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PUBLIC SERVICE COMMISSION

July 1, 2008

North Dakota Public Service Commission
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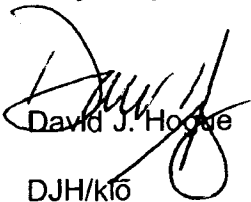
RE: *Midcontinent Communications, a South Dakota partnership v. Missouri Valley Communications, Inc. Case No. PU-08-61*

Enclosed please find one original and eight copies of the following document:

1. *Respondent Missouri Valley Communications, Inc.'s Pretrial Brief.*

If you have any questions regarding the same, please do not hesitate to contact me.

Very Truly Yours,


David J. Hogue
DJH/klb

Enclosures

cc: Mr. John Olson
Mr. Allen C. Hoberg
Mr. Shawn Hanson

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Missouri Valley Communications, Inc. Pretrial Brief

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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|---------------------------------------|---|-------------------|
| Midcontinent Communications, a |) | |
| South Dakota Partnership, |) | |
| |) | |
| Complainant, |) | |
| vs. |) | Case No: PU-08-61 |
| |) | |
| |) | OAH No. 20080079 |
| Missouri Valley Communications, Inc., |) | |
| |) | |
| Respondent. |) | |

PRELIMINARY STATEMENT

On November 14, 2007, Midcontinent Communications (Midcontinent) made a request for a facilities based interconnection agreement with local number portability (LNP) services for the Williston North Dakota exchange from Missouri Valley Communications, Inc. By its filing of February 8, 2008, Midcontinent filed with the Commission its Notice of Bona Fide Request for Services and Interconnection and Petition to Find Rural Exemption Waived.

Midcontinent requests that the Commission conduct an inquiry under the provisions of 47 USC § 251(f)(1)(A) for the purpose of determining whether to terminate Missouri Valley's exemption from providing its services as requested by Midcontinent. On April 9, 2008, Missouri Valley filed an Application for Suspension pursuant to 47 USC § 251 (f)(2). Missouri Valley requests that the Commission grant to Missouri Valley a suspension of the requirements of subsections (b) and (c) of § 251 for Missouri Valley's telephone exchange service facilities in the Williston exchange area for such duration as the Commission determines.

On May 1, 2008, Administrative Judge Allen Hoberg issued an Order for Consolidation and Scheduling pursuant to Stipulation for Consolidation filed by the parties consolidating these cases for hearing. On May 7, 2008, the Commission issued a Notice of Consolidated Hearing scheduling a hearing in Cases No. PU-08-61 and No. PU-08-176 for July 9, 2008, and identifying the following issues:

1. Whether the request of Midcontinent is unduly economically burdensome.
2. Whether the request of Midcontinent's technically feasible.
3. Whether the request of Midcontinent is consistent with 47 U.S.C 254 (other than subsections (b)(7) and (d)(1)(D) thereof).
4. The implementation schedule for compliance with the request should the exemption be terminated.
5. Whether suspension or modification is necessary.
6. Whether suspension or modification is consistent with public interest, convenience and necessity.

These consolidated hearings present the question whether Missouri Valley will be required to grant Midcontinent's request for interconnection with Missouri Valley.

LEGAL HISTORY and BACKGROUND

In 1996, Congress enacted the Telecommunications Act of 1996, amending the 1934 Communications Act and codified as 47 U.S.C. § 151 et. seq. (sometimes referred to herein as the "Act" or the "federal act," as defined by N.D.C.C. 49-21-01 subd 5.).

The federal act includes provisions to promote competition in local exchange telecommunications services. The provisions that affect these cases are the obligations of “incumbent local exchange carriers” (local exchange companies that had legal local monopolies before 1996, ILECs) to interconnect with “competitive local exchange carriers” (CLECs) that seek to provide alternative (competitive) local exchange telecommunications service in the ILEC’s formerly exclusive service areas. Interconnection is required under the Act to facilitate the emergence of competition by making available to CLECs the facilities in place and owned by old competitors, the ILECs. Act § 251.

The federal act obliges ILECs to cooperate with CLECs who request interconnection so CLECs do not encounter barriers to entry into a market (formerly monopolistic) that public policy mandates to be a market that shall be opened to competition. The Act imposes on ILECs the obligation to negotiate the terms of interconnection (§ 251(c)(1)) and the Act created timelines and arbitration and mediation mechanisms (§ 252).

