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	)))))	Docket No. TC21-124

REPLY BRIEF OF MIDCONTINENT COMMUNICATIONS ON BIFURCATED ISSUE

Midcontinent Communications ("Midco") hereby submits its reply brief on the bifurcated issue in the above-referenced proceeding.[1]

As described in the Midcontinent's initial brief, South Dakota law does not require Midco to obtain new local exchange authority to obtain an interconnection agreement and to interconnect in the territory served by James Valley Cooperative Telephone Company ("James Valley"). This is confirmed by the Commission's practice of approving interconnection agreements involving parties that do not hold local exchange service authorizations. As a consequence, South Dakota law is consistent with the terms of the Federal Communications Act. Further, even if South Dakota law were not consistent with the Communications Act, the FCC has decided on two separate occasions that any telecommunications carrier is entitled to arbitration and interconnection with a rural telephone company.

The joint brief filed by James Valley Cooperative Telephone Company ("James Valley") and the South Dakota Telephone Association ("SDTA") is an exercise in misdirection, pointing the Commission towards irrelevant facts and arguing, in essence, that a single sentence entirely changes the meaning of two different FCC orders. The Staff brief is correct in agreeing that

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

Midco is entitled arbitration and an interconnection agreement, but does not properly account for South Dakota law and the FCC's unambiguous orders in arguing that Midco cannot actually interconnect with James Valley at this time.

For these reasons, the Commission should determine that Midco is not required to obtain a new certificate of authority to provide the interconnection services described in its proposed interconnection agreement.

I. Binding FCC Precedent Requires the Commission to Arbitrate an Interconnection Agreement and Permit Midco to Interconnect with James Valley.

The basic problem that James Valley, SDTA, and the Staff do not address is that there is binding FCC precedent that decides the bifurcated issue. As described in Midco's initial brief, under the FCC's decisions in *Time Warner* and *CRC Communications,* Midco is entitled to interconnection with James Valley and for arbitration of an interconnection agreement.[2]

A. *Time Warner* and *CRC Communications* Unambiguously Require Interconnection and the Arbitration of an Interconnection Agreement.

Time Warner and *CRC Communications* hold that any telecommunications carrier seeking to provide wholesale telecommunications services is entitled to interconnection with a rural telephone company under Section 251(a) of the Communications Act and to arbitration of an interconnection agreement.[3] They are unequivocal on these points. First, all carriers, including rural carriers, are required to interconnect under Section 251(a):

> Thus, we believe that a uniform, national policy concerning the scope of the rural exemption is necessary to promote local competition, prevent conflicting interpretations of carriers' statutory obligations under the Act, and eliminate a

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[2] Initial Brief of Midcontinent Communications on Bifurcated Issue at 10-11 ("Midco Initial Brief").

[3] 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"*) (holding that "providers of wholesale telecommunications services enjoy the same rights as any 'telecommunications carrier' under" Sections 251(a) and (b) of the Communications Act"); 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, 8269 (2011) (holding that telecommunications carriers seeking Section 251(a) interconnection are entitled to arbitration) (*"CRC Communications"*).

> potential barrier to broadband investment. . . . Consistent with Commission precedent, we reaffirm that all telecommunications carriers, including rural carriers covered by section 251(f)(1), have a basic duty to interconnect their networks under section 251(a) and that all LECs, including rural LECs covered by section 251(f)(1), have the obligation to comply with the requirements set forth in section 251(b).[4]

Second, carriers obtaining interconnection under Section 251(a) are entitled to arbitration:

> [W]e conclude that requests made to incumbent LECs for interconnection and services pursuant to sections 251(a) and (b) are subject to state commission arbitration as set forth in section 252, and that section 251(f)(1) does not exempt rural incumbent LECs from the compulsory arbitration process established in that provision.[5]

Third, these rights are available not just to competitive local exchange carriers, but to *all* telecommunications carriers that wish to provide wholesale interconnection services:

> Consistent with Commission precedent, we find that the 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), and we confirm that providers of wholesale telecommunications services enjoy the same rights as any "telecommunications carrier" under those provisions of the Act.[6]

