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PUBLIC SERVICE COMMISSION

August 1, 2008 – HAND DELIVERY

Ms. Illona Jeffcoat-Sacco
North Dakota Public Service Commission
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

RE: Midcontinent Communications, a South Dakota partnership v. Missouri Valley Communications, Inc.
Case No. PU-08-61
OAH No. 20080079
Our File No. 28-16

Dear Ms. Jeffcoat-Sacco:

Enclosed for filing please find an original and eight copies of the following documents:

1. ***Initial Brief of Midcontinent Communications***
2. ***Proposed Findings of Fact and Conclusions of Law of Midcontinent Communications***
3. ***Proposed Order***
4. ***Certificate of Service by Mail***

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

Sincerely,

John M. Olson
Attorney at Law

JMO/dmb
enclosures
cc David Hogue
J.G. Harrington
Nancy Vogel
Mary Lohnes
Annette Bendish

31 PU-08-61 Filed: 8/1/2008 Pages: 55
Initial Brief - Proposed Findings of Fact and Conclusions of Law - Proposed Order

Midcontinent Communications

John M. Olson, P.C.

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

MIDCONTINENT COMMUNICATIONS, A SOUTH DAKOTA PARTNERSHIP,	)	
COMPLAINANT	)	
VS.	)	Case No. PU-08-61 OAH No. 20080079
MISSOURI VALLEY COMMUNICATIONS INC.,	)	
RESPONDENT	)	

MISSOURI VALLEY COMMUNICATIONS INC.	)	
APPLICATION FOR SUSPENSION OR MODIFICATION PURSUANT TO 47 U.S.C. § 251(F)(2)	)	Case No. PU-08-176 OAH No. 20080079

Initial Brief of Midcontinent Communications

MIDCONTINENT COMMUNICATIONS

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August 1, 2008

TABLE OF CONTENTS

Page

I. Introduction 1

II. The Rural Exemption Should Not Be Applied to Missouri Valley. 4

A. Missouri Valley Has Waived Its Rural Exemption 5

1. Missouri Valley Waived Its Exemption When It Agreed to Honor the Requirements of the Previous Interconnection Agreement for Williston 5

2. Missouri Valley's Resale Agreement Constitutes a Waiver of Its Rural Exemption. 8

B. When the Criteria Under Section 251(f)(1) Are Applied, There Is No Basis to Maintain the Exemption 9

1. Section 251(c) Interconnection Would Not Impose an Undue Economic Burden on Missouri Valley 11

(a) Missouri Valley's Analysis Should Be Rejected Because It Is Not Related to any Section 251(c) Interconnection Obligation. 13

(b) The Evidence Shows that Facilities-Based Competition in Williston Will Not Impose an Undue Economic Burden on Missouri Valley 14

2. Interconnection Would Not Have a Harmful Impact on Universal Service 26

III. Missouri Valley Should Not Be Granted a Suspension of Its Section 251(b) and (c) Obligations. 31

A. There Is No Evidence that Requiring Missouri Valley to Meet Its Section 251(c) Obligations Will Have an Adverse Impact on Users of Telecommunications Services. 32

B. The Public Interest Strongly Supports Requiring Missouri Valley to Meet Its Section 251(b) and (c) Obligations. 33

IV. The Commission Should Adopt a Reasonable Implementation Schedule 35

V. Conclusion 37

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

MIDCONTINENT COMMUNICATIONS, A SOUTH DAKOTA PARTNERSHIP, COMPLAINANT VS. MISSOURI VALLEY COMMUNICATIONS INC., RESPONDENT	)))))))))))	Case No. PU-08-61 OAH No. 20080079
MISSOURI VALLEY COMMUNICATIONS INC. APPLICATION FOR SUSPENSION OR MODIFICATION PURSUANT TO 47 U.S.C. § 251(F)(2)	))))))	Case No. PU-08-176 OAH No. 20080079

Initial Brief of Midcontinent Communications

Midcontinent Communications, by its attorneys, hereby submits its initial brief in the above-referenced proceeding. For the reasons shown below, the Commission should grant Midcontinent's petition to lift the rural exemption in the Williston exchange and should deny the application of Missouri Valley Communications, Inc. ("Missouri Valley") for suspension or modification of its statutory obligations as an incumbent local exchange carrier.

I. Introduction

At its heart, this proceeding is about the extent to which telephone customers in Williston will be able to benefit from facilities-based local telephone competition. While the Commission

must make its decision based on the statutory criteria of Sections 251(f)(1)(B) and 251(f)(2), that decision is informed by the key public interest questions about the benefits of competition.

Missouri Valley takes the position that competition would be bad for consumers and bad for Williston. Even taking Missouri Valley's factual claims at face value – which the Commission should not do – there is no real evidence for this position. On the other hand, there is a wealth of evidence that demonstrates that competition does not create undue harm and, in fact, is beneficial to consumers.

This analysis is entirely consistent with the results when the statutory criteria under Section 251(f)(1)(B) and Section 251(f)(2) are evaluated. First, when evaluating whether Midcontinent has shown that the rural exemption should be lifted, the evidence demonstrates that each of the criteria has been met. There is no dispute at all concerning whether Midcontinent has made a *bona fide* request or whether Midcontinent's request is technically feasible; Missouri Valley disputes only the extent to which the request is unduly economically burdensome or will have an effect on universal service.

The evidence, however, shows that Midcontinent's request will not be unduly burdensome and will not have an adverse impact on universal service. Even if the Commission adopted Missouri Valley's financial analysis, the company still would have close to $1 million in operating profits each year (using a calculation that treats depreciation as a cash expense), but Midcontinent's witnesses have shown that Missouri Valley's analysis is incorrect in several significant ways and does not account for the integration of the Missouri Valley/Nemont business. When these corrections are made, it is evident that the economic burden of competition would not be significant, especially in light of the significant consumer benefits. Equally important, however, Missouri Valley's analysis is not tied to Midcontinent's request for

interconnection under Section 251(c), but is simply a generic analysis of the impact of a competitor, and so cannot meet the standards for showing an undue burden under Section 251(f)(1)(B). Moreover, unchallenged evidence shows that rural carriers succeed in responding to competition when, like Nemont/Missouri Valley, they offer a range of integrated services to their customers.

Missouri Valley's showing on universal service is likewise insufficient. First, there is no evidence at all that competition would prevent Missouri Valley from meeting its obligations under the current rules, and much evidence to the contrary. Moreover, Missouri Valley's showing is based almost entirely on presumptions and assumptions about what the FCC and Congress might do in the future to change the requirements for universal service. Missouri Valley provided no evidence, other than Mr. Hanson's speculation, that its universal service obligations will be expanded. In fact, the most current FCC proposal for broadband services merely creates funding to support broadband and includes no mandatory deployment.

Moreover, Missouri Valley has waived its rural exemption as to Midcontinent. It did so by agreeing to take on the interconnection obligations of its predecessors, Qwest (then U S West) and Citizens and, separately, it did so by agreeing to the existing resale agreement with Midcontinent.

Missouri Valley's request for suspension of its Section 251 obligations should be denied, in large part for the same reasons that Midcontinent's petition should be granted. Again, there is no question of technical feasibility; all of the issues relate to the burdens of meeting Section 251 requirements and the impact on customers and the public interest.

While the analysis of economic burdens is essentially the same as under the exemption provision, the other two prongs of the Section 251(f)(2) test – "a significant adverse economic

impact on users of telecommunications services generally" and consistency with the public interest – do require separate analysis. Missouri Valley's argument, in both cases, essentially is that consumers will be harmed if Missouri Valley is forced to permit competition. These arguments utterly ignore the benefits of local telephone competition, as described in the testimony of Mr. Gates, and the actual results of competition in small communities across North Dakota.

Missouri Valley's arguments also are built on the assumption that what is good for Missouri Valley is good for its consumers. That, unfortunately, is incorrect. The record demonstrates that Missouri Valley and its parent Nemont, rather than investing aggressively to improve service in Williston, have been spending the vast majority of the company's operating profits to service the debt that Nemont incurred to buy the exchange. Perhaps the most striking example is that Missouri Valley is only now increasing its DSL speeds to 1 Mbps, or about one-tenth the speed of Midcontinent's standard high speed Internet offering. And Mr. Hanson testified that it would take 16 years at Missouri Valley's current level of spending to upgrade its systems to fiber. That pace of innovation will handicap Williston consumers for decades to come, and the only real solution to that problem is to encourage, not prevent, competition.

II. The Rural Exemption Should Not Be Applied to Missouri Valley.

This proceeding demonstrates that the rural exemption should be lifted in the Williston exchange. The Commission can reach this conclusion in two different ways. First, Missouri Valley has waived the exemption by its actions with regard to Midcontinent. Second, even if the exemption had not been waived, the evidence shows that the exemption should be lifted. Finally, given Missouri Valley's claims about the extent of existing competition, it is disingenuous for Missouri Valley to suggest that one new facilities-based competitor would cause significant harm.

A. Missouri Valley Has Waived Its Rural Exemption.

There are two independent reasons for the Commission to conclude that Missouri Valley has waived its rural exemption as to Midcontinent. First, Missouri Valley promised to honor the requirements of Midcontinent's previous interconnection agreements when it purchased the Williston exchange in 2003. Second, Missouri Valley waived the rural exemption when it agreed to provide wholesale resale to Midcontinent in 2004.

1. Missouri Valley Waived Its Exemption When It Agreed to Honor the Requirements of the Previous Interconnection Agreement for Williston.

As the Commission is aware, Missouri Valley was created so that Nemont could acquire the Williston exchange from its previous owner, Citizens Communications. Citizens, in turn, had acquired the Williston exchange from U S West (now Qwest).[1]

At the time that Citizens purchased the exchange from U S West, Midcontinent had an interconnection agreement with U S West for all of North Dakota. That agreement was a standard agreement for all services covered by Section 251(b) and (c) of the federal Communications Act, including wholesale resale, physical interconnection, number portability, reciprocal compensation and unbundled network elements.[2]

In connection with its application to acquire the Williston exchange, Citizens agreed that it would assume the obligations under the existing interconnection agreement. It formalized that agreement in May, 2001, and the assumption was approved by the Commission later that year.[3] As a result, Citizens was obligated to provide Midcontinent with all of the interconnection arrangements required under the U S West agreement.

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[1] Exhibit MV2, Prefiled Direct Testimony of Mr. Shawn Hanson ("Hanson Prefiled") at 2-3.

[2] Late-filed Exhibit C9 at 1; *see also* Docket No. PU-1945-99-125.

