

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

In the Matter of)
)
Petition for Arbitration of an Interconnection) Docket No. TC21-124
Agreement Between Midcontinent)
Communications and James Valley)
Cooperative Telephone Company)
)

INITIAL BRIEF OF MIDCONTINENT COMMUNICATIONS ON BIFURCATED ISSUE

Midcontinent Communications (“Midco”) hereby submits its initial brief on the bifurcated issue in the above-referenced proceeding.¹

As indicated in the January 13, 2022, letter from Kristen Edwards to Patricia Van Gerpen, the bifurcated issue is described as follows:

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?²

For the reasons described below, Midco submits that it is not required to obtain a new Certificate of Authority (“COA”) to provide the interconnection services contemplated in the Proposed Interconnection Agreement, or to obtain interconnection from James Valley Cooperative Telephone Company (“James Valley”).

I. Introduction

This portion of the arbitration proceeding concerns James Valley’s repeated assertion that it is not required to interconnect with Midco because Midco does not hold a COA to provide

¹ See *Order Denying Motion to Dismiss; Order Bifurcating Issue*, Docket TC21-124,

² Letter from Kristen Edwards, Staff Attorney, to Patricia Van Gerpen, South Dakota Public Service Commission, Docket TC21-121, January 13, 2022 (the “Edwards Letter”). Attachment 1 to the Edwards Letter was the proposed interconnection agreement submitted by Midco as part of its petition for arbitration (the “Petition”). See Petition, Exhibit 1.

local exchange service within the James Valley service area.³ James Valley is incorrect for multiple reasons. Under both South Dakota law and the plain text of the federal Communications Act interconnection is available to any provider of telecommunications services in South Dakota. Moreover, the interconnection services that Midco plans to provide in the James Valley service area are not local exchange services. Thus, a local exchange COA is not required to provide interconnection services or to obtain interconnection from a local exchange carrier. Further, the FCC has held on two separate occasions that any telecommunications carrier within a state can obtain interconnection under Section 251(a) of the Communications Act. Thus, even if South Dakota law could be read to require a local exchange certificate, that law would be preempted. Since Midco holds multiple authorizations to provide service in South Dakota, including three authorizations that permit it to provide service anywhere within the state, it has the authority necessary to provide interconnection services in South Dakota.

Midco is a provider of competitive telecommunications services in South Dakota and other states. It has been providing service in South Dakota since the 1980s, and providing local exchange service in South Dakota since the late 1990s. Over its history, Midco has provided both retail and wholesale services, including service to other carriers in South Dakota. It holds COAs to provide intrastate interexchange services throughout the state and to provide local exchange services.⁴ It also holds a domestic Section 214 authorization and an international

³ See, e.g., Response of James Valley to Midcontinent Communications' Petition for Arbitration, Docket TC21-124 (Jan. 3, 2022) at 5-6; James Valley Telecommunications, Petition for Declaratory Ruling to Determine: Whether Midcontinent Communications Must Obtain a Certificate of Authority Before It Seeks Interconnection with James Valley Cooperative Telephone Company, filed Sept. 23, 2021 (the "September 23 Petition"); Petition, Exhibit 2, Letter from James Groft to Andi Livingston, June 18, 2021 (the "Groft June 18 Letter").

⁴ See South Dakota Certificate of Authority described in Docket No. TC96-163 (granting authority to conduct business as a Telecommunications Company in South Dakota); South Dakota Certificates of Authority for local exchange service issued in Docket Nos. TC96-163, TC98-148, TC03-068, TC04-081, TC05-161, TC07-057, TC08-105, TC12-035, TC15-063, TC17-005, and TC18-058 (local exchange service).

Section 214 authorization from the FCC, which permit it to provide interstate and international services throughout the country.⁵ Thus, like the South Dakota interexchange service COA, these federal authorizations permit Midco to provide service anywhere within the state.

Midco Voice, LLC (“Midco Voice”) is a wholly-owned subsidiary of Midco.⁶ Midco Voice was created in 2020 to provide voice over IP services in South Dakota and elsewhere. It is distinct from Midco.⁷ The FCC has granted Midco Voice the independent authority to obtain telephone numbers in its own name as an entity that is separate from Midco.⁸

Midco offers interconnection services on a wholesale basis in South Dakota, and intends make interconnection within James Valley’s territory part of that offering.⁹ Currently, Midco’s only customer is Midco Voice, which has entered into an interconnection services agreement with Midco, but Midco’s interconnection services are available to any company that wishes to purchase them.¹⁰ While the terms of the interconnection services agreement are available to any other provider, providers that do not wish to purchase under the interconnection services agreement can negotiate their own terms if they so desire.