As the FCC noted in *CRC Communications,* these determinations are binding on the states because the FCC has the power to decide what is required under the Communications Act:

> The Supreme Court has stated that "the question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 379 n.6 (1999). *See also Southwestern Bell Tel. Co. v. Connect Communications Corp.,* 225 F.3d 942, 946–47 (8th Cir. 2000) ("The new regime for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law.").[7]

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[4] *CRC Communications,* 26 FCC Rcd at 8266-67; *accord Time Warner,* 22 FCC Rcd at 3517.
[5] *CRC Communications,* 26 FCC Rcd at 8269.
[6] *Time Warner,* 22 FCC Rcd at 3517. This holding was affirmed in *CRC Communications. CRC Communications,* 26 FCC Rcd at 8267.
[7] *CRC Communications.,* 26 FCC Rcd at 8266, n.47.

There can be no question that under this precedent – which binds all telecommunications carriers and state regulators – Midco is entitled to interconnect with James Valley and to arbitration. The record shows that Midco is an active telecommunications carrier in South Dakota, with four separate authorizations to provide telecommunications services, three of which authorize Midco to provide service in the entire state.[8] It also shows that Midco will offer interconnection services on a wholesale basis, not for its own use.[9] As a provider of telecommunications service seeking to provide wholesale interconnection services, Midco's request falls squarely within both *Time Warner* and *CRC Communications.*

B. *Time Warner* Does Not Permit the Commission to Conduct a Separate Proceeding to Determine Whether Midco Should Be Granted an Additional Authorization Before Obtaining Interconnection.

In response to *Time Warner* and *CRC Communications,* James Valley and SDTA point to a single sentence in the *Time Warner* decision acknowledging that state regulators have the power to make an "evidentiary assessment" of whether a party requesting interconnection is a telecommunications carrier.[10] From this sentence, James Valley and SDTA spin out a theory that the Commission can deny arbitration unless Midco obtains specific local exchange authority to serve the James Valley territory. Even a cursory reading of *Time Warner* and *CRC*

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[8] *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); 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).

[9] *See* Midco Petition for Arbitration at 1-2; Midco Initial Brief at 3 and Exhibit 1 (affidavit of Andrea Livingston), ¶ 4. In their brief, James Valley and SDTA argue that Midco will not be offering interconnection services as a common carrier service, but for the reasons described below, this claim is both wrong and irrelevant. *See infra* Part III.

[10] James Valley Cooperative Telephone Company and South Dakota Telephone Association Joint Brief on Bifurcated Issue at 8-9 (the "JV/SDTA Brief").

Communications demonstrates that this theory is utterly disconnected from what those cases actually say.

First, James Valley and SDTA entirely mischaracterize the fact pattern in the *Time Warner* decision.[11] While they claim the facts somehow are different from this case, *Time Warner* was about whether providers of wholesale interconnection services could obtain interconnection. This is stated clearly in the very first paragraph of the order, which explains that the petition asks the FCC to declare that "wholesale telecommunications carriers are entitled to interconnect and exchange traffic with incumbent local exchange carriers (LECs) when providing services to other service providers, including voice over Internet Protocol (VoIP) service providers pursuant to sections 251(a) and (b) of the Communications Act of 1934, as amended (the Act)."[12] That is precisely what Midco is seeking in this proceeding.

Second, *Time Warner* makes it clear that the question of whether a petitioner is a telecommunications carrier is a factual question, as there is no other kind of question that would be subject to an "evidentiary assessment." In this case, the answer already is clear because Midco holds four different authorizations that allow it to operate as a telecommunications carrier in South Dakota, and it currently operates as a telecommunications carrier in the state. Moreover, the sentence before the one cited by James Valley and SDTA specifically states that a company qualifies for interconnection under Section 251(a) if it offers either retail or wholesale services, so both Midco's current retail offerings and the wholesale services it provides to other carriers qualify it to obtain interconnection.[13]

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[11] *Id.* at 8.

