

**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)

**RESPONSE OF JAMES VALLEY COMMUNICATIONS TO MIDCONTINENT
COMMUNICATIONS' PETITION FOR ARBITRATION**

James Valley Cooperative Telephone Company files this response to Midcontinent Communications' Petition for Arbitration.

Preliminary Statement

1. Midcontinent's Petition should be dismissed or denied for the reasons set forth herein, including, (a) *Time Warner Cable*, 22 FCC Rcd 3513 (2007) does not authorize Midcontinent to request an Interconnect Agreement from James Valley, (b) under ARSD 20:10:32:02 Midcontinent is required to obtain a Certificate of Authority in the James Valley service area and (c) Midcontinent's prior Stipulations and this Commission's Order require Midcontinent to obtain a Certificate of Authority

2. All allegations and statements in the Petition not expressly admitted herein are specifically denied.

3. James Valley requests the Commission permit discovery on factual issues relevant to Midcontinent's Petition and this Response.

Procedural Background

4. On December 6, 2021, Petitioner filed a Petition with the South Dakota Public Utilities Commission ("Commission") to arbitrate issues related to Midcontinent's request to interconnect with and exchange traffic with James Valley (the "Petition"). The Petition and filing were made pursuant to SDCL 49-31-81, ARSD 20:10:32:29 and 47 U.S.C. § 252.

5. James Valley is a "rural telephone company" for purposes of the Act and the state laws enacted in 1998 addressing local exchange competition (SDCL 39-31-69, et. seq.).

6. On December 22, 2021, James Valley filed a Motion to Dismiss Midcontinent's Petition as untimely, and it filed a Reply to Staff and Midco's Responses to that Motion on December 30, 2021. James Valley incorporates the arguments, factual allegations, and requests for relief from the Motion and Reply here.

7. On December 27, 2021, SDTA filed a Motion to Intervene. James Valley supports and consents to the SDTA's Motion.

8. On December 29, 2021, Commission Staff filed a Motion to bifurcate the issues presented in the docket. James Valley supports the Staff's Motion. Resolution of the legal issues raised in this Docket prior to the parties, the Commission or Staff negotiating or arbitrating the technical terms of an interconnect agreement is best use of the parties', Commission and Staff resources.

Legal Issues

Time Warner Cable Is Not Authority for Midcontinent's Interconnect Request

a. Midcontinent will not be servicing "other service providers"

9. Midcontinent relies upon *Time Warner Cable*, 22 FCC Rcd 3513 (2007) as authority for its position that it is entitled to interconnection. Its reliance is misplaced.

10. *Time Warner Cable* authorized interconnect agreement requests by wholesale telecommunications carriers providing services to “other service providers.”

- a. The Order “grant[ed] a petition for declaratory ruling filed by Time Warner Cable (TWC) asking the Commission 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).” (para. 1 of Order, emphasis added)
- b. “As explained above, *see supra* para. 1, we affirm today the rights of *all* wholesale carriers to interconnect when providing service to **other** providers.” (para. 13 Fn 33 of Order, emphasis added)
- c. “Finally, we emphasize that our ruling today is limited to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection *in their own right* for the purpose of transmitting traffic to or from another service provider.” (para. 16 of Order, emphasis original)

11. Upon information and belief, Midcontinent will not be providing services to “other service providers” but instead will provide wholesale VOIP services to its affiliate Midco Voice, LLC.

b. Telecommunications Carrier Analysis

12. The basis for the *Time Warner Cable* decision was the requesting entity's operation as a telecommunications carrier offering services indiscriminately to unrelated third parties.¹

13. The *Time Warner Cable* Order further stated that “we make clear that the scope of our declaratory ruling is limited to wholesale carriers that are acting as telecommunications carriers for purposes of their interconnection request.” (para. 16 of Order, emphasis added)

14. Midcontinent defines itself as a telecommunications carrier and self-declares it is entitled to interconnection. However, under the proposed interconnection agreement, and the method by which Midcontinent will serve end user customers, it does not meet the definition of a telecommunications carrier under Federal Code. See 47 U.S.C. § 153(51).

15. A telecommunications carrier is, “any provider of telecommunications services.” 47 U.S.C. § 153(51). The FCC determined that, telecommunications services are intended to “encompass only telecommunications provided on a common carrier basis.” *Universal Service Order*, 12 FCC Rcd at 9177-8, para 785 (emphasis added). A common carrier is one that, “holds himself out to serve indifferently all potential users.” *National Ass’n of Regulatory Utility Com’rs v. FCC*, 533 F.2d 601, 608 (CA DC 1976).