[3] Late-filed Exhibit C9 at 1; *see also* Docket No. PU-2483-01-48.

Citizens decided to sell the Williston exchange to Missouri Valley in the fall of 2002. The transaction was approved in an order dated December 4, 2002.[4] In that order, the Commission noted that Missouri Valley "intends to honor existing interconnection agreements with exchange carriers[.]"[5] In February, 2003, Citizens formally informed Midcontinent that Missouri Valley would negotiate a new agreement with Midcontinent and, in the meantime, "provide interconnection under the existing agreement."[6] In response to a Midcontinent inquiry, Missouri Valley acknowledged that it would continue to "honor the current Interconnection Agreement that is in place between Citizens and Midcontinent Communications until a new Agreement can be negotiated."[7]

Missouri Valley later sent a letter terminating the existing agreement with Midcontinent and seeking negotiations for a new agreement. The reason for the termination was described as follows:

> Missouri Valley did not acquire all of Citizens' assets in North Dakota and is a smaller company than Citizens and therefore will not be conducting business in all respects like Citizens. Moreover, the terms of the underlying interconnection agreement between Midcontinent and Qwest allow for modification of that agreement in light of subsequent decisions by courts and regulatory agencies. Missouri Valley's intention is, therefore, to negotiate an agreement with Midcontinent that takes into consideration the foregoing considerations.[8]

Nothing in the letter indicated that Missouri Valley would not continue to make Section 251(c) interconnection available to Midcontinent or that it objected in any way to providing Section

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[4] Missouri Valley Communications, Inc., Designated Eligible Carrier Application and Local Exchange Public Convenience and Necessity, *Findings of Fact, Conclusions of Law and Order*, Case Nos. PU-2779-02-451 and PU-2779-02-452 (Dec. 4, 2002).

[5] *Id.* at 3 (¶ 5).

[6] Late-filed Exhibit C9, Attachment 2 at 1.

[7] *Id.*, Attachment 3. This letter also was submitted to the Commission, so it is a matter of public record.

[8] *Id.*, Attachment 5 at 2.

251(c) interconnection. Missouri Valley relied entirely on its contractual rights and specifically acknowledged that it would negotiate a new agreement.

This history demonstrates that there is an unbroken chain from U S West's initial agreement with Midcontinent to Missouri Valley and that Missouri Valley/Nemont specifically agreed to honor the full interconnection commitment undertaken by U S West and Citizens. That commitment included all elements of facilities-based interconnection, such as collocation and interconnection at any technically feasible point. Because the commitment was made to the Commission, it is binding on Missouri Valley, no matter what rights it might otherwise have under Section 251(f)(1).[9]

Moreover, there is no doubt that a rural carrier can waive its rural exemption rights through its voluntary actions. The Commission has approved several interconnection agreements between rural carriers and Midcontinent, for instance, that have been based on voluntary waivers of Section 251(f)(1).[10] Here, Missouri Valley's waiver of its rural exemption plainly was voluntary and made with the knowledge that there was an existing agreement that included terms for provision of facilities-based interconnection. When a waiver is made voluntarily, knowingly and in a representation to the Commission, there is no basis for the rural carrier to later renege on its commitment.

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[9] It is not significant that the interconnection agreement that Midcontinent and Missouri Valley negotiated following the November, 2003 letter from Missouri Valley covered only resale. The agreement does not contain any language that indicates that the parties had agreed that resale would be the only mechanism by which Midcontinent would provide service in Williston or that the agreement superseded Missouri Valley's commitment to the Commission.

[10] *See, e.g.*, Midcontinent Communications/Consolidated Telcom Interconnection Agreement Amendment Application, *Order Approving Interconnection Agreement Amendment*, Case No. PU-08-84 (Apr. 23, 2008).

2. Missouri Valley's Resale Agreement Constitutes a Waiver of Its Rural Exemption.

Even if Missouri Valley had not waived the rural exemption when it committed to provide facilities-based interconnection in 2002, it would have waived the exemption when it agreed to provide services to Midcontinent for resale in 2004. Missouri Valley's acquiescence to the resale agreement was an independent waiver of Section 251(f)(1).

Section 251(f)(1) does not permit a carrier to partially invoke the exemption; the context and language of that provision demonstrate that it is an all-or-nothing proposition. For instance, when discussing termination of the exemption, Section 251(f)(1)(B) provides that a state commission "shall terminate the exemption," and not just those elements of the exemption that are affected by a specific carrier request, if the criteria for lifting the exemption are met.[11] Indeed, the Commission ruled in another rural exemption case just two years ago that "a bona fide request for any interconnection, service, or network element...triggers a Commission determination concerning termination of the rural exemption with regard to the entire list of obligations under Section 251(c) for the rural carrier in its entire service area."[12]

While the Commission's 2006 ruling related to a request to lift a rural exemption, there is no basis to believe that a waiver should be treated any differently. For instance, if a rural carrier could waive the exemption selectively, it could favor an affiliated entity over an unaffiliated competitor by offering Section 251(c) interconnection to the affiliate while requiring the

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[11] 47 U.S.C. § 251(f)(1)(B).

[12] Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation, *Findings of Fact, Conclusions of Law, and Order*, Case No. PU-05-451 (Apr. 26, 2006) at 4. The Commission concluded later in the proceeding that it would not enforce this conclusion because of concerns about whether North Dakota Telephone Company had been provided adequate notice that its entire exemption might be lifted. The notice for this proceeding, however, indicates that the Commission will consider whether Missouri Valley has waived its exemption, without any qualification as to the services covered by the waiver.

competitor to obtain interconnection by other means. Moreover, once a rural carrier has determined that it is willing to face competition, the basis for differentiating between competitors or types of competition becomes more difficult to discern. Consequently, the Commission should conclude that a waiver of the rural exemption for one purpose is a waiver for all purposes.

In the context of this proceeding, such a conclusion means that Missouri Valley, by entering into a resale agreement with Midcontinent, waived its rural exemption from the other provisions of Section 251(c). This conclusion is reinforced because, as noted above, the resale agreement contains no language that would limit the impact of Missouri Valley's waiver only to resale.[13] Consequently, the Commission should hold that Missouri Valley has waived its rural exemption and must provide Section 251(c) interconnection to Midcontinent.

B. When the Criteria Under Section 251(f)(1) Are Applied, There Is No Basis to Maintain the Exemption.

As shown above, Missouri Valley has waived its rural exemption. The Commission can, however, reach the same substantive result under the analysis mandated when a waiver has not occurred, and also should lift the rural exemption on that basis.

Section 251(f)(1)(B) of the Act mandates consideration of four issues in determining whether to lift the rural exemption. First, the Commission must determine whether there has been a *bona fide* request. Next, the Commission must evaluate whether the request is unduly economically burdensome. Third, the Commission must decide whether the request is technically feasible. Finally, the Commission must consider whether the request is consistent with the universal service requirements of Section 254 of the Act.[14]

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[13] *See supra* note 9. In fact, the agreement does not mention that Missouri Valley has waived its rural exemption. This suggests that Missouri Valley did not believe that it had any rural exemption rights at the time the agreement was negotiated.

[14] 47 U.S.C. § 251(f)(1)(B).

In this case, there is no dispute that Midcontinent has made a *bona fide* request. The record reflects that a request was made on November 14, 2007, and that Missouri Valley's response was that it would rely on its rural exemption.[15] Missouri Valley has not claimed that the request did not meet the standards for a *bona fide* request, and the request itself not only specified that Midcontinent sought interconnection and local number portability, but included a draft interconnection agreement.[16] In addition, Mr. Hanson's testimony acknowledges that the request meets the standards under Section 251(f)(1).[17]

Similarly, there is no dispute that compliance with the interconnection and other requirements of Section 251(c) that Midcontinent has requested is technically feasible. While Mr. Hanson's prefiled testimony was evasive on this issue, the best reading of it is that establishing interconnection would require some time and technical discussions between the companies, not that it would be difficult or impossible to provide interconnection.[18] More significantly, Mr. Hanson acknowledged that, in fact, Missouri Valley has existing physical interconnection arrangements with multiple carriers, as evidenced by Missouri Valley's response to Midcontinent's discovery requests.[19] Under the FCC's rules, the existence of these interconnection arrangements triggers a presumption that like arrangements with other carriers are technically feasible.[20] In fact, as Mr. Gates testified, "[t]he physical interconnection required by Midcontinent is not unique or difficult and utilizes standard industry practices and

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[15] *See* Notice of Consolidated Hearing, May 7, 2008.

[16] *See* Notice of Bona Fide Request for Services and Interconnection and Petition to Find Rural Exemption Waived, Feb. 8, 2008, Exhibit A.

[17] Hanson Prefiled at 10.

[18] Hanson Prefiled at 29-30.

[19] *See* Exhibit C5 (detailing interconnection arrangements, and listing eight carriers with which Missouri Valley interconnects directly).

[20] 47 C.F.R. § 51.305(c).

technology."[21] Consequently, the Commission can conclude that Midcontinent's request is technically feasible.

While there is no dispute concerning the nature of Midcontinent's request or technical feasibility, Missouri Valley claims that grant of Midcontinent's request would be unduly economically burdensome and that it would be inconsistent with federal universal service requirements. As detailed below, Missouri Valley is wrong on both counts.

1. Section 251(c) Interconnection Would Not Impose an Undue Economic Burden on Missouri Valley.

Missouri Valley spent most of its effort on the question of the economic burden imposed by interconnection with Midcontinent. However, Missouri Valley's analysis errs in several key respects, and the evidence provided by Midcontinent shows that there would not be an undue economic burden. For those reasons, the Commission should conclude that Midcontinent has met this prong of the test.

Any analysis of the undue burden test must consider at least two factors. First, the Commission must determine whether the interconnection requested by the competitor – and not just competition in general – would impose a burden on the incumbent rural carrier. This is required by the plain language of Section 251(f)(1)(B), which states that the exemption will be terminated if the state commission determines that "*the request* is not unduly economically burdensome" and the other elements of the test are met.[22] This analysis is consistent with the holdings of courts and state commissions around the country.[23] Thus, the Commission should

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[21] Exhibit M3, Prefiled Testimony of Timothy J Gates ("Gates Prefiled") at 19.

[22] 47 U.S.C. § 251(f)(1)(B) (emphasis supplied).