[12] *Time Warner,* 22 FCC Rcd at 3513. While Time Warner filed the petition, the question presented to the FCC was entirely about wholesale provision of interconnection services, not retail services.

[13] *Id.,* 22 FCC Rcd at 3520 (interconnection available to providers that "do in fact provide telecommunications services to their customers, either on a wholesale or retail basis"). Further, although three of Midco's authorizations allow it to provide service within the James Valley territory, neither *Time Warner* nor *CRC Communications*

Third, neither *Time Warner* nor *CRC Communications* requires a telecommunications carrier to hold any specific type of authorization, but only to provide some form of telecommunications service. This point is made repeatedly in the orders. For instance, *CRC Communications*, when describing rural carriers' interconnection obligations, says "section 251(a), which applies to '[e]ach telecommunications carrier,' imposes a basic duty 'to interconnect directly or indirectly' with other telecommunications carriers," and states that "wholesale telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to sections 251(a) and (b)[.]"[14] *Time Warner* is no less direct, stating that "a provider of wholesale telecommunications service is a telecommunications carrier and is entitled to interconnection under section 251 of the Act," and "that providers of wholesale telecommunications services enjoy the same rights as any 'telecommunications carrier 'under those provisions of the Act."[15] The only limitation is "that the rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis."[16]

Fourth, James Valley and SDTA appear to believe that the "evidentiary assessment" would take place in a proceeding on an application for a certificate of authority ("COA:).[17] That plainly is not what *Time Warner* contemplates, as the question it leaves to state regulators is whether a party "*offers* a telecommunications service," not whether it will be permitted to offer a telecommunications service.[18] Indeed, *Time Warner* specifically refers to the determination being made in an arbitration, which would not be the case if the FCC expected a state

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requires the wholesale interconnection provider to have the right to provide service within the area served by the rural carrier.

[14] *CRC Communications,* 26 FCC Rcd at 8267, 8273.

[15] *Time Warner,* 22 FCC Rcd at 3517, 3520.

[16] *Id.* at 3520.

[17] JV/SDTA Brief at 8.

[18] *Time Warner,* 22 FCC Rcd at 3520 (emphasis supplied).

commission to create a separate proceeding on the kinds of questions that James Valley and SDTA propose in their brief. In any event, as discussed above, Midco is a telecommunications carrier, as evidenced by its multiple authorizations and literal decades of providing service, so there is no question to resolve.

Finally, the reading of *Time Warner* that James Valley and SDTA espouse is directly contrary to the explicitly expressed intent of *Time Warner* and *CRC Communications*. Both decisions were intended to prevent rural carriers and state commissions from placing roadblocks in the way of competition. *Time Warner* overruled state commission actions that required lifting rural exemptions to obtain interconnection and *CRC Communications* prevented states from thwarting competition by refusing to arbitrate interconnection disputes. As the FCC explained in *CRC Communications*:

> Congress did not intend to insulate small or rural LECs from competition, preventing subscribers in those communities from obtaining the benefits of competitive local exchange service, including innovative offerings. We therefore reject the arguments of some commenters that oppose state arbitration of section 251(a) and (b) requirements without recognizing any alternative forum for enforcement of those requirements.[19]

Similarly, in *Time Warner* itself, the FCC said that "state commission decisions denying wholesale telecommunications service providers the right to interconnect with LECs pursuant to sections 251(a) and (b) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment."[20] Both decisions rejected efforts to require additional authorizations or proceedings before a telecommunications

[19] *CRC Communications,* 26 FCC Rcd at 8271 (footnotes omitted).
[20] *Time Warner,* 22 FCC Rcd at 3513.

carrier could obtain interconnection.[21] Given that context, the James Valley/SDTA reading of *Time Warner* makes no sense, and must be rejected.

C. *Time Warner* Refutes the Staff's Claim that the Commission Can Withhold the Right to Interconnect Pending a Separate COA Proceeding.

