

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

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

PETITION FOR ARBITRATION

Midcontinent Communications (“Midco”), pursuant to Section 49-31-81 of the South Dakota Codified Laws, SDCL 49-31-81, Section 20:10:32:29 of the Administrative Rules of South Dakota, ARSD 20:10:32:29, and Section 252 of the federal Communications Act of 1934, 47 U.S.C. § 252, hereby petitions the Public Utilities Commission of South Dakota (the “Commission”) for arbitration of the terms of an interconnection agreement between Midco and James Valley Cooperative Telephone Company (“James Valley”)¹ for the exchange of traffic between Midco and James Valley in the James Valley service area in South Dakota.

I. Introduction

This petition requests arbitration for an interconnection agreement between Midco and James Valley for interconnection requested pursuant to Section 251(a) of the federal Communications Act of 1934 (the “Act”), 47 U.S.C. § 251(a). Midco is making this request so that it may provide wholesale interconnection services to voice over IP providers that wish to

¹ Midco notes that James Valley has responded to Midco’s request both as James Valley Cooperative Telephone Company and as James Valley Telecommunications. James Valley brands itself as James Valley Telecommunications (and is listed in some Commission records as James Valley Telecommunications), but its website reports its formal name as James Valley Cooperative Telephone Company, it appears on the Commission’s list of incumbent local exchange carriers as James Valley Cooperative Telephone Company, and Midco’s existing extended area service agreement is with James Valley Cooperative Telephone Company. This petition is filed under the company’s formal name.

serve the James Valley service area.² As described in more detail below, the Federal Communications Commission has held that interconnection under Section 251(a) is not subject to the rural exemption or to suspensions under Section 251(f) of the Act, and that Section 251(a) interconnection requests are subject to the arbitration provisions of Section 252 of the Act. Further, Section 49-21-81 of the South Dakota Consolidated Laws specifically provides for arbitration of interconnection requests made under Section 251(a). SDCL § 49-21-81.

Midco seeks standard terms for interconnection and the exchange of traffic, as well as for implementation of local telephone number portability between the parties. The specific terms proposed by Midco are contained in its proposed interconnection agreement, which was provided to James Valley in August, 2021, is attached to this petition as Exhibit 1.³

II. Procedural History

Midco first made a request for discussions towards an interconnection agreement by letter to James Groft, the Chief Executive Officer of James Valley, on June 3, 2021.⁴ On June 18, 2021, Mr. Groft responded in a letter that claimed that Midco was not entitled to interconnection, based on the theory that Midco would be required to hold a certificate from the Commission to provide local telephone service in the James Valley territory to obtain interconnection.⁵

Midco answered Mr. Groft's letter on July 16, 2021, with a letter from Midco's federal communications counsel that described the FCC rulings that permit carriers providing wholesale services to obtain interconnection under Section 251(a) of the Act so long as they hold any

² Midco notes that, pursuant to the stipulation and order in Docket TC-0477, James Valley agreed to provide number portability to Midco under any interconnection agreement entered into between the companies and approved by the Commission. *See James Valley Cooperative Telephone Company Petition for Suspension or Modification of 47 U.S.C. § 252(b)(2) of the Communications Act of 1934, As Amended*, Final Order Decision and Order Approving and Incorporating Stipulation (Aug. 26, 2004).

³ As described below, James Valley chose not to provide an alternative proposal to Midco.

⁴ Copies of all of the correspondence between Midco and James Valley are attached to this petition in Exhibit 2.

⁵ *See* Exhibit 2, Letter from James Groft to Andi Livingston, June 18, 2021.

authorization that allows them to provide service within the state where interconnection is requested, and which formally triggered the period for negotiation and arbitration of an interconnection agreement under the Act.⁶ Mr. Groft responded to this letter on August 6, reiterating his claim that James Valley is not required to provide interconnection unless Midco holds an authorization to serve the James Valley territory from the Commission.⁷ Midco sent a final response to Mr. Groft on August 17, explaining that his position continued to be inconsistent with federal law, noting that his claims did not stop the clock for arbitration, and providing a draft interconnection agreement that could be used as a basis for negotiation.⁸

There was no further correspondence between the parties, and James Valley did not choose to enter into negotiation or mediation with Midco during the pendency of the interconnection request. However, on September 23, 2021, James Valley filed a petition for declaratory ruling with the Commission, seeking a ruling to confirm its view that it was not required to enter into an interconnection agreement with Midco.⁹ The Commission dismissed that petition *sua sponte* on September 29, 2021 in an email message to James Valley counsel from Patricia Van Gerpen, Executive Director of the Commission.¹⁰

Ms. Van Gerpen's email message also requested that Midco provide notice of its request for interconnection pursuant to Article 20:10:32:20 of the South Dakota administrative rules,

⁶ See Exhibit 2, Letter from J.G. Harrington to James Groft, July 16, 2021, at 3 (stating that "this letter constitutes a formal request for interconnection under Sections 251(a), 251(b) and 252 of the Communications Act, and begins the period for negotiation and arbitration under Section 252").