Midco is not proposing to offer retail telecommunications services in James Valley territory, or wholesale local exchange services to end user customers.¹¹ Midco does and will

⁵ See FCC Public Notice, *Domestic Section 214 Authorization Granted*, DA 10-1260 (rel. July 6, 2010) (granting transfer of control of domestic Section 214 authorization held by Midcontinent); FCC Public Notice, *International Authorizations Granted*, DA No. 01-1604 (rel. July 6, 2001) (granting international Section 214 authorization to Midcontinent).

⁶ See Affidavit of Andrea Livingston (the “Livingston Affidavit”), attached hereto as Exhibit 1, (the “Livingston Affidavit”), ¶ 2.

⁷ See *Dakota Fire Ins. Co. v. J&J McNeil, LLC*, 2014 SD 37, 849 N.W.2d 648, 653 (quoting SDCL 47-34A-201 for the proposition that a limited liability company “is a legal entity distinct from its members”).

⁸ See FCC Public Notice, *Notice of Interconnected VoIP Numbering Authorization Granted*, 36 FCC Rcd 9247 (2021) (granting application of Midco Voice for numbering authorization).

⁹ See Livingston Affidavit, ¶ 4.

¹⁰ *Id.*, ¶ 5.

¹¹ *Id.*, ¶ 6.

continue to offer cable service and broadband Internet access service to retail customers. Any voice services provided in James Valley territory will be offered by Midco Voice.¹²

The interconnection model being used by Midco and Midco Voice, where the parent holds a state authorization and provides interconnection services to a subsidiary that offers retail voice over IP services, is commonly employed by cable operators around the country to provide voice over IP services, and is the model adopted by both Comcast and Charter for their voice service businesses. In 2018, the U.S. Court of Appeals for the Eighth Circuit held that voice over IP providers are not subject to state telecommunications regulation as local exchange carriers, effectively ratifying Charter's use of that model in Minnesota.¹³ The Commission has recognized the *Charter* decision and that, as a consequence, it cannot require voice over IP providers to hold COAs.¹⁴

II. There Is No Requirement for Midco to Obtain a New Certificate to Provide Interconnection Services.

As described above, since the time Midco first raised the possibility of obtaining interconnection to James Valley customers, James Valley has argued that it is not obligated to provide interconnection unless Midco holds a certificate to provide local exchange services in James Valley territory.¹⁵ This is incorrect as a matter of law.

¹² *Id.*, ¶ 6.

¹³ *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715 (8th Cir. 2018). As described in the decision, the case arose when “arose “when Charter underwent a corporate reorganization in order to segregate its Voice over Internet Protocol (“VoIP”) services from its regulated wholesale telecommunications services.” *Id.* at 718. The FCC submitted an *amicus curiae* brief in support of Charter's position in that case.

¹⁴ See Comments of Chairman Nelson, Docket TC21-010, May 13, 2021, available at <https://puc.sd.gov/commission/media/2021/puc05132021.mp3> (“The 8th Circuit federal court has made a determination that certain technologies of telephone service, in other words, this interconnected VoIP that we have been talking about are unable to be legally regulated by states.”) (Discussion appears at approximately the 43 minute mark of the recording.)

¹⁵ See *supra* note 3. The one time that James Valley did not assert this claim was when Midco, in response to a request from Commission staff, filed notice that it had requested interconnection from James Valley. Petition, Exhibit 3, Letter of Patrick Mastel, Midco, to the Commission, Oct. 11 2021 (the “October 11 Notice”). Staff had instructed James Valley to “inform Midco and the commission if James Valley is disputing whether the request is a bona fide request” within ten days of Midco's notice, but James Valley did not respond. See Email correspondence

James Valley’s letters and filings all refer to ARSD 20:10:32:02, and claim that holding a local exchange certificate in the area to be served is a predicate to obtaining interconnection.¹⁶ As shown below, James Valley is looking in the wrong place. The governing law does not require a certificate and, in any event, ARSD 20:10:32:02 does not apply to interconnection. This reading of South Dakota law also is consistent with the federal Communications Act.