The Staff argues that Midco cannot rely on *Time Warner* because Midco has not been granted a COA to provide local exchange services in the entire state of South Dakota.[22] This is a misreading of *Time Warner,* which specifically does not require a local exchange COA to obtain with a rural telephone company under Section 251(a).

Time Warner is quite direct about the scope of the interconnection obligation, stating that Section 251(a) interconnection is available to "carriers that . . . provide telecommunications services to their customers, either on a wholesale or retail basis."[23] While a local exchange carrier provides telecommunications services, so do many other types of carriers, including specialized carriers, intrastate and interstate interexchange carriers, alternative access providers, and international carriers. Under *Time Warner* and *CRC Communications,* all of these types of carriers are eligible to obtain interconnection for the purpose of offering interconnection services to other service providers. In fact, *Time Warner* was intended to address situations in which state regulators refused to allow telecommunications carriers to interconnect with rural telephone companies. Thus, *Time Warner* does not permit state regulators to limit interconnection rights to local exchange carriers.

II. South Dakota Law Is Consistent with *Time Warner* and *CRC Communications*.

Midco's initial brief explained why, as a matter of South Dakota law, it is not required to obtain new or amended authority from the Commission.[24] The other parties provide no reason to conclude otherwise.

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[21] *CRC Communications,* 26 FCC Rcd at 8273 (rejecting argument that separate rural exemption proceedings should be required); *Time Warner,* 22 FCC Rcd at 3513.
[22] Brief of the South Dakota Public Utilities Commission Staff at 4 ("Staff Brief").
[23] *Time Warner,* 22 FCC Rcd at 3520.
[24] Midco Initial Brief at 4-9.

As described in Midco's initial brief, South Dakota law – both the Commission's governing statute and its rules – allow "any provider of competitive telecommunications services" to obtain interconnection and arbitration of an interconnection agreement.[25] As the text makes clear, South Dakota law does not place any restriction on the type of interconnection that a competitive telecommunications services provider can obtain – it can be for exchange access, EAS, or local traffic. The statutory text making interconnection and arbitration available to any telecommunications services provider makes it clear that a local exchange authorization cannot be required. The definition of local exchange service in ARSD 20:10:32:02 is consistent with these other provisions, as it does not mention interconnection at all, and local exchange service is described as provision of "service within a local exchange area," not the exchange of traffic between carriers.[26]

This understanding of the distinction between interconnection and local exchange service is consistent with prior Commission actions approving interconnection agreements involving parties that do not hold local exchange COAs and with federal law, which defines "telephone exchange service" as a service provided to end users and interconnection as a functionality that carriers provide to each other to facilitate the provision of end user services.[27] It also is consistent with the requirements of *Time Warner* and *CRC Communications.*

James Valley and SDTA argue that Midco is proposing to offer a local exchange service because Midco proposes to exchange Local/EAS Traffic.[28] This argument is simple but wrong. First, as shown in Midco's initial brief and described above, under South Dakota law a local

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[25] *Id.* at 5, *quoting* SDCL 49-31-81; *see also* ARSD 20:10:32:20 (permitting "any telecommunications company" to make an interconnection request), 20:10:32:29 (allowing "any party" to interconnection negotiations to seek arbitration), 20:10:32:24-28 (mediation), 29-32 (arbitration rules), 33-36 (approval of arbitrated agreement).
[26] Midco Initial Brief at 6-7, *quoting* ARSD 20:10:32:02 and SDCL 49-31-1(13) (definition of local exchange service).
[27] Midco Initial Brief at 7-8.
[28] JV/SDTA Brief at 6.

exchange COA cannot be required before a carrier can obtain interconnection: Any telecommunications carrier is entitled to interconnection, without restrictions, and interconnection is not the same as local exchange service.

James Valley and SDTA make this mistake because they import concepts into the definition of local exchange service that are not there and because they do not consider any other provision of South Dakota law. In particular, their interpretation treats traffic exchange as if it is local telephone service (which it is not) and ignores both the statute and rules that grant interconnection rights to any competitive telecommunications carrier. Moreover, their argument depends on the idea that Midco would be providing service to end users, which is not what it would be doing as a provider of interconnection services.[29]

The Staff brief makes a similar error, stating in effect that the interconnection service Midco plans to offer is a local exchange service because it would be terminated to end user customers.[30] Again, because Midco ***will not*** be providing service to end user customers, it cannot be providing local exchange service. The Staff, like James Valley and SDTA, has confused interconnection with local exchange service.