[23] *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 761 (8th Cir. 2000) ("it is the full economic burden on the ILEC *of meeting the request* that must be assessed") (emphasis supplied), *rev'd in part on other grounds*, 535 U.S. 467 (2002) (*Iowa II*); *Sprint Communications Co., L.P.*, Tex. P.U.C., Docket No. 32582 at *7 (refusing to look at the general economic burden of the termination of

evaluate only the burden imposed by the specific interconnection request, and if it can be shown that a supposed burden is not related to the interconnection request, then it should be disregarded.

Second, Section 251(f)(1)(B) requires the Commission to evaluate whether any economic burden is undue. To give appropriate effect to the inclusion of this word in the test, the Commission should recognize that an "undue economic burden" is not any burden, but a burden that is excessive in some way. As one court explained in 2005, the term "unduly" is a critical component of the test because "competition would 'almost always result in a negative revenue effect to the ILEC as it loses market share.'"[24] In other words, some losses to competition are to be expected, and are contemplated by Section 251(f)(1)(B). Undue burdens, therefore, are something more than reduced revenues or lost customers. Rather, they are burdens that are "exceeding or violating propriety or fitness" or "excessive."[25] Consequently, an undue economic burden is one that would create significant harm to the rural carrier and that would threaten its ability to continue to provide service.[26] As shown below, the evidence in this proceeding demonstrates that Midcontinent's request would not impose a unique economic burden on

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the rural exemption because "the language of § 251(f)(1)(A) is clear that the focus of the economic burden analysis should be on 'such request,' which would mean [the requesting entity's] specific request."); *see also Wireless World, L.L.C. v. Virgin Islands Public Services Commission,* 2005 U.S. Dist. LEXIS 15061 (D. V.I. 2005) at *15.

[24] *Wireless World, L.L.C.*, 2005 U.S. Dist. LEXIS 15061 at *16 (citing V.I.P.S.C. Docket No. 526, May 22, 2001). The *Iowa Utils. Bd.* court vacated an FCC rule that required rural carriers to demonstrate that a request would cause a burden in excess of that caused by efficient entry. However, the court did not conclude that the term "undue economic burden" included ordinary losses caused by competitive entry. Rather, it focused on the FCC's failure to adopt rules that focused on the impact of the specific request for interconnection. *Iowa Utils. Bd.*, 219 F.3d at 761.

[25] Definition of "undue," Merriam-Webster Online, at http://www.merriam-webster.com/dictionary/undue; *see also* Gates Prefiled at 38.

[26] *See also* Gates Prefiled at 38.

Missouri Valley or Nemont and that any burden imposed by Midcontinent's entry would not be undue.

(a) Missouri Valley's Analysis Should Be Rejected Because It Is Not Related to any Section 251(c) Interconnection Obligation.

There is no evidence in this proceeding that there is any economic burden at all specifically associated with Midcontinent's actual request for interconnection. Mr. Hanson's analysis – the only evidence of any burden provided by Missouri Valley – is not specific to the type of interconnection requested by Midcontinent. As a consequence, there is no basis to conclude that Midcontinent's request would impose an undue economic burden.

The disconnect between Midcontinent's request and Mr. Hanson's analysis is particularly obvious as to his claims concerning special access services. These services do not require any interconnection at all, and therefore could be provided by Midcontinent without any cooperation from Missouri Valley.[27] Special access services alone account for more than ten percent of the revenues Missouri Valley claims it will lose.[28]

This disconnect is not, however, limited to special access. On cross-examination, Mr. Hanson acknowledged that his projected economic impact would be unchanged whether or not Midcontinent obtained collocation and whether or not Midcontinent exchanged traffic via

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[27] *See* Exhibit M2, Prefiled Testimony of Scott C. Lundquist ("Lundquist Prefiled") at 17-19. During his oral testimony, Mr. Hanson argued that some special access services could be provided more efficiently by interconnecting with Missouri Valley's switch, but he did not quantify the impact of that claim and, in any event, Midcontinent has its own switch and obviously could perform those functions itself. *See* Exhibit M1, Prefiled Testimony of W. Thomas Simmons ("Simmons Prefiled") at 5.

[28] Lundquist Prefiled at 28.

indirect interconnection. In other words, Mr. Hanson's analysis was not of the impact of Section 251(c) interconnection, but of the impact of facilities-based competition in general.[29]

Given the requirement under the statute that any undue economic burden be related to the specific request made by the competitive carrier, Missouri Valley's failure to provide evidence that it would be burdened in any way by collocation, facilities-based interconnection, the duty to negotiate in good faith or any other element of Section 251(c) makes it impossible for the Commission to conclude that Missouri Valley will suffer any economic impact from Midcontinent's specific request. For that reason alone, the Commission should conclude that the requested interconnection will not cause an undue economic burden.

(b) The Evidence Shows that Facilities-Based Competition in Williston Will Not Impose an Undue Economic Burden on Missouri Valley.

Midcontinent and Missouri Valley provide the Commission with very different pictures of the potential impact of facilities-based competition in Williston. When the evidence is evaluated, however, it is apparent that Missouri Valley's view is incorrect, and that the economic burdens that would be imposed by Midcontinent's entry would not be significant.

Midcontinent's Evidence of Economic Impacts

Midcontinent's witnesses demonstrated that, as a practical matter, facilities-based competition in rural markets does not have a significant negative impact on rural carriers. As Mr. Simmons explained, and as the Commission is aware, Midcontinent competes with rural

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[29] It is important in this context to recognize that, even with the rural exemption in place, Midcontinent has a right under Section 251(a) of the Act to indirect interconnection with any telecommunications carrier, including Missouri Valley. 47 U.S.C. § 251(a). This right also would be unaffected by any Commission action on Missouri Valley's suspension petition because Section 251(f)(2) suspensions address only Section 251(b) and (c) obligations. Consequently, Missouri Valley is unable to prevent Midcontinent from obtaining some form of interconnection in Williston.

carriers across North Dakota and in South Dakota, and "to date none of those companies have sought regulatory relief from state or federal regulators as a result of competition from Midcontinent or even asked for permission to raise their rates."[30] Instead, the rural carriers competing with Midcontinent have "tr[ied] to broaden and improve the service they offer to their customers."[31] Indeed, as Mr. Simmons explained in response to a question from Mr. Hogue, facilities-based interconnection has caused "no appreciable harm at all."[32]

Midcontinent's empirical experience in North Dakota and South Dakota is consistent with the national experience described by Mr. Gates. As he explained in his prefiled testimony, a recent national study of rural carriers demonstrates that competition (as measured by line loss) does not correlate with negative financial results. Instead, companies that offer a diversified portfolio of services to their customers are successful even if they lose substantial numbers of access lines.[33] This evidence, which was unchallenged by Missouri Valley, is particularly significant because, as Mr. Gates further explained, Nemont Communications, Missouri Valley's parent, follows the diversification model described in the Raymond James study. In Williston, a wide variety of regulated and unregulated services, including Missouri Valley's local exchange

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[30] Simmons Prefiled at 11.

[31] *Id.* Missouri Valley argued during the hearing that these markets are less significant because the rural carriers offer video services. It provided no explanation of why video, and video alone, was necessary to compete effectively. Moreover, Missouri Valley has multiple options if it wishes to offer video, including resale arrangements with satellite providers and construction of its own facilities.

[32] Simmons Cross-Examination (Hogue). Because there is no formal transcript of this proceeding, Midcontinent prepared an informal transcript from the recording made at the hearing. This and other quotations are taken from the informal transcript, which will be provided to the Commission and Missouri Valley upon request.

[33] Gates Prefiled at 29-30, *citing* Statistical Analysis of Access Line Impact on ILEC Financial Results," Telecommunications Services Wireline Industry Report, June 20, 2008, by Raymond James & Associates, attached to Gates Prefiled as Exhibit TJG-2.

services, are offered on an integrated basis under the Nemont brand.[34] Moreover, Missouri Valley, like Midcontinent's other competitors, will have the opportunity to further diversify and improve its service offerings to respond to competition, including the opportunity to offer video if it wishes to do so.[35] The empirical evidence shows that this is what happens when Midcontinent brings facilities-based competition to a rural market, and there is no reason to believe that it would not happen in this case as well.

Missouri Valley's Impact Analysis

Against Midcontinent's facts and empirical experience, Missouri Valley presented a financial analysis that it claims demonstrates that it would suffer an undue economic impact from facilities-based competition. Close review of that analysis, however, demonstrates that there is no basis for such a conclusion.

Initially, even if the Commission were to accept Missouri Valley's financial analysis without any changes, it would not demonstrate the existence of an undue economic burden. Missouri Valley's analysis claims that after four years of competition, with annual line losses that grow each year, its net margin would be approximately $930,000, rather than the margin of $2.12 million it would expect in the absence of facilities-based competition.[36] Missouri Valley does not claim that it would have a negative net operating margin, and its calculations include depreciation – a non-cash cost – in its operating expenses. Moreover, the $930,000 would be earned on expenses of approximately $5.1 million, a margin of approximately 18 percent.

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[34] Gates Prefiled at 34.

[35] Mr. Hanson argued in his oral testimony that Missouri Valley would be unable to invest additional amounts in Williston to respond to competition. Even if this were true, Nemont already has the kind of integrated, diversified service offerings described in the Raymond James report and by Mr. Gates in his testimony, and thus is unlikely to suffer a significant adverse economic impact. However, as described below, Mr. Hanson's claims are incorrect. *See infra* note 76.

[36] Hanson Prefiled, Exhibit 1 at 2.

This is not a portrait of company that is suffering an undue economic burden, one that is "exceeding or violating propriety or fitness." It is, instead, a reduction in the positive cash flow that the company expects to experience. This is reflected in Mr. Hanson's oral testimony, which repeatedly focused not on Missouri Valley's ability to continue to provide service, but on its ability to upgrade its plant to provide new services that are not currently required.[37]

A demonstration of an undue economic burden requires much more than this. It requires evidence that a carrier will not be able to serve its customers or meet its current obligations. It simply is not enough to say that a carrier will lose some of its profits, because "competition would 'almost always result in a negative revenue effect to the ILEC as it loses market share.'"[38] Consequently, even without considering the flaws described below, Missouri Valley's analysis demonstrates that it will not suffer an undue economic burden.

It becomes even more evident that interconnection will not result in an undue economic burden when the errors in Mr. Hanson's analysis are corrected. As shown in Mr. Lundquist's testimony and during cross-examination of Mr. Hanson, these errors are pervasive and significant.

First, Mr. Lundquist identified a series of necessary revisions to Mr. Hanson's analysis.[39] These revisions are as follows:

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[37] As described below, Mr. Hanson's testimony concerning the services that he thinks might be required in the future should be discounted. *See infra* text accompanying notes 73 to 77.