First, both the Commission’s governing statute and its rules do not require a requesting carrier to provide local exchange service to obtain interconnection. For instance, SDCL 49-31-81 provides in relevant part that

Except to the extent a local exchange carrier is exempt from or has received a suspension or modification pursuant to 47 U.S.C. § 251(f)(1) or 251(f)(2), as of January 1, 1998, and the provisions of this chapter, the carrier shall provide interconnection, network elements, and other telecommunications services to **any provider of competitive telecommunications services** that requests such interconnection and services to the extent required by 47 U.S.C. §§ 251(a) to 251(c), inclusive, as of January 1, 1998. If the parties are unable to voluntarily negotiate an agreement for the interconnection or services requested, either party may petition the commission to mediate or arbitrate any unresolved issues as provided in 47 U.S.C. § 252.¹⁷

It is clear from this language that “any provider of competitive telecommunications services” – not just a local exchange carrier – can request “interconnection, network elements, and other telecommunications services” from a local exchange carrier under Section 251(a) and (b) of the federal Communications Act, and that any requesting carrier can file a petition for arbitration.¹⁸

The Commission’s rules are consistent with this conclusion. Section 20:10:32:20, which addresses requests for interconnection negotiations, describes such requests as coming from “[a]

from Patricia Van Gerpen, Executive Director, Commission, to Josh Wurgler, counsel to James Valley, Sept. 29, 2021. While arguably James Valley’s failure to respond waived its right to raise the bifurcated issue in this arbitration, for the reasons described below James Valley is wrong as a substantive matter as well.

¹⁶ See, e.g., Groft June 18 Letter at 1.

¹⁷ SDCL 49-31-81 (emphasis supplied).

¹⁸ The language concerning Section 251(f) of the Communications Act is not relevant here because Midco’s interconnection request was made under Section 251(a) of the Communications Act.

telecommunications company.”¹⁹ Similarly, Section 20:10:32:29, which addresses petitions for arbitration, states that “any party” to negotiations under SDCL 49-31-81 may request arbitration.²⁰ And none of the other provisions of the Commission’s rules that address any aspect of the process of obtaining an interconnection agreement – negotiation, mediation, arbitration, or approval – mentions any requirement that the party seeking interconnection hold a local exchange authorization.²¹

Thus, under these provisions, the only requirement for requesting interconnection under Sections 251(a) and (b) is that the requesting entity be a provider of competitive telecommunications services. Midco, by virtue of its two intrastate authorizations and two interstate authorizations, plainly qualifies as a provider of competitive telecommunications services.

The text of ARSD 20:10:32:02 is not inconsistent with this conclusion. In fact, it does not mention interconnection at all. Rather, in relevant part, it states that:

A telecommunications company may not provide local exchange service in an area for which it does not have a valid certificate of authority without first obtaining an amended certificate of authority from the commission applicable to the area into which the company proposes to expand.²²

In turn, local exchange service is defined by statute as “the access to and transmission of two-way switched telecommunications service within a local exchange area.”²³ Again, this definition does not mention interconnection.

This is not a mistake: interconnection is not a form of local exchange service. In particular, interconnection is not “two-way switched telecommunications service within a local

¹⁹ ARSD 20:10:32:20.

²⁰ ARSD 20:10:32:29. As noted above, SDCL 49-31-81 permits “any provider of competitive telecommunications services” to request interconnection.

²¹ See ARSD 20:10:32:24-28 (mediation), 29-32 (arbitration), 33-36 (approval of arbitrated agreement).

²² ARSD 20:10:32:02.

²³ SDCL 49-31-1(13).

exchange area.” Instead, interconnection facilitates or enables service providers to offer communications between customers of two carriers. It is not service “within” a local exchange area, but service to and from that local exchange area.

Prior Commission actions are consistent with the conclusion that a local exchange certificate is not required to enter into an interconnection agreement with a local exchange carrier. For instance, the Commission has approved interconnection agreements with wireless providers on many occasions, including in cases involving James Valley.²⁴ Wireless providers are not required to obtain local exchange carrier certificates to provide service, and it does not appear that any of the wireless providers that interconnect with James Valley have held such certificates.²⁵ In 2021, the Commission also approved amendments to Midco’s interconnection agreement with Alliance.²⁶ None of these actions would have been permissible if Section 20:10:32:02 were read to require a local exchange carrier certificate to enter into an interconnection agreement.

This analysis also is consistent with how the federal Communications Act and the FCC’s rules and decisions treat interconnection. Section 153(32) of the Communications Act defines a local exchange carrier as “any person that is engaged in the provision of telephone exchange service or exchange access.”²⁷ “Telephone exchange service” is defined as a service to “subscribers” – that is, end users²⁸ and exchange access is defined as “the offering of access to

²⁴ See, e.g., Dockets TC98-032 (CommNet Cellular), TC06-043 (Alltel); TC04-068 (Western Wireless); TC12-178 (amendment to Verizon Wireless agreement). In discovery responses, James Valley indicated that it currently has interconnection agreements with three wireless providers.

