

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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===== SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF
LEVEL 3 COMMUNICATIONS, LLC FOR AN
APPROVAL TO EXPAND ITS CERTIFICATE OF
AUTHORITY TO PROVIDE FACILITIES-BASED
LOCAL EXCHANGE SERVICES IN THE SERVICE
TERRITORY OF BERESFORD MUNICIPAL
TELEPHONE CO.

TC02-018

COPY

===== Transcript of Proceedings
May 30, 2002
=====

BEFORE THE PUBLIC UTILITIES COMMISSION,
JIM BURG, CHAIRMAN
PAM NELSON, VICE CHAIRMAN
ROBERT SAHR, COMMISSIONER

COMMISSION STAFF
John Smith
Karen Cremer
Kelly Frazier
Greg Rislov
Mary Healy
Harlan Best
Keith Senger
Dave Jacobson
Michele Farris
Heather Forney
Mary Giddings
Sue Cichos
Debra Elofson

APPEARANCES
David A. Gerdes, Midcontinent Communications
Darla Pollman Rogers, Beresford Municipal
Richard D. Coit, SDTA
Mike Romano, Level 3

Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING
L I M I T E D

1 THE PUBLIC UTILITIES COMMISSION
 2 OF THE STATE OF SOUTH DAKOTA
 3 -----
 4 IN THE MATTER OF THE APPLICATION OF
 5 LEVEL 3 COMMUNICATIONS, LLC FOR AN
 6 APPROVAL TO EXPAND ITS CERTIFICATE OF
 7 AUTHORITY TO PROVIDE FACILITIES-BASED TC02-018
 8 LOCAL EXCHANGE SERVICES IN THE SERVICE
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 Mike Romano, Level 3
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1 CHAIRMAN BURG: TC02-018, In The
 2 Matter of the Application of Level 3
 3 Communications, LLC For Approval to Expand Its
 4 Certificate of Authority to Provide
 5 Facilities-Based Local Exchange Services in the
 6 Service Territory of Beresford Municipal Telephone
 7 Company.
 8 Today shall the Commission grant an
 9 intervention to SDTA? Secondly, shall the
 10 Commission grant Beresford's Motion to Dismiss?
 11 And, shall the Commission grant staff's Motion for
 12 a determination that the application of Level 3 is
 13 incomplete or, in the alternative, that the
 14 application was complete as of May 6, 2002? Also
 15 how shall the Commission rule on Level 3's request
 16 for Finding of Fact?
 17 I think we'll take these one at a time. Today
 18 shall the Commission grant intervention to SDTA?
 19 Is anybody representing SDTA?
 20 Rich?
 21 MR. COIT: Mr. Chairman,
 22 Commissioners, my name is Richard Coit. I'm here
 23 today representing the South Dakota
 24 Telecommunications Association.
 25 We didn't file the intervention initially in

3

1 APPEARANCES BY TELEPHONE
 2 Colleen Sevoid, Qwest Corporation
 3 John Munn, Qwest Corporation
 4 Philip Roselli, Qwest Corporation
 5 Tom Welk, Qwest Corporation
 6 Janet Browne, AT&T
 7 Steven Weigler, AT&T
 8 Brad Vanleur, VP Telecom
 9 Mike Powers, VP Telecom
 10 Mary Lohnes, Midcontinent Communications
 11 David Prazak, Otter Tail Power Co.
 12 Cindy Grosvenor, TELEC Consulting
 13 Tom Frieberg, City of Beresford
 14 Wayne Akland, City of Beresford
 15 Jerry Zeimetz, City of Beresford
 16 -----
 17 TRANSCRIPT OF PROCEEDINGS, held in the
 18 above-entitled matter, at the South Dakota State
 19 Capitol, Room 412, 500 East Capitol Avenue, Pierre,
 20 South Dakota, on the 30th day of May 2002, commencing
 21 at 1:30 p.m.
 22
 23
 24
 25

1 this Docket. The intervention date as set
 2 initially by the Commission was March 8. Since
 3 that time there have been a number of filings -- I
 4 guess about three filings that I'm aware of -- that
 5 Level 3 has made with the Commission providing more
 6 information regarding its application. And I think
 7 what we've been able to determine at this point is
 8 clearly that this is really not a run of the mill
 9 local exchange certification proceeding.
 10 There are some residential questions raised,
 11 new questions that have been raised with some of
 12 this additional information that's been filed, and
 13 it's because of that that we took the -- we felt
 14 compelled to seek intervention in this proceeding.
 15 On the intervention petition with regard to
 16 some of the new issues I've indicated on page 4 of
 17 that petition what those new issues are or at least
 18 some of those new issues. You know, one question
 19 is now looking at what they've provided whether
 20 they, in fact, intend to offer any local exchange
 21 services that require a certification. There are
 22 other issues as well relating to waivers of service
 23 obligations. All of these issues are important
 24 issues to the industry as a whole, and it's on that
 25 basis that we really feel that the public interest

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1 requires in this case that we be granted
 2 intervention.
 3 We also had really no ability when this thing
 4 was first filed to reasonably foresee some of these
 5 issues would be presented in this case. So from a
 6 due process standpoint we feel we should also be
 7 given a chance for this late intervention.
 8 The Level 3 itself has given an indication
 9 that, you know, they really -- they, I guess, don't
 10 feel that their application or -- or have agreed, I
 11 guess, that their application was incomplete at
 12 least through May 6, and given all of that, we just
 13 would ask the Commission to grant us intervention
 14 in this process.
 15 It's an important Docket. There are some very
 16 substantial issues, and up until this point in time
 17 up to the time that we submitted our petition we
 18 really didn't know what those issues were. So with
 19 that I would entertain any questions.
 20 CHAIRMAN BURG: Is there any
 21 objection to the late intervention of SDTA?
 22 MR. ROMANO: Good afternoon,
 23 Mr. Chairman, Commissioners. My name is
 24 Mike Romano. I'm the Director of State Regulatory
 25 Affairs for Level 3.

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1 We do not have any opposition to the petition
 2 for late intervention. We think too the
 3 substantial questions presented here, that all the
 4 parties should have a chance to examine in a more
 5 thorough manner and we do not oppose SDTA's
 6 intervention at this time to participate in that
 7 examination.
 8 CHAIRMAN BURG: Are there any other
 9 comments?
 10 If not, I will move we grant intervention to
 11 SDTA in Docket TCO2-018.
 12 COMMISSIONER NELSON: Second.
 13 COMMISSIONER SAHR: Concur.
 14 CHAIRMAN BURG: The second question,
 15 shall the Commission grant Beresford's Motion to
 16 Dismiss.
 17 I'm going to ask Beresford to give us an
 18 argument in favor of their Motion to Dismiss.
 19 MS. POLLMAN ROGERS: Good afternoon,
 20 Commissioners and staff members. In light of the
 21 track record with motions to dismiss today I'm not
 22 sure that I want to address my own Motion here, but
 23 I will do so.
 24 I would tell you my name is Darla Pollman
 25 Rogers, and I represent Beresford Municipal

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1 Telephone Company. We also have on the phone
 2 Tom Frieberg who represents Beresford as well and
 3 Wayne Ackland, who is the general manager of the
 4 telephone company. I will make a few brief
 5 comments with regard to our Motion and then perhaps
 6 Tom would want to follow up with some other
 7 comments if he perceives that I've missed some.
 8 We did file a Motion to Dismiss the
 9 application of Level 3 for a Certificate of
 10 Authority to provide local exchange services.
 11 Basically our Motion was founded on two grounds.
 12 The first one was that Level 3 does not need a
 13 Certificate of Authority to provide local exchange
 14 services in Beresford because according to the
 15 application and information that has been filed to
 16 date, they do not really intend to offer or provide
 17 local exchange services.
 18 The second grounds upon which we've filed this
 19 Motion is because the application is incomplete.
 20 And under the rules that requires that the
 21 application be rejected, which I perceive to be the
 22 same thing as dismissed. I believe that even with
 23 the additional filings that Level 3 has provided,
 24 the application is still not complete as we sit
 25 here today. I think my Motion basically speaks for