Equally important, James Valley, SDTA, and the Staff fail to recognize that South Dakota law is not the source of Midcontinent's interconnection rights. They come from federal law, and are defined by the FCC. Section 251(a) of the Communications Act says directly that all telecommunications carriers are entitled to interconnection with all other telecommunications

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[29] As shown in the network diagram attached as Exhibit 1 to this reply brief, the voice over IP providers that purchase interconnection services from Midco will serve their end user customers directly, and Midco will provide only the services necessary to connect the VoIP providers to James Valley and other incumbent LECs. *See* Exhibit 1.

[30] Staff Brief at 3. The Staff quotes a provision from the draft interconnection agreement to support its theory; to the extent that the interconnection agreement could be read to permit Midco to provide end user services in James Valley territory, Midco is willing to amend the draft agreement to clarify that it only would be providing wholesale interconnection services. In any event, this issue is a matter of the terms and conditions of interconnection, which is to be resolved in arbitration.

carriers, and the FCC has definitively interpreted Section 251(a) as giving all telecommunications carriers the right to interconnect with rural carriers for the purpose of providing interconnection services to VoIP providers.[31] Since, as the Supreme Court has held, the federal government "unquestionably has" "taken the regulation of local telecommunications competition away from the states," South Dakota law cannot require more of Midco than the Communications Act does.[32] Attempting to impose an obligation to obtain a local exchange COA on Midco as a condition of exercising its interconnection rights would be a plain violation of federal law.

III. The SDTA/James Valley Claims Concerning Whether Midco Interconnection Services Are Telecommunications Services Are Incorrect and Irrelevant.

James Valley and SDTA also argue that Midco must "prove" that it is a telecommunications carrier under state law to obtain interconnection, and that Midco is not a telecommunications carrier for purposes of interconnection.[33] Once again, this argument is contrary to the facts and the law. For that matter, even if James Valley and SDTA were correct that Midco's wholesale interconnection services were not telecommunications services, that would not affect its right to interconnection.

The standard for determining whether an entity is operating as a common carrier or a telecommunications carrier is well understood. It is not a matter of how many customers the company has, but of the nature of the service offering. As the U.S. Court of Appeals has described it, even "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

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[31] *Time Warner,* 22 FCC Rcd 3517.
[32] *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 379 n.6 (1999).
[33] JV/SDTA Brief at 9-10.

potential users."[34] Moreover, a company that offers its services to a narrow class of customers " may still be a common carrier if it holds itself out indiscriminately to serve all within that class."[35]

Midco's planned interconnection services meet that test. As described in the Petition and in Midco's initial brief, it will make interconnection services available to any company that wishes to purchase them. They will be available on the same terms and conditions offered to Midco Voice or on separately negotiated terms if that is what a retail voice provider prefers.[36] The commitment to make interconnection services available to all who wish to purchase them on standard terms and conditions, in this case Midco's agreement with Midco Voice, is the exact meaning of "hold[ing] . . . out indifferently to serve all potential users."[37]

James Valley and SDTA, ignoring Midco's commitment to offer interconnection to any party on the exact terms made available to Midco Voice, argue that Midco's willingness to negotiate different terms with other providers somehow transforms Midco's interconnection services into private carriage.[38] This is incorrect. First, there are many examples of carriers offering negotiated terms and conditions on a common carrier basis, such as through contract tariffs.[39] All that matters is that the negotiated terms and conditions be made reasonably available to other parties, which Midco will do if any party negotiates a separate agreement.

