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PUBLIC SERVICE COMMISSION

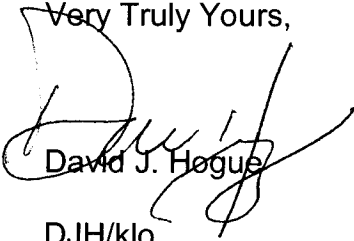
RE: *Midcontinent Communications, a South Dakota partnership v. Missouri Valley Communications, Inc. Case No. PU-08-61 and PU-08-176*

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

Reply Brief in Support of Proposed Orders of Missouri Valley Communications, Inc.

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

Very Truly Yours,


David J. Hogue

DJH/klo

Enclosures

cc: Mr. John Olson
Mr. Shawn Hanson

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Missouri Valley Communications, Inc.

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Missouri Valley Communications, Inc.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

**Reply Brief In Support of Proposed Orders
of Missouri Valley Communications, Inc.**

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STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)	
South Dakota Partnership,)	
)	Rural Exemption
)	Case No. PU-08-61
Complainant,)	
vs.)	
)	Suspend/Modify Interconnection
)	Requirements
)	Case No. PU-08-176
Missouri Valley Communications, Inc.,)	
)	
Respondent.)	

**Reply Brief In Support of Proposed Orders
of Missouri Valley Communications, Inc.**

This Reply Brief responds to Midcontinent’s proposed findings of fact, conclusions of law and order, and its accompanying brief. Missouri Valley’s Reply Brief generally follows the order of Midcontinent’s brief.

Missouri Valley’s Rural Exemption has not been waived.

Midcontinent’s initial filing with the Commission, its Notice of Bona Fide Request and Petition to Find Rural Exemption Waived filed on February 8, 2008, averred that “MVC has waived its right to the rural exemption under the Act by previously entering into an interconnection agreement with Midcontinent for the purpose of resale. Said interconnection agreement was filed with this Commission on December 3, 2004, as PU-04-638.” [Emphasis added.] That claim is addressed in Missouri Valley’s initial brief, at pages 35-37. Midcontinent does not cite the Commission to any provision in the Act that supports its waiver argument. There simply is no

provision of the Act relating to waiver of the rural exemption, except § 251(f)(1)(C), relating to waivers by a rural telephone company providing video services. That explicit waiver Congress authorized in the Act was implicated in recent previous cases before the Commission, e.g., PU-05-451. However, in the present case, it is undisputed that Missouri Valley is not offering video services.

Now the Commission is told that Missouri Valley waived its rural exemption earlier, when it acquired the Williston exchange in 2002. (Midcontinent's brief, pp. 5-7.) The Commission did not presume to impose on Missouri Valley any contract obligations of former owners of the Williston exchange when it granted Missouri Valley a certificate of public convenience and necessity for the Williston exchange in Case No PU-2779-02-452. Midcontinent describes an "unbroken chain" of agreements made between Midcontinent and previous owners of the Williston exchange. (Midcontinent's brief, p. 7.) Those previous agreements affecting Midcontinent's contracts with former owners of the Williston exchange were terminated under Missouri Valley's ownership of the exchange. (Midcontinent's brief, p. 6.) The old agreements were replaced by the 2004 resale agreement, PU-04-638. As Mr. Hanson testified, and as the Commission might note from a review of the "resale" agreement, there is no express indication of waiver in the resale agreement. Midcontinent does not point the Commission to any language in the resale agreement upon which an implied waiver might be argued. Thus, without any legal authority to support its position, Midcontinent asks the Commission to imply a waiver from either the Act or the resale agreement, but fails to point the Commission to any language in either the Act or resale agreement to support its waiver argument.

Midcontinent's argument is not only unsupported in the law or resale agreement; Midcontinent's argument is bad policy for North Dakota. There are at least 18 rural telephone companies in North Dakota. If the Commission were to conclude a rural telephone company

waives its rural exemption by entering into a resale agreement or other limited agreement, two events are likely to occur, neither of which is beneficial to North Dakota consumers. First, the “Midcontinent Implied Waiver Rule” will have a chilling effect on rural telephone companies’ willingness to enter into mutually beneficial, even routine, interconnection agreements that have little or no economic impact on rural telephone companies. Rural telephone companies will understandably be reluctant because the rural telephone company will not want to relinquish its rural exemption for a future requested interconnection that is, in the words of the Act, “unduly economically burdensome.”

Second, as argued below, the rule proposed by Midcontinent impermissibly places the Commission in the role of a district court, adjudicating the rights of parties’ under a written contract. The Commission should adhere to the Act: absent the provision of video programming, there is no waiver of the rural exemption.