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1 itself, and I will not address that further.
 2 Within the past two days, however, I have
 3 received from Level 3 a response to our Motion and
 4 I would just like to respond to some of the points
 5 made in Level 3's response.
 6 First of all, I think it is very important to
 7 focus on the nature of Level 3's application. What
 8 they are asking for as I noted before is the
 9 authority to provide local exchange services in
 10 Beresford. It's Beresford's position that that is
 11 not what Level 3 actually intends to offer, at
 12 least not according to what they have filed to
 13 date.
 14 Level 3 has defined the services to be
 15 provided in Beresford as DID and private line or
 16 nonswitched services, and these would be inbound
 17 only. So those services as described do not fit
 18 the definition of local exchange services found in
 19 SDCL 49-31-1.
 20 In response to that, Level 3 has cited the
 21 general supervisory authority of the PUC over
 22 telecommunications authority and companies and
 23 common carriers, and that's found in SDCL 49-31-3.
 24 Beresford doesn't argue with that statutory
 25 authority. Obviously, you do have general

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1 authority to regulate telecommunications companies.
 2 But that's really not the point of the
 3 application. The point of the application is for a
 4 Certificate of Authority to provide local exchange
 5 services. So regardless of whether Level 3 meets
 6 the definitions in 49-31-3, that does not relieve
 7 them of the obligation to show that they actually
 8 are going to provide local exchange services as
 9 those terms are defined in our statute. So I would
 10 submit that 49-31-3 is a general authority statute,
 11 and it's not applicable in this case.
 12 Level 3 next points out that its primary
 13 customers for its proposed services are ISPs,
 14 Internet service providers, and that ISPs can
 15 purchase out of a local tariff local services from
 16 telecommunications carriers and use them for
 17 interstate services. That is true. But just
 18 because ISPs are able to do so, does not convert
 19 the -- automatically convert the provider of those
 20 services into a local service provider.
 21 And, again, you go back to what they say
 22 they're going to provide. They're going to provide
 23 inbound only connectivity to the public switched
 24 network, to the ISPs. That's what they're going to
 25 provide. That is not a local service and does not

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1 magically convert Level 3 into a provider of local
 2 exchange services. Inbound only connectivity to
 3 the public switched network is not a local exchange
 4 service as defined by the statute.
 5 So Level 3's argument with regard to ISPs as
 6 its customers does not support its need for a
 7 Certificate of Authority to provide local exchange
 8 services in Beresford.
 9 I think it's really important to focus on
 10 Level 3's own description of its intended services.
 11 The direct inward dialing as they describe will be
 12 utilized by Level 3 and private line services for
 13 inbound only functionality defies the statutory
 14 definition of local exchange services. Our statute
 15 says it has to be two-way switched services. So to
 16 say that DID and private line services are local
 17 and then to turn around and say but they're inbound
 18 only takes it right out of our definition of local
 19 exchange services.
 20 I would also note in passing that Level 3's
 21 implication that narrowing the scope of the
 22 application just to these services is sort of a
 23 favor or something that benefits Beresford, I don't
 24 agree with that. If, in fact, Level 3 really did
 25 intend to offer local exchange services, they could

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1 do so now under current laws, and it's no -- it's
 2 not any benefit to us to limit the scope of
 3 services the way they have.
 4 I think we need to back up and look at what
 5 constitutes local services. Black letter law
 6 dictates that the jurisdictional nature of a call
 7 is determined by where the call originates and then
 8 where it terminates. In this case, according to
 9 the plans submitted, the calls will originate in
 10 Beresford, via the NXX codes, assuming they
 11 ultimately get those, so they are originating in
 12 Beresford's local service area, and then those
 13 calls are being terminated in Sioux Falls or
 14 wherever -- whatever point of presence Level 3 has
 15 out there. Their diagram indicates it's in
 16 Sioux Falls.
 17 Now when calls originate in a local service
 18 area and terminate somewhere else most people would
 19 say that that's long distance service. Level 3
 20 doesn't call it that. You can call it whatever you
 21 want, but where it originates in one service area
 22 and terminates somewhere else it is not local
 23 service. And that's what -- from the plans and the
 24 diagrams submitted, that's what it appears Level 3
 25 intends to do.

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1 I would submit that this is a very -- it is a
 2 unique case. It's unique in the sense of the way
 3 the plan appears to operate. There is no evidence
 4 that there's going to be local exchange services
 5 here. They have not come into Beresford and
 6 purchased any local services from Beresford.
 7 They're not providing any local services.
 8 What they're doing is they're just asking for
 9 connection at the Beresford switch, thereby
 10 obligating Beresford to deliver their traffic
 11 somewhere else outside of the service area without
 12 compensation so the DID part is actually the
 13 marketing that gets the calls -- or the NXX numbers
 14 to the ISP providers.
 15 And yet by doing that somehow they're saying,
 16 well, this becomes a local service and, therefore,
 17 we need a Certificate of Authority. We disagree
 18 with that premise, and we think that the
 19 application should be denied on that ground.
 20 With regard to our second ground, we feel that
 21 the application is incomplete. We think it's still
 22 incomplete even after the responses. And my
 23 construction of our rules is that an incomplete
 24 application should be rejected and, therefore,
 25 that's our second ground for dismissal.

13

1 CHAIRMAN BURG: Could you identify a
 2 little bit more why you feel it's incomplete?
 3 MS. POLLMAN ROGERS: I identified in
 4 my Motion specific portions of the rules that I
 5 felt were not complied with, and in Level 3's
 6 response they did not respond specifically to any
 7 of those allegations.
 8 CHAIRMAN BURG: Thank you. Any
 9 questions for Ms. Rogers?
 10 COMMISSIONER SAHR: Ms. Rogers, do
 11 you think there could be any debate over whether or
 12 not this would be considered to be a local exchange
 13 service area or not?
 14 MS. POLLMAN ROGERS: I'm sorry.
 15 Repeat your question, please.
 16 COMMISSIONER SAHR: You're talking
 17 about the -- this was long distance service because
 18 it wasn't within the local exchange.
 19 MS. POLLMAN ROGERS: It does not
 20 originate and terminate within the local exchange,
 21 the calls don't.
 22 COMMISSIONER SAHR: Okay. And
 23 that's because they originate in Beresford and
 24 terminate in Sioux Falls; correct?
 25 MS. POLLMAN ROGERS: Sioux Falls if

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1 that is their point of presence, yes. Denver,
 2 wherever it happens to be.
 3 COMMISSIONER SAHR: All right.
 4 Thank you.
 5 CHAIRMAN BURG: Level 1 -- Level 3.
 6 I wanted to call it 1. I don't know if that's an
 7 upgrade or downgrade.
 8 MR. ROMANO: I'm always afraid
 9 someone will do us better and start a Level 4 or
 10 something.
 11 Good afternoon again. My name is Mike Romano,
 12 still the Director of State Regulatory Affairs for
 13 Level 3.
 14 It might be good to start off just explaining
 15 who Level 3 is what we're doing right now. Level 3
 16 is already certificated in South Dakota to serve in
 17 Qwest's serving area. We hope to be in service
 18 there the third quarter of 2002.
 19 As part of our expansion effort, though,
 20 around the country we're going to less urban areas
 21 and trying to bring benefits of competition and
 22 newer technology into those serving areas as well.
 23 In that regard we've already filed applications in
 24 many other states and been granted certification in
 25 small telephone company serving areas in states