[38] *Wireless World, L.L.C.*, 2005 U.S. Dist. LEXIS 15061 at *16 (citing V.I.P.S.C. Docket No. 526, May 22, 2001).

[39] During the hearing, Missouri Valley asserted repeatedly that Mr. Lundquist merely was critiquing Mr. Hanson's analysis, rather than providing analysis of his own. This argument is both incorrect and irrelevant. First, as Mr. Lundquist explained in redirect testimony, the framework used by Mr. Hanson "was actually the same framework that was developed by QSI Consulting [Mr. Lundquist's employer] in the prior case regarding North Dakota Tel," so the analysis was created by QSI, not Missouri Valley. Second, Mr. Lundquist's decision to base his analysis on what was provided by Mr. Hanson was made, in part, because "it just simplifies

- Eliminate Missouri Valley's assumption of an instant transition from resale to facilities-based service, based on Missouri Valley's limited ability to handle new orders. This change reduces the revenue loss in 2009 by $154,300.[40]
- Reduce the assumed growth in Midcontinent's line count to match recent empirical experience, rather than using Missouri Valley's erroneous compound growth projections. This change reduces the overall revenue loss by $572,000, or about 16 percent.[41]
- Eliminate losses due to special access services, for the reasons described above. This change reduces the overall revenue loss by $367,000, or approximately 10 percent.[42]
- Adjust Missouri Valley's assumptions about universal service funding to account for access to additional support. These changes reduce the overall impact by approximately $2.2 million.[43]

Taken together, these adjustments reduce Missouri Valley's expected net revenue losses over the four year period of the analysis from $3.6 million to $888,000, a reduction of more than 75 percent. Missouri Valley's expected net revenue loss in the last year of the analysis drops even more, from $1.19 million to $249,000.[44]

Each of these adjustments is fully justified. First, given the requirements for transitioning customers from resale to facilities-based service, including the limitations on Missouri Valley's

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things for the Commissioners and for analysts to look at this and say we have two versions that are starting from the same kinds of assumptions and you can compare them more readily . . ." This approach is much superior to requiring the parties and the Commission to compare two radically different models. Third, Mr. Lundquist did not merely describe why Mr. Hanson's analysis was wrong; he performed alternative analyses and employed them to create a more realistic model, producing a new result and, therefore, independent evidence. This is most obvious in the case of universal service support, which was omitted from Missouri Valley's model entirely. Fourth, it does not matter whether Mr. Lundquist produced his own model or not; the only issue is whether the evidence, taken as a whole, shows that there is an undue economic burden, and his analysis demonstrates that there is no such burden. Finally, as a practical matter Missouri Valley had control of nearly all of the information necessary to prepare an analysis, so it would have been impossible for Mr. Lundquist to prepare an independent analysis without reference to Missouri Valley's data.

[40] Lundquist Prefiled at 8-10.

[41] *Id.* at 13-16.

[42] *Id.* at 17-18.

[43] *Id.* at 18-26.

[44] *Id.* at 28.

ability to handle orders and the time it actually takes to connect new customers at their premises, the kind of flash-cut transition envisioned by Missouri Valley simply is not possible.[45] Given Midcontinent's previous experience, as described in Mr. Lundquist's testimony, a six month transition is much more realistic.

It also is much more realistic to base growth estimates for access lines on recent empirical data than on Missouri Valley's erroneous compound growth rates. As Mr. Lundquist explained, Missouri Valley's growth formulas were oversimplified and erroneously assumed that Midcontinent could sustain compounded annual growth rates of up to 76 percent for the next four years.[46] Instead, Mr. Lundquist applied the average monthly access line gains that Midcontinent has experienced since the initial "ramp-up" period, using more recent empirical data that is more likely to reflect future experience.[47]

Mr. Hanson's special access calculations should be eliminated for a different reason. As described above, special access is unrelated to interconnection because special access facilities do not require interconnection, and therefore should not be included in any impact analysis.

Finally, Mr. Lundquist provided an adjustment to account for Missouri Valley's ability to obtain increased universal service funding through the FCC's "safety valve" mechanism. Missouri Valley's argument against including this adjustment is that it has been trying to qualify for it for several years without success.[48] According to Mr. Hanson, Missouri Valley cannot

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[45] *Id.* at 9.

[46] *Id.* at 13.

[47] Mr. Hanson also objected to Mr. Lundquist's evaluation of changes in revenues from subscriber line charges. However, on cross-examination, Mr. Hanson conceded that Mr. Lundquist's spreadsheet calculated the adjustment correctly, and that the only basis for that objection was his disagreement over customer growth projections.

[48] Mr. Hanson's claim that Missouri Valley has been, in its counsel's words "trying to get around this parent trap" since he became the general manager of Nemont is difficult to reconcile with his

qualify in future years because it did not qualify in the first year after the company was acquired by Nemont. This claim is inconsistent with the FCC's rules, the order adopting the rules and with the FCC order granting Nemont's application to acquire the Williston exchange.

The safety valve rule is contained in Section 54.305 of the FCC's rules, and the provisions that are relevant to Missouri Valley are in subsection (d)(2), which addresses exchanges that were acquired after 1997 and before January 10, 2005.[49] Subsection (d)(2) provides that a carrier's expenses for any given year will be compared to its expenses in an index year, which is the first year after the exchange is acquired.[50] This comparison is made "[f]or each subsequent year" after the index year is completed, and the carrier can be eligible for support equal to up to half of the difference between the index year and subsequent year's loop cost.[51] The rule contains no language that limits the availability of safety valve funding to carriers that qualify for it immediately following an acquisition; indeed, given that the funding is made available based on the difference between index year expenses and later expenses, a carrier cannot qualify for it until at least the second year after the acquisition is completed.

This analysis is consistent with the FCC's statements when it adopted the rule and in the order granting Nemont's application to acquire Missouri Valley. The FCC's order does not include any language that restricts the availability of safety valve funding to carriers that qualify in the first year after an acquisition. Rather, the order states that: "We conclude that safety valve support should be provided for up to 50 percent of any positive difference between the rural

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later acknowledgment that Missouri Valley has not invested enough in Williston to meet the loop cost threshold that is necessary to qualify for safety valve funding under the FCC's rules.

[49] 47 C.F.R. § 54.305(d)(2).

[50] Thus, because the index year is the first year after the acquisition is completed, Mr. Hanson's claim that Missouri Valley had to quality for safety valve support in the first year after the acquisition cannot be correct.

[51] 47 C.F.R. § 54.305(d)(2), (3).

incumbent local exchange carrier's index year expense adjustment for the acquired exchanges and subsequent year expense adjustments."[52] This statement was repeated nearly word-for-word in the order granting the application for Nemont to acquire Missouri Valley, and that order further noted that Missouri Valley and the other companies that were acquiring exchanges from Citizens "may be eligible for safety valve support for investments in the acquired lines[.]"[53] Thus, the FCC's rules and the orders governing those rules do not support Missouri Valley's position. Consequently, the Commission should accept Mr. Lundquist's proposed universal service adjustment.

Of course, even if the safety valve adjustment were not made, Mr. Lundquist's other adjustments would still amount to nearly $1.1 million of the total of $3.6 million in impact claimed by Missouri Valley, and to $428,500 in 2012, which would reduce the impact in that year by more than 35 percent.[54] Thus, even without the safety valve adjustment, Missouri Valley's net operating revenue in 2012 would be about $1.36 million, not the $930,000 Missouri Valley claims.

Moreover, Mr. Lundquist's impact analysis is conservative because it did not identify all of the flaws in Mr. Hanson's model. Mr. Hanson testified, for instance, that he did not anticipate any reductions in costs as a result of losing customers, but this testimony did not account for, among other things, reductions in employee expense related to failure to meet growth incentives

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[52] Federal-State Joint Board on Universal Service; Multi- Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, Further Notice of Proposed Rulemaking and Report and Order*, 16 FCC Rcd 11244, 11285 (2001).

[53] Nemont Telephone Cooperative, Inc., et al., *Order*, 18 FCC Rcd 838, 842 (WCB 2003). This order also reports that all of the companies acquiring the Citizens exchanges "state that they will make extensive upgrades to the facilities being purchased from Citizens." *Id.* at 843.

[54] Lundquist Prefiled at 28.

in employees' compensation agreements or Missouri Valley's ability to renegotiate its union contracts, which Mr. Hanson said expire in 2009. Similarly, while claiming that Missouri Valley would be forced to reduce its investment, Mr. Hanson did not make a parallel reduction in depreciation expense, which necessarily would follow from reduced investment.

It also is significant that many of Missouri Valley's expenses come from affiliate transactions. While Mr. Hanson could not identify what proportions of various types of expenses are paid to affiliates, it is evident that Nemont receives a very high proportion of Missouri Valley's revenues, as reflected in Missouri Valley's most recent financial statements.[55] Moreover, all of these affiliate expenses, even for items like vehicles and computers, are incurred under month-to-month operating leases, which means that Nemont can change the rates and even the number of items that Missouri Valley must lease at any time.[56] It is likely that Nemont could reduce many of these expenses if it chose to do so.

Taking all of these factors into consideration, it is apparent that an accurate calculation of the economic burden of facilities-based competition would show that it would be much smaller than suggested by Missouri Valley. Considering that even Missouri Valley's own calculations do not show that competition will cause an undue economic burden, a corrected analysis demonstrates that the likelihood of an undue burden is quite small.

Context of the Economic Burden Analysis

Missouri Valley's analysis is premised on the notion that the Commission should consider only those revenues and expenses associated with Missouri Valley itself, and should exclude anything that has to do with any other Nemont entity from the analysis. This might be a plausible claim if Nemont operated Missouri Valley as a standalone entity, but that is not the

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[55] *See* Exhibit C1 at 13 (describing total amounts of affiliate transactions).
[56] *Id.*

case. Nemont has integrated all of its service offerings in Williston so as to make Missouri Valley indistinguishable from its affiliates and there are extensive interaffiliate relationships that tie all of the Nemont companies together. For those reasons, the Commission should consider the entire Nemont operation in its economic burden analysis.