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[34] *National Ass'n of Regulatory Utility Com'rs v. FCC,* 533 F.2d 601, 608 (D.C. Cir. 1976).
[35] *State of Iowa v. FCC,* 218 F.3d 756, 759 (D.C. Cir. 2000).
[36] Midco Initial Brief at 3 and Exhibit 1, ¶ 4.
[37] *NARUC II,* 533 F.2d at 608.
[38] James Valley/SDTA Brief at 10.
[39] *See, e.g., MCI Telecommunications Corp. v. FCC,* 917 F.2d 30 ,38 (D.C. Cir. (holding that "rates arrived at through negotiations between a carrier and an individual customer and then made generally available to other similarly situated customers do not *per se* violate the Communications Act" common carrier obligations if procedural requirements are met). South Dakota law recognizes that a carrier may provide service via contracts or other agreements. *See* SDCL 49-31-12.2(4) (requiring regulated carriers to file "any contracts, agreements or arrangements with other companies that are affected by the provisions of this chapter" upon Commission request).

Second, even if a separately negotiated agreement did constitute private carriage, that would be relevant only to that agreement. Midco's commitment to offer its existing terms and conditions to any party seeking interconnection services is more than sufficient to qualify as holding out indiscriminately.

Moreover, the number of customers Midco has today does not affect its status as a common carrier. Simply put, no carrier starts off with hundreds of customers; in fact, it is not unusual for a carrier to start off with none at all.

For that matter, even if James Valley and SDTA were correct in asserting the Midco's interconnection service was not being offered on a common carrier basis, that would be irrelevant to the question of whether Midco could obtain interconnection. As described above, Midco's right to interconnection is based on its status as a telecommunications carrier generally, not on whether it is using interconnection to provide a common carrier service.[40] Indeed, a telecommunications carrier can obtain interconnection under Section 251(a) to provide both telecommunications and information services.[41] In fact, if James Valley and SDTA were correct and Midco were not offering interconnection as a common carrier service, that would provide an additional reason to conclude that there is no basis for the Commission to require Midco to obtain a new COA.

Finally, the FCC rejected the view that offering interconnection services via individually-negotiated contracts affected a telecommunications carrier's interconnection rights in the *Time Warner* order. The petition for declaratory ruling in that proceeding was filed in part in response to a Nebraska Public Service Commission ruling that Section 251 interconnection was not

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[40] *See supra* Sections II, III.
[41] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499, 15990 (1996).

available to providers offering service under individually-negotiated contracts.[42] The FCC's ruling made it clear that what matters is whether the requesting party is a telecommunications carrier, not the nature of its individual relationships with wholesale customers.[43]

IV. Public Policy Considerations Support Following the Law and Arbitrating an Interconnection Agreement.

James Valley and SDTA devote a significant portion of their brief to arguing, in essence, that Midco should not be permitted to obtain interconnection because it promised the Commission not to offer local exchange service without obtaining a COA and that the Commission should not follow the law because of potential harms to rural telephone customers.[44] Neither of these claims bears scrutiny. In fact, the public interest strongly supports additional competition in rural areas of South Dakota and around the country.

First, the simple fact is that Midco is not breaking any promises. As described above, Midco will not be providing local exchange service in the James Valley service area, but instead will be providing interconnection, a very different service.[45] Midco Voice will offer only VoIP services, which are not local exchange services and are not subject to regulation by the Commission.[46] Indeed, the U.S. Court of Appeals specifically has held that VoIP services are not subject to state regulation and the Commission has recognized that it is bound by that decision.[47]

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[42] *Time Warner,* 22 FCC Rcd at 3516.
[43] *See, e.g., id.,* 22 FCC Rcd at 3517.
[44] JV/SDTA Brief at 3-5, 11-12.
[45] *See supra* Section III.
[46] *See* Midco Initial Brief at 7.
[47] *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715 (8th Cir. 2018) (holding the Minnesota was not permitted to regulate VoIP services under federal law); 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.).