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1 such as Tennessee, Ohio, Missouri, Idaho,
 2 Minnesota, and North Dakota among others. We have
 3 some applications pending still, South Dakota being
 4 one of those.
 5 In all of those cases we've represented and in
 6 our negotiations with the small telephone companies
 7 we've also represented that we understand that
 8 those companies are subject to special rural
 9 safeguards under federal law and we will abide by
 10 those in the fullest. We do not intend to make any
 11 of the small companies unbundle their networks to
 12 collocate with them. This application is not
 13 intended to reach any so-called 251(f) exemptions
 14 under federal law.
 15 To respond a little bit more to what's become
 16 the first ground now, which is that we don't need
 17 local certification under South Dakota Law, we do
 18 believe that the services we intend to offer fit
 19 within the definition of local exchange service and
 20 that the South Dakota statutes would require that
 21 we be certified.
 22 What Level 3 proposes here is a local exchange
 23 service. We understand there's been some confusion
 24 around that. I think part of that is because we're
 25 trying not to raise a fight over the rural

16

1 exemptions so we didn't want to go in and make it
 2 seem as if we were applying any vague broad manner
 3 for the entire menu of basic local exchange
 4 services because in so doing oftentimes rural
 5 telephone companies will respond, well, if you're
 6 going to do that, you need to unbundle my network
 7 as well or you need to collocate with me.
 8 We tried to do this in a matter sort of path
 9 of least resistance in terms of raising a fight
 10 with a company such as Beresford by narrowing the
 11 scope of our services very specifically and by
 12 stating we would at least transport from them their
 13 tariff rates.
 14 (Discussion off the record)
 15 MR. ROMANO: We weren't trying to, I
 16 think, make them impose any additional obligations
 17 with respect to under the act of respect to cost
 18 rates pricing or collocation or anything like that.
 19 What we're trying to do here is really just a
 20 subset of what we're already authorized to provide
 21 in Qwest territory today.
 22 So with that being said, I think our DID
 23 services do fit within the local scope. Although
 24 there has been some confusion over them we'd like
 25 to continue to work with staff and Beresford and

17

1 the Commission to clarify.

2 We are proposing to offer local connectivity

3 to the public switch telephone network for Internet

4 service providers who would like to establish a

5 presence in the Beresford serving area. We do this

6 today in many other locations, as I said, hope to

7 do it in South Dakota beginning the third quarter.

8 I would note with respect to DID services in

9 particular that we cited to a case in our response

10 where the Commission found that DID constituted a

11 competitive local exchange service. And that's a

12 1989 case. I think the Commission's already found

13 that the DID fits within the definition of what can

14 be considered a local exchange service. I also

15 believe it's tariffed in Qwest's general services

16 exchange tariff today.

17 So I'm not sure that -- I suppose there may be

18 a question about if whether what we're specifically

19 proposing to do fits within that definition. That

20 seems to be a question that is not right for

21 examination through a summary Motion to Dismiss but

22 rather something that can be discussed throughout

23 the courses examined in this proceeding and in

24 further negotiations with Beresford.

25 I guess to get in a little further to the

18

1 services we're providing to ISPs and where the ISP

2 is located and the origination and termination of a

3 local call, for years incumbent telephone companies

4 had argued that calls don't terminate to ISPs, they

5 go on to the distant Internet and even if the ISP

6 is sitting right across the street, that's not a

7 local call because the call is destined for the

8 Internet.

9 So I guess as a matter of law there's a

10 question of whether a call to an ISP ever

11 terminates in the local calling area, and that's

12 something that needs to be considered in this

13 proceeding as well.

14 ISPs, pursuant to longstanding federal law, do

15 have the opportunity to purchase local services on

16 an intrastate tariff, and what we're proposing to

17 do here is offer them that kind of local

18 connectivity on a tariff just like Beresford would

19 offer to an ISP or Qwest or anybody else that's

20 certified in the State of South Dakota.

21 One important point I think we want to address

22 briefly too -- I'm not sure it's germane to the

23 Motion to Dismiss. But the implication was Level 3

24 would require Beresford to carry its calls all over

25 the place. We are not proposing that.

19

1 We are proposing to either build or lease

2 facilities to come into Beresford's serving area.

3 We would interconnect with Beresford in the local

4 serving area. Any responsibility for transport of

5 calls to a foreign exchange type customer or

6 something of that sort, an ISP, would be on

7 Level 3. It would be Level 3's financial

8 responsibility to do so.

9 To the extent we lease transport from

10 Beresford, to do that we would pay Beresford

11 transport at its special access or whatever tariff

12 generally available rates it has. We're not again

13 seeking to impose any special pricing obligations.

14 We are also, just to be clear, not looking for

15 reciprocal compensation, which has been a hot

16 button issue in the area of carriers who serve

17 ISPs. We are not asking Beresford to pay anything

18 for termination of these calls.

19 I guess, turning to the second point, whether

20 the application should be deemed complete, again,

21 there's been confusion, I think, because we

22 narrowed the scope of the application in a way that

23 hadn't been done before in the state. We responded

24 to numerous staff inquiries on this, and we're

25 willing to do more. We want to make sure everybody

20

1 is clear about what we're offering to provide here.

2 That's, in fact, why we think a Motion to

3 Dismiss isn't appropriate because we need more

4 time, and everyone needs more time, we believe, to

5 review this.

6 I think Mr. Coit may have said it best, there

7 are substantial questions here, and the substantial

8 questions we think deserve a more thorough

9 examination than a summary Motion to Dismiss.

10 I guess one final comment in that regard, it's

11 interesting on one hand the claim is we're not

12 offering local services so our application should

13 be dismissed, and then on the other hand our

14 application is incomplete such that can't they tell

15 what we're offering, but yet it should be

16 dismissed. So I guess I see some contradiction in

17 the claims as well.

18 In the end we think there are good policy

19 reasons to go forward as well. I would just note

20 we think the consumers of South Dakota will benefit

21 from having the ability to choose from more

22 Internet service providers who could purchase our

23 service as well as Beresford in the Beresford

24 serving area and other serving areas ultimately

25 where we go to in South Dakota.

1 With that, I thank you.

2 CHAIRMAN BURG: Does staff have any

3 comments?

4 MR. FRAZIER: Yes. Staff does not

5 support the Motion to Dismiss as to the issue of

6 whether or not Level 3 would qualify as an LAS. In

7 reading the statute, I think that argument has

8 merit, but we have filed a Motion for the

9 application to be found incomplete and at this

10 point we're just looking for more information so we

11 can get a feel and then Keith will be the one

12 discussing this Motion. I've filed it on his

13 behalf. But we feel we need more information to

14 make a determination on that. So we do not support

15 the Motion to Dismiss at this point.

16 CHAIRMAN BURG: Any other questions?

17 MR. GERDES: Mr. Chairman, would you

18 permit one other comment?

19 CHAIRMAN BURG: Sure. We're trying

20 to get as much information as we can.

21 MR. GERDES: Mr. Chairman, members

22 of the Commission, I'm lucky Dave Gerdes. I

23 represent Level 3.

24 CHAIRMAN BURG: We just treat you

25 too well ordinarily. You're not used to this.

1 MR. GERDES: I just would like to

2 make one observation and ask you to consider this

3 and deliberate on this, if you wish. About the

4 point that is made by Beresford that Level 3 does

5 not meet the definition of local exchange area as

6 set forth in 49-31-1, subparagraph 13, and that is

7 that at the very least there's a conflict between

8 that definition and that which appears in the

9 chapter as to what local services are or should be

10 available to an applicant for a Certificate of

11 Authority.

12 If you look at the definition which Beresford

13 relies on, it says local exchange service is the

14 access to and transmission of two-way switched

15 telecommunications service. Service, singular.