In his prefiled testimony, Mr. Gates explains some of the reasons why Missouri Valley and Nemont are effectively inseparable:

> The companies share many operating resources and present a unified face to the public. As noted above, Mr. Hanson serves as general manager for Nemont and for MVC, but he is far from the only shared employee. During the deposition of Mr. Hanson and Mr. Del Fiacco, they identified several other employees whose duties were split between MVC and Nemont. In response to an interrogatory, MVC reported that:
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> > Missouri Valley received the following goods and/or services from Nemont Communications, Inc.: fiber lease (entitled circuit equipment in Audit notes), computer lease, office support lease, head quarters building lease, vehicle lease, other equipment lease, and voice mail expense.
>
> At the same time, Nemont also received goods and services from MVC, specifically, "billing and collection services, customer service, installation and maintenance service" and Sagebrush Cellular received "circuit lease, and customer service" from MVC.
>
> * * * *
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> From a consumer perspective, it would not appear that there is any difference between Nemont and MVC. In fact, every service is offered under the Nemont brand. For instance, when you search for Missouri Valley Communications in Google, the first hit is for the Nemont web site, and it takes you to a page titled "About Nemont – Williston, North Dakota." That page says that Nemont offers services that include local telephone service – which technically is provided by MVC – and voice mail – which technically is provided by Nemont. Clicking on the links for local service, long distance service, Internet and wireless will take the viewer to pages that brand these services as offered by Nemont, and there is no explanation on any of these pages that different companies offer different services, even on the local service page where both local service and voice mail are offered.[57]

[57] Gates Prefiled at 33-34, 34 (footnotes omitted). The second excerpt above reflects a correction to his testimony that Mr. Gates made during the hearing.

This public integration and the formal division of services between Missouri Valley, which offers only regulated services, and other Nemont affiliates, which offer everything else, are not mandated by any legal or policy requirement. Rather, they reflect business decisions made by Nemont, as Missouri Valley's parent, to offer all of the non-regulated services – even voice mail – through companies other than Missouri Valley while offering only one public face.[58]

While there may be valid tax and operational reasons for the formal separation of functions, the practical effect is to strip Missouri Valley of a number of potentially lucrative revenue sources and to place all of those revenues in Nemont Communications and Sagebrush Cellular. At the same time, Missouri Valley, by virtue of its corporate relationship with Nemont, is required to pay a very high proportion of its revenues for services it is provided by affiliates like Nemont Communications.[59] This is further evidence of the integration of these companies into a coherent whole.[60]

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[58] Hanson Cross-Examination (Harrington) (Mr. Harrington: So from the customer perspective, as of 2006, as a matter of what is facing the customer, the customer would see Nemont. Is that correct? Mr. Hanson: Yes. Although I'd say that because of the history in Williston that there are many customers that probably still think that their telephone company is Citizens or U S West.).

[59] For example, Missouri Valley leases all of its vehicles and computers from a Nemont affiliate. Hanson Cross-Examination (Harrington) (Mr. Harrington: . . . a Nemont affiliate, purchases vehicles and then Missouri Valley leases them from Nemont. Is that correct? Mr. Hanson: That is correct. Mr. Harrington: Is that the case with the computers, too? That they are purchased by a Nemont affiliate and then leased by Missouri Valley? Mr. Hanson: That is my understanding.)

[60] Midcontinent notes that Missouri Valley was required to provide a late-filed exhibit that detailed the proportions of different types of expenses (such as corporate operating expenses) attributable to affiliate transactions). That exhibit was due on July 24, but had not been filed as of the date of this brief. In the absence of this information, the Commission should presume that Missouri Valley has chosen not to provide the required response because doing so would be damaging to its argument that Missouri Valley and Nemont should not be considered as a single entity.

During the hearing, Missouri Valley's response to this analysis was to suggest that the Commission should not consider the integration of the companies because Section 251(f)(1)(B) does not cover affiliates of affected rural carriers.[61] However, this misreads the statute and would create a significant loophole for rural carriers. The statute itself does not contain any language that limits the Commission's consideration to the economic burden of interconnection on the corporate entity that holds a rural authorization. Rather, it says that the Commission shall consider whether "the request is not unduly economically burdensome," and therefore sweeps all considerations relevant to the burden imposed by the interconnection into the Commission's analysis.[62] Moreover, if a carrier could avoid having the rural exemption lifted by organizing its corporate affairs in a particular way, the power of state commissions to lift the exemption would be eliminated entirely.[63] Congress clearly did not intend to permit rural carriers to evade the termination of the rural exemption in this way, and the Commission should not permit Missouri Valley and Nemont to operate as integrated entities yet claim that they are entirely separate.

Thus, the Commission, in evaluating the economic burden of interconnection, should consider Nemont as a whole, and not Missouri Valley in isolation. When it does so, it becomes starkly apparent that there will not be an undue economic burden. Nemont has more than $40 million in annual revenues, and even accepting Missouri Valley's revenue loss claims, the revenue reduction never would amount to more than 3 percent of Nemont's total revenues.[64] When Mr. Lundquist's adjustments are applied, and without considering other adjustments for

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[61] This suggestion was made during the cross-examination of Mr. Gates.

[62] 47 U.S.C. § 251(f)(1)(B).

[63] To take an extreme example, a carrier could separate its retail services from its facilities, placing its certificate in the entity that offers the retail services, and claim that it would be unduly burdensome and technically infeasible to require interconnection because the "retail" entity did not have any facilities with which to interconnect.

[64] Gates Prefiled at 35.

reductions in costs associated with losing customers, the revenue reduction is reduced to about one-half of one percent of Nemont's total. In either case, the reduction would, at most, require a reduction in the annual payouts to Nemont cooperative members in Montana, and certainly would not affect the health of Nemont as a whole. Consequently, there would be no undue economic burden as a result of Section 251(c) interconnection.

2. Interconnection Would Not Have a Harmful Impact on Universal Service.

The final element of the test is whether lifting the rural exemption "is consistent with section 254 (other than subsections b(7) and (c)(1)(D) thereof" of the Act.[65] Section 254 is a broad provision that covers a wide range of topics, but the basic purpose of this requirement is to ensure that the Commission considers whether interconnection would have an adverse impact on universal service.

In some respects, the analysis of this issue is similar to the analysis of economic burdens. Most important, the impact on universal service must be considered in light of the impact of the request, not the impact of facilities-based competition generally. In addition, the impact should be evaluated in light of current, known universal service requirements, not on what requirements might be adopted in the future. To the extent that future requirements are considered, those considerations should be based on existing proposals, not on speculation about possible changes that have not been suggested by the FCC or the Federal-State Joint Board on Universal Service. Finally, the statute asks the Commission to consider the impact on universal service generally, not on the incumbent carrier alone, and so any evaluation must include potential benefits to

[65] 47 U.S.C. § 251(f)(1)(B). Paragraph (b)(7) of Section 254 concerns additional universal service principles that the FCC could adopt; paragraph (c)(1)(D) addresses whether services that are included in the definition of universal service are consistent with the public interest. 47 U.S.C. § 254(b)(7), (c)(1)(D).

universal service from the introduction of competition. When the universal service issue is analyzed in this light, it becomes apparent that Midcontinent's petition should be granted.

The first element of this analysis is the economic impact of the requested interconnection. As shown above, there is no evidence at all that there is a link between the interconnection Midcontinent requested and any economic harm; all of Missouri Valley's evidence relates to potential harm from any facilities-based competition.[66] Moreover, closer analysis shows that Missouri Valley greatly exaggerates the economic impact of competition while ignoring the resources available from its parent company.[67] Even taking Missouri Valley's claims at face value, it will maintain a significant operating margin during the entire period of its analysis, which would permit it to continue to maintain its current levels of service and operations. Mr. Hanson admitted as much in his prefiled testimony when he said: "The loss of revenue would not damage Missouri Valley's ability to continue to offer service in the near future[.]"[68]

This conclusion also is consistent with the evidence that Mr. Simmons and Mr. Gates presented on the impact of competition on other rural carriers, in North Dakota and elsewhere. Again, no rural carrier that is competing with Midcontinent has asked for regulatory relief or even a rate increase.[69] And at the national level, carriers that offer their customers diverse services, like Nemont/Missouri Valley, are the ones that do not suffer when they lose customer

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[66] *See supra* Section II.B.1(a).

[67] *See supra* Section II.B.1(b).

[68] Hanson Prefiled at 26.

[69] Simmons Prefiled at 11; Simmons Cross-Examination (Hogue) ("no appreciable harm at all" to rural carriers competing with Midcontinent). Even if Missouri Valley were to need to raise its rates, this would not be a sufficient basis to conclude that universal service is harmed. *See Fairpoint Communications Corp.*, N.Y.P.U.C., Case No. 99-C-1337 (June 6, 2000) at *9 (simply showing that the ILEC "will be required to increase basic service rates or subsidize them by other service offerings" is not sufficient to show termination of the exemption would be inconsistent with the universal service goals).

lines.[70] Thus, there is no credible evidence that Missouri Valley would be unable to continue to maintain its current facilities and operations.[71]

Faced with these facts, Missouri Valley relies on speculation about future universal service obligations that might be imposed. Mr. Hanson, in both his prefiled and oral testimony, referred repeatedly to an "expanding" definition of universal service and possible new mandates for additional services.[72] According to Mr. Hanson, competition would prevent Missouri Valley from meeting those mandates.

There are two significant errors in this argument. The first is that, as was established during cross-examination, there is no evidence that the requirements for universal service will be expanded in the way that Mr. Hanson described. In fact, Mr. Hanson acknowledged that no new requirements have been adopted by either the FCC or Congress and that there is no timetable for adoption of new requirements by either body. Second, the proposals now being considered by the FCC are inconsistent with Mr. Hanson's description: They would not require rural carriers to provide broadband service and they would provide targeted additional funding to encourage broadband deployment.[73] In other words, if the current proposals are adopted, rural carriers will have the opportunity to use public money, not their private funds, to expand their broadband

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[70] Gates Prefiled at 29-30, *citing* Statistical Analysis of Access Line Impact on ILEC Financial Results," Telecommunications Services Wireline Industry Report, June 20, 2008, by Raymond James & Associates, attached to Gates Prefiled as Exhibit TJG-2.

[71] Missouri Valley has noted on several occasions that its carrier of last resort obligations require it to serve all of the customers in its service area, including those who are located far from the city of Williston. That obligation, however, is tempered by North Dakota statutory requirements that a customer who seeks service must pay the costs of having that service brought to the customer. *See* N.D. CENT. CODE § 49-21-23.2. Missouri Valley has a written policy to implement that statutory requirement that permits it to deny service to customers who refuse to pay. *See* Exhibit C3. In addition, Midcontinent is bound by the same statutory provision.

[72] *See, e.g.*, Hanson Prefiled at 26.

