

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

**IN THE MATTER OF THE APPROVAL OF)
THE PETITION FOR ARBITRATION OF AN)
INTERCONNECTION AGREEMENT) STAFF’S REPLY BRIEF ON
BETWEEN MIDCONTINENT) BIFURCATED ISSUE
COMMUNICATIONS AND)
JAMES VALLEY COOPERATIVE) TC21-124
TELEPHONE COMPANY)**

Staff of the South Dakota Public Utilities Commission (Commission) hereby submits and files this Reply Brief on Bifurcated Issue.

I. Argument

In it’s brief, Midco focuses on the issue of timing. Staff does not disagree, as reflected in Staff’s opening brief, that Midco is not required to obtain a certificate of authority (COA) in order to commence negotiations and obtain an interconnection agreement. Where Staff diverges from Midco’s argument is the question on whether Midco needs a COA in order to actually utilize the interconnection agreement.

A. Midco would be providing local exchange services.

SDCL 49-31-1(13) defines local exchange service as “the access to and transmission of two-way switched telecommunications service within a local exchange area.” Nothing in this definition limits local exchange services to only those services provided to an end user or only those services provided at retail. In fact, this Commission has granted COAs to companies for wholesale local exchange services.¹

¹ See examples: TC13-107 and TC18-014.

There are two essential elements to being a local exchange service: 1) is it a telecommunications service, and 2) is it being offered within a local exchange? In this case, the answer to both is yes.

It is uncontested that what Midco seeks to offer is a telecommunications service. Further, Midco's proposed interconnection agreement clearly demonstrates that the services would be provided within a local exchange. The proposed interconnection agreement states Midco "agrees that it is requesting and will use this arrangement for the sole purpose of exchanging Local/EAS Traffic".²

While not legal precedent, it is worth noting that another telecommunications provider in South Dakota, CenturyLink, appears to agree with this position. On its website, CenturyLink provides the following:

Local Interconnection Service (LIS) is a bundled trunk-side service providing switching and transport for the mutual exchange of traffic that originates and terminates within a CenturyLink™ Local Calling Area (LCA) or an Extended Area Service (EAS) boundary.

You must obtain certification from the state Public Utilities Commission (PUC) to provide Exchange Service (EAS/Local) in any state in which you plan to purchase LIS. Before ordering LIS, you must also request from NeuStar, a division of Lockheed Martin, at least one Numbering Plan Area (NPA) Numeric Numbering Plan (NXX) in each Local Access and Transport Area (LATA) in which you are providing Exchange Service (EAS/Local).³

² Petition, Exhibit 1, Page 1, Paragraph 1.3.

³ See, <https://www.centurylink.com/wholesale/pcat/lis.html>, as of 28 February 2022.

Midco argues that it would provide “interconnection services” rather than local exchange services. South Dakota law does not define “interconnection services” nor distinguish such services from local exchange service. Merely labeling the services as something other than local exchange does not negate the fact that those services described do fall under the definition of local exchange services. Ultimately, the traffic at issue originates and terminates within the James Valley exchange and therefore, it is local exchange service.

In addition, Midco asserts in its brief that the obligation to obtain a COA has not been placed on wireless providers.⁴ This is a correct statement. However, going back to the two-part test above, wireless providers do not satisfy the first element of the test. They are not providing a telecommunications service regulated by the state, because wireless services have been explicitly preempted by federal law. The Omnibus Budget Reconciliation Act of 1993 preempts state regulation of wireless services and bars states from establishing requirements for wireless providers to enter the field. Thus, the wireless comparison is inapplicable here.

Regarding the 2021 docket in which an amendment to an interconnection agreement between Midco and Alliance Communications Cooperative, Inc. (Alliance) was approved⁵, Midco’s COA does cover portions of Alliance’s service territory. In Docket No. TC08-105, the Commission approved an amendment to Midco’s COA pursuant to SDCL 49-31-69 to include local exchange services within the city limits of Crooks and Baltic. Then, in 2009, in Docket No. TC09-099, the Commission approved the interconnection agreement between Midco and Alliance, which was then amended in 2021, as referenced in Midco’s brief.

⁴ Midco brief at page 7.

⁵ Midco brief at page 7.

The interconnection agreement, as amended, facilitates local and EAS traffic to/from Alliance and Midco Crooks and Baltic customers to Alliance and Midco customers in Sioux Falls, Crooks, and Baltic, as well as local and EAS traffic to/from Alliance and Midco customers in Brandon to Midco customers in Sioux Falls. It appears Crooks and Baltic were a part of the interconnection agreement approved in 2009 and the purpose of the amendment to the interconnection agreement in 2021 was to add the Brandon exchange. As previously discussed, Midco does have a COA for Crooks and Baltic. However, Staff can find no record of Midco obtaining a COA for the Brandon exchange.