While James Valley and SDTA refer to the arrangement between Midco and Midco Voice as "creative" and "not proper," there is in fact nothing unusual or improper about it.[48] As described in Midco's initial brief, it is quite common for carriers to provide interconnection services to VoIP providers, including to affiliated VoIP providers.[49] Indeed, these kinds of arrangements were specifically endorsed by the FCC in *Time Warner* and *CRC Communications*.[50] Midco Voice, as a separate company, has separate existence from Midco, as recognized by the FCC and by South Dakota law.[51] Moreover, under South Dakota law, the burden for treating a subsidiary and its parent as a unified entity is quite high, often requiring specific malfeasance by the parent that is relied upon by a party that has been harmed.[52] There has been no such behavior here.

The argument about potential harm to rural customers is even less compelling. Since the time of the Telecommunications Act of 1996, the extent of competition in rural markets has increased greatly, with no apparent harm to rural telephone companies. For instance, today wireless service is available from all three major carriers in the James Valley service area (including some 5G coverage), and Vonage advertises that it provides service anywhere in South Dakota to households with high speed internet access (which is available in the James Valley service area). Thus, James Valley already faces significant competition.

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[48] JV/SDTA Brief at 11.
[49] Midco Initial Brief at 4,
[50] *Time Warner,* 22 FCC Rcd at 3519 (noting that the FCC "expressly contemplated" that VoIP providers would obtain interconnection through competitive carriers); *CRC Communications,* 26 FCC Rcd at 8273.
[51] *See* FCC Public Notice, Notice of Interconnected VoIP Numbering Authorization Granted, 36 FCC Rcd 9247 (2021) (granting application of Midco Voice for numbering authorization); *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").
[52] *See, e.g., Mobridge Community Industries, Inc. v. Toure, Ltd.,* 273 N.W.2d 128, 132 (S.D. 1978) (holding that "[t]he general rule is that the corporation is looked up as a separate legal entity," but indicating that misrepresentation of financial condition by the parent company is a basis for piercing the corporate veil).

At the same time, James Valley competes with Midco in other services. The James Valley website offers not only its local telephone service, but high speed internet access service, digital cable TV, and wireless, both on a standalone basis and in bundles.[53] In essence, James Valley and SDTA are taking the position that James Valley should be able to offer whatever services it wants, but that it should be insulated from competition for local voice customers. While it is understandable that James Valley would want to avoid additional competition, there is no good public policy reason to protect it from the marketplace when it competes aggressively today.

James Valley and SDTA also do not recognize that the FCC already has addressed whether allowing carriers to provide interconnection services in rural telephone company markets is in the public interest. Both *Time Warner* and the *CRC Communications* considered this very question, and concluded that the public interest in competition in voice services demanded that interconnection services be made available, with a particular focus on the benefits to rural areas.[54] As the FCC said in *CRC Communications:*

> In reaffirming these interconnection rights, we promote facilities-based voice competition, and also bolster the case for deploying additional broadband facilities and upgrading existing broadband networks in rural areas. We reaffirm that VoIP providers may obtain access to and interconnection with the local exchange network through competitive carriers. Therefore, today's clarifications regarding the rights of wholesale carriers to interconnect pursuant to sections 251(a) and (b) advance the objectives of the Communications Act.[55]

This conclusion was consistent with the *Time Warner* decision, which found that "such wholesale competition and its facilitation of the introduction of new technology holds particular promise for consumers in rural areas."[56]

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[53] *See* James Valley home page, *available at* https://jamesvalley.com.
[54] *Time Warner,* 22 FCC Rcd at 3519; *CRC Communications,* 26 FCC Rcd at 8274.
[55] *CRC Communications,* 26 FCC Rcd at 8274.
[56] *Time Warner,* 22 FCC Rcd at 3520.

Thus, public interest considerations, like the underlying law, support the conclusion that Midco should be allowed to obtain interconnection with James Valley through this arbitration proceeding.

V. Conclusion

Both South Dakota law and binding FCC decisions on this issue are clear, and the Commission should hold that Midco need not obtain a new or amended certificate before interconnecting with James Valley, and that the arbitration should proceed. Nothing in the James Valley/SDTA brief or the Staff brief affects that conclusion.

Respectfully submitted,

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March 3, 2022