⁷ See Exhibit 2, Letter from James Groft to Andi Livingston, Aug. 6, 2021.

⁸ See Exhibit 2, Letter from J.G. Harrington to James Groft, Aug. 17, 2021. The interconnection agreement attached to the August 17 letter is omitted from Exhibit 2 because the same agreement has been provided as Exhibit 1 to this petition.

⁹ See 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.

¹⁰ See Email correspondence from Patricia Van Gerpen, Executive Director, Commission, to Josh Wurgler, counsel to James Valley, Sept. 29, 2021.

ARSD 20:10:32:20, and stated that James Valley would have the opportunity to object to Midco's request in response to that notice.¹¹ Midco provided notice in a letter dated October 11, 2021, but noted that Article 20:10:32:20 does not apply when, as here, a request is not subject to an exemption or suspension under Section 252 of the Act.¹² James Valley did not respond to the October 11 letter.

III. Basis for Petition

This petition is properly before the Commission under Sections 251(a) and 252(b)(1) of the Act, 47 U.S.C. §§ 251(a), 252(b)(1), and Section 49-21-81 of the South Dakota Consolidated Laws, which specifically provides for arbitration of interconnection requests made under Section 251(a) of the Act. SDCL 49-21-81. It is not subject to the exemption or suspension provisions of the Section 251(f) of the Act. 47 U.S.C. § 251(f). It also is timely filed.

A. The Petition Is Properly Before the Commission

FCC precedent establishes that Midcontinent can obtain interconnection under Section 251(a) as a provider of wholesale telecommunications services. The FCC first reached this conclusion in 2007 in its *Time Warner* case, where it 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.”¹³ That decision rejected claims that wholesale service did not qualify as telecommunications service, and concluded that wholesale carriers are entitled to request interconnection from rural carriers under Sections 251(a) and (b) to provide wholesale

¹¹ *Id.*

¹² See Letter of Patrick Mastel, Midco, to the Commission, Oct. 11 2021, attached hereto as Exhibit 3.

¹³ 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) (“*Time Warner*”).

service. The *Time Warner* decision specifically determined that the rural exemption under Section 251(f) does not apply to interconnection requests under Section 251(a) and (b) of the Act because the rural exemption applies only to the requirements of Section 251(c) of the Act.¹⁴ The FCC affirmed this position four years later in *CRC Communications*. In that decision, the FCC said:

We also reaffirm the Bureau’s conclusion in the *TWC Order* 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), 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.¹⁵

CRC Communications also held that carriers are entitled to arbitration of Section 251(a) requests to provide wholesale service.¹⁶ As the FCC explained,

[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)(2) does not exempt rural incumbent LECs from the compulsory arbitration process established in that provision.

* * * *

This interpretation of the statute advances the goals of the Communications Act in several respects. For one, this interpretation advances the Act’s competition policy goals. As the Commission has recognized, 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.¹⁷

¹⁴ See 47 U.S.C. § 251(f)(1)(A) (stating that rural exemption applies to Section 251(c) obligations only); *Time Warner*, 22 FCC Rcd at 3517-20 (determining that wholesale services qualify as telecommunications services entitled to interconnection under Sections 251(a) and (b) of the Communications Act).

¹⁵ *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*”).

¹⁶ *Id.*

¹⁷ *Id.*, 26 FCC Rcd at 8269, 8271.

Further, interconnection with a rural incumbent LEC does not require overlap with the incumbent LEC's service area, or that a carrier provide local exchange service, although in fact Midcontinent is authorized to provide service within the James Valley territory.

First, neither *Time Warner* nor *CSC Communications* requires any service territory overlap to create an interconnection obligation. Section 251(a) adopted a broad interconnection obligation that covers all types of telecommunications services, including interconnection between IXCs and LECs and interconnection between incumbent LECs that do not compete with each other. Thus, it is apparent that a carrier requesting interconnection need not provide local exchange services or overlap the service area of the other carrier.¹⁸ Consequently, a carrier need only to have authority to provide telecommunications service of some kind in the state where it is requesting interconnection to have rights under Section 251(a) and, consequently, arbitration rights under Section 252.

