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418 East Broadway, Suite 9 • Bismarck, ND 58501
Phone: 701-222-3485 • Fax: 701-222-3091
Email: olsonpc@midconetwork.com

August 11, 2008

PUBLIC SERVICE COMMISSION

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

- 1. *Reply Brief of Midcontinent Communications, with Exhibit 1.***
- 2. *Affidavit 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/tbb

enclosures

cc: David Hogue
Mary Lohnes
J.G. Harrington
Nancy Vogel
Annette Bendish

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Reply Brief of Midcontinent Communications with Exhibit 1

Midcontinent Communications

John M. Olson, P.C.

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

Reply Brief of Midcontinent Communications

Midcontinent Communications, by its attorneys, hereby submits its reply brief in the above-referenced proceeding. As described in more detail below, the evidence and the initial briefs in this proceeding establish that 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

Missouri Valley’s initial brief asks the Commission to ignore nearly all of the evidence that supports lifting the rural exemption in favor of a view of Missouri Valley, Midcontinent and

the market in Williston that is not supported by the record or common sense. For instance, Missouri Valley claims that it invests all of its net revenue into its Williston operations; in fact, more than 70 percent of Missouri Valley's operating cash flow is used to pay off the debt that Nemont incurred to acquire the Williston exchange. For that matter, Missouri Valley entirely ignores the evidence that rural carriers succeed in the face of competition when they offer diverse services to their customers, just as Missouri Valley and Nemont do today. This pattern, repeated throughout Missouri Valley's brief, demonstrates that the facts do not support Missouri Valley's arguments.

Indeed, as shown in Midcontinent's initial brief and below, even when the facts in this case are viewed in the light most favorable to Missouri Valley, the Commission would have to lift the rural exemption. This is true because Missouri Valley's own showing demonstrates that it would have ample resources to serve Williston and meet its universal service obligations throughout the period of Missouri Valley's analysis. When the evidence provided by Midcontinent is taken into account and appropriate legal standards are applied, the case for lifting the exemption becomes even more compelling.

The same analysis applies to Missouri Valley's suspension application. Missouri Valley's evidence is not sufficient to support a suspension on its own, and is overwhelmed by the evidence provided by Midcontinent. There is, as a result, no basis to grant a suspension.

This reply brief will focus on the four central issues in this proceeding:

- Missouri Valley's waiver of its rural exemption rights, both when it acquired the Williston exchange and through its resale agreement with Midcontinent;
- The "undue economic burden" test under Section 251(f)(1) and how the evidence shows that Section 251(c) interconnection would not create such a burden;
- The impact – or lack thereof – that Section 251(c) interconnection would have on universal service in the Williston exchange; and

- The public interest effects of making facilities-based competition available in Williston.

While the Commission must consider each of the issues under Section 251(f)(1) and Section 251(f)(2), the remaining issues either relate closely to these issues or are not contested. The Commission's resolution of these issues will decide this proceeding, and should decide it in Midcontinent's favor.

II. Missouri Valley Has Waived the Rural Exemption

Midcontinent's initial brief showed that Missouri Valley had waived the rural exemption in two distinct ways.¹ First, Missouri Valley agreed at the time it acquired the Williston exchange to honor the interconnection agreement that was then in place, which included all of the Section 251(c) obligations. Second, Missouri Valley, by agreeing to the existing resale agreement, independently waived its exemption.

Missouri Valley's initial argument is, in essence, that there is only one way for a rural carrier to waive its exemption, and that is by offering video service.² This is incorrect for several reasons.

First, the cable competition provision of Section 251(f)(1) is not a waiver provision at all. It simply provides that the rural exemption does not apply in markets where the rural carrier is offering video service and the cable operator seeks interconnection.³

¹ Midcontinent Initial Brief at 5-9.

² Missouri Valley Initial Brief at 4.