The existing agreement between Midcontinent and Missouri Valley is limited by its terms to establishing a resale arrangement. Neither the old terminated agreements nor the existing agreement includes a waiver or some other sort of open-ended option for Midcontinent to demand an interconnection under Act § 251(c), avoiding the rural exemption under § 251(f).

It defies the most uncomplicated of legal logic that Midcontinent would assert in 2008 that Missouri Valley is obliged under Midcontinent’s old contracts to which Missouri Valley was not a party, contracts which Missouri Valley expressly disavowed without objection from Midcontinent, contracts which were replaced to Midcontinent’s satisfaction in 2004. But the Commission need not concern itself with Midcontinent’s tortured arguments of contract law.

For Midcontinent to assert “waiver” based on the parties’ written contract is to assert a contract right. That is what a waiver is, a promise of contractual quality to forego an otherwise available right or privilege, in this case a specific statutory exemption (under Act section 251(f) from an otherwise effective legal obligation (interconnection and negotiation, under section 251(c)). Missouri Valley denies it has waived its statutory exemption. The Commission need only identify the nature of Midcontinent’s waiver claim as outside its jurisdiction; that is enough for the claim to be dismissed. Williams Electric Cooperative v. Montana-Dakota Utilities Co., 79 N.W. 2d 508, 517 (N.D. 1956)(“If any contractual rights exist between the appellant and the respondent under the agreement . . . , the enforcement of such rights must be sought in the courts of this state. No judicial power being vested in the Public Service Commission of this state, it has no jurisdiction to adjudicate the alleged contractual rights of the parties to the agreement, and the participation of the Commission, or some of its members, in the negotiations preceding its execution is wholly immaterial.”) Williams Electric at 517. The Commission has no jurisdiction to declare the rural exemption has been contracted or waived out of existence based on the alleged breach of contract. The PSC’s rejection of Midcontinent’s waiver claim because of jurisdictional limits will not deprive Midcontinent of the opportunity to take its contract claim to a court. See Montana-Dakota Utilities Co. v Williams Electric Cooperative, 263 F.2d 431 (8th Cir. 1959).

As noted in Missouri Valley’s initial brief, this case is not Midcontinent’s first effort to leverage an uncontested resale proceeding to sidestep a rural telephone company’s exemption from facilities based competition. Feigning ignorance, Midcontinent argues”...once a rural carrier has determined that it is willing to face competition; the basis for differentiating between competitors or types of competition becomes difficult to discern. Consequently, the Commission should conclude that a waiver of the rural exemption is a waiver for all purposes.” (Midcontinent’s brief, page 9.)

Missouri Valley easily discerns the difference between resale and facilities based interconnection arrangements. So does the Commission, and probably Midcontinent does too. In the hierarchy of arrangements between ILECs and CLECs, resale arrangements impose little or no economic impact on an ILEC, there is no effect on universal service and there is no problem of technical feasibility. If facilities based interconnection is requested, the undoubted economic burden on ILECs becomes apparent and universal service issues also arise. Those issues do not arise in the resale context. (Midcontinent did a good job of demonstrating this difference between resale and facilities based interconnection in the NDTC case, PU-05--451.) The difference is demonstrated in the economic impact exhibits in the case now before the Commission.

It is absurd for Midcontinent to argue that the important issues measured in millions of dollars in a present interconnection case were waived in a past resale negotiation where the present issues were zero dollar non-issues. The Commission should follow its earlier decisions in Cases PU-06-345 and PU-06-400 that prevent Midcontinent from claiming a resale arrangement as a vehicle to evade rural telephone companies' exemption from facilities based interconnection.

The Commission must stand by its 2005 order (Case No. PU-04-546) when it granted Midcontinent its certificate of public convenience and necessity on a statewide basis. Granting Midcontinent a certificate on a statewide basis is not a ruling that affects the rights of specific rural telephone companies under 47 U.S.C. 251(f). Missouri Valley's rights under 47 U.S.C. 251(f) were in effect in 2005 and continue in effect. (See Missouri Valley's proposed finding No 2 in Case No. PU-08-61.)

Considering Midcontinent's vigorous but erroneous arguments about "waiver" and Missouri Valley's foregoing reply, Missouri Valley amends its proposed order in Case PU-08-61, as follows:

Waiver

47. We find that Midcontinent's claim that Missouri Valley waived its exemption under Act section 251(f)(1) is a claim under the law of contracts, a claim over which the Commission has no jurisdiction.