²⁵ Similarly, James Valley indicated in discovery that it has five extended area service arrangements with other carriers in South Dakota. If ARSD 20:10:32:02 required each party to have local exchange certification in the other party’s market for an interconnection arrangement to be lawful, these agreements would be invalid.

²⁶ See Docket TC21-102.

²⁷ 47 U.S.C. § 153(32).

²⁸ 47 U.S.C. § 153(54) (in relevant part, defining term as a “service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers

telephone exchange services or facilities for the purpose of origination or termination of telephone toll services.”²⁹ Neither of those services is local interconnection.

The interconnection provisions in Section 251 of the Communications Act further demonstrate that a carrier need not provide local exchange service to obtain interconnection. Section 251 imposes tiered interconnection obligations on different types of carriers – telecommunications carriers, local exchange carriers, and incumbent local exchange carriers – but does not limit what kinds of telecommunications carriers can obtain that interconnection. For instance, Section 251(a) requires “any telecommunications carrier” to interconnect “directly or indirectly with the facilities and equipment of other telecommunications carriers,”³⁰ while Section 251(c)(2) gives incumbent local exchange carriers “[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network.”³¹ In both cases, the Communications Act uses the broad term “telecommunications carrier” to describe the party that has the right to interconnection, and

intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge”).

²⁹ 47 U.S.C. § 153(20).

³⁰ 47 U.S.C. § 251(a)(1).

³¹ 47 U.S.C. § 251(c)(2). This and other incumbent local carrier obligations under Section 251(c) are subject to exemptions for rural carriers and suspensions for small carriers under Section 251(f). 47 U.S.C. § 251(f),

specifically does not limit that right to local exchange carriers.³² The FCC's rules are consistent with the Communications Act.³³

The two relevant FCC decisions also are consistent with this view. Both *Time Warner* and *CRC Communications* require states to arbitrate interconnection agreements when the requesting party is a telecommunications carrier authorized to provide service in the state.³⁴

Thus, South Dakota law and federal law agree: To obtain interconnection, particularly interconnection under Section 251(a) of the Communications Act, a carrier need only be authorized to provide telecommunications service, and is not required to hold a local exchange carrier authorization. Midco holds multiple authorizations that permit it to provide competitive telecommunications services in South Dakota, including three that permit it offer services in every exchange in the state.³⁵ In this context, it is clear that, as a matter of South Dakota law, Midco is entitled to request interconnection from James Valley under Section 251(a) and (b) and to obtain arbitration.

³² A telecommunications carrier is defined in the Communications Act as a provider of telecommunications services and telecommunications services are defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used . . .” 47 U.S.C. §§ 153(51), (54). The FCC has held on multiple occasions that wholesale services qualify as telecommunications services. *See, e.g.,* 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, 3517 (2007) (“*Time Warner*”) (confirming that “providers of wholesale telecommunications services enjoy the same rights as any ‘telecommunications carrier’ under” Sections 251(a) and (b) of the Communications Act”); *see also National Ass’n of Regulatory Utility Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (holding that “a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all possible users”).

³³ *See* 47 C.F.R. §§ 51.100(a) (general duty of all telecommunications carriers to interconnect with other telecommunications carriers); 51.305 (duty of incumbent local exchange carriers to provide interconnection to telecommunications carriers for exchange of local or access traffic on specified terms). The FCC’s rules implementing Section 251(c) even specify that a carrier need not hold an authorization before it can request interconnection. 47 C.F.R. § 51.301(b)(4).

³⁴ *Time Warner*; *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, 8273 (2011) (“*CRC Communications*”).

³⁵ *See supra* Part I (describing Midco’s South Dakota competitive interexchange authorization, its domestic Section 214 authorization and its international Section 214 authorization, in addition to its South Dakota competitive local exchange carrier authorization).

III. Even If There Were Any Doubts Concerning the Requirements of South Dakota Law, the *Time Warner* and *CRC Communications* Decisions Would Require the Commission to Arbitrate an Interconnection Agreement.

For the reasons described above, Midcontinent is entitled to arbitration as a matter of South Dakota law, and consistent with the requirements of the Communications Act. Even if that were not the case, however, controlling FCC precedent would allow Midco to obtain both arbitration of its interconnection request and actual interconnection from James Valley.

The FCC specifically considered the question of whether carriers are entitled to interconnection and arbitration for the purpose of providing wholesale services in rural telephone company service areas on two occasions, in *Time Warner* and *CRC Communications*. In both cases, the FCC determined that interconnection with rural carriers is available for this purpose.

