

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

<b>IN THE MATTER OF THE APPROVAL OF</b>	)	
<b>THE PETITION FOR ARBITRATION OF AN</b>	)	
<b>INTERCONNECTION AGREEMENT</b>	)	<b>STAFF'S BRIEF ON</b>
<b>BETWEEN MIDCONTINENT</b>	)	<b>BIFURCATED ISSUE</b>
<b>COMMUNICATIONS AND</b>	)	
<b>JAMES VALLEY COOPERATIVE</b>	)	<b>TC21-124</b>
<b>TELEPHONE COMPANY</b>	)	

Staff of the South Dakota Public Utilities Commission (Commission) hereby submits and files this Brief on Bifurcated Issue. The issue to be resolved is: Is Midcontinent Communications required to obtain a Certificate of Authority from the Commission to provide the services contemplated in Exhibit 1 attached to the Proposed Interconnection Agreement?

**I. Background**

A detailed background of Midcontinent Communications' (Midco) presence in South Dakota can be found in Midco's Amended Application in Docket No. TC12-035. Relevant to this docket, however, in TC00-085, this Commission approved a transfer of a Certificate of Authority (COA) from Midco Communications, Inc. and Sioux Falls Cable Television to Midco. The Commission's Order in that docket granted a COA to Midco for local exchange and interexchange services, subject to a bond and to the rural safeguards. This COA covered all local areas served by US WEST Communications, Inc.

Midco's COA was expanded in TC03-068<sup>1</sup> to allow for the provision of local exchange services in the Webster Exchange of Interstate Telecommunications Cooperative, Inc (ITC). In this docket, Midco was also granted a waiver of the requirement to serve an entire study area.

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<sup>1</sup> The Petition in this docket sought an expanded COA and interconnection pursuant to 47 USC § 251(f)(1)(A).

Because ITC was providing video programming, the COA Application was later amended to state that 47 USC § 251(f)(1)(A) did not apply. An interconnection agreement between Midco and ITC was approved in TC03-192. Then, in TC04-081, Midco received a similar expansion for the Waubay Exchange. Midco's COA for local exchange services has since been expanded as follows:

- TC05-161 – Wolsey Exchange
- TC07-057 -- Gayville Exchange
- TC08-105 – Crooks and Baltic Exchanges

All of the above COA expansions were in response to the RLEC's provision of video programming.

In Docket No. TC12-035, Midco was granted a local exchange COA for Lennox. It does not appear that video programming was a factor in that docket.

The exchanges of Bowdle, Roslyn, Selby, Java, and Roscoe were added to Midco's local exchange COA in TC15-063, after the RLEC began offering video programming. By stipulation and agreement between Midco, SDTA, and the RLEC, the exchange of Ipswitch was later added to Midco's COA in TC17-005. Finally, in TC18-058 Midco's COA was again expanded to cover certain census blocks in which Midco received CAFII funding.

## **II. Legal Argument**

SDCL 49-31-69 provides in relevant part:

A company may not extend an existing telecommunications facility outside its local exchange service area for the purpose of providing local exchange service in a service area in which it is not certified without applying to the commission for authority to do so. Any telecommunications company seeking to amend or alter its authorized local exchange service territory shall apply for an amended certificate of authority.

“Local exchange service” is defined in SDCL 49-31-1 as “the access to and transmission of two-way switched telecommunications service within a local exchange area.”

According to its Petition for Arbitration, Midco made its request for interconnection in order provide wholesale interconnection services to VoIP providers that wish to service the James Valley service area.<sup>2</sup> Neither SDCL 49-31-69 nor the definition of “local exchange service” differentiate between wholesale and retail service or limit the need for a certificate of authority (COA) to retail service.

The interconnection agreement proffered by Midco attached to its Petition in this docket states that it is “for network interconnection arrangements between ILEC and [Midco] for the purpose of the exchange of Local/EAS that is originated by an End User Customer of one Party and is terminated to an End User Customer of the other Party physically located in the same Exchange Area...”<sup>3</sup> Based upon this language, it is apparent that the service sought is, in fact, local exchange service.

