

**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)**

MOTION TO STRIKE

Midcontinent Communications (“Midco”), by its attorneys, hereby moves to strike the Reply to Midco’s List of Disputed Issues (the “Reply”) filed by James Valley Cooperative Telephone Company (“James Valley”) on April 25, 2022 in this proceeding.

The Commission should strike and disregard the Reply for two reasons. First, it is an unauthorized pleading not permitted by the schedule agreed to by the parties and approved by the Commission. Second, the Reply raises several new issues after the time for the parties to raise new issues and instead should be narrowing the issues. Either of these reasons would justify striking the Reply and disregarding it entirely.

I. The Commission Should Strike the Reply as an Unauthorized Pleading.

The Reply is an unauthorized pleading. This proceeding is governed by a strict schedule agreed to by the parties and approved by the Commission.¹ That schedule specifically included additional time requested by James Valley to ensure that it would be able to complete a full review of the proposed interconnection agreement and prepare a complete response to Midco’s draft agreement.² That schedule does not include any provision for a reply to Midco’s response

¹ See *Order Establishing Procedural Schedule; Order Assessing Filing Fee*, Docket TC21-124 (rel. March 31, 2022).

² Midco agreed to that additional time even though James Valley first received a copy of the proposed agreement in the summer of 2021 and the agreement was included in Midco’s Petition

to James Valley's disputed issues list. As a consequence, not only was James Valley on notice that its disputed issues list had to include all disputed issues, but it knew that it was not entitled to a reply. Given the restricted time frame of this proceeding, the additional time granted to James Valley to prepare its response, and that James Valley agreed to the schedule, there is no justification for James Valley filing an unauthorized pleading. Indeed, James Valley did not even attempt to provide any reason for filing a pleading not permitted by the schedule, but simply filed it with no explanation at all.

In fact, this is not the only time that James Valley has failed to comply with the schedule or the Commission's rules in this proceeding. Under the Commission's rules, James Valley was required to file its full response to the Petition within 25 days of the time the Petition was filed.³ It did not file a response, but instead filed a motion to dismiss. More recently, James Valley submitted its discovery requests two days after the deadline set by the procedural schedule, with no explanation or even acknowledgment that it was late.⁴ Now James Valley has filed an entirely unauthorized pleading, again with no explanation. It should not be rewarded for its repeated failures to comply with the procedural schedule in this proceeding, and the Commission should strike the Reply.

II. The Reply Inappropriately Expands the Issues in the Proceeding

Striking the Reply would be appropriate even if it just argued about whether certain issues were open or made claims about the reasons for its positions on the open issues. In fact, though, the Reply goes beyond that by introducing new issues into the proceeding after

for Arbitration, which was filed on December 6, 2021, more than four months before the James Valley response was due.

³ ARSD 20:10:32:30.

⁴ Midco has responded to those requests even though they were not made in a timely fashion.

submitting its initial response, including introducing a new issue after James Valley agreed to the language for the affected provision. This provides an independent reason to strike the Reply.

The purpose of the process through which James Valley identified open issues and Midco responded was to narrow the issues in the proceeding, not to expand them. Midco's Disputed Issues List did just that, agreeing to James Valley's position on one issue and noting that the parties had reached agreement on a second issue.⁵ Limiting issues as early as possible in the arbitration process is critical because the arbitration provisions of the Communications Act place strict time limits on the completion of arbitrations. James Valley's Reply introduced two new issues, including a new issue relating to a provision that James Valley explicitly agreed to prior to the filing of the Disputed Issues List, and apparently seeks to eliminate one of Midco's issues even though James Valley still disagrees with Midco's proposed language.⁶

There is no question that these are new issues because none of them were raised in the James Valley Disputed Issues List.⁷ The James Valley text for Section 29.2 of the General Terms and Conditions includes no language concerning a requirement that Midcontinent hold a local exchange certificate of authority.⁸ This is particularly significant because Section 29.2 was

⁵ Midco Disputed Issues List, Attachment 1 at 8, 10.

⁶ See Reply at 1 (deleting Midco description of Issue 3 and inserting a new description that creates a new issue) & Attachment 1 at 15 (proposing to add language to the interconnection agreement concerning Midcontinent's receipt of a local exchange certificate). James Valley also proposes a modification to Midco's description of Issue 2, and for the reasons described earlier in this motion, that modification should be rejected as well.

⁷ See James Valley Cooperative Telephone Company's Disputed Provisions in Interconnection Agreement with Midcontinent Communications, filed Apr. 11, 2022 (the "James Valley Issues List").

⁸ *Id.* at 2. Midco notes that its Disputed Issues List contains proposed agreement language providing that Midco will not exchange traffic with James Valley "until it has obtained all regulatory authority necessary to provide the services contemplated hereunder." Midco Disputed Issues List, Attachment 1 at 4. Thus, it is not even apparent what James Valley is attempting to dispute.

a new provision that James Valley proposed to add to the agreement. Further, prior to the time Midco filed its response to the James Valley Disputed Issues List, and as reflected in that filing, the parties had agreed on the text of that provision and removed that issue from the issues list.⁹

James Valley's changes to Issue 3 also introduce new issues. The description that James Valley proposes literally has nothing to do with the dispute concerning the provisions listed under Issue 3. Those provisions concern the mechanics of providing wholesale interconnection services, and James Valley's April 11 filing proposed to remove them entirely, not to replace them with language requiring interconnecting parties to hold certificates of authority.¹⁰ Thus, the description James Valley proposes actually is an entirely new issue. Further, its deletion of the accurate description of the issue that Midco raised creates a new question about what James Valley proposes to do with the language Midco originally proposed. In particular, while the new proposed description of the issue suggests that James Valley no longer objects to that language, the draft agreement attached to the Reply still reflects that those provisions have been rejected.

By introducing these new issues – two weeks after the date when James Valley provided its issues list – James Valley is attempting to subvert the process in a way that unreasonably places additional pressure on Midcontinent and the Commission, and prevents Midcontinent from properly preparing for the arbitration hearing.¹¹ This is precisely what the issue identification and resolution process is intended to avoid. And, again, James Valley has no excuse for not raising all of its disputed issues in the James Valley Disputed Issues List, as it had

⁹ Midco Disputed Issues List, Attachment 1 at 8.

¹⁰ Midco's response simply was to say that the agreement should include the provisions it originally proposed, so it also did not provide a basis for James Valley to ask for some entirely new (and apparently not yet drafted) provision to be added to the agreement. *Id.*, Attachment 1 at 3, 5-7, 9-12.

¹¹ For instance, by filing the Reply five days after the deadline for discovery, James Valley made it impossible for Midco to submit interrogatories or document requests as to its new issues.

the draft agreement since last summer, knew the agreement would be considered in the arbitration in December, and specifically was granted extra time for file its disputed issues list in the schedule for this proceeding adopted by the Commission. Thus, these new issues should not be considered in this proceeding.

III. Conclusion

For all of these reasons, the Commission should strike the James Valley Reply to Midco's List of Disputed Issues.

Respectfully submitted,

Midcontinent Communications

/s/Patrick Mastel

Patrick Mastel
Senior Vice President and General Counsel
Midcontinent Communications
3901 N. Louise Avenue
Sioux Falls, South Dakota 57107
605-271-0594
pat.mastel@Midco.com

/s/J.G. Harrington

J.G. Harrington
Counsel to Midcontinent Communications
Cooley LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
202-776-2818
jgharrington@cooley.com

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