16 Now if you go over to the more recent statute,

17 which is -- or a more -- I think it's more recent,

18 in any event, but if you go over to the statute

19 that deals with the full application for a

20 Certificate of Authority for local exchange

21 service, it says -- this is 49-31-70, "An

22 application for a Certificate of Authority to

23 provide local exchange service shall set forth with

24 particularity the proposed geographic territory to

25 be serving and provide information regarding the

1 types of local exchange services," plural, more

2 than one.

3 Whereas the definition talks simply about the

4 local exchange service being two-way switched

5 access. So you've got an internal inconsistency

6 between the two statutes.

7 Now this Commission has ruled DID services

8 are, in fact, a local service. So does this second

9 Section 49-31-70 contemplate that? I would submit

10 it does. And so the application for DID services

11 we would say is consistent with local exchange

12 service.

13 CHAIRMAN BURG: Rich.

14 MR. COIT: Thank you, Mr. Chairman,

15 Commissioners. I'd just like to offer some brief

16 comment.

17 SDTA supports the Motion to Dismiss, and as

18 Ms. Rogers indicated, you really need to look at

19 the services, I guess, or the -- that they're

20 requesting from Beresford and the information that

21 they've given along those lines in terms of what

22 their plans are. And I don't think you'll find

23 anything anywhere that says that they will have a

24 point of presence in Beresford.

25 There's nothing anywhere that says that they

1 are actually going to provide or purchase, I guess,

2 from Beresford any local line type services.

3 They're not seeking to resell local exchange

4 service.

5 Really all they're asking for are

6 interexchange trunking facilities. To me it's

7 pretty clear that really all they want to do is

8 provide some interexchange connectivity to Internet

9 service providers. So they're really not offering

10 a local exchange service. They're offering more an

11 interexchange service.

12 I think a lot of the confusion here arises

13 because of the fact that they are claiming that

14 their service is a DID service. And generally DID

15 services have been viewed as local services.

16 But I think their version of what DID service

17 is as compared to some of the local exchange

18 tariffed versions of DID appears to be a lot

19 different because they're not going to have any

20 sort of a local presence in Beresford to which they

21 would connect to through some local lines.

22 They're also not going to buy any local lines

23 and resell those local lines. They're not going to

24 buy any local lines in order to get access that's

25 local. All they're going to buy is interexchange

1 trunking facilities into the Beresford switch. And
2 they're going to allow ISPs to access those
3 trunking facilities as a local facility.

4 And the fact of the matter is that's going to
5 be an interexchange facility, and they're going to
6 call it local. That's why they're saying they're
7 offering DID service. And I don't think that's
8 what DID service is, as we've seen it today in the
9 tariffs that are out there today.

10 So I think that's where a lot of the confusion
11 arises here. And I think if you really look at
12 what they've asked for to this point in time and
13 it's shown in their diagram and so forth, it's
14 pretty clear to me they're offering interexchange
15 connectivity. That's what they're offering, and
16 they're going to throw it out there as local
17 access.

18 I guess if you want to call it local access,
19 you can call it local access. And there will be
20 issues there that arise with their ability to
21 obtain local numbers with the use of local exchange
22 facilities when they don't buy any local facilities
23 or purchase any local exchange services whatsoever.

24 So that to me is pretty clear if you look at
25 what they're asking for, what their plans are,

1 they're not talking about local exchange service.
2 They're talking about interexchange service. Thank
3 you.

4 CHAIRMAN BURG: Questions for Rich?
5 You know, I think that -- any other comments on
6 this particular issue?

7 MR. ROMANO: Mr. Chairman, if I may
8 respond to Mr. Coit's point, very quickly.

9 CHAIRMAN BURG: I really am
10 reluctant to argue the whole case.

11 MR. ROMANO: I'll be very brief. I
12 guess one misperception that still exists here and
13 this is, again, why we think a full hearing or some
14 more full examination is required is Mr. Coit kept
15 referring to buying local lines from Beresford.

16 Carriers don't buy local lines from one
17 another. We don't go out today when we compete
18 with Qwest and buy local lines from Qwest. We are
19 a CLEC who interconnects with Qwest through trunks.

20 So to say we haven't offered to buy local
21 lines from Beresford, it's a nonissue here in
22 reality. I mean, no CLEC buys local lines from an
23 ILEC. No ILEC buys local lines from a CLEC. So I
24 think that's a misperception here that demands even
25 more that this proceeding go forward and allow for

1 a further examination of the services that are at
2 issue.

3 One other thing I note, I guess, too is this
4 question about interexchange connectivity, local
5 connectivity. Many carriers today offer through
6 DID services also a foreign exchange type
7 functionality. No one has ever claimed that a call
8 placed to a foreign exchange customer is an
9 interexchange call for which access charges are due
10 or that the customer should have placed a toll call
11 because the called party wasn't located in the
12 local calling area.

13 If our service is in question, then all
14 foreign exchange services are in question as well,
15 frankly. So I guess those are two points I would
16 make, that there are novel questions here,
17 substantial questions as others have noted, that
18 warrant a further examination.

19 COMMISSIONER NELSON: The bottom
20 line here -- so I couldn't sign up to have you as
21 my local provider for my every day service, could
22 I?

23 MR. ROMANO: Correct.

24 COMMISSIONER NELSON: That's what I
25 thought.

1 MR. ROMANO: I suppose we could have
2 filed the application to seek for the full menu of
3 local exchange services, including basic local dial
4 tone. We're not seeking basic local dial tone
5 here. We're only seeking subset of local service.

6 COMMISSIONER NELSON: Even if we
7 supported Beresford's Motion to Dismiss, you could
8 still refile to provide what is more typically
9 described as local exchange services; right?

10 MR. ROMANO: We could. If we did
11 that, though, Commissioner, it's very difficult --
12 as we noted in response to the Motion to Dismiss,
13 it's difficult in the rural areas or any area to
14 provide the full menu of basic local exchange
15 services, including dial tone, without questions
16 being raised under the rural exemption.

17 Because in order to do that you need to either
18 resell it and avoid cost discount or collocate with
19 the carrier. And we're not looking to do that in
20 Beresford's territory, nor I think would Beresford
21 necessarily want to offer that or go through that
22 kind of proceeding then either.

23 COMMISSIONER NELSON: Can you
24 explain to me then if I would be voting in your
25 favor today, why I wouldn't be giving you away to

1 circumvent the intent of public interest and the
2 rural safeguards and all the protections they
3 offered?

4 MR. ROMANO: I think if you voted
5 our way, you would not be circumventing those at
6 all. We are, in fact, willing to sign up for
7 exactly -- put on every page of our contract with
8 Beresford for an interconnect exchange with
9 Beresford something that says this is not meant to
10 undermine or otherwise lift any rural safeguards,
11 including but not limited to the fact they don't
12 have lapse collocation, they don't have to give us
13 the Telric pricing, they don't have to give us the
14 OSS, which as such is an issue in the Qwest 271
15 proceeding, they don't have to give us resale at an
16 avoided cost discount.

17 We are looking to make it as minimal impact as
18 possible on Beresford by entering their market
19 through a means that doesn't challenge any of the
20 rural safeguards. That's exactly what we're trying
21 to do.

22 CHAIRMAN BURG: Okay.

23 MR. SMITH: I have a question,
24 Mr. Romano.

25 Despite what we might want to do or not want

1 MR. SMITH: If we were to grant the
2 Motion to Dismiss because for that reason, that we
3 found it's not a local exchange service, okay, what
4 happens to your company then?

5 Does this thing go away, or do you -- are you
6 going to attempt to do the same thing under an
7 interexchange certificate?

8 MR. ROMANO: I don't believe we
9 could offer this service under an interexchange
10 certificate. In order to provide service to the
11 these Internet service providers they will need
12 local dial up connectivity. No customer is going
13 to place a toll call to reach the Internet.

14 So if we can't be considered a local exchange
15 carrier and provide the local connectivity we're
16 looking for here, the customers will have no
17 opportunity to dial into ISPs other than those who
18 either, A, are served by Beresford or, B, are a
19 Beresford ISP.