Rural Exemption and Burden of Proof

Under § 251(f)(1)(A) of the Act, Missouri Valley is an ILEC and a rural telephone company that is exempt from the interconnection requirements of section 251(c). The exemption is subject to termination under section 251(f)(1)(B).

“The plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption.” Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, at 762. (8th Cir. 2000) (Herein Iowa v FCC.)

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

Against this background, one might have expected Midcontinent to acknowledge its burden to prove the three pre-requisites and to propose findings and conclusions that use statutory words to express the proposals. Those expectations are unfulfilled.

Nowhere in Midcontinent's proposed findings of fact will be found any reference to Midcontinent's burden of proof or to any evidence to prove the three prerequisites. No facts, no opinions, no exhibits, no testimony, no evidence of any kind offered by Midcontinent is mentioned

in Midcontinent's proposed findings of fact. Some of Midcontinent's proposed findings (Nos. 12, 15 and 16) criticize Missouri Valley's evidence, as if Missouri Valley had a burden of proof.

Nowhere in Midcontinent's proposed findings of fact will be found any assertion that Midcontinent's interconnection request "is not unduly economically burdensome." (Act section 251 (f)(1)(B).)

Nowhere in Midcontinent's proposed findings of fact will be found any assertion that Midcontinent's interconnection request "is consistent with section 254 ..." [regarding universal service.] (Act section 251 (f)(1)(B). Its proposed finding No. 20, "There is no evidence showing that interconnection under 251(c) would have a harmful impact on universal service." shows how completely Midcontinent has failed to carry its affirmative burden of proof to show that Midcontinent's interconnection request "is consistent with section 254." The accurate expression would be "There is no evidence showing that interconnection under 251(c) is consistent with section 254."

Midcontinent's words that came closest to statutory criteria was one proposed conclusion of law (No. 6). Not only did this proposal fail to assert the statutory criteria were satisfied, it erroneously recited the criteria. The economic burden issue is not whether Midcontinent's request "is unduly economically burdensome" (quoting Midcontinent's proposed conclusion). The issue, the pre-requisite that Midcontinent must prove, is that Midcontinent's interconnection request "is not unduly economically burdensome" (quoting the statute and emphasizing the word that emphasizes the strength of the rural exemption.).

Searching for some argument whether Midcontinent's interconnection request "is not unduly economically burdensome," one finds familiar tributes to competition and one startling new

assertion: “There is no evidence in this proceeding that there is any economic burden at all specifically associated with Midcontinent’s actual request for interconnection. (Midcontinent brief, p. 13.) This remarkable assertion disintegrates under the weight of applicable legal authority:

““There can be no doubt that it is an economic burden on an ILEC to provide [interconnections] Congress has directed it to provide to new competitors in 251(b) or 251(c).” Iowa v FCC at 761).

There is simply no point in arguing whether an economic burden would result from implementation of Midcontinent’s requested interconnection or arguing about the meaning of the words “economically burdensome” when that has been established by judicial interpretation. What remains to be determined is the financial amount of economic burden that will undoubtedly occur and consideration whether the burden is “undue,” a decision constrained by the status of the rural exemption as a “broad protection Congress granted to small and rural telephone companies,” a protection that is not to be weakened. The decision will be informed by conforming to the purpose and structure of the Act:

“In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the Congressional debates.” Iowa v FCC at 761. [Emphasis added.]

Simply and completely stated, the promotion of competition is not an adequate reason to terminate Missouri Valley’s exemption from the statutory obligations of interconnection and negotiation.

Continuing the search for arguments that Midcontinent has carried its burden of proof that its requested interconnection “is not unduly economically burdensome,” one finds *Midcontinent’s Evidence of Economic Impacts*” (pp14-16), a vague prediction about the benefits of competition devoid of any comment about the amount or severity of the undoubted economic burden of

Midcontinent's requested interconnection - not even its admitted minimum four years loss of \$888,000. As demonstrated in Missouri Valley's brief and proposed order, *Midcontinent's Evidence of Economic Impacts* consists of Lundquist's discredited opinion of an amount of the economic burden that would be caused by Midcontinent's requested interconnection and Gates' opinion that Lundquist's erroneous number, though not "trivial," does not rise to the level of unduly economically burdensome, under Gates' mistaken understanding of the meaning of the statutory words "not unduly economically burdensome." See Missouri Valley's initial brief, pages 16-26 and proposed order in Case No PU-08-61, paragraphs 9-27.