16. Upon information and belief, Midcontinent will be using the proposed interconnection agreement to exclusively provide services to its affiliate Midco Voice, LLC and therefore, it will not offer services “indifferently to all potential users” and as a result, it will not operate as a common carrier.

¹ The FCC did “not address or express any opinion on any state commission’s evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service.” *Id.* at Para 14. States retain authority to examine facts. The facts in the present docket indicate Midcontinent will not provide telecommunications services and as a result it is not entitled to 47 U.S.C. § 251 interconnection.

17. Midcontinent is not a “telecommunications carrier” in the James Valley rural exchange area. Therefore, Midcontinent is not entitled to 47 U.S.C. § 251 interconnection under the terms of its proposed interconnection agreement.

Certificate of Authority is Required

18. Midcontinent must obtain the required Certificate of Authority as a condition of interconnection. ARSD 20:10:32:02 provides that “a telecommunications company may not provide local exchange service² 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.”

19. Midcontinent does not have a Certificate of Authority in the James Valley exchange.

20. Midcontinent intends to connect consumers in the James Valley rural exchange to the public switched network for the transmission of two-way switched services thus meeting the definition of a telecommunications company, SDCL 49-31-1(28), and therefore, Midcontinent must obtain a Certificate of Authority to operate as a telecommunications carrier in the James Valley rural telephone exchange.

21. Upon information and belief, Midcontinent attempts to avoid the Certificate of Authority requirement by utilizing its own VOIP provider, Midco Voice, LLC as the entity that provides end user services.

² Local Exchange Service is “the access to and transmission of two-way switched telecommunications service within a local exchange area” SDCL 49-31-1(13).

22. Whether direct or indirect, however, the connection of the public to the public switch network results in regulatory duties and obligations. Midcontinent's proposed service implicates regulatory duties and obligations under South Dakota law.

23. Midcontinent relies on *Time Warner Cable* as authority for its position that a Certificate of Authority cannot be required by a state regulatory body. However, *Time Warner* did not disturb state technical requirements. *Id.* at Para 16, page 10. Rather, *Time Warner* merely clarified that a wholesale provider is considered a telecommunications carrier for purposes of 47 U.S.C. § 251 interconnection if it meets the definition of "telecommunications carrier" under federal code.³

24. The South Dakota Certificate of Authority requirements are not preempted by *Time Warner*.

Midcontinent Prior Stipulations and Commission Orders

25. Midcontinent entered into various Stipulations with SDTA (or its predecessor) resulting in Commission Orders that require Midcontinent to obtain an amended Certificate of Authority prior to providing service outside "CenturyLink" service areas.

26. In TC98-148 the Order which granted a Certificate of Authority to Sioux Falls Cable (the predecessor of Midcontinent) incorporated language contained in a Stipulation between, among others, Sioux Falls Cable and the South Dakota Independent Telephone Coalition, Inc. (a predecessor of South Dakota Telecommunications Association, also known as SDTA) stated:

Sioux Falls Cable agrees that if at any time it intends to provide local exchange services in the service area of any "rural telephone company" as defined by federal law, it will make further application to the Commission for a certificate of authority to provide local exchange service under SDCL 49-31-71 prior to providing any such

³ Midcontinent does not meet the definition of a common carrier, thus is not a telecommunications carrier and is not entitled to 47 U.S.C. § 251 interconnection.

services in compliance with state and federal law on that subject, including 47 USC §214(e)(1) and §253(f).

27. Neither the Stipulation nor the Order in TC98-148 have been modified, amended or set aside.

28. In TC00-085, the Commission issued its Order granting the transfer of Midco Communications Certificate and the Sioux Falls Cable Certificate to Midcontinent Communications. The Order provided "...the Commission shall authorize Midcontinent Communications to offer its local services in those areas in South Dakota where US WEST Communications Inc. is the incumbent local exchange carrier."

29. On February 10, 2017, in TC17-005, Midcontinent filed an Amended Application for an Amended Certificate of Authority to provide local exchange service in the rural exchange area of Ipswich, SD. In its Amended Application at Paragraph 8, Midcontinent confirmed it only has a Certificate of Authority in the following areas:

Midcontinent Communications is currently certified to provide local exchange and long distance services throughout the state of South Dakota in the CenturyLink service areas, the ITC exchanges of Webster and Waubay, Santel's exchange in Wolsey, Knology's exchanges in Gayville and Lennox, Alliance exchanges in Baltic and Crooks, and the Venture exchanges of Bowdle, Roscoe, Selby, and Java.