Rural Exemption

Whether Missouri Valley will be required to grant Midcontinent’s request for interconnection is affected by the “rural exemption.” ILECs that qualify as rural telephone companies are exempt from the obligations to negotiate and to make interconnections with CLECs until the state regulatory commission conducts an inquiry and acts to terminate or sustain the exemption after a CLEC notifies the state commission that it has requested interconnection with a particular rural ILEC. In addition, a rural ILEC may request the state commission to grant “suspension or modification” of the interconnection requirements affecting other ILECs. Act § 251(f)(1) and (2) and NDCC § 49-21-01.7 subds. 11 and 16.

Under § 251(f)(1)(A) of the Act, an ILEC that is a rural telephone company is exempt from the interconnection requirements of section 251(c) until (1) the rural company has received a bona fide request for interconnection, services, or network elements, and (2) the state commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with the universal service requirements of section 254.

Section 251(f)(1)(C) installs a limitation on rural ILECs' exemption.

The exemption under section 251(f)(1)(A) shall not apply if the CLEC is a cable operator providing video programming and the rural ILEC also provides video programming.

There is an evident "level playing field" rationale underlying the video programming limitation on the rural exemption. A rural telco that also provides cable TV services does not need or deserve an exemption or any protection from competition posed by a cable TV company that enters the local telephone market. A rural telephone company that does not also provide cable TV services does need and deserve protection from competition posed by a cable TV company that enters the telephone market. Under "level playing field" principles, it is not fair for a CLEC to have the opportunity to bundle cable TV and telephone service as a way to siphon telephone customers away from a rural ILEC that does not offer cable TV services.

Suspension and Modification

Under section 251(f)(2) of the Act, any local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may request "suspension or modification" of the interconnection requirements under §251(c) and other requirements under §251(b).

Though there are similarities between subsections (f)(1) and (f)(2), the language of subsection (f)(2) contains an important element not found in subsection (f)(1): whether a suspension or modification is “consistent with the public interest, convenience, and necessity.” Act § 251(f)(2). This element gives the Commission broad authority to analyze all the facts and circumstances of the proposed interconnection and evaluate not only the interconnection impact on the rural ILEC, but the role the interconnection will have on consumers, competition, and other policy considerations.

THE PARTIES

Missouri Valley is:

- a. a “local exchange carrier” that is engaged in the provision of “telephone exchange service” in the “local exchange area” of Williston, North Dakota (Act § 153 (26), (16) and (47), and N.D.C.C. §49-21-01(9) under a certificate of public convenience and necessity issued by the Commission under N.D.C.C. Chapter 49-03.1. Order, Case No. PU-2779-02-452.
- b. an “incumbent local exchange carrier” (Act § 251(h) and N.D.C.C. 49-21-01, subd. 6.)
- c. a “rural telephone company” (Act § 153 (37) and N.D.C.C. 49-21-01, subd. 16.)
- d. a local exchange carrier with fewer than 2 percent of the Nation’s subscriber lines installed in the aggregate nationwide. (Act § 252 (f)(2).

Midcontinent is a competitive local exchange carrier, a cable television company that has embarked on the development of its network to provide telecommunications service in several communities in North Dakota and South Dakota. Midcontinent has been granted a certificate of public convenience and necessity to provide telecommunications service throughout North Dakota, subject to the rural exemptions under the federal act, §251(f). Order, Case No. PU-04-456.

Missouri Valley does not provide video programming, so its exemption under Act § 251(f)(1)(A) continues in effect, unless and until Midco proves that its request for interconnection “meets the three prerequisites to justify the termination of the otherwise continuing rural exemption.” Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, at 762. (8th Cir. 2000). (Herein Iowa v FCC.)

THESE PROCEEDINGS

Case No. PU-08-61, the Rural Exemption Investigation, was opened by the Commission in response to Midcontinent's Notice of Bona Fide Request for Services and Interconnection, in which Midcontinent requested the Commission to “conduct an inquiry” (using the words of Act section 251(f)(1)(B)) for purposes of determining whether to terminate Missouri Valley's exemption under section 251(f)(1)(A). Missouri Valley's position in the Rural Exemption Investigation is its exemption under Act section 251 (f)(1) should be sustained, not terminated.