³ 47 U.S.C. § 251(f)(1)(C). Missouri Valley also suggests that there should be some additional burden placed on cable operators that seek to compete with rural carriers that do not offer video service, based on "level playing field" considerations. Missouri Valley Initial Brief at 4-5. There is nothing in the statute to support that theory, as the three criteria for lifting the exemption are not affected by whether or not the competitor is a cable operator. 47 U.S.C. § 251(f)(1)(A), (B). To the extent that Missouri Valley is arguing that some public interest element should be added to the Section 251(f)(1) tests, this would be contrary to the statute and, in fact, to Missouri Valley's own interpretation of the provision. See Missouri Valley Initial Brief at 4

Second, it is evident that rural carriers can waive the rural exemption by their own actions. Missouri Valley cites cases in which rural carriers in North Dakota have done just that.⁴ It also is precisely what happened when Missouri Valley acquired the Williston exchange. Missouri Valley specifically agreed to honor the existing interconnection agreements with other exchange carriers (and their attendant obligations).⁵ This representation included the existing, facilities-based agreement with Midcontinent, as Missouri Valley acknowledged in its own letter to Midcontinent just a few months later.⁶ These facts are a matter of public record.⁷ This waiver was specific, binding and encompassed facilities-based interconnection, which was included in the underlying interconnection agreement.

(“Importantly, there is no ‘public interest’ analysis in § 251(f)(1).”). Moreover, as described in Midcontinent’s initial brief and below, any level playing field analysis also must consider Missouri Valley’s marketplace advantages. Midcontinent Initial Brief at 35; *see infra* Section V.

⁴ Missouri Valley Initial Brief at 15 (North Dakota Telephone), 37 (Consolidated Telecom).

⁵ 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) at 3 (¶ 5).

⁶ Late-filed Exhibit C9, Attachment 3.

⁷ Midcontinent notes that Missouri Valley argued in its brief that Midcontinent presented no testimony or facts to support the waiver argument. Missouri Valley Initial Brief at 35. This is untrue, as many of the salient facts were described in late-filed Exhibit C9 and there is no dispute that the parties currently operate under a resale agreement. Moreover, Mr. Hanson, in response to a question from Commissioner Clark, described much of the history of the interconnection agreements for Williston. Hanson Cross-examination (Clark) (“As I understand it, there were agreements between U S West and Midcontinent and then those were adopted when Citizens took over and then they were renamed but largely the same as agreements between Citizens and Midcontinent and then when Missouri Valley acquired Williston, we terminated . . . part of the terms and conditions of the acquisition were that we adopt them too, but we don’t have the size or the scale of a Citizens. So there are appropriate notifications and letters that were sent to Midcontinent canceling that and then agreeing to renegotiate in good faith this agreement that now stands. So this was negotiated in good faith and as I understand it put into effect with the Commission in December of ’04.”) Even if Midcontinent had not presented any facts at the hearing, however, it is not required to do so as to matters of public record before the Commission.

Missouri Valley also waived its rural exemption by entering into the current resale agreement, under which Missouri Valley provides wholesale resale, which is a Section 251(c) function. This agreement waives all of Missouri Valley's exemption because, as Missouri Valley says in its brief, termination of the exemption "is a yes or no question."⁸ For that reason, Missouri Valley's objections to the claim that the resale agreement constitutes a waiver of the rural exemption fail. It does not matter whether the agreement recites that there is a waiver, whether the Commission has the ability to resolve contract disputes or even whether the agreement mentions the rural exemption at all.⁹ In fact, as described in Midcontinent's brief, the omission of any mention of the rural exemption from the agreement suggests that Missouri Valley did not believe that it was operating under the exemption.¹⁰ Moreover, a resale agreement is a Section 252 interconnection agreement, subject to the same approval processes as any other Section 252 agreement, which further demonstrates that waiver for purposes of wholesale resale should be treated as waiver for all purposes.¹¹ Indeed, the current agreement was filed with the Commission and approved through the regular process, something that would

⁸ Missouri Valley Initial Brief at 6. *See also* Midcontinent Initial Brief at 8.

⁹ Missouri Valley Initial Brief at 35-36. Missouri Valley also argues that the Commission's action in holding a hearing "implicitly indicates" that the waiver argument has been denied. *Id.* at 35. This, of course, is wrong. Since Midcontinent did not file a motion seeking to have this proceeding decided before the hearing based on Missouri Valley's waiver, there was no basis for any Commission action prior to completion of the hearing and the briefing cycle. Moreover, the waiver issue is mentioned specifically in the Notice of Hearing, so it plainly was not decided before the hearing. Notice of Hearing at 1.