20 CHAIRMAN BURG: I'm going to set the
21 decision aside because I think the next issue kind
22 of -- they float together to some degree.

23 And the third issue was shall the Commission
24 grant staff's Motion for a determination that the
25 application of Level 3 is incomplete or, in the

1 to do and whether you're a nice person or not or
2 whether your company is and a lot of objectives, we
3 have to follow the statute no matter what. I mean,
4 you know that.

5 MR. ROMANO: Yes.

6 MR. SMITH: How do we get around the
7 fact that the statute defines local exchange
8 service as the access to and transmission of
9 two-way switched telecommunications service?

10 Mr. Gerdes has offered -- the only way out has
11 been the fact that a later statute has the plural
12 at the end of the word "services." And whether we
13 think what you're doing is a good idea or not
14 cannot confer jurisdiction upon us to do something
15 that the law doesn't let us do.

16 MR. ROMANO: Well, I guess the other
17 justification that we found in the law and it's
18 precedent of this Commission is your 1989 order
19 declaring that direct inward dial services are
20 competitive local services.

21 I mean, if this Commission's already found in
22 1989 that that direct inward dial constitutes a
23 local service, that is an inbound only service that
24 this Commission found to fit within the statutory
25 meaning.

1 alternative, the application was complete as of
2 May 6, 2002.

3 And I'll let staff argue the position since it
4 was their request on that first.

5 MR. SENGER: SDCL 49-31-72 states
6 that, "The Commission shall act on local exchange
7 application within 60 days of the completed
8 application, or within 120 days if a hearing is
9 required." This application was filed on
10 February 19 of 2002.

11 With the intervention of Beresford and the
12 complexity of the Docket, staff believed that a
13 hearing would be needed, giving the Commission the
14 120 days as allowed by the law. If the clock were
15 to start upon filing the application, the 120 days
16 would be up June 19 of 2002. That's 20 days from
17 today.

18 Level 3 has agreed that the application was
19 incomplete upon filing. They believe that the
20 application is complete as of May 6, 2002, per a
21 letter from their attorney dated 5-14 of 2002.
22 Under this scenario the Commission would have to
23 act upon this Docket by July 5 of 2002 or
24 September 3 of 2002, if the hearing were required.

25 It is staff's belief that the application is

1 still, as of today's date, incomplete. Thus, we
 2 are asking that the Commission rule that the
 3 application is not incomplete (sic) because it has
 4 not provided the required information pursuant to
 5 ARSD 20:10:32:03, particularly Section 7(C) and
 6 Section 24.

7 Specifically the application does not provide
 8 adequate information as to describe the services
 9 that Level 3 will be providing or the facilities
 10 used to provide these services. Staff and
 11 Commission need this required information to
 12 understand the nature of the services that Level 3
 13 will be providing.

14 The Motion to intervene by SDTA and the Motion
 15 to Dismiss by Beresford, which we have heard
 16 arguments on today, clearly indicate that the
 17 parties to this Docket also do not feel that the
 18 application is complete.

19 Without this information staff is not able to
 20 determine if the services that Level 3 intends to
 21 provide, called their direct inward dial trunk
 22 services and their direct access services, are
 23 actually local exchange services or not. We don't
 24 know whether they're local exchange service,
 25 interexchange services, or intraexchange services.

1 Each one of these three different types of
 2 services require a different type of authority
 3 either from this state Commission or from the FCC.

4 We've heard lots of arguments today about
 5 meetings and diagrams and discussions between the
 6 various parties. I need to note that that is not
 7 part of the application. Staff is not -- has not
 8 been invited to sit on those discussions. We have
 9 not been informed of those discussions. Nothing
 10 has been provided from those discussions to
 11 supplement the record.

12 We talk about a diagram. Staff received a
 13 copy of that diagram from a Motion -- from a
 14 Beresford Motion to Dismiss. It is in there. That
 15 is the only time staff has seen that diagram.

16 Therefore, I guess I'll summarize by saying
 17 that staff would ask that the Commission find that
 18 this application is incomplete and that we move
 19 forward through data requests and further
 20 conversations to determine exactly what is going
 21 on, what kind of services, what type of facilities
 22 so staff can make their preliminary decision and
 23 make some recommendations when it comes to hearing
 24 or if it doesn't come to hearing, at a Commission
 25 meeting.

1 CHAIRMAN BURG: Mr. Romano, do you
 2 have any arguments of why it is complete?

3 MR. ROMANO: Thank you. We had
 4 thought it to be complete because I suppose we had
 5 thought we provided perhaps more than may have been
 6 provided in the context of most applications filed
 7 in the state.

8 That being said, we've recognized this has
 9 obviously presented some confusion among all
 10 interested parties, including staff and Beresford.
 11 So I guess what we had come to the point of -- when
 12 we came to the point of sending the letter the
 13 thought was that would either allow us to move
 14 forward to get a hearing so we can get our business
 15 started, or, in the alternative, if other
 16 information is required, we can receive a specific
 17 request for that information and provide it as soon
 18 as possible so that we can move forward.

19 So the intent of the letter was to hopefully
 20 move things along and either receive specific
 21 questions or receive a determination that it was
 22 complete.

23 COMMISSIONER NELSON: Mr. Romano,
 24 are you saying that you didn't -- that the staff
 25 didn't ask for information that you did not

1 provide?

2 MR. ROMANO: We provided responses
 3 to staff's questions. What I guess we're finding
 4 again is because of the rather unique nature of
 5 this application while we may have thought that
 6 those responses were complete, we are getting the
 7 sense from staff that those did not provide a full
 8 picture as to what staff wanted.

9 And so with that and if we need to do more
 10 follow-up with staff, we're certainly willing to do
 11 so.

12 COMMISSIONER NELSON: I guess my
 13 question is at what point did you decide staff
 14 didn't have the information they needed? Because I
 15 got the impression you've known before we got here
 16 today that they weren't satisfied with the
 17 completeness of your application.

18 So you've appeared not to have made any
 19 attempt to make it a little more clearer for them.

20 MR. ROMANO: What had happened was
 21 our letter was filed on or about May 14. We have
 22 previously responded to staff's data request on
 23 May 6. We had not heard anything further in that
 24 intervening week. When we had not heard anything
 25 further we filed a letter for the determination

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1 that it was complete.

2 After that we then -- I don't think we've

3 necessarily seen anything further from staff, but

4 we've obviously seen Beresford's Motion which they

5 deem it to be still incomplete and as a result of

6 that and other conversations we've learned staff,

7 as well, thinks further information is required.

8 We are willing to respond to whatever further

9 questions staff has to meet with them as needed.

10 CHAIRMAN BURG: Anything from SDTA?

11 MR. COIT: Just to say that we agree

12 with staff's Motion on the point of the application

13 being incomplete. There's still some things that

14 haven't been provided. Another thing that hasn't

15 been provided in my mind or in our view is recent

16 financial information.

17 The rules very clearly indicate that the most

18 recent 12 months of financial data should be

19 provided, and right now we're looking at 2000 data.

20 You know, we've got a whole year that's passed

21 since then, and in this industry with all of the

22 upheaval and so forth in the industry I think it's

23 pretty important that they provide some recent

24 financial data.

25 So there's that as well as other things that

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1 need to be followed up on.

2 COMMISSIONER SAHR: Mr. Romano, do

3 you have more recent data as far as 2001?

4 MR. ROMANO: I believe we do. I

5 believe at the time we filed in it must have been

6 February now 2000 was the most recent annual report

7 that was available. 2001 hadn't been released yet.

8 I will check, and we will supplement with the

9 2001 annual report, if that's available. I will

10 note as well that we had requested certain waivers

11 with respect to financial information, which are

12 not atypical, as I understand it, in competitive

13 local exchange carrier applications.

