ARSD §§20:10:32 et seq.

The fulcrum of Midco's inconsistent argument is its contention that it is a "telecommunications carrier" for purposes of satisfying Section 251(a) of the Communications Act of 1934, as amended (the "Act")[4] and its related negotiation and arbitration provisions, but

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[1] Page 12 of Midco's Brief, Section IV. Midco requests the Commission hold, *"Midco need not obtain a new or amended certificate before interconnecting with James Valley."* Midco's requested Commission holding does not answer the noticed question.

[2] Initial Brief of Midcontinent Communications on Bifurcated Issue, filed Feb. 17, 2022 ("Midco Initial Brief").

[3] Remarkably, even though Midco concedes it will use its wholly owned subsidiary to implement its scheme to avoid the COA it argues that because "[Midco Voice] is distinct from Midco" that corporate structure absolves it from the COA requirement. However, Midco's use of this corporate structure should be disregarded, given no legal effect and not absolve it from complying with the requirement to obtain a COA. ("Some of these factors …that may result in a disregard of the corporate entity …include …use of the corporation to promote … illegality") *Curtis v. Vlotho*, 313 N.W.2d 469, 472 (S.D. 1981). ("Under federal law, state law doctrines of corporate autonomy may be disregarded when the corporate form is being used to defeat the ends of federal law") *Hansen v. Huston*, 841 F.2d 862, 864 (8th Cir.1988).

[4] 47 USC 251(a).

not a "telecommunications company" obligated to obtain a COA before construction, operation, or provision of exchange telephone service under SDCL 49-31-69. *See*, James Valley Cooperative Telephone Company and South Dakota Telephone Association Joint Brief on Bifurcated Issue, filed Feb. 22 at pp. 6-7 ("James Valley/SDTA Initial Brief"). As might be anticipated, most of Midco's brief amounts to a needle threading exercise to show why Section 251(a) applies but COA requirements do not.

I. Midco is Either a Telecommunications Company Requiring a COA, or Is Not Entitled to Interconnection

Midco's specific arguments as to why it is exempt from COA requirements constitute a veritable grab bag of arguments, ranging from allegations that Midco is providing its affiliate "interconnection services" that are not "local exchange services," to allegations that any law requiring a COA would be preempted by Federal Communications Commission ("FCC") precedent, to allegations that its other COAs and federal authorizations allow Midco broad authority to provide service within the state of South Dakota. Midco Initial Brief at pp. 4-9. It also offers inapt comparisons to several other services. *Id.* As discussed following, these arguments, at most, illustrate the length to which Midco seeks to avoid regulation and run from the COA requirement. None of the arguments made by Midco are legally correct nor indeed, in the main, relevant. Midco's arguments against any COA requirement are discussed first; the case for affirmatively requiring such a COA application from Midco is discussed next. It claims to provide interconnection service. However, the FCC has discussed this in the context of "wholesale local exchange service." *See* p. 6, infra.

II. Midco is a Telecommunications Company Seeking to Provide Local Exchange Service.

Midco seeks to put distance between its current plan to interconnect with James Valley and the actual South Dakota statute governing COA status, SDCL 49-31-69. In pertinent part, this statutory section requires that a "telecommunications company" possess a COA before offering or "otherwise providing local exchange service" in this state. Midco claims that it is not offering "local exchange service" requiring a COA, but rather that it intends to offer "interconnection services," which, it argues, does not require a COA. Midco Initial Brief at pp. 6-7. Midco also makes a summary conclusion that two intrastate authorizations and two interstate authorizations give it status as a provider of "competitive telecommunication services." *Id.* In other words, Midco wants the Commission to believe that its "telecommunications status" in South Dakota is good enough for its Section 251(a) interconnection and arbitration request. However, Midco does not want the Commission to find that same "telecommunications status" requires it to get a COA.

None of this hair splitting is persuasive or credible. "Interconnection service," rather than local exchange service is what Midco claims it will provide in the James Valley service area. Although the invented term, "interconnection service" is creative, it is not recognized in South Dakota law as an exemption to Commission regulation. And indeed, Midco's brief offers no authority of any kind on this point. On the other hand, the existing statutory framework captures the services Midco seeks to provide. Rather than attempt to assign meaning to invented words, the Commission should simply look to the words contained in South Dakota law and within the proposed Interconnection Agreement, Exhibit 1.