¹⁰ Midcontinent Initial Brief at 9, n. 13.

¹¹ Even Missouri Valley refers to resale as a form of interconnection. Missouri Valley Initial Brief at 2 ("Interconnection can take many forms. At one extreme, a CLEC might have no local facilities but instead purchase service from the ILEC at wholesale rates that the CLEC resells to its customers.").

have been unnecessary and inappropriate if it were not an interconnection agreement under Section 252.¹²

Finally, Missouri Valley's argument that the waiver is an inappropriate way to avoid litigating facilities-based interconnection is incorrect, and mischaracterizes the NDTC decision.¹³ The NDTC decision was concerned with the question of whether North Dakota Telephone had proper notice that the proceeding would concern facilities-based interconnection, either through Midcontinent's *bona fide* request or otherwise.¹⁴ Here, there is no question that Missouri Valley had adequate notice that the issue of a waiver would be before the Commission because that issue was included in Midcontinent's initial filing with the Commission and in the notice of hearing.

III. The Evidence Shows that Lifting the Rural Exemption Will Not Impose an Undue Economic Burden.

The second major issue in this proceeding is whether lifting the rural exemption will be "unduly economically burdensome."¹⁵ The Commission need not even consider Midcontinent's evidence to conclude that lifting the exemption will not be unduly burdensome, because that is established by the information in Mr. Hanson's testimony and Missouri Valley's financial statements. When Midcontinent's evidence is considered, however, there is no doubt that Section 251(c) interconnection will not cause any undue burden.

¹² See Docket No. 04-638.

¹³ Missouri Valley Initial Brief at 36.

¹⁴ See Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation, *Amended Findings of Fact, Conclusions of Law, and Order*, Case No. PU-05-451 (June 7, 2006), ¶ 19.

¹⁵ 47 U.S.C. § 251(f)(1)(A), (B), (f)(2).

A. Even Without Considering Midcontinent's Evidence, Missouri Valley Will Have Ample Revenues to Support Its Services.

The crux of Missouri Valley's argument is that, as Mr. Hanson claimed during the hearing, "Missouri Valley requires all of its net revenues to be reinvested into the Missouri Valley plant and network."¹⁶ This is untrue. In fact, Mr. Hanson's testimony and Missouri Valley's financials reveal that for the last two years Missouri Valley has invested less than 30 percent of its operating cash flow in the network – just \$679,000 out of \$2.75 million in operating cash flow in 2007 – and that percentage has been going down.

According to Mr. Hanson's testimony, Missouri Valley had a "net margin" of approximately \$1.9 million in 2007.¹⁷ To calculate that amount, Mr. Hanson subtracted a series of expenses from Missouri Valley's revenues. Most of those expenses were cash expenses, but he also included Missouri Valley's depreciation expense, which amounted to more than \$800,000. Removing depreciation from the calculation yields Missouri Valley's operating cash flow, or the amount of cash it generated from operations in 2007. This amount is \$2.75 million.¹⁸ Missouri Valley generated a comparable amount of operating cash flow in 2006.

Missouri Valley did not invest all, most or even one-third of this cash flow into its plant and network. Instead, Missouri Valley invested about \$861,000 in its plant in 2006 and about \$679,000 in its plant in 2007. This amounts to 29 percent of its operating cash flow for 2006 and 22 percent of its operating cash flow for 2007.¹⁹ The remaining amounts – more than \$2 million each year – essentially were spent to service the debt that Nemont incurred to acquire Missouri

¹⁶ Missouri Valley Initial Brief at 11.

¹⁷ Exhibit MV2, Prefiled Direct Testimony of Mr. Shawn Hanson ("Hanson Prefiled") at Exhibit 1.

¹⁸ All of the calculations in this section are described in more detail in Exhibit 1 to this brief.