Midco does not currently have a COA to provide local exchange service in James Valley’s service territory. Therefore, prior to the provision of such service, Midco should obtain an amended COA from this Commission.

As a side note, Staff notes that the proffered interconnection agreement contains a clause that states that “Each Party shall comply with all federal, state, and local statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings applicable to its performance under this Agreement.”<sup>4</sup> As long as this language remains in the Agreement, there is no reason

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<sup>2</sup> See Petition, pages 1-2

<sup>3</sup> See page 34 of 49, Section 1.1.

<sup>4</sup> See page 11 of 49, Section 10.

that the interconnection agreement cannot be approved prior to Midco obtaining a COA. The enumerated commitment to follow state law ensures that a COA will be obtained if required by law.

**A. The *Time Warner* Declaratory Ruling does not excuse providers from obtaining a COA**

In its Petition for Arbitration, Midco seems to imply that Time Warner excused wholesale providers from the requirement of obtaining a certificate of authority.<sup>5</sup> Midco states that “[c]onsequently, 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.”<sup>6</sup> Midco goes on to argue that it has multiple authorizations in this state.

As discussed in the Background section above, Midco does hold a Certificate of Authority, which has been amended several times to include several specified exchanges. However, Midco has never been granted a COA to provide local exchanges services for the whole state of South Dakota. Nothing in *Time Warner* indicates that the FCC has ever found or intended for every COA granted in any exchange to effectively be a blanket COA for an entire state.

Rather, the only proposition for which *Time Warner* stands is that telecommunications companies, both wholesale and retail, have rights to interconnection and arbitration. It does not

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<sup>5</sup> See Petition, pages 5-7, citing 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”).

<sup>6</sup> Id. At page 6.

say that a company does not need to first obtain a COA nor does it appear that any other state has interpreted it that way.

## **B. Guidance from other jurisdictions**

While this is the first time this issue has been before the South Dakota Commission, a similar issue was brought before the Oklahoma Corporation Commission (OCC) in 2021.<sup>7</sup> In that docket, the question before the OCC was whether Level 3 Communications (Level 3) should be permitted to expand its service territory into the service territory of Bixby Telephone Company, Inc., a rural local exchange carrier (RLEC). The OCC's Order indicates that Level 3 was seeking to provide wholesale services and to enter into an interconnection agreement with the RLEC.<sup>8</sup> Interconnection was sought with the RLEC pursuant to Section 251(a) and (b). The OCC Order referred to witness testimony, stating that the "gate issue, i.e., the prerequisite to interconnection, is the certification and service territory authority to operate."<sup>9</sup>

While some states have found a certificate of authority to be required before an interconnection agreement may be approved, this Commission has historically allowed flexibility to the companies on the issue of timing. With the understanding that a certificate of authority would need to be obtained prior to utilizing an interconnection agreement, this commission has nonetheless approved such agreements before the COA was sought or granted. Therefore, while SDCL 49-31-69 requires Midco to obtain a COA for the area and services at issue in this docket, Staff does not believe it should be required to do so before this docket is processed. Rather, any

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<sup>7</sup> See Cause No. PUC 202100060, Order No. 72080

<sup>8</sup> Id. at pages 19-20.

<sup>9</sup> Id. at page 20.

interconnection agreement approved by the commission should include a term or be contingent upon the agreement becoming effective if and when a COA is obtained.

### III. Conclusion

Based on the language contained in its proposed interconnection agreement, Midco intends to provide local exchange services in the service territory of James Valley. Pursuant to South Dakota law, Midco must obtain a COA prior to the provision of such services since it does not currently have a COA to provide local exchange services in that exchange. While Midco seems to indicate that *Time Warner* determines a COA is unnecessary, the only implication *Time Warner* has is that both wholesale and retail telecommunications companies have the right to interconnection. *Time Warner* does not address the requirements of a telecommunications company to obtain a COA from the South Dakota Commission. The Commission should find that Midco is required to obtain a Certificate of Authority from the Commission to provide the services contemplated in Exhibit 1 attached to the Proposed Interconnection Agreement and any interconnection agreement approved by the Commission should include a term or be contingent upon the agreement becoming effective if and when a COA is obtained.

Dated this 17th day of February 2022.

  
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