First, Midcontinent turns ordinary procedure on its head. Midcontinent's argument on the "not unduly economically burdensome" issue is like a tort defendant's who admits imposing harm on a plaintiff, but tries to evade its liability by criticizing the plaintiff's proof of damage. But Midcontinent is not a defendant. Indeed, it has identified itself as a complainant in this proceeding. Midcontinent has the burden of proof. Missouri Valley's reliance on its continuing exemption from interconnection does not require it to prove the economic burden that interconnection would cause, or that the burden is undue. Missouri Valley is in the position Midcontinent wants to usurp. It is Missouri Valley that is in the position to criticize Midcontinent's evidentiary presentation, not the other way around. Midcontinent's criticism of Missouri Valley's rebuttal evidence reveals the fundamental flaw in Midcontinent's evidence and argument: Midcontinent introduced no persuasive evidence about the economic burden that its requested interconnection would impose on Missouri Valley. It has offered only opinion evidence to criticize Missouri Valley's defensive evidence, and Midcontinent's critical opinion evidence is unsubstantiated by any factual evidence to support the criticisms. This is not the quality of evidence necessary for Midcontinent to carry the burden of proof that Midcontinent's requested interconnection "is not unduly economically burdensome."

Second, the principal part of Witness Lundquist's testimony was his fanciful "offset" argument, based on his opinion about the availability of "Safety Valve" universal service funds, all of which is inconsistent with section 254 and rules and orders promulgated by the FCC. See Missouri Valley's initial brief, pages 19-24 and proposed order in Case No PU-08-61, paragraphs 19, 36-43.

In the post-hearing process of argument, it cannot escape notice that Midcontinent's brief acknowledges that Missouri Valley "may be eligible for safety valve support for investments in the acquired lines." See Midcontinent brief at page 21, including footnotes 52 and 53. Midcontinent knows that Safety Valve support is not available to Missouri Valley to offset the undoubted economic burdens of interconnection. Midcontinent knows the \$888,000 of economic burden it concedes is understated by at least \$2.2 million. (See Midcontinent's brief, page 18.)

Continuing the search of Midcontinent's brief for some argument about how it has endeavored to prove that its requested interconnection "is not unduly economically burdensome," one finds "*Context of the Economic Burden Analysis.*" (Pp. 23-26), a proposal that "the Commission, in evaluating the economic burden of interconnection, should consider Nemont as a whole, and not Missouri Valley in isolation." Midcontinent's proposed findings 18 and 19 are loosely connected to the proposal, but still there is no proposed finding that Midcontinent's requested interconnection "is not unduly economically burdensome". Missouri Valley's proposed order in case No PU-08-61 addressed this proposal, at paragraph 28, repeated here in pertinent part and supplemented.

Section 251 (f)(1) refers to a request to "a rural telephone company." "A rural telephone company is a singular term. Neither Section 251(f)(1), 47 CFR 51.405, nor the FCC's Local Competition Order often cited by Midcontinent's witness Gates supports his opinion that the

impact on the Nemont group of companies in total should be the relevant benchmark. By stark contrast, the 2% rule of section 251(f)(2), suspension/modification, is administered “at the holding company level” (47 CFR 51.403), negating by implication Midcontinent’s proposal that the Commission should assume a power to oblige Missouri Valley’s corporate relative, a rural telephone company in Montana, to assume any part of the economic burden of Midcontinent’s requested interconnection in Williston, North Dakota.

As the Commission is aware, “rural telephone company” is a defined term under the Act. Act § 153(37). The Act also defines an “affiliate.” An “affiliate” is an entity or person “that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.” Act § 153(1). “Own” under this definition means an equity position of ten (10%). *Id.* Clearly Congress understood that a “rural telephone company,” or any entity regulated under the Act, may have an “affiliate.” Nemont Telephone Cooperative, Inc. is an “affiliate” of Missouri Valley.

The Act does not direct the Commission to consider whether the proposed interconnection is not unduly economically burdensome on the “rural telephone company” and its “affiliate.” An affiliate’s economic status is not part of the analysis under Act § 251(f)(1). Without expressly stating it, Midcontinent again asks the Commission to ignore the plain language of the rural exemption. Midcontinent suggests the Commission focus on the financial impact to the rural telephone company and its affiliate, a focus Congress did not provide for in the Act. Through its desired language of the Act, i.e., that the Commission determine whether the request is unduly economically burdensome to a “rural telephone company and its affiliate,” Midcontinent leads itself down a path of legally irrelevant observations and arguments about shared business relationships between Missouri Valley and Nemont.