¹⁹ Even using Mr. Hanson's "net margin" calculation, Missouri Valley invested only 44 percent of its net margin in plant in 2006 and 35 percent of its net margin in 2007. Thus, the claim that Missouri Valley invests all of its net revenue is untrue on its face.

Valley.²⁰ In fact, Missouri Valley's actual investment in its plant, both as a percentage of its operating cash flow and in actual dollars, has declined consistently over the past three years while its debt payments have remained steady.

When the adjustment for depreciation is flowed into Missouri Valley's calculation of the impact of facilities-based competition from Midcontinent, the picture Mr. Hanson painted changes drastically. Rather than a decline of more than half in Missouri Valley's net margin, Missouri Valley's operating cash flow drops by 37 percent. More important, the remaining operating cash flow of \$1.7 million is more than double the average investment made by Missouri Valley over the last two years, and more than two and half times what Missouri Valley invested in 2007.

This calculation provides a much more realistic view of Missouri Valley's financial situation, both today and in the future, than the one presented by Mr. Hanson. The principal reason that it is more realistic is that Mr. Hanson's calculation treats depreciation as a cash expense when it does not reflect actual current cash expenditures and does not affect cash available for investment in Missouri Valley's plant. What the new calculations show is that Missouri Valley is, in effect, funding its new investment entirely with depreciation, not with its net operating revenues.²¹ This source of funding will remain available regardless of whether Missouri Valley's revenue is affected as much as Mr. Hanson claims. Thus, when Mr. Hanson's calculations are considered in light of this fact, it becomes apparent that Missouri Valley would

²⁰ This debt is held by Missouri Valley, but was incurred by Nemont to finance the purchase of the exchange.

²¹ In fact, Missouri Valley's depreciation has been more than \$100,000 greater than its investment in each of the last two years, so Missouri Valley's net plant in service actually has declined. State commissions generally are concerned when carriers show disinvestment (a situation which more telecommunications plant is depreciated than added) in their operating territories.

have no difficulty maintaining its current levels of investment even if all of his assumptions turned out to be correct. This belies any claim that Missouri Valley will suffer an undue economic burden as a result of interconnection.

B. Midcontinent's Evidence Demonstrates that Missouri Valley Will Not Bear an Undue Economic Burden from Complying with Section 251(c).

While the financial information provided by Missouri Valley is, by itself, enough for the Commission to conclude that interconnection would not cause an undue burden, Midcontinent's evidence also is more than sufficient for the Commission to reach the same conclusion. As described in Midcontinent's brief, there is no evidence that ties Missouri Valley's burden calculation to the interconnection requested by Midcontinent and, even if there were any connection between Missouri Valley's calculation and Midcontinent's request, Midcontinent has proved that the impact would not be undue.

1. There Is No Evidence Connecting the Missouri Valley Impact Calculations to Midcontinent's Request.

Midcontinent's brief established that the record shows that Missouri Valley's impact analysis had no connection to Midcontinent's interconnection request.²² This is critical because Section 251(f)(1) requires that any impact analysis must be made in the context of "the request" for interconnection.²³ Thus, in the absence of a connection to the request, there is no cognizable impact.

Missouri Valley's brief simply does not address this requirement. It cites no evidence and makes no argument that would connect the impacts it alleges to Midcontinent's request. The most Missouri Valley can muster is a statement that "allowing Midcontinent to interconnect physically with Missouri Valley" would be detrimental, but it does not acknowledge the

²² Midcontinent Initial Brief at 13-14.

²³ 47 U.S.C. § 251(f)(1)(B).

existence of indirect interconnection or Mr. Hanson's admission that the impacts would be the same no matter how Midcontinent interconnected with Missouri Valley.²⁴ Thus, the Commission has no basis to conclude that the effects described by Missouri Valley are related at all to Section 251(c) interconnection and cannot conclude that there would be an undue economic impact.

2. There Is Compelling Evidence that Section 251(c) Interconnection Would Not Be Unduly Economically Burdensome.

Missouri Valley focuses its attack on the economic burden issue on the claim that Midcontinent provided no evidence.²⁵ This is incorrect, as all three Midcontinent witnesses provided detailed and specific evidence, much of it entirely unchallenged, on this topic. This evidence compels a conclusion that there will not be an undue burden.