In *Time Warner*, the FCC held that “wholesale providers of telecommunications services are telecommunications carriers for the purposes of sections 251(a) and (b) of the [Communications] Act, and are entitled to the rights of telecommunications carriers under that provision.”³⁶ It repeated that conclusion in *CRC Communications*, stating that:

We also reaffirm the Bureau’s conclusion in the *TWC Order* that the [Communications] Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b), as well as that Order’s holding that providers of wholesale telecommunications services enjoy the same rights as any other “telecommunications carrier” under those provisions of the Act.³⁷

Both of these decisions refer only to “telecommunications carriers.” They do not distinguish among local exchange carriers, specialized carriers, or interexchange carriers, or between interstate and intrastate carriers.³⁸ As noted above, this is consistent with both Section

³⁶ *Time Warner*, 22 FCC Rcd 3513.

³⁷ *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 at 8273.

³⁸ See *Time Warner*, 22 FCC Rcd at 3513; *CRC Communications*, 26 FCC Rcd at 8273.

251(a) and with the definition of “telecommunications carrier” in the Communications Act, which makes no distinction among the types of telecommunications services provided or whether the services are interstate or intrastate in nature.³⁹

Moreover, both *Time Warner* and *CRC Communications* specifically refer to the provision of wholesale interconnection services to voice over IP providers like Midco Voice. The question presented in the *Time Warner* case was whether wholesale telecommunications services providers were entitled to interconnection with incumbent LECs “including VoIP providers,” and the FCC held that those rights did not depend on the identity or “regulatory classification” of the party purchasing interconnection services.⁴⁰ *CRC Communications* reached the same conclusion, stating that

We reaffirm the Bureau’s finding that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to sections 251(a) and (b) when providing telecommunications services to other service providers, including for the specific purpose of providing wholesale services to interconnected VoIP providers.⁴¹

Thus, under *Time Warner* and *CRC Communications*, a telecommunications carrier like Midco is entitled to obtain interconnection from any carrier, including a rural telephone company like James Valley, for the purpose of providing wholesale interconnection services to voice over IP providers like Midco Voice.⁴²

³⁹ 47 U.S.C. §§ 3(44) (defining a telecommunications carrier as a provider of telecommunications service), 3(46) (defining a telecommunications service based on nature of service offering, not whether the service is intrastate or interstate in nature), 251(a)(1) (requiring all telecommunications carriers to interconnect with all other telecommunications carriers).

⁴⁰ *Time Warner*, 22 FCC Rcd 3513, 3514.

⁴¹ *CRC Communications*, 26 FCC Rcd at 8273.

⁴² *CRC Communications* also specifically addressed the question of whether arbitration is available to telecommunications carriers that seek interconnection under Section 251(a) of the Communications Act, holding that “rural incumbent LECs’ obligations under sections 251(a) and (b) can be implemented through state commission arbitration and mediation provisions in section 252 of the Act” and that “section 251(f)(1) does not exempt rural incumbent LECs from the compulsory arbitration process established in that provision.” *Id.* at 8259 (citation omitted), 8269. See also *Ohio Bell Tel. Co. v. Pub. Utilities Comm’n of Ohio*, 844 F. Supp. 2d 873, 890 (S.D. Ohio 2012) (explaining that “[t]he FCC’s ruling in *In the Matter of Petition of CRC Communications* . . . cleared up the question” of whether arbitration was available for requests under Section 251(a)).

Time Warner and *CRC Communications* both override any state law that is contrary to their holdings. As definitive interpretations of Sections 251 of the Communications Act by the federal agency responsible for implementing that provision, they are binding on state commissions.⁴³

As described above, South Dakota law, including the Commission's regulations implementing Sections 251 and 252 of the Communications Act, allows Midco to obtain interconnection with James Valley as a telecommunications carrier and to obtain arbitration of its interconnection request.⁴⁴ If that were not the case, however, *Time Warner* and *CSC Communications*, as definitive interpretations of Sections 251 and 252, would override South Dakota law, and Midco still would be entitled to arbitration of its interconnection request to James Valley, to an interconnection agreement, and, ultimately, to obtain interconnection and exchange traffic with James Valley so that Midco could serve its wholesale customers.

IV. Conclusion

The Commission should hold that Midco need not obtain a new or amended certificate before interconnecting with James Valley. As a telecommunications carrier authorized to provide service in the state, Midco is entitled to interconnection to provide wholesale

⁴³ See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 380 (1999) (holding that “§201(b) [of the Communications Act] explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies,” including Section 251); see also *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50 (2011) (deferring to FCC interpretation of its own regulations).

⁴⁴ See *supra* Part II.

interconnection services under South Dakota law, and even if South Dakota law did not permit Midco to obtain interconnection, binding FCC decisions would override any state requirements.

Respectfully submitted,

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