First, Midco is a telecommunications company. South Dakota law defines a "telecommunications company," as:

> any person or municipal corporation owning, operating, reselling, managing, or controlling in whole or in part, any telecommunications line, system, or exchange in this state, directly or indirectly, for public use. For purposes of this definition the term, for public use, means for the use of the public in general or for a specific segment of the public, or which connects to the public in general or for a specific segment of the public, or which connects to the public switched network for access to any telecommunications service. (Emphasis supplied). SDCL 49-31-1(28).

Next, Midco seeks to provide local exchange service. Local exchange service is the "access to and transmission of two-way switched telecommunication service." SDCL 49-31-1(38). Midco must have access to "two-way switched telecommunication services" to provide local number porting in the James Valley Exchange. Midco's attempt to deny this need is most concerning given a stated purpose of the proposed interconnection agreement is, "for the sole purpose of exchanging Local/EAS Traffic…" Exhibit 1, paragraph 1.3. Midco's purpose for interconnection is to offer local exchange service to residents in the James Valley Exchange.

When looking to South Dakota law, it is clear Midco is a "telecommunications company" and seeks to provide "local exchange service" and falls under Commission regulation.

III. Midco is not certified to provide local services in the James Valley Exchange

Midco's claim that it is already a telecommunication carrier by virtue of South Dakota and FCC authorizations is not a valid argument for jettisoning this Commission's COA authority here. In this respect, Midco cites its South Dakota COA authorization to provide "interexchange service" and FCC authorizations for domestic and international long-distance service. Midco Initial Brief at pp. 2-3. It claims, "… like the South Dakota interchange service COA, these federal authorizations permit Midco to provide service anywhere within the state." *Id.* However, nothing could be further from the truth. Midco is not certified to provide local exchange services in the James Valley rural exchange territory.

The record is replete with PUC orders granting Midco and its predecessors amended COAs to provide local exchange service in various South Dakota rural telephone markets.[5] *See*, Midco Initial Brief at 2, fn. 4; James Valley/SDTA Initial Brief at pp. 3-5. Almost all the referenced COA orders rely upon statutory sections applicable to telecommunications companies and/or telecommunications services in the context of COA requirements. *See*, SDCL 49-31-3; 49-31-69. All Certificates that Midco holds in South Dakota outside of a Century Link territory are the result of a stipulation between Midco and an individual rural carrier. The impact of the various stipulations and Orders does not extend beyond a particular service area within the impacted rural provider's territory.

It seems Midco's proposition is that these prior orders confer telecommunication status upon it now so that it may qualify for the provisions of Section 251(a) – while not being subject to the statutory COA requirements which apply to telecommunications companies. The lack of an explicit exposition of this theory is understandable, as there is no basis in the suggestion that the COA statutory requirement has been supplanted. COA for interexchange service cannot be the basis for authority to provide local exchange service.

Midco also states that its federal authorizations permit Midco to provide service anywhere within the state. Midco Initial Brief at p 3. Midco refers to its domestic Section 214 authorization for transfer of control transactions and its international Section 214 authorization in a footnote, *id.* at fn. 5; however, it provides no discussion or explanation or argument as to how the authorizations have any relevance to this Commission's COA authority. In fact, federal law dictates the FCC cannot assert jurisdiction over purely intrastate communications such as these.

[5] Although an interconnection agreement was negotiated (TC21-102) Midco currently does not have a COA to provide services in the Brandon Exchange. Service in the Brandon exchange absent a COA is a violation of SDCL 49-31-69.

See, *e.g.*, 47 USC 152(b)(1) (expressly excluding FCC authority over charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier).

Finally, Midco argues that it is subject to disparate treatment if it is required to obtain a COA because wireless providers have obtained PUC-approved interconnection agreements without having a COA issued, and also that extended area service ("EAS") arrangements exist between ILECs (evidently without specific EAS-related COAs). According to Midco, this proves that South Dakota code cannot be read to require Midco to obtain a COA here. Midco Initial Brief at p.7, fn 25. These contentions are meritless. First, as to Midco's argument that it is not required to obtain a COA because wireless carriers allegedly obtained interconnection without one, Midco appears to have overlooked Section 332(a)(3) of the Act, which preempts state entry regulation for both commercial mobile service (such as Western Wireless) and private mobile service. As Midco has thus far not labeled itself as a "commercial mobile radio service," like a conventional cellular carrier, its argument about the COA status of these companies is irrelevant.

Midco's argument concerning EAS routes similarly is invalid. EAS is not local exchange service; rather, it is a toll route, historically between rural ILECs, that is either offered at a reduced charge, or no charge, and typically approved by the state regulatory commission. *See*, Newton, H., & Newton, H. (2000) *Newton's telecom dictionary*, at p. 496. Such service is irrelevant to the legal question as to whether Midco is subject to COA requirements here.