Even if there were some jurisdictional support in federal or state law to support Midcontinent's wish for amendment of the Act, no such jurisdiction has been invoked. Midcontinent's request for interconnection is addressed to Missouri Valley, not to Nemont. Because the Notice of Hearing is based on Midcontinent's "request for facilities based interconnection" from Missouri Valley and because neither the request nor the Notice of Hearing was addressed to or served on Nemont Telephone Cooperative, due process requires that the Commission limit its consideration to the economic burden that Midcontinent's requested interconnection would impose on Missouri Valley. (Order, Case No. PU-05-451, par. 10. June 7, 2006.)

Universal Service and the Rural Exemption and Burden of Proof

Midcontinent has the burden to prove not only that its requested interconnection "is not unduly economically burdensome," it also has the burden to prove that its requested interconnection "is consistent with section 254." Missouri Valley's initial brief (pages 27-36) and proposed findings(32-43) amply demonstrate that Midcontinent has failed to establish this prerequisite. Consequently, even if the Commission were to conclude that Midcontinent's requested interconnection "is not unduly economically burdensome," Missouri Valley's exemption from interconnection under 251 (f)(1)(A) cannot be terminated. This conclusion is consistent not only with sections 251(f)(1)(B) and 254, it is also consistent with section 253, despite Midcontinent's contrary opinion. (See Midcontinent's brief, page 30 and proposed Conclusion of Law No. 9). Midcontinent's rejection of universal service obligations throughout the Williston exchange area and its disinterest in participation as an eligible telecommunications carrier in the universal service/Lifeline program that benefits low-income consumers are adequate cause for the Commission to conclude that Midcontinent's requested interconnection is not consistent with section 254 regarding universal service.

Summary and Conclusion

The Commission must dismiss Midcontinent's claim that Missouri Valley has waived its rural exemption on jurisdictional grounds, and proceed to address the issues that are identified in the notice of hearing, guided by these principles:

"In the Act, Congress sought *both* to promote competition *and* to protect rural telephone companies as evidenced by the Congressional debates." (Emphasis added, to emphasize the point of law that Midcontinent declines to acknowledge.)

"There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in 251(b) or 251(c).

"Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily granted exemption should continue unless the state commission found all three pre-requisites for terminating the exemption.

The rural exemption is a "broad protection Congress granted to small and rural telephone companies" that is not to be weakened. Iowa v FCC, at 761.

"The plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." Id., at 762.

Guided by these principles and the lack of evidence, the Commission should take the following action in these consolidated cases:

In Case No. PU-08-61, Missouri Valley's exemption under Act section 251(f)(1)(A) should not be terminated because (paraphrasing the issues stated in the Notice of Hearing and the statutory criteria):

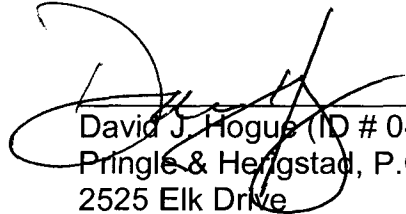
1. Midcontinent did not prove that Midcontinent's requested interconnection is not unduly economically burdensome.
2. Midcontinent did not prove that Midcontinent's requested interconnection is consistent with 47 U.S.C 254.
3. The implementation schedule for compliance with Midcontinent's request for an interconnection is moot, because Midcontinent did not prove that Midcontinent's requested interconnection is not unduly economically burdensome and did not prove that Midcontinent's requested interconnection is consistent with 47 U.S.C 254.

Alternatively, should the exemption be terminated in Case No. PU-08-61, in Case No. PU-08-176, Missouri Valley's facilities based interconnection requirements should be suspended because (paraphrasing the issues stated in the Notice of Hearing and the statutory criteria):

1. Suspension is necessary to avoid a significant adverse economic impact on users of telecommunications services generally.
2. Suspension is necessary to avoid imposing a requirement that is unduly economically burdensome; and is (B) consistent with the public interest, convenience and necessity.
3. Suspension is consistent with public interest, convenience, and necessity.

Dated this 8th day of August, 2008.

PRINGLE & HERIGSTAD, P.C.



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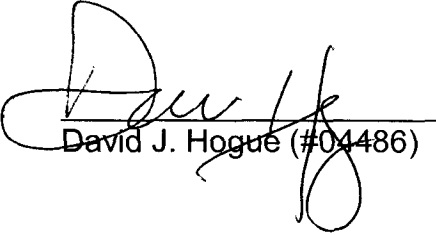
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing **Reply Brief In Support of Proposed Orders of Missouri Valley Communications, Inc.**, was mailed to the following on the 11th day of August, 2008:

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