[73] High-Cost Universal Service Support, *Notice of Proposed Rulemaking*, 23 FCC Rcd 1531, 1543-4 (2008).

capacity, and any possible impact of lower revenues on Missouri Valley's ability to expand its broadband offerings would be mitigated by the new funding mechanism.

Moreover, the Commission should afford no deference at all to Mr. Hanson's opinions on universal service, as he is not an expert in that field. As his oral direct testimony demonstrated, the vast majority of his career experience is in operational matters, not in policy issues.[74] Moreover, he repeatedly said that he would "defer" universal service questions to Mr. Del Fiacco (who was not a witness), and stated that Mr. Del Fiacco has the key universal service responsibilities within Missouri Valley.[75] Mr. Hanson did not know the specifics of the current FCC proposals on universal service. He did not know the purpose of the safety valve rule, which was central to his testimony concerning Mr. Lundquist's analysis. He misstated the rules governing the use of universal service funds by eligible telecommunications carriers, stating that Nemont's profitable affiliates that receive universal service funds could not provide capital to Missouri Valley.[76] If Mr. Hanson were an expert on these issues, he would have made none of these mistakes, and certainly would not have needed to "defer" to Mr. Del Fiacco on the safety valve rule, which he claims has been a central issue for Missouri Valley since he joined the company. The Commission, therefore, should not rely on his opinions.[77]

There is one other key consideration in the Commission's universal service analysis, which is the contribution that Midcontinent's presence in the market will make to meeting

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[74] *See, e.g.*, Hanson Oral Direct ("I managed a very large design service center organization . . . . At McLeod I ran an organization that was somewhat the mirror of that on the opposite side.")

[75] *See, e.g.*, *id.* (Mr. Hogue: Can you just describe what is the safety valve? Mr. Hanson: Mr. Del Fiacco could probably describe it better . . .).

[76] Under the FCC's rules, a carrier must use universal service funds for their stated purpose, but the carrier is free to use its profits in any way it sees fit.

[77] In addition, Mr. Hanson's opinions on universal service issues should be discounted because he has an obvious bias as the general manager of Missouri Valley and Nemont. In those roles, he has a clear incentive to make claims about universal service policy that would benefit his employer.

universal service goals. Competition is beneficial to universal service because it brings better, more reliable and less expensive services to customers in competitive markets. These benefits do not inure only to the customers of the new competitor, but are spread through the community as the incumbent responds to competition.[78] For instance, it appears that the threat of competition has caused Missouri Valley to upgrade its DSL service and make faster service available more widely in its service area. Any evaluation of universal service issues must consider these positive impacts.

Finally, Section 253 issues should not affect the Commission's analysis here. Section 253 of the Act generally requires state commissions to permit competitive entry, but has an exception for rural markets.[79] That exception permits a state commission to require an applicant for CLEC authority to meet the requirements "for designation as an eligible telecommunications carrier" before obtaining authority to serve a rural area.[80]

Section 253(f) is not significant to this proceeding for three reasons. First, it applies only to a carrier's initial certification application, and Midcontinent already is certificated for the Missouri Valley territory. Second, it applies only when the rural carrier makes wholesale resale available to the competitor, and so the competitor cannot be required to construct new facilities to meet its eligible telecommunications carrier obligations. Third, and most important, Midcontinent already is subject to the requirements of North Dakota law concerning construction of facilities to unserved customers, and will comply with those requirements if it receives a customer request.[81]

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[78] *See* Gates Prefiled at 24, 27.
[79] 47 U.S.C. § 253.
[80] 47 U.S.C. § 253(f).
[81] *See* Late-filed Exhibit C9.

III. Missouri Valley Should Not Be Granted a Suspension of Its Section 251(b) and (c) Obligations.

In response to Midcontinent's petition, Missouri Valley filed a petition of its own under Section 251(f)(2) of the Act, seeking to have the Commission suspend its Section 251(c) obligations. As shown below, there is no basis to grant this petition.[82]

Section 251(f)(2) adopts a three part test for determining whether a suspension should be granted. Under that test, the state commission must consider whether suspension:

- Is necessary "to avoid a significant adverse economic impact on users of telecommunications services generally";
- Is necessary "to avoid imposing a requirement that is unduly economically burdensome";
- Is necessary "to avoid imposing a requirement that is technically infeasible"; and
- "[I]s consistent with the public interest, convenience and necessity."[83]

The Commission can grant a suspension if it finds that one or more of the first three elements of the test and the last element of the test are met. The Commission cannot grant a suspension if it determines that doing so would not be consistent with the public interest, even if it finds that one or more of the first three elements have been proven.

The second and third prongs of the test are the same as the corresponding elements of the test for lifting the rural exemption, and the Commission's analysis of those issues should be the same as well. In both cases, there is ample evidence that there is no basis for granting a suspension to Missouri Valley for the reasons described above.[84]

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[82] Midcontinent notes that Missouri Valley has suggested that Midcontinent should bear the burden of proof on Missouri Valley's petition, referring to the Eighth Circuit decision that vacated certain portions of the FCC rule governing exemptions and suspensions. However, the court did not vacate the subsection that places the burden of proof in suspension proceedings under Section 251(f)(2) on the requesting carrier. *See Iowa Utils. Bd. v. FCC*, 219 F.3d at 762.

[83] 47 U.S.C. § 251(f)(2).

[84] *See supra* Sections II.B and II.B.1

The first and fourth prongs of the test require separate analysis. As shown below, Missouri Valley cannot meet either of those elements and, consequently, its petition should be denied.

A. There Is No Evidence that Requiring Missouri Valley to Meet Its Section 251(c) Obligations Will Have an Adverse Impact on Users of Telecommunications Services.

This element of the Section 251(f)(2) test considers whether users of telecommunications services in the Williston exchange would be harmed if Missouri Valley were required to comply with its Section 251(c) obligations. There is no evidence that this is the case, and significant evidence to the contrary.

Much like its arguments concerning economic burdens, Missouri Valley's claims concerning impacts on users generally are based on the presence of facilities-based competition, not on the specific interconnection requirements of Section 251(c). For that reason alone, the Commission should conclude that Missouri Valley has not met this test.

At the same time, the Commission should reject the specifics of Missouri Valley's claims. As described above in the discussion of universal service, one of Missouri Valley's chief claims is that it will be unable to meet future expectations for broadband services if it is subject to competition. However, Mr. Hanson acknowledged on cross examination that Missouri Valley's investment levels are not sufficient today to bring advanced services to its customers in a timely fashion. In fact, when asked how long it would take Missouri Valley to bring fiber to its customers at current rates of investment, he conceded that it would take approximately 16 years.[85] This is consistent with Missouri Valley's longstanding go-slow approach to upgrading its services in Williston, despite the promises it made to the FCC when it acquired the exchange.

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[85] Hanson Cross-Examination (Harrington).

As for existing services, Mr. Hanson's testimony was that Missouri Valley would continue to provide those services without any significant degradation.[86] This alone demonstrates that Williston customers would not suffer any harm.

There is, however, ample evidence that Williston customers would benefit from facilities-based competition. As Mr. Gates and Mr. Simmons explained, competition brings significant benefits to telecommunications users through lowered prices, better quality, more responsiveness to customers, more features and new services.[87] These benefits flow to customers of all of the competitors, because competition spurs competitive responses from incumbents and innovation and efficiency by all competitors. Moreover, even if the service offered by Missouri Valley were to become less reliable or more expensive, the presence of a competitive alternative would help to ensure that customers – the focus of this element of the test – would not be harmed. Thus, there is no basis to conclude that a suspension is necessary to avoid adverse effects on telecommunications users.

B. The Public Interest Strongly Supports Requiring Missouri Valley to Meet Its Section 251(b) and (c) Obligations.

Like the analysis of impacts on telecommunications users, the public interest test weighs heavily against granting Missouri Valley's petition. Williston is a market that would benefit greatly from facilities-based competition, and granting a suspension would make it that much harder to achieve those benefits.

As described repeatedly above, there are significant public interest benefits to competition. These benefits are the reason that incumbent carriers are required to comply with the obligations of Section 251(c) – so that competition can develop promptly and efficiently.

[86] Hanson Prefiled at 26.

[87] *See, e.g.*, Gates Prefiled at 23-24; Simmons Prefiled at 10-11.

The evidence shows that competitive pressure is particularly necessary in Williston, the second-largest community in North Dakota without facilities-based local telephone competition. Missouri Valley, despite promises to the FCC, has not invested significant amounts in upgrading its facilities. Instead, it is investing as little as possible, with the result that its customers have been waiting for years for features and services that are widely available in the rest of the country. Indeed, the evidence shows that all of Missouri Valley's operating profits are used to service the debt that Nemont took on when it bought the Williston exchange.[88] Nemont makes only these minimum investments even though it consistently is paying dividends to its cooperative members in Montana.[89] The result is slow DSL, high charges for features and no promise of any real improvement. If there is any market that would benefit from competition, it is Williston.

Moreover, despite Missouri Valley's claim that it is subject intense competition already, the competition it cites is not likely to benefit local telephone consumers. For instance, wireless substitution affects only a small minority of consumers, and Missouri Valley has ported only a handful of numbers to wireless carriers.[90] Similarly, competition from long distance providers does not affect the local market at all. In the absence of competitive pressure from these two types of services, the only way to ensure that the benefits of competition come to Williston in the near future is to require Missouri Valley to meet its Section 251(c) obligations and to deny the request for suspension.

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[88] *See* Exhibit C1 (Missouri Valley financial statements).

[89] Hanson Cross-Examination (Harrington) (stating that Nemont has paid dividends for the last three years). Missouri Valley customers do not receive these payments because Missouri Valley is a for-profit subsidiary of the larger Nemont cooperative.

[90] Lundquist Prefiled at 9. Missouri Valley also has overstated the extent of wireless competition. Hanson Cross-Examination (Harrington) (conceding that there are only two current facilities-based competitors to Missouri Valley's wireless affiliate, and that they are merging).