30. Also, in TC17-005, Midcontinent traced the history of its corporate status and Certificate of Authority stating at Paragraph 6 of its Amended Application the following:

The present Midcontinent Communications was originally certificated as MidcoTel in 1982 as a provider of interexchange service in South Dakota. MidcoTel became Midco Communications, and Midco Communications filed for and received a certificate to provide resold local exchange service in South Dakota in 1997 and a facilities based certificate in 1999. Midcontinent Media was the parent company of Midco Communications. Another division of Midcontinent Media was Sioux Falls Cable. Sioux Falls Cable filed for and received a certificate as a local exchange carrier in 1999. In

*2000, Sioux Falls Cable and Midco Communications merged to Midcontinent Communications and a new certificate was granted September 2000.*⁴

31. Midcontinent has consistently followed the dictates of the Stipulation and Order in TC98-148 and has made application to the Commission to amend its Certificate of Authority prior to providing local exchange service in rural ILEC areas in these Dockets: TC03-068 Webster, TC04-081 Waubay, TC 05-161 Wolsey, TC07-057 Gayville, TC08-105 Baltic and Crooks, TC12-035 Lennox, TC15-063 Bowdle, Roscoe, Roslyn, Selby and Java, TC17-005 Ipswich.

32. In its Application to Amend its Certificate of Authority in TC17-005 to provide service in Ipswich, Midcontinent proposed providing the following services in Ipswich:

In the Ipswich exchange Midcontinent will use an Internet Protocol (IP) network from its cable plant to provide primary transport for residential telephone services. In addition to providing local exchange services for commercial and residential customers, Midcontinent also provides intrastate interexchange services for commercial and residential customers and interstate interexchange services for commercial and residential customers, which will be available in Ipswich.

This is the same service Midcontinent proposes to provide in the interconnection agreement with James Valley which provides, among other things, the following:

To allow the parties to “interconnect their facilities and exchange telecommunications traffic” - *ICA page 1*

The parties to physically connect their respective networks at the James Valley central office – *ICA/Interconnect Attachment page 4, Section 3*

⁴ In 2000, Sioux Falls Cable and Midco Communications merged to form Midcontinent Communications. In **TC00-085**, the Commission issued its Order granting the transfer of Midco Communications Certificate and the Sioux Falls Cable Certificate to Midcontinent Communications. The Order provided “ Further Ordered that the Commission shall authorize Midcontinent Communications to offer its local services in those areas in South Dakota where US WEST Communications Inc. is the incumbent local exchange carrier.”

The parties provide local number portability, query, routing, and transport services in accordance with rules and regulations as prescribed by the FCC and the guidelines set forth by the North American Numbering Council. – *ICA/Local Number Portability Attachment*

33. Midcontinent’s request for an Interconnect Agreement with James Valley violates its own Stipulations and Commission Orders which require it to obtain a Certificate of Authority.

Schedule

34. James Valley will work cooperatively with Midcontinent, SDTA and Staff on a discovery, briefing and hearing Schedule after the Commission rules on James Valley’s Motion to Dismiss and Staff’s Motion to Bifurcate.

Proposed Interconnect Agreement

35. James Valley denies the terms of the proposed interconnect agreement are fair, just and reasonable and will be prepared to negotiate in good faith appropriate terms on a timely basis once the Commission rules on the relief requested herein.

REQUEST FOR RELIEF

James Valley respectfully requests that the Commission:

1. Dismiss or deny the Petition;
2. If the Commission does not dismiss or deny the Petition, then in the alternative, the Commission enter an Order that one of the terms of the interconnection agreement is that Midcontinent must obtain a Certificate of Authority;
3. Bifurcate the legal issues raised in the Docket and resolve the same prior to arbitrating the technical nature of an interconnect agreement;
4. Prior to arbitration, permit discovery on factual issues relevant to Midcontinent’s Petition;
5. Grant such other relief as the Commission deems appropriate.

Dated: January 3, 2022.

Bantz, Gosch & Cremer, L.L.C

/s/ Josh Wurgler

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CERTIFICATE OF SERVICE

I hereby certify that an original of the RESPONSE OF JAMES VALLEY COMMUNICATIONS TO MIDCONTINENT COMMUNICATIONS' PETITION FOR ARBITRATION, dated January 3, 2022, and filed in PUC Docket TC21-124 was served upon the PUC electronically, directed to the attention of:

Ms. Patty Van Gerpen, Executive Director
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A copy was also sent by e-mail to each of the following individuals:

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Dated: January 3, 2022.

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