Case No. PU-08-176, Suspend/Modify Interconnection Requirements Application, was opened by the Commission in response to Missouri Valley's alternative position: If the exemption is not sustained, it should not be entirely terminated but should be suspended under Act § 251(f)(2).

These consolidated proceedings invoke the complete scope of the Commission's jurisdiction regarding the rural exemption, Act §§ 251(f)(1), and (2) and NDCC § 49-21-01.7, subds. 11 and 16.

The Commission has not previously made a decision in any contested case whether a rural telephone company's exemption from facilities based interconnection should be terminated under

section 251(f)(1)(A) or whether the interconnection requirements should be suspended under section 251 (f)(2). There was one previous case under subsection (f)(1) that involved disputed issues similar to the present case. Case No. PU-05-451 was initiated by Midcontinent's request for telecommunications service for resale under section 251(c)(4). The ILEC in that case was a rural telephone company, North Dakota Telephone Company (NDTC), who initially declined the request because of the rural exemption. At the conclusion of the case, NDTC did not challenge the termination of its rural exemption for resale. See June 7, 2006 Order in Case No. PU-05-451, paragraph 11. The NDTC case did not involve a request for facilities based interconnection.

The Commission has not previously made a decision in any case under section 251(f)(1) where a CLEC that is also a cable TV company requested facilities based interconnection with a rural ILEC that did not provide video programming.

SUMMARY OF ARGUMENT

Missouri Valley's exemption under Act § 251(f)(1) should be sustained, not terminated, because Midcontinent cannot carry its burden of proof on the two contested issues, undue economic burden and universal service. (To date, Midcontinent has failed to produce any and such failure is the subject of a motion to compel responses to discovery or dismiss Midcontinent's petition altogether.) Alternatively, if the petition of Midcontinent is not dismissed, and the exemption of Missouri Valley is not sustained, it should not be entirely terminated but should be suspended under Act § 251(f)(2). Suspension is necessary to avoid a significant adverse economic impact on users of telecommunications services generally and to avoid imposing a requirement that is unduly economically burdensome. Suspension and modification is consistent with the public interest, convenience and necessity.

This case is like any other adjudicative proceeding before any administrative agency or court. One party has a burden of proof, and it is axiomatic that the party with the burden of proof is the party with the burden to produce relevant and material evidence.

“The plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption.” Iowa v FCC, at 762.

The three prerequisites to which the court referred are “is (1) not unduly economically burdensome, (2) technically feasible, and (3) consistent with section 254.” *Id.* at 761, citing Act § 251 (f)(1)(A).

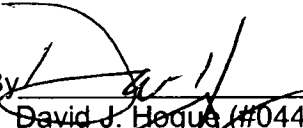
Missouri Valley’s rural exemption is “continuing,” in full force and effect as a matter of federal statute, subject to Midcontinent’s burden to prove a negative, that termination of the exemption is not unduly economically burdensome, and is otherwise consistent with the universal service principles under § 254. The counterpoint is that Missouri does not have an affirmative burden to prove that interconnection would be unduly economically burdensome.

Missouri Valley expects to present evidence at the hearing that termination of its otherwise continuing rural exemption would be unduly economically burdensome and otherwise not consistent with universal service principles. But Missouri Valley’s evidence is rebuttal evidence only, not to be considered as if Missouri Valley has any burden of proof on any issue. If Midcontinent’s evidence is incomplete or unpersuasive, either standing alone or evaluated in comparison to Missouri Valley’s rebuttal evidence, then Missouri Valley’s continuing rural exemption must be sustained because Midcontinent has failed “... to prove that the request [for

interconnection] meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." Iowa v FCC, at 762.

Missouri Valley anticipates filing a proposed order and comprehensive brief in support of its proposed order, following completion of the hearing.

PRINGLE & HERIGSTAD, P.C.

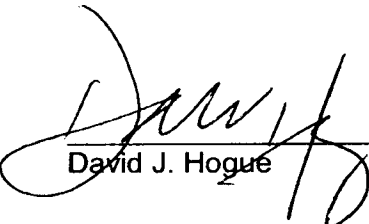
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CERTIFICATE OF SERVICE

A copy of the foregoing **Respondent Missouri Valley Communications, Inc.'s Pretrial Brief** was mailed to the following on July 1, 2008:

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