Missouri Valley's final gambit is to argue that it suffers from a competitive disadvantage compared to Midcontinent because it does not offer video service in Williston.[91] This is not, however, an inherent disadvantage that Missouri Valley cannot overcome. Rather, it is the result of a business decision not to enter the video market.[92] There is no legal or technical barrier that would prevent Missouri Valley from changing its decision and making the same investment that Midcontinent has made in Williston. There also is nothing that would prevent Missouri Valley from reselling the service of one of the satellite video providers or entering into a co-marketing arrangement with one of those providers to sell a bundle of services. Given these facts, there is no basis to conclude that Midcontinent has a competitive advantage that Missouri Valley cannot remedy through its own actions. Indeed, as Mr. Gates testified, Missouri Valley has competitive advantages of its own, including its status as the incumbent provider of local telephone service in Williston and its integration with Nemont's operations.[93] In addition, Missouri Valley has a wireless affiliate, which means that it can offer wireless bundles that are not available to Midcontinent customers. Consequently, there is no reason to believe that either company's competitive advantages affect the public interest determination.

IV. The Commission Should Adopt a Reasonable Implementation Schedule

Once the Commission completes its analysis of the standards under Section 251(f)(1)(B) and Section 251(f)(2), the next issue is the schedule for implementation of Missouri Valley's Section 251(c) obligations.[94] The testimony reflects that there is little disagreement on an

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[91] *See, e.g.*, Hanson Prefiled at 41-42.
[92] *Id.* at 9.
[93] Gates Prefiled at 31.
[94] 47 U.S.C. § 251(f)(1)(B) ("Upon termination of an exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission [FCC] regulations.").

appropriate schedule, and that Midcontinent's proposal is consistent with Missouri Valley's expectations. Therefore, Midcontinent's proposed schedule should be adopted.

Midcontinent proposed that the parties should be required to file an interim interconnection agreement with the Commission no later than 30 days after the Commission reaches its order. The interim agreement, as described in Midcontinent's testimony, would simply be one of Midcontinent's existing agreements for facilities-based interconnection and collocation. It would remain in effect until the parties negotiated or arbitrated a permanent agreement, and pricing under the interim agreement would be subject to a true-up to the terms of the permanent agreement once it is in place.[95] The permanent agreement would be negotiated and arbitrated under the standard time frame in Section 252 of the Communications Act, so it would be in place no more than nine months after the Commission's order.[96]

The parties should start discussions on the type and location of physical interconnection and other technical and operational issues immediately upon issuance of the Commission's orders, and those discussions should be completed within 30 days. Physical interconnection then could be completed within 60 days of the end of the discussions, or within 90 days of the Commission's order, and Midcontinent could begin providing facilities-based service at that time.[97]

This timing is reasonable. Interconnection is well understood, and Missouri Valley already has interconnection arrangements of various types with many carriers. In addition, and as Mr. Simmons noted, the parties already have processes in place for ordering and customer

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[95] Simmons Prefiled at 12.

[96] *Id.* at 13.

[97] *Id.* at 12-13.

changes, so there is no need to develop such processes from scratch.[98] In addition, Midcontinent's proposed timing is not significantly different from Missouri Valley's. Mr. Hanson testified, for instance, that he believed the parties could begin implementation within 90 days of a Commission order.[99] Given Missouri Valley's prior experience in setting up interconnection with non-competitors, it is likely that this estimate is overly pessimistic.

V. Conclusion

Grant of Midcontinent's petition and denial of Missouri Valley's petition will bring the benefits of facilities-based local telephone competition to consumers in Williston. The evidence overwhelmingly demonstrates that the criteria for lifting the rural exemption have been met and that the criteria for suspending Missouri Valley's Section 251(c) obligations have not been met. The sooner the Commission acts, the sooner Williston residents will enjoy the benefits of

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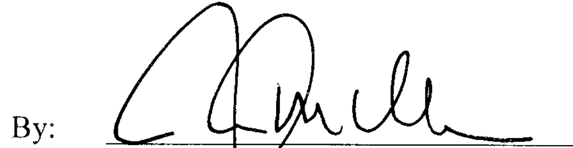
[98] *Id.* at 11.
[99] Hanson Prefiled at 30.

facilities-based competition. For all these reasons, Midcontinent Communications respectfully requests that the Commission grant its petition and deny the petition of Missouri Valley.

Respectfully submitted,

MIDCONTINENT COMMUNICATIONS

By: 

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August 1, 2008

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

MIDCONTINENT COMMUNICATIONS, A SOUTH DAKOTA PARTNERSHIP, COMPLAINANT VS. MISSOURI VALLEY COMMUNICATIONS INC., RESPONDENT	)	Case No. PU-08-61 OAH No. 20080079
MISSOURI VALLEY COMMUNICATIONS INC. APPLICATION FOR SUSPENSION OR MODIFICATION PURSUANT TO 47 U.S.C. § 251(F)(2)	)	Case No. PU-08-176 OAH No. 20080079

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF MIDCONTINENT COMMUNICATIONS

Proposed Findings of Fact

1. Midcontinent Communications ("Midcontinent") requested interconnection with Missouri Valley Communications, Inc. ("Missouri Valley") on November 14, 2007.

2. Missouri Valley denied that request on the basis of its rural exemption on January 30, 2008.

3. Midcontinent filed its notice of bona fide request and petition to find that Missouri Valley had waived the rural exemption with the Commission on February 8, 2008.

4. Missouri Valley is the incumbent local exchange carrier in the Williston exchange.

5. Midcontinent is a competitive local exchange carrier in all the areas it serves in North Dakota.

6. Missouri Valley is the successor in interest to Citizens Communications and U S West as the incumbent local exchange carrier in the Williston exchange.

7. When Citizens acquired the Williston exchange from U S West, it agreed to honor U S West's existing interconnection arrangements with Midcontinent.

8. When Missouri Valley acquired the Williston exchange from Citizens, it agreed to honor Citizen's existing interconnection arrangements with Midcontinent.

9. Midcontinent and Missouri Valley currently have a valid agreement for the provision of wholesale services for resale, which has been approved by the Commission.

10. Missouri Valley interconnects with a number of other carriers using a variety of interconnection arrangements.

11. It is technically feasible for Missouri Valley to comply with the requirements of Section 251(c) of the federal Communications Act.

12. Missouri Valley's analysis of the impact of competition evaluates the costs it would incur from any form of competition other than resale and does not specifically evaluate the impact of complying with the requirements of Section 251(c).

13. Experience in other rural areas of North Dakota shows that facilities-based interconnection does not impose an undue economic burden on rural carriers.

14. Experience across the country shows that rural carriers that offer diverse services are not economically harmed by local service line losses.

15. Missouri Valley's analysis of the economic burden of competition from Midcontinent demonstrates that Missouri Valley would continue to generate significant net operating margins, even if that analysis were not modified in accordance with the corrections proposed by Midcontinent.

16. Missouri Valley's analysis of the economic burden of competition should be modified in accordance with the corrections proposed by Midcontinent, and if Midcontinent's modifications are applied, the overall economic cost of competition is approximately one-fourth of Missouri Valley's estimate.

17. Missouri Valley would be able to reduce its costs if it lost customers to Midcontinent, which would further reduce the economic cost of facilities-based competition.

18. Missouri Valley and Nemont operate as an integrated operation and therefore should be treated as a single entity for purposes of analyzing the economic burden of interconnection.

19. When Missouri Valley and Nemont are considered as a unified entity, the economic cost of competition from Midcontinent would constitute an insignificant fraction of the combined entity revenues.

20. There is no evidence showing that interconnection under Section 251(c) would have a harmful impact on universal service.

21. Experience in North Dakota and across the country shows that facilities-based competition does not have an adverse effect on universal service.

22. Missouri Valley will be able to continue meeting its current universal service obligations after providing Section 251(c) interconnection to Midcontinent.

23. There is no current requirement to expand the scope of the definition of universal service.

24. The only pending proposal at the FCC concerning broadband and universal service would not mandate broadband service and would provide financial support to rural carriers that invest in broadband.

25. Facilities-based competition can have universal service benefits.

26. There is no evidence that Section 251(c) interconnection will result in an adverse impact on users of telecommunications services generally.

27. Missouri Valley has not been investing at a sufficient level to bring advanced services to its customers in a timely fashion.

28. Competition benefits consumers by lowering prices, improving quality, creating incentives for innovation, encouraging better customer service and providing choice.

29. Competition in Williston is necessary because Missouri Valley is not offering advanced services to its customers and there is no real prospect for improvement without competition.

30. Current competition in Williston is not sufficient to put competitive pressure on Missouri Valley because the competitors are not offering true substitute services.

31. Missouri Valley's failure to offer video service is the result of a business decision, not an inherent competitive disadvantage.

32. Missouri Valley has competitive advantages, including its incumbent status, its integration with Nemont and its wireless affiliate.

33. It is realistic to adopt an implementation schedule that calls for an interim interconnection agreement in thirty days, interconnection in ninety days and a permanent interconnection agreement in nine months.

Proposed Conclusions of Law

1. Midcontinent has met the requirements for a bona fide request for the rural exemption under Section 251(f)(1) of the Communications Act to be lifted in Williston.

2. The Commission must grant Midcontinent's petition to lift the rural exemption in Williston if the criteria established in Section 251(f)(1) of the Communications Act are met or if the rural exemption has been waived.

3. A rural carrier can waive the exemption by agreeing to provide interconnection in compliance with Section 251(c).

4. Missouri Valley's actions in agreeing to accept Midcontinent's existing agreement with Citizens constitute a waiver of the rural exemption.

5. Missouri Valley's actions in agreeing to a resale agreement with Midcontinent constitute a waiver of the rural exemption.

6. The criteria under Section 251(f)(1) are (a) whether Midcontinent's request is unduly economically burdensome; (b) whether Midcontinent's request is technically feasible; and (c) whether Midcontinent's request is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

7. Section 251(f)(1) requires that the analysis of the criteria for lifting the rural exemption must be in the context of the impact of the competitor's request, not in the context of facilities-based competition generally.

8. The evidence in this proceeding establishes that the criteria in Section 251(f)(1) for lifting a rural exemption have been met.

9. The terms of Section 253 of the Communications Act do not have any impact on the Commission's actions in this proceeding.

10. The criteria for consideration of a Section 251(f)(2) suspension petition are (a) whether suspension is necessary "to avoid a significant adverse economic impact on users of telecommunications services generally"; "to avoid imposing a requirement that is unduly economically burdensome" or "to avoid imposing a requirement that is technically infeasible"; and whether a suspension "is consistent with the public interest, convenience and necessity."

11. Section 251(f)(2) requires that the analysis of the criteria must be in the context of the specific elements for which suspension is requested, and not in the context of competition generally.

12. The evidence in this proceeding establishes that the criteria for suspension under Section 251(f)(2) have not been met.

13. Once a state commission determines that the three criteria for lifting the rural exemption have been met, it is empowered to set a schedule for the rural carrier's implementation of its obligations under Section 251(c) of the Communications Act, so long as the schedule is consistent with any rules adopted by the FCC.

