

**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 Number: TC21-124

MOTION TO DISMISS
UNTIMELY PETITION

James Valley Cooperative Telephone Company (“James Valley”) moves the Public Utilities Commission to dismiss Midcontinent Communications’ (“Midco”) Petition as untimely filed in violation of Section 252(b)(1) of the federal Communications Act of 1934, 47 U.S.C. § 252, thus depriving the Commission of jurisdiction over the Petition. The deadline to file the Petition was November 11, 2021. The petition was filed on December 6, 2021.

1. Procedural history.

On June 3, 2021, Midco sent James Valley a request for Interconnection Agreement. *See* Midco’s Petition, Exhibit 2. That June 3rd letter stated, “This request is made under the provisions of Section 251 (c)(2) of the Act, 47 U.S.C., and is intended to trigger the time periods for negotiation and arbitration under Section 252 of the Act.”

On June 18, 2021, James Valley sent its letter reply to Midco arguing why Midco’s request was substantively deficient. *See* Midco’s Petition, Exhibit 2.

On July 16, 2021, Midco, via letter from its counsel J.G. Harrington to James Valley, responded with its arguments to the contrary, and again stated, “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.” See Midco’s Petition, Exhibit 2.

On December 6, 2021, Midco filed a *Petition for Arbitration of an Interconnection Agreement Between Midcontinent Communications and James Valley Cooperative Telephone Company*.

2. The precise issue before the Commission:

Did Midco timely file its Petition for Arbitration?

3. Argument for dismissal.

The Commission’s authority to arbitrate interconnection disputes is conferred by SDCL 49-31-81: “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.” The Commission’s jurisdiction is therefore constrained by 47 U.S.C. § 252. See *O’Toole v. Bd. of Trustees of S. Dakota Ret. Sys.*, 2002 S.D. 77, ¶ 15, 648 N.W.2d 342, 346 (“The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute.”).

“Congress intended that such disputes be addressed by state commissions in the first instance.” *Glob. Naps, Inc. v. Bell Atl.-New Jersey, Inc.*, 287 F. Supp. 2d 532, 545 (D.N.J. 2003); see also *GTE N. Inc. v. Glazer*, 989 F. Supp. 922, 924 (N.D. Ohio 1997) (“§ 252 of the Act plainly states that Federal District Courts are to become involved only after the State Commission has reviewed the agreement to determine whether that agreement meets the requirements of §§ 251 and 252.”).

Relevant to this motion, Section 252(b)(1) only grants the Commission authority to arbitrate disputes when it receives a timely petition for arbitration. Midco's petition is untimely, therefore it must be dismissed.¹

The issue facing the Commission is the statutory interpretation of Section 252(b)(1). “[C]ongressional intent should be gleaned from the plain text of the statute.” *In re GCC License Corp.*, 2001 S.D. 32, ¶ 11, 623 N.W.2d 474, 479 (citing *De Smet Ins. Co. of South Dakota v. Gibson*, 1996 SD 102, ¶ 7, 552 N.W.2d 98, 100). “When statutory language is clear and unambiguous we can simply declare the meaning as expressed.” *Id.*

Section 252(b)(1) states, “During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.” There are two elements of consequence in that statute: 1) a request for negotiation; and 2) a petition made within a certain timeframe.

First, the request for negotiation. Midco's June 3rd letter unambiguously requested negotiation of an interconnection agreement. The subject line of the letter says, “Midcontinent Communications Request for Section 251 (c) Facilities based Interconnection Agreement.” (Midco Petition, Exhibit 2.) Midco's second sentence of the letter clearly states that the letter's purpose is to request interconnection:

¹ ARSD 20:10:01:01.02 provides for the use of the SD Rules of Civil Procedure in Commission actions. Under SDCL 15-6-12(b) a party may move to dismiss an action for lack of jurisdiction and under SDCL 15-6-12(a) if the motion is denied, a party has ten days after notice of the dismissal to file a responsive pleading. Therefore, if the Commission denies the Motion, James Valley will have ten days to file a substantive response on the merits to the Petition, including, but not limited to the need for a Certificate of Authority.

The purpose of this letter is to request an interconnection agreement with James Valley Cooperative Telephone Company ("James Valley") for the purpose of facilities based interconnection, the exchange of traffic, number portability and other customary arrangements in the Groton, South Dakota, exchange.

(Midco Petition, Exhibit 2.)

Midco also invoked the statute at issue in this motion, Section 252, when it said in the June 3rd letter, "This request is made under the provisions of Section 251 (c)(2) of the Act, 47 U.S.C., and is intended to trigger the time periods for negotiation and arbitration under Section 252 of the Act." (Midco Petition, Exhibit 2.) Midco ended its letter by stating, "We look forward to negotiating and reaching an acceptable interconnection Agreement with James Valley for the Groton exchange."

Clearly, with its letter, Midco intended to initiate a negotiation for interconnection and to trigger the relevant deadlines for arbitration in the event negotiation was unsuccessful.

Second, a petition made within a certain timeframe. The statutory language of Section 252(b)(1) clearly and unambiguously provides a 25-day window during which a requesting party must petition for arbitration. It directs that a petition for arbitration may not be made *before* 135 days from the request for negotiation, nor may the petition be made *after* 160 days from the request. As noted by the Ninth Circuit Court of Appeals, the statute provides "a strict window of time for the submission of a petition for arbitration." *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 977 (9th Cir. 2012).

Midco failed to meet the statutory 160-day deadline. It triggered Section 252(b)(1)'s 160-day countdown with its June 3, 2021, letter in which Midco specifically stated it intended to trigger the countdown. The deadline one hundred sixty days from June 3rd was November 11, 2021. Midco did not file its Petition until 25 days *after* the deadline. The parties have not stipulated to extend the deadline. Thus the Petition is untimely and must be dismissed.

It is anticipated that Midco will argue that its July 16, 2021, letter is the one that triggered the Section 252(b)(1) deadlines. That argument is wrong for two reasons.

First, the subject matter of the June and July letters was the same request for interconnection. The July letter was merely Midco's response to James Valley's stated concern (in its June 18th letter) that Midco could not legally request interconnection without first obtaining a certificate of authority. Indeed, the first sentence of Midco's July 16th letter begins, "Midcontinent Communications ("Midcontinent") has asked me *to respond to your June 18, 2021 letter* to Andi Livingston." (Midco Petition, Exhibit 2, emphasis added.) Because Midco's July letter simply supplemented its June letter, it could not serve to change the Section 252(b)(1) deadlines that the June letter had already established.

Second, Midco's anticipated argument would render the Section 252 time periods irrelevant. If Midco can avoid the statutory deadlines by conveying a redundant supplement to its earlier request for negotiation, thus triggering new deadlines, then the deadlines are meaningless. After each request, Midco could wait till the 159th day, send another request, and reset the deadlines *ad infinitum*. If Congress had intended such a result, it would have explicitly provided for such a procedure, or it could have written the statute without any deadlines.

The statute is unambiguous. When a carrier requests negotiation, the 135 to 160-day window is triggered. And the statute does not authorize "rolling" requests to keep moving the deadline further down the road.

4. Conclusion

Because Midco did not file its Petition for Arbitration prior to the 160-day deadline, its

Petition must be dismissed as untimely.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December 2021, a copy of foregoing was filed electronically with the South Dakota Public Utilities Commission and sent by email and first-class mail, postage prepaid, to:

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