Midco argues the amendment to the interconnection agreement with Alliance would not have been permissible if a local exchange carrier certificate was required in order to enter into an interconnection agreement.⁶ As previously stated, Staff agrees that Midco is not required to obtain a COA in order to commence negotiations and obtain an interconnection agreement. However, this does not negate the requirement that a COA must be obtained before utilizing the interconnection agreement to provide local exchange services in South Dakota. Given Midco's history of obtaining approval of both an interconnection agreement and an amended COA for local exchange services, it would have been expected that Midco would have subsequently filed with the Commission an application for an amended COA. However, it appears Midco did not.

B. It is not being suggested that the VoIP provider obtain a COA.

In its brief, Midco states that the Commission cannot require VoIP providers to hold a COA given the 2018 decision by the U.S. Court of Appeals for the Eighth Circuit.⁷ Staff does not disagree with this statement. However, Staff's opinion regarding the bifurcated issue

⁶ Midco brief at page 7.

⁷ Midco brief at page 4.

question is limited to the requirement that Midco, not Midco Voice, LLC (Midco Voice), obtain a COA. This question is not addressed by the Eighth Circuit decision. We want to be clear that Staff is not suggesting the Commission place any requirements on Midco Voice at this time or through its decision on the current issue before it.

C. Neither *Time Warner* nor *CRC Communications* preempt the Commission’s jurisdiction over certificates of authority.

In its brief, Midco argues that the Federal Communications Commission (FCC) has preempted state regulatory authority through the *Time Warner* and *CRC Communications* decisions. If that were true, those decisions certainly would have been a major shift in the telecommunications industry, taking away state authority over intrastate telecommunications services. However, to Staff’s knowledge that has never been found to be the case.

In *CRC Communications* the FCC reaffirmed its holding in *Time Warner* that “providers of wholesale telecommunications services enjoy the same rights as any other telecommunications carrier under sections 251(a) and (b) of the [1996] Act.”⁸ Neither of these Declaratory Rulings preempt the states’ ability to certify telecommunications companies. Rather, the rulings deal with a different subject matter altogether.

The issuance of a certificate of authority is a question of state law. Federal law and the aforementioned FCC Rulings deal with how telecommunications carriers get to interconnect.

⁸ *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended; A National Broadband Plan for Our Future; Developing a Unified Intercarrier Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling, 26 FCC Rcd 8259 (2011) (CRC Order). 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*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007) (*TWC Order*).

State law requires a telecommunications company to obtain a COA to provide local exchange service in South Dakota. While the COA question has been presented in this interconnection docket, Staff does not view this as a prerequisite to or dispositive of this docket. The interconnection agreement and the COA are two separate issues. Midco confirms as much in its brief, stating that ARSD 20:10:32:02 does not apply to interconnection.⁹ Conversely, interconnection is distinct from the COA process, and the interconnection rules do not apply to or control the process laid out in ARSD 20:10:32:02.

Interconnection and obtaining a COA are two separate issues. This docket merely provided a forum to discuss both, as all interested parties are at the table.

D. Will Midco be providing the proposed services as a telecommunications company?

In their joint opening brief,¹⁰ SDTA and James Valley alert the Commission of the question of whether Midco is indeed a telecommunications company under state law and thus entitled to a COA and likewise, whether Midco is a telecommunications carrier in order to be entitled to interconnection under Section 251. Staff agrees the record indicates that Midco will be providing the proposed services only to Midco Voice, which raises the question of common carriage versus private carriage. As it pertains to South Dakota COA requirements, the issue of whether Midco is a telecommunications company and entitled to a COA will need to be addressed in a future COA proceeding if the Commission agrees a COA is required to provide the proposed services. As it pertains to interconnection, the common carrier question may likely

⁹ Midco Brief at page 5.

¹⁰ SDTA/James Valley Joint Brief at page 9.

need to be addressed in this proceeding, but it is not ripe for discussion at this time as it does not address the bifurcated issue question.

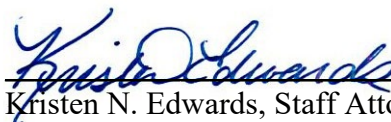
II. Conclusion

The services Midco seeks to prove are local exchange services. The FCC has set the rules for interconnection for telecommunications carriers. But this Commission still gets to enforce South Dakota law requiring a telecommunications company to obtain a COA to provide local exchange services in South Dakota. Federal law and FCC rulings neither conflict with nor preempt the South Dakota's COA requirements in SDCL 49-31-69. Midco must obtain a COA from this Commission prior to actually providing local exchange services in James Valley's service area.

Based on Commission precedent, Staff disagrees with James Valley and SDTA's assertion that the COA must be sought prior to negotiating interconnection.

Staff respectfully requests that the Commission find that Midco does need a COA to provide the services contemplated in the proposed interconnection agreement, but that the COA process should not hold up this docket.

Dated this 3rd day of March 2022.



Kristen N. Edwards, Staff Attorney
Brittany A. Mehlhaff, Staff Analyst
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Kristen.edwards@state.sd.us