14. The FCC has adopted no rules governing how state commissions may set implementation schedules under Section 251(f)(1).

15. Any implementation schedule adopted by the Commission must be consistent with the evidence in this proceeding.

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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A SOUTH DAKOTA PARTNERSHIP,

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PROPOSED ORDER

SEPTEMBER , 2008

On February 8, 2008, Midcontinent Communications, a South Dakota partnership ("Midcontinent"), filed a bona fide request to lift the rural exemption under Section 251(f)(1) of the federal Communications Act of 1934 (the "Communications Act") for the operations of Missouri Valley Communications, Inc. ("Missouri Valley") in Williston, North Dakota.

On April 9, 2008, Missouri Valley filed an application for suspension or modification pursuant to Section 251(f)(2) of the Communications Act, asking the Commission to suspend its obligations to comply with Section 251(c) of the Communications Act.

A prehearing conference was held in these proceedings on April 9, 2008. Prehearing orders were issued on April 14, 2008 and May 1, 2008. On May 7, 2008, the Commission issued a Notice of Hearing in these proceedings. The Notice identified the following issues to be considered:

1. Whether the request of Midcontinent is unduly economically burdensome.

2. Whether the request of Midcontinent is technically feasible.

3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(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 the public interest, convenience and necessity.

7. The extent and duration should any suspension or modification be granted.

In addition, the Notice indicated that Midcontinent contended that Missouri Valley has waived its rural exemption.

Missouri Valley filed a Motion to Compel or Dismiss on June 26, 2008 and Midcontinent filed an opposition to that motion on July 2, 2008. Oral argument on the motion was held on July 9, 2008. On July 14, 2008, the Hearing Examiner issued a Recommended Consolidated Order Denying Motion that recommended that Missouri Valley's motion be denied.

Missouri Valley filed prefiled direct testimony on June 26, 2008 and Midcontinent filed prefiled direct testimony on July 2, 2008. A hearing was held on January 23, 2006. The parties filed post-hearing briefs on August 1, 2008 and reply briefs on August 11, 2008

The Commission, having heard the evidence and reviewed the briefs, hereby adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Midcontinent Communications ("Midcontinent") requested interconnection with Missouri Valley Communications, Inc. ("Missouri Valley") on November 14, 2007.
2. Missouri Valley denied that request on the basis of its rural exemption on January 30, 2008.
3. Midcontinent filed its notice of bona fide request and petition to find that Missouri Valley had waived the rural exemption with the Commission on February 8, 2008.
4. Missouri Valley is the incumbent local exchange carrier in the Williston exchange.
5. Midcontinent is a competitive local exchange carrier in all the areas it serves in North Dakota.

6. Missouri Valley is the successor in interest to Citizens Communications and U S West as the incumbent local exchange carrier in the Williston exchange.
7. When Citizens acquired the Williston exchange from U S West, it agreed to honor U S West's existing interconnection arrangements with Midcontinent.
8. When Missouri Valley acquired the Williston exchange from Citizens, it agreed to honor Citizen's existing interconnection arrangements with Midcontinent.
9. Midcontinent and Missouri Valley currently have a valid agreement for the provision of wholesale services for resale, which has been approved by the Commission.
10. Missouri Valley interconnects with a number of other carriers using a variety of interconnection arrangements.
11. It is technically feasible for Missouri Valley to comply with the requirements of Section 251(c) of the federal Communications Act.
12. Missouri Valley's analysis of the impact of competition evaluates the costs it would incur from any form of competition other than resale and does not specifically evaluate the impact of complying with the requirements of Section 251(c).
13. Experience in other rural areas of North Dakota shows that facilities-based interconnection does not impose an undue economic burden on rural carriers.
14. Experience across the country shows that rural carriers that offer diverse services are not economically harmed by local service line losses.
15. Missouri Valley's analysis of the economic burden of competition from Midcontinent demonstrates that Missouri Valley would continue to generate significant net operating margins, even if that analysis were not modified in accordance with the corrections proposed by Midcontinent.
16. Missouri Valley's analysis of the economic burden of competition should be modified in accordance with the corrections proposed by Midcontinent, and if Midcontinent's modifications are applied, the overall economic cost of competition is approximately one-fourth of Missouri Valley's estimate.
17. Missouri Valley would be able to reduce its costs if it lost customers to Midcontinent, which would further reduce the economic cost of facilities-based competition.
18. Missouri Valley and Nemont operate as an integrated operation and therefore should be treated as a single entity for purposes of analyzing the economic burden of interconnection.
19. When Missouri Valley and Nemont are considered as a unified entity, the economic cost of competition from Midcontinent would constitute an insignificant fraction of the combined entity revenues.
20. There is no evidence showing that interconnection under Section 251(c) would have a harmful impact on universal service.
21. Experience in North Dakota and across the country shows that facilities-based competition does not have an adverse effect on universal service.

22. Missouri Valley will be able to continue meeting its current universal service obligations after providing Section 251(c) interconnection to Midcontinent.

23. There is no current requirement to expand the scope of the definition of universal service.

24. The only pending proposal at the FCC concerning broadband and universal service would not mandate broadband service and would provide financial support to rural carriers that invest in broadband.

25. Facilities-based competition can have universal service benefits.

26. There is no evidence that Section 251(c) interconnection will result in an adverse impact on users of telecommunications services generally.

27. Missouri Valley has not been investing at a sufficient level to bring advanced services to its customers in a timely fashion.

28. Competition benefits consumers by lowering prices, improving quality, creating incentives for innovation, encouraging better customer service and providing choice.

29. Competition in Williston is necessary because Missouri Valley is not offering advanced services to its customers and there is no real prospect for improvement without competition.

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31. Missouri Valley's failure to offer video service is the result of a business decision, not an inherent competitive disadvantage.

32. Missouri Valley has competitive advantages, including its incumbent status, its integration with Nemont and its wireless affiliate.

33. It is realistic to adopt an implementation schedule that calls for an interim interconnection agreement in thirty days, interconnection in ninety days and a permanent interconnection agreement in nine months.

CONCLUSIONS OF LAW

1. Midcontinent has met the requirements for a bona fide request for the rural exemption under Section 251(f)(1) of the Communications Act to be lifted in Williston.

2. The Commission must grant Midcontinent's petition to lift the rural exemption in Williston if the criteria established in Section 251(f)(1) of the Communications Act are met or if the rural exemption has been waived.

3. A rural carrier can waive the exemption by agreeing to provide interconnection in compliance with Section 251(c).

4. Missouri Valley's actions in agreeing to accept Midcontinent's existing agreement with Citizens constitute a waiver of the rural exemption.

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6. The criteria under Section 251(f)(1) are (a) whether Midcontinent's request is unduly economically burdensome; (b) whether Midcontinent's request is technically feasible; and (c) whether Midcontinent's request is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).
7. Section 251(f)(1) requires that the analysis of the criteria for lifting the rural exemption must be in the context of the impact of the competitor's request, not in the context of facilities-based competition generally.
8. The evidence in this proceeding establishes that the criteria in Section 251(f)(1) for lifting a rural exemption have been met.
9. The terms of Section 253 of the Communications Act do not have any impact on the Commission's actions in this proceeding.
10. The criteria for consideration of a Section 251(f)(2) suspension petition are (a) whether suspension is necessary "to avoid a significant adverse economic impact on users of telecommunications services generally"; "to avoid imposing a requirement that is unduly economically burdensome" or "to avoid imposing a requirement that is technically infeasible"; and whether a suspension "is consistent with the public interest, convenience and necessity."
11. Section 251(f)(2) requires that the analysis of the criteria must be in the context of the specific elements for which suspension is requested, and not in the context of competition generally.
12. The evidence in this proceeding establishes that the criteria for suspension under Section 251(f)(2) have not been met.
13. Once a state commission determines that the three criteria for lifting the rural exemption have been met, it is empowered to set a schedule for the rural carrier's implementation of its obligations under Section 251(c) of the Communications Act, so long as the schedule is consistent with any rules adopted by the FCC.
14. The FCC has adopted no rules governing how state commissions may set implementation schedules under Section 251(f)(1).
15. Any implementation schedule adopted by the Commission must be consistent with the evidence in this proceeding.

In light of the findings of fact and conclusions of law, and being fully advised in the premises, the Commission hereby enters the following:

ORDER

The Commission orders:

1. The recommended decision concerning Missouri Valley's Motion to Compel or Dismiss is accepted, and the motion is hereby DENIED.

2. Midcontinent's petition for termination of Missouri Valley's exemption from the requirements of Section 251(c) of the Communications Act is hereby GRANTED.

3. Missouri Valley's application for suspension or modification pursuant to Section 251(f)(2) of the Communications Act is hereby DENIED.

4. Missouri Valley and Midcontinent shall enter into an interim interconnection agreement substantially in the form of any current Midcontinent interconnection agreement that includes Section 251(c) interconnection and collocation and shall submit that agreement to the Commission for approval within thirty (30) days of the issuance of this order.

5. Midcontinent and Missouri Valley shall, within thirty (30) days of this order, determine the technical and operational requirements for physical interconnection in the Williston exchange. Within sixty (60) days of the determination of the technical and operational requirements for interconnection and no later than ninety (90) days after the issuance of this order, the parties shall implement physical interconnection arrangements.

6. Upon issuance of this order, Missouri Valley and Midcontinent shall commence negotiation of a permanent interconnection agreement for the Williston exchange. The negotiation and any necessary arbitration shall be conducted in accordance with the requirements of Sections 251(c)(1) and 252 of the Communications Act, including the time periods described in Section 252.

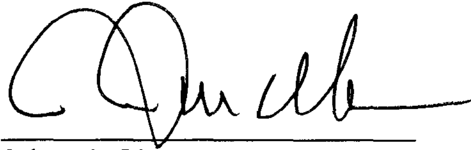
PUBLIC SERVICE COMMISSION

TONY CLARK	SUSAN E. WEFALD	KEVIN CRAMER
COMMISSIONER	PRESIDENT	COMMISSIONER

CERTIFICATE OF SERVICE

A copy of the foregoing **Initial Brief of Midcontinent Communications, Proposed Findings of Fact and Conclusions of Law of Midcontinent Communications, Proposed Order, and Certificate of Service**, was mailed to the following on August 13, 2008:

Mr. David J. Hogue
Attorney at Law
P.O. Box 1000
Minot, ND 58702



John M. Olson