IV. Midco Is Not Entitled to Interconnection Under Federal Law If It Is Not a Telecommunications Carrier Under South Dakota Law

The final argument advanced by Midco is that federal law compels both arbitration and interconnection with James Valley even if Midco is not a telecommunications carrier under South Dakota law. Midco Initial Brief at pp. 10-12. To press this argument, Midco is forced to render an inaccurate account of FCC decisions in *Time Warner* and *CRC Communications of Maine, Inc.* [6]

Neither of these decisions held that states are unable to determine the telecommunications company status of companies like Midco. Instead, the FCC only clarified that wholesale carriers providing service to last mile providers were entitled to proceed under the interconnection provisions of the federal act. Neither decision prohibited state certification proceedings to determine whether a company offers telecommunications service in the first instance. James Valley and SDTA stand upon their arguments in their initial brief and incorporate them by reference here. *See*, James Valley/SDTA Initial Brief at pp. 7-9. The short of it is, this Commission's COA authority is intact, and *Time Warner* and *CRC Communications* provide only that Midco may not be disqualified from requesting interconnection and arbitration merely because it provides telecommunication services at wholesale.

Midco suggests that this Commission "would be preempted …" by the FCC were a COA requirement applied to Midco. The leading Authority on FCC preemption of state authority under Title II of the Act is *Louisiana Public Service Commission v. FCC*. 476 US 355 (1986). There, the Supreme Court reversed an FCC order attempting to prescribe intrastate depreciation

[6] *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007); *CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, Declaratory Ruling, 26 FCC Rcd 8259 (2011).

rates for larger incumbent carriers fully subject to Title II. The Supreme Court found that the FCC had overstepped its jurisdictional boundaries given the express jurisdictional limitations on FCC power contained in Section 152(b) of the Act, discussed earlier here. The Court held as follows: "by its terms, this provision fences off from FCC reach or regulation intrastate matters - indeed, including matters in connection with intrastate service." 476 US 355 at 370.

Midco's argument omits any discussion of these provisions preserving public utility commission jurisdiction, which is particularly noteworthy given Midco's failure to acknowledge the FCC's recognition of state evidentiary determinations as to whether carriers in fact offer "telecommunication services" for purposes of Section 251 interconnection. *See, Time Warner* at ¶14. In sum, there are no holes through which Midco can slip in either South Dakota law or in federal law. The Commission's COA authority is intact and Midco must prove its status as a telecommunications company before it can obtain interconnection.

V. Conclusion

Midco seeks local exchange interconnection, and it did not provide the Commission with legal authority necessary for it to waive or otherwise ignore SDCL 49-31-69. The state law must be followed. In following that law, Midco must apply to the Commission and receive for a COA before it can serve in the Groton Exchange located in the James Valley rural service territory. *Time Warner*, although relevant for purposes of determining whether a telecommunications company is entitled to 47 USC §251 interconnection, has nothing to do with South Dakota's telecommunications certification process. The FCC does not have jurisdiction over intrastate service and cannot therefore preempt state regulation of the same. SDCL 49-31-69 pertains to intrastate service.

Midco focuses on the wrong issue and therefore its arguments are misplaced and not helpful regarding the question noticed for Commission decision. Midco, in its initial brief, focus on the interconnection process and whether state certification plays any role in that process. That is not, however, the question. The question does not contemplate the procedural order of things. Rather, it seeks a yes or no answer regarding whether a COA is required to provide the services as described in Exhibit 1.

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.

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Respectfully submitted,

Bantz, Gosch & Cremer, L.L.C

By: */s/ Josh Wurgler*
Josh Wurgler
305 Sixth Avenue, SD
P.O. Box 970
Aberdeen, SD 57402
Tel: (605) 789-7777
jwurgler@bantzlaw.com
Attorneys for James Valley Cooperative Telephone Company

SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION

By: */s/ Kara Semmler*
Kara Semmler, General Counsel
South Dakota Telecommunications Association
320 East Capitol Avenue
P.O. Box 57
Pierre, South Dakota 57501-0057
(605) 224-7629
karasemmler@sdtaonline.com

Benjamin H. Dickens, Jr., Of Counsel
Salvatore Taillefer, Jr., Of Counsel
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
2120 L Street NW STE 300
Washington, DC 20037
(202) 659-0830
bhd@bloostonlaw.com