14 CHAIRMAN BURG: Mrs. Rogers, do you

15 have anything from Beresford on this question?

16 MS. POLLMAN ROGERS: I have nothing

17 further other than to say that we concur with

18 staff's Motion -- staff's position that the

19 application is not complete.

20 With regard to the issue of waivers, I think

21 that that probably raises a whole another area of

22 questions with regard to this whole application

23 process. And, you know, as we view the financial

24 information that has been submitted, it's not for

25 the applicant, it's for the applicant's parent

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1 company, I believe, or at least someone other than

2 the applicant. I think that's something that needs

3 to be looked at.

4 And then the request for waivers is extremely

5 broad, and it appears to me that the request for

6 waivers requests waiver of everything that local

7 service requires. For example, 911, how are you

8 going to comply with that.

9 If we waive all of those things, we're back to

10 the same thing and that is is this really an

11 application to provide local services as defined by

12 the statute?

13 So I think the two issues kind of go -- or the

14 two positions go hand-in-hand, but we do think the

15 application is not complete.

16 CHAIRMAN BURG: One other question

17 that occurs to me is that is it not a burden upon

18 the applicant to determine when it's complete and

19 take their risks in front of the hearing process as

20 to incompleteness?

21 I mean, you know, should they not say we'll

22 live with what we filed?

23 MS. POLLMAN ROGERS: Well, I guess I

24 don't -- I think that the applicant can do that.

25 It doesn't sound to me like they're doing that at

40

1 this point, or maybe they did that in their May 14

2 letter.

3 But I think that you certainly have the

4 authority to reject an application that is

5 incomplete. I think the rules give you that

6 authority.

7 CHAIRMAN BURG: Right. I'm trying

8 to decide who determines when it's complete. If

9 they want to live with what they file and take

10 their risk of having it rejected on the basis of

11 incomplete, should they not have that opportunity?

12 MS. POLLMAN ROGERS: I believe they

13 can, but I believe you would have to, to a certain

14 extent, rely on staff's recommendation as to

15 whether each of the criteria have been met.

16 CHAIRMAN BURG: Right. Do you have

17 a response to that question?

18 MR. SENGER: May I make a comment?

19 We've heard a lot of arguments today, and I think a

20 lot of arguments do have merit today. I just want

21 to make one clarification on what staff is asking

22 for.

23 We do believe that the Commission has the

24 authority to reject the application. However,

25 staff is not asking for that. Staff does not

1 believe that rejecting the application is going to
 2 get us where we need to be.
 3 Essentially, if you reject the application,
 4 we're probably going to start all over again. What
 5 we are suggesting is is that the Commission merely
 6 find that as of this point it is incomplete. If
 7 the Commission finds -- wants to find it is
 8 incomplete, I think all the parties can agree that
 9 the May 6 date would be a date that we could shoot
 10 for.
 11 That is an alternative thing that we threw
 12 out. But we are not asking that the Commission
 13 dismiss or throw this out. We just want to find it
 14 is incomplete so everybody has the adequate time --
 15 once we find the application is incomplete, that we
 16 have adequate time to give the Commission the time
 17 to do what we need to do.
 18 The 60 days and 120 days from the completed
 19 application is there for two reasons, the way I see
 20 it, to give the Commission enough time to do what's
 21 needed and to prevent the Commission from dragging
 22 their feet and not acting upon an application. So,
 23 therefore, the completed application I see as a
 24 very important part in providing both protection
 25 for the company and for giving adequate time to the

1 Commission.
 2 So we just ask that it be found incomplete at
 3 this point until a further date when we can all
 4 determine -- I think we can all come to an
 5 agreement at some point and maybe not in the very
 6 distant future. It may be somewhat in the next
 7 couple of weeks once we get our questions answered
 8 that we can all probably stipulate, okay, all the
 9 parties feel that the application is complete, now
 10 let's start that clock. That's all we're asking
 11 for.
 12 CHAIRMAN BURG: So you're not
 13 requesting a May 6, in any case?
 14 MR. SENGER: We are not. We feel
 15 the application is still incomplete. But if the
 16 Commission wanted to determine that it is complete,
 17 the May 6 date may give enough time for the
 18 Commission to do what they need to do and for the
 19 parties involved.
 20 But we do not feel it's complete. Therefore,
 21 we do not feel the Commission should say May 6 is
 22 the completion date.
 23 CHAIRMAN BURG: Mr. Gerdes.
 24 MR. GERDES: Mr. Chairman, members
 25 of the Commission, the way the statute is worded is

1 a little bit strange because it says completed
 2 application.
 3 Well, it's easy enough to see that we would
 4 never get to the point where the time limits start
 5 running if every party to the proceeding got a vote
 6 as to whether or not the application is complete
 7 because the people behind me aren't going to agree
 8 to that, and I don't blame them. I wouldn't either
 9 if I was in their position.
 10 I think what has to happen is -- and the
 11 purpose of the letter I filed with the Commission
 12 was to say the applicant is entitled to have staff
 13 tell them either the application is complete in
 14 their view or if not complete, then tell us what is
 15 missing. And then we have the option to provide
 16 what is missing, and then we can either decide to
 17 rely on that application or not.
 18 But there has to be some finality, and it has
 19 to be somebody that's objective and neutral that
 20 says whether or not it's complete. It can't be a
 21 vote by the parties to the Docket. So I think what
 22 we're entitled to is a ruling from this Commission
 23 that says, staff, tell them how it's not complete
 24 and Level 3 has until June 5 or June 10 or whatever
 25 it might be to satisfy staff's request.

1 COMMISSIONER NELSON: Mr. Chairman,
 2 for myself I think the whole issue about whether
 3 it's complete or incomplete is a moot issue because
 4 I believe that and I move that we grant Beresford's
 5 Motion to Dismiss based on the fact that I don't
 6 believe that they met the definitions of local
 7 exchange service.
 8 CHAIRMAN BURG: I'm reluctant to go
 9 there now because I agree with staff that I don't
 10 think that finalizes anything. I think we start
 11 over. I think they could appeal it to the court
 12 and the court would kick it right back to us and
 13 we'd be in the same position we are now.
 14 Not that I don't believe they have an adequate
 15 argument. I think they may have. But I think we
 16 may need to decide that at a hearing process and
 17 not outside the hearing because I don't believe
 18 we'll see the end of it with that so I'm reluctant
 19 to do that.
 20 Counsel, do you have any recommendations, and
 21 if you have any comments also, Bob.
 22 MR. SMITH: I have one question and
 23 maybe Bob does too or maybe the attorneys for
 24 Level 3 or your witness or anyone else you might
 25 have.

1 The question I think is -- and I think where
 2 the Chairman's going with this is if we are going
 3 to hear evidence at the hearing that will enlighten
 4 us further as to whether or not the definition of
 5 local service is met, then by all means we ought to
 6 go forward and hear the evidence, I think, before
 7 we jump to a conclusion that turns out to be wrong
 8 and we waste a lot of time.

9 But if we're not going to hear that -- and I
 10 think we can look down here and see what the
 11 definition says. If we're not going to hear
 12 evidence at some point along the line that provides
 13 us a reason or a basis for finding that this is a
 14 local service, then honestly we're maybe wasting
 15 all of our time.

16 And can you just give me -- can you give me an
 17 answer, I guess, or some enlightenment as to what
 18 we're going to see in the way of evidence that's
 19 going to give us a basis for decision?

20 MR. ROMANO: Well, I suppose we
 21 wouldn't be here unless we thought that, you know,
 22 our case had merit here.

23 Among other things that come to mind, there's
 24 both evidence perhaps and legal argument as to what
 25 constitutes a local exchange service. This is a

1 very complicated legal question in many respects
 2 because we are not only dealing with the pure
 3 definition of local exchange service, we're also
 4 dealing with the area of Internet service
 5 providers, which complicates the question of what
 6 is local in many respects.