Midco holds multiple authorizations to provide service in South Dakota, including a certificate from the Commission that allows it to provide local exchange and intrastate interexchange service, a domestic Section 214 authorization from the FCC that allows it to provide interstate service from anywhere in the country, and an international Section 214 authorization from the FCC that allows it to provide international service from anywhere in the country.¹⁹ The plain text of Section 251(a)(1), *Time Warner*, and *CSC Communications*

¹⁸ 47 U.S.C. § 251(a)(1). Section 251(a)(1) was created in part to ensure that all carriers would have interconnection rights, whether or not they fell within the limited scope of Section 251(c). Compare 47 U.S.C. § 251(a)(1) (adopting right for telecommunications carriers to interconnect "directly or indirectly" with other telecommunications carriers) with 47 U.S.C. § 251(c) (adopting specific rights to interconnect with incumbent local exchange carriers on just and reasonable rates, terms, and conditions at points of the interconnector's choosing at specified quality levels). For instance, the interconnection between James Valley and other rural LECs in South Dakota is governed by Section 251(a) even though their territories do not overlap.

¹⁹ See South Dakota Certificate of Authority TC00-085 (granting authority to conduct business as a Telecommunications Company in South Dakota); 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

establish that any of these authorizations is sufficient to require James Valley to interconnect with Midcontinent. Even to the extent that Midco could be required to have authorization to serve within the James Valley territory to obtain interconnection, the two FCC authorizations provide that authority.

Finally, both *Time Warner* and *CRC Communications* concluded that wholesale providers are eligible for Section 251(a) interconnection and arbitration. 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.”²⁰ It repeated that conclusion in *CRC Communications*.²¹ Both *Time Warner* and *CRC Communications* refer to the broad category of “telecommunications carriers” as eligible for interconnection and arbitration, and do not differentiate among local exchange carriers, specialized carriers, or interexchange carriers, or between interstate and intrastate carriers.²² This is consistent with both Section 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.²³

Midcontinent); FCC Public Notice, International Authorizations Granted, DA No. 01-1604 (rel. July 6, 2001) (granting international Section 214 authorization to Midcontinent)

²⁰ *Time Warner*, 22 FCC Rcd at 3513.

²¹ In *CRC Communications*, the FCC stated 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. *CRC Communications*, 26 FCC Rcd at 8273.

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

²³ 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).

B. The Petition Is Timely Filed

Under Section 252(b)(1) of the Act, arbitration petitions may be filed during the period from the 135th day to the 160th day after a party makes a formal request for interconnection. As described above, in the July 16 letter, Midco notified James Valley that “this letter constitutes a formal request for interconnection under Sections 251(a), 251(b) and 252 of the Communications Act, and begins the period for negotiation and arbitration under Section 252.”

The July 16 Letter was transmitted to James Valley electronically on July 16, 2021 and via overnight courier to arrive on July 17.²⁴ The 135th day following the July 16 Letter was November 28, 2021. The 160th day following the July 16 Letter will be December 23, 2021. This petition is being filed on December 6, 2021, and therefore is within the permitted time frame under Section 251(b)(1).

IV. Relief Requested

Midco requests that the Commission adopt the terms and conditions of the proposed interconnection agreement attached to this petition as Exhibit 1. This proposed agreement is based on the terms of voluntarily-negotiated agreements between Midco and other rural local exchange carriers, and addresses all of the issues typically encompassed within interconnection agreements.

Midco also proposes that compensation for traffic exchanged under the agreement be set at bill and keep, consistent with the requirements of the FCC’s rules for the exchange of both local and long distance traffic. *See* 47 C.F.R. Subpart H. While Section 251(a)(1) does not specify pricing terms for the exchange of traffic, the FCC’s rules set limits on the prices that

²⁴ Although Section 252(b)(1) specifies that the period for interconnection is counted from the date that a request is made, Midco is providing information on delivery of the July 16 Letter as well. James Valley acknowledged receipt of the July 16 Letter in the August 6 Letter.

carriers can charge for exchanging both local exchange and access traffic, and under the current rules both types of traffic are subject to bill and keep.

As noted above, James Valley has not responded to the Midco draft, so Midco does not know if there are any areas of dispute between the parties on the terms of the agreement. Midco will respond to any specific proposals from James Valley at an appropriate time. However, in the absence of any response, Midco submits that its proposed terms and conditions for interconnection and intercarrier compensation are fair, just, and reasonable.

V. Information Required by Article 20:10:32:29

Midco has provided the information required by Article 20:10:32:29 of the Administrative Rules, ARSD 20:10:32:29, in Exhibit 4.

VI. Conclusion

Midco respectfully requests that the Commission adopt its proposed agreement for interconnection between Midco and James Valley.

Respectfully submitted,

Midcontinent Communications



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December 6, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2021, a copy of the foregoing Petition for Arbitration was filed electronically with the South Dakota Public Utilities Commission and sent by first class mail, postage prepaid, and by electronic mail, to:

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