7 Calls go locally to ISPs, but, again, for
 8 years incumbent telephone companies said even if
 9 the ISP is located across the street, that's not a
 10 local call because the call keeps going. So even
 11 though the call to the ISP is local, it's not
 12 treated as local for intercarrier compensation
 13 purposes.

14 Those are the kind of issues we need to flesh
 15 out in a hearing, the question of how does the fact
 16 the FCC has weighed in how ISP traffic should be
 17 treated fit into the question of local exchange
 18 service under South Dakota Law.

19 Other issues to be considered would be network
 20 design, financial responsibility for
 21 interconnection purposes, the fact that we provide
 22 service like this and many other carriers provide
 23 service like this today, the fact that foreign
 24 exchange service really functionally is no
 25 different than this.

1 So these are the kinds of things we would want
 2 to present and discuss at a hearing and allow for
 3 everybody to weigh in on.

4 MR. SMITH: In the other states in
 5 which you are doing this under similar
 6 circumstances, do they have Certificate of
 7 Authority statutes that you had to comply with?

8 MR. ROMANO: Yes. We've had to file
 9 for -- in every state I think except for perhaps
 10 Montana and Massachusetts we've got some kind of
 11 certification requirement.

12 The statutes, I do not know whether they are
 13 all in the same structure in terms of, you know,
 14 each piece part of the definition. That, I do not
 15 know.

16 MR. SMITH: You don't know whether
 17 they were precisely like ours and whether we might
 18 be constrained to a greater extent than those other
 19 states?

20 MR. ROMANO: I do not know. I mean,
 21 that's the kind of thing that perhaps could be
 22 examined as well.

23 I do know, for example, Missouri had several
 24 tiers of service provision, and one of them was
 25 two-way, one of them was just any local exchange

1 service. So there's all sorts of permutations even
 2 throughout, even in individual state's statutory
 3 provisions.

4 COMMISSIONER NELSON: Well, you can
 5 define it any way you want, but generally speaking
 6 on the telecommunications committee at NARUC or
 7 anywhere else, basically local exchange service is
 8 usually described as two-way switched.

9 MR. ROMANO: Well, in some cases
 10 that's correct, but I guess I also see there are
 11 subsets of local exchange service. There's basic
 12 local exchange service, which is two-way switched.

13 I mean, many carriers today offer direct
 14 inward dial or PRI ISDN telephone lines and they're
 15 required to get certification to offer those and
 16 the required certification for that is local
 17 exchange certification.

18 I don't think the State of South Dakota would
 19 want somebody out there offering DID lines or PRI
 20 ISDN lines without local exchange authority.

21 CHAIRMAN BURG: But they're not
 22 two-way switched?

23 MR. ROMANO: Yes. PRI, I
 24 understand, could be two-way switched, as I
 25 understand it. I'm a lawyer as well so I'm not a

1 technical person. But I understand for the large
2 part PRI ISDN telephone lines are used to support
3 ISP services. I doubt very much the State of South
4 Dakota would want someone out there offering those
5 kinds of services without a certificate.

6 COMMISSIONER SAHR: Mr. Romano, if
7 staff had some additional questions, would you have
8 any objections to clarifying issues that they might
9 have?

10 MR. ROMANO: Not one bit. In fact,
11 we've offered to meet with staff at their
12 convenience to discuss anything further. I made
13 that offer today.

14 MR. SENGER: If I may throw one
15 comment out, Mr. Gerdes indicated that he doesn't
16 believe it should be a vote of the parties, I can
17 understand that, and I think I probably -- after
18 hearing him, I think I agree with him.

19 My suggestion is -- he also indicated that it
20 should be somebody independent who determines
21 whether or not it's complete. Well, we are asking
22 the Commission at this point.

23 Another suggestion I have and if the parties
24 agree, maybe it could be staff, the one who
25 determines when it's complete and notify the

1 parties that staff at this point, after our
2 discussions that we're going to have, we feel that
3 it's complete. We can come up with a date, bring
4 that to the Commission.

5 And I also want to state that staff does not
6 believe that the application is the arena to argue
7 all of these arguments. We believe that the
8 application is just the foundation, setting --
9 giving some basic information and enough
10 information so we can understand how to proceed.

11 We believe that there should be a hearing on
12 this. In fact, maybe that should be another one of
13 the questions before us at some time is maybe we
14 should set a hearing, maybe we should set a
15 procedural schedule.

16 But that's just another option on when we can
17 determine when this is complete.

18 COMMISSIONER NELSON: I guess I have
19 another question on my mind, and that is it seems
20 to me that the staff should decide if the
21 application is complete or incomplete and should
22 have indicated to Level 3 that it was or it wasn't.

23 MR. SENGER: We -- and I don't have
24 all the dates in front of me on when this was done,
25 but the application was filed in mid-February.

1 Staff took about a week and a half to two weeks
2 going through this trying to figure out what was
3 going on.

4 We knew Beresford -- through our notification
5 process, our weekly filings, Beresford found out
6 about this, made some minor discussions -- had some
7 minor discussions with them. Staff issued a data
8 request. The company responded to that data
9 request.

10 During that time I spoke with Mr. Gerdes about
11 some other questions I had, specifically does this
12 application -- why do we need a local exchange
13 Certificate of Authority for this? And I also
14 indicated, you know, we really don't know what's
15 going on here.

16 After that we got a response to the data
17 request, staff filed another data request. And in
18 that time we had the 271 hearings. In fact, during
19 the 271 hearings Mr. Gerdes and I spoke again
20 about, you know, what staff needs, we're not sure
21 what's going on, do they -- tell us why Level 3
22 feels they need a local exchange Certificate of
23 Authority.

24 The response of staff's final data request
25 that has been issued so far was filed May 6. The

1 answer to our question was filed May 7. Then we
2 had all of these other motions going in.

3 So staff believes that Level 3 did know that
4 the application was incomplete, that we felt --
5 that staff felt the application was incomplete.

6 COMMISSIONER NELSON: Thank you.

7 CHAIRMAN BURG: The other question I
8 have or the problem that I have with determining
9 whether this is local exchange service or not is
10 the opportunity for waivers that are in the law or
11 in the rules.

12 As long as those waiver opportunities are
13 there, if they are met, then that would somehow
14 indicate to me that the intent was that they
15 constitute local service.

16 I don't know if that's the answer. Those
17 things are all so confusing, and I don't believe we
18 clarify them by just out of sorts just dismissing
19 at this point. And I think that's what I'm hearing
20 from staff.

21 I guess for that reason I'm not ready to
22 actually dismiss it because I really don't think
23 we've gotten any place with that. Bob.

24 We do have a Motion on the table, though.

25 COMMISSIONER SAHR: And I would

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1 agree with the Chairman on this issue, and I think
2 staff has an interest in getting some additional
3 information that will help clarify the issues here.

4 We have two of the parties that are urging the
5 Motion to Dismiss, are agreeing that the
6 application may be incomplete, and I think it's
7 reasonable to get the additional information from
8 Level 3, see where we're at after that.

9 And I certainly, though, would not preclude a
10 refiling of the Motion to Dismiss or a renewal of
11 the Motion to Dismiss. It may very well be a valid
12 Motion, but at this point in time I think there's a
13 lot of factual issues in dispute, a lot of
14 questions about what exactly the service is.

15 And with those questions and with the need for
16 additional information I don't think it's
17 appropriate at this time to dismiss the case and I
18 would be inclined to go along with staff's
19 recommendation of getting some additional
20 information and then looking at going forward after
21 that.

22 COMMISSIONER NELSON: So are you
23 substituting the Motion? Because the Motion on the
24 table is to grant the dismissal.

25 COMMISSIONER SAHR: Well, I'm

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1 dissenting from that Motion.

2 COMMISSIONER NELSON: Okay. You
3 didn't call the question --

4 CHAIRMAN BURG: Did you have a
5 Motion?

6 COMMISSIONER SAHR: Yes. I guess
7 procedurally we need a substitute Motion; is that
8 correct?

9 COMMISSIONER NELSON: Because
10 otherwise you can vote two against it and then come
11 back with a new Motion. So you can substitute it
12 and come up with a Motion you want.

13 COMMISSIONER SAHR: I wasn't sure if
14 the Chair had made the Motion or not.

15 CHAIRMAN BURG: No, I haven't. I
16 didn't actually make a Motion, but I would or you
17 can.

18 I'll good ahead then and say that I would at
19 this time move not to grant Beresford's Motion to
20 Dismiss but allow them to refile that at any time
21 or to include that at the time of hearing, if
22 that's what we go to.

23 In the meantime staff should determine when
24 they feel that the petition is complete, and that's
25 when the time frame will start.

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1 COMMISSIONER SAHR: And the only
2 question I have on it is with staff determining the
3 issue of completeness, if at some point in time the
4 Petitioner wanted to just move ahead on that --

5 CHAIRMAN BURG: Well, the point
6 being to me is if they don't arrive at that, either
7 party could ask us to make a determination.

8 COMMISSIONER SAHR: Right. And I'm
9 comfortable with that as long as we make it clear
10 if Level 3 wanted to petition us to move forward
11 and we feel staff is slowing things down or
12 whatever the case may be, I would want to leave
13 that open.

14 But I will second that Motion.

15 CHAIRMAN BURG: Do you want to
16 concur or --

17 COMMISSIONER NELSON: What's the
18 Motion?

19 CHAIRMAN BURG: The Motion is to not
20 grant dismissal at this time, allow dismissal to
21 still be a recourse for Beresford but that staff
22 determine when the application is complete.

23 COMMISSIONER NELSON: I guess I
24 dissent.

25 CHAIRMAN BURG: Okay. And the final

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1 question -- and then on the two-to-one vote the
2 dismissal has been denied at this time and staff
3 will determine when the Motion is complete -- or
4 when the application is complete. Excuse me.

5 The last question is how shall the Commission
6 rule on Level 3's request for finding of fact. And
7 who requested that one? I'm not even sure.

8 MR. ROMANO: If I may clarify, if I
9 understand that question correctly, I believe that
10 refers to the May 14 letter, which was a finding --
11 the finding of fact being our application was
12 complete.

13 I think our Motion makes that a moot question.

14 MR. SENGER: I would like to comment
15 on that. I don't have the dates, but it wasn't the
16 May 14. In the May 6 response to staff's second
17 data request Level 3 changed a lot of their
18 filings -- they essentially added a few more
19 things, that they're asking for waiver and then
20 they --

21 In the original application they had asked to
22 waive ARSD 20:10:32 -- help me out here Kelly. 04?

23 MR. FRAZIER: 04:10 --

24 MR. SENGER: Let's just talk about 4
25 because that's the question in hand here. That

1 Administrative Rule states the applicant, Level 3,
2 at this point shall file notice to other carriers
3 in that area.

4 On the May 6 letter, I think, is when it was
5 response -- they withdrew that application and
6 stated that Level 3 -- I think they stated Level 3
7 granted -- we have not provided notice to Beresford
8 but Beresford does have notice -- has received
9 notice.

10 And what was that called? Constructive
11 notice?

12 MR. FRAZIER: Yes.

13 MR. SENGER: Why don't you take
14 over.

15 MR. FRAZIER: The finding of fact
16 Motion was a Motion that they were in compliance
17 with the notice section is what they were
18 requesting a finding of fact from the Commission,
19 and we wouldn't deny that.

20 At this point Beresford does have constructive
21 notice and requiring them to file notice at this
22 point would be like yelling fore after you hit
23 somebody with the golf ball. So we wouldn't resist
24 that Motion at this point.

25 COMMISSIONER NELSON: I want the

1 record to clearly represent my position here, and
2 my position is that I object to denying Beresford's
3 Motion to Dismiss. But I do not dissent on the
4 possibility of them raising it at another time.

5 And I think the Motion that we were on will
6 indicate that I dissented on both parts, and that's
7 not my position here today.

8 So I don't know how you plan to clear that up
9 in the record. It would have been cleaner perhaps
10 if we would have voted my Motion down and went
11 ahead with your Motion to do that. I want the
12 record to clearly reflect I dissent on the denial
13 of the dismissal of Beresford's Motion, but I do
14 not necessarily -- I don't definitely dissent on
15 the possibility of them raising it at another time.

16 CHAIRMAN BURG: I think that's
17 always a possibility. I think that's understood.

18 COMMISSIONER NELSON: I don't want
19 the record to say that I didn't support --

20 COMMISSIONER SAHR: I think we're 3
21 for 3 on that one.

22 CHAIRMAN BURG: Dave, did you have a
23 comment on this?

24 MR. GERDES: I want to say I agree
25 with Kelly. It comes back to me now. The rule

1 requires Level 3 to give notice to the incumbent
2 carrier, yes. We didn't do it, but we've
3 suggested -- well, they've intervened so obviously
4 they have notice.

5 So we've asked the Commission to make a
6 finding of fact to say that Beresford does, in
7 fact, have actual notice, which, thus, meets the
8 requirement of the rule.

9 CHAIRMAN BURG: Ms. Rogers, do you
10 have a comment on that?

11 MS. POLLMAN ROGERS: We don't have
12 any problem with that. There was a notice of
13 intervention filed actually before I filed my
14 notice of appearance so I don't think that we can
15 sit here and say that we have not had adequate
16 notice.

17 CHAIRMAN BURG: Just out of
18 curiosity, do you know how notice was received
19 or -- you did find out.

20 MR. ROMANO: I can probably clarify
21 that. It was -- I believe filing the application
22 and also representatives of Level 3 contacted
23 Beresford, I believe, perhaps right after the
24 application was filed to begin discussing traffic
25 exchange arrangements.

1 MS. POLLMAN ROGERS: I think
2 Mr. Frieberg and Wayne Ackland are still on the
3 line. If you might want to ask them, they might be
4 able to clarify.

5 CHAIRMAN BURG: Tom, do you know ho
6 you got notice?

7 MR. FRIEBERG: Mr. Ackland got
8 contacted by Mark Stacy of Level 3 shortly after
9 the application had been filed, and we also saw it
10 on the Docket on the filings.

11 COMMISSIONER SAHR: So that welt in
12 the back of your head from the golf ball has gone
13 down?

14 CHAIRMAN BURG: I think we probably
15 need a Motion then from what I heard as the finding
16 of fact that Beresford does actually have notice of
17 the application. And I'll make that Motion.

18 COMMISSIONER NELSON: Second.

19 COMMISSIONER SAHR: And I'll concur.

20 Although I certainly will point out it would have
21 been Beresford's Motion to raise if it were a
22 defect, and since they're waiving it, I'll concur.
23 But I do think it's not insignificant to not give
24 someone notice.

25 CHAIRMAN BURG: Again, you know, as

1 far as I'm concerned, is there any other issues in
2 this Docket for taking up right now?

3 I do want to emphasize I think Beresford has a
4 very strong argument from their position. I did
5 what I did because I didn't feel it was going to go
6 away with that Motion.

7 I think there's a likelihood it would have
8 either been appealed or it would come back in a
9 different way, and I think if we can proceed
10 forward from where we are, we're probably better
11 off.

12 (The hearing concluded at 3:45 p.m.)

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1 STATE OF SOUTH DAKOTA)
2 :SS CERTIFICATE
3 COUNTY OF HUGHES)
4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter and Notary Public in and for the
7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 30th day of
11 May 2002, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 12th day
14 of June 2002.

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Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter

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