(a) Missouri Valley Misstates the Undue Burden Test.

Initially, Missouri Valley misconstrues the nature of the undue economic burden test. Even while stating that Mr. Gates was "just plain wrong," Missouri Valley misreads the *Iowa* decision, which in fact is consistent with both the Gates testimony and the decisions of other commissions and courts that have had to address the issue.

While Missouri Valley does not say exactly what would constitute an undue burden, it appears that Missouri Valley's view is that nearly any burden would be undue.²⁶ However, that is not what the *Iowa* court said. The *Iowa* court was focused on the types of burdens that should

²⁴ Missouri Valley Initial Brief at 14; Hanson Cross-examination (Harrington) ("Mr. Harrington: One more question about what might affect the impact analysis in this particular case. What if Midcontinent obtained indirect interconnection and connected via another carrier and did not require . . . any facilities-based interconnection with you directly? How would that affect this analysis? Mr. Hanson: If there were another carrier that it could interconnect with in Missouri Valley to get access to all its customer locations, the analysis would be the same.")

²⁵ See, e.g., Missouri Valley Initial Brief at 11.

²⁶ See *id.* at 25.

be considered in evaluating this element of the test, not on the extent of the burden. As the court explained:

It is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission. The FCC's elimination from that assessment of the "economic burden that is typically associated with efficient competitive entry" substantially alters the requirement Congress established. By limiting the phrase "unduly economically burdensome" to exclude economic burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. We have found no indication that Congress intended such a cramped reading of the phrase. If Congress had wanted the state commissions to consider only that economic burden which is in excess of the burden ordinarily imposed on a small or rural ILEC by a competitor's requested efficient entry, it could easily have said so. Instead, its chosen language looks to the whole of the economic burden the request imposes, not just a discrete part.²⁷

This is entirely consistent with what Mr. Gates said in his prefiled testimony, which stated that "this test relates to the financial and operational impact of competition on MVC."²⁸ There is nothing at all in this passage, or any other portion of the *Iowa* decision, that addresses the level at which a burden becomes undue.

As described in Midcontinent's brief and by Mr. Gates, there are other sources that can help the Commission determine whether a burden is undue.²⁹ Dictionaries tell us that an "undue" burden is one that is "excessive" or "exceeding or violating propriety or fitness," and other decision makers have concluded that it is not sufficient for a rural carrier to show merely "a negative revenue effect."³⁰ In that context, Mr. Gates plainly is correct when he states that an undue burden is one that would "harm[] MVC to the point where it was damaging its ability to

²⁷ *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 761 (8th Cir. 2000), *rev'd in part on other grounds*, 535 U.S. 467 (2002).

²⁸ Exhibit M3, Prefiled Testimony of Timothy J Gates ("Gates Prefiled") at 38.

²⁹ Midcontinent Initial Brief at 13 & n. 24; Gates Prefiled at 38.

³⁰ Midcontinent Initial Brief at 13, *citing* Definition of "undue," Merriam-Webster Online, at <http://www.merriam-webster.com/dictionary/undue> and *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).

operate efficiently or to continue to offer services.”³¹ As described above and below, the evidence shows that the impact on Missouri Valley will come nowhere near to that threshold.

In fact, Missouri Valley’s own evidence demonstrates that it does not believe that there will be an undue burden. Mr. Hanson repeatedly told the Commission that, even in light of the impacts he outlined, “[t]he loss of revenue would not damage Missouri Valley’s ability to continue to offer service.”³² If Mr. Hanson, who has a vested interest in convincing the Commission that the burden will be severe, is not willing to tell the Commission that Missouri Valley will be unable to meet its obligations, then there is no reason for the Commission to disagree with him.

(b) Mr. Simmons Demonstrated that Competition Does Not, in General, Create an Undue Economic Burden for Rural Carriers in North Dakota and South Dakota.

A key element in the testimony of Mr. Simmons was his discussion of the experience of other rural carriers that compete with Midcontinent. As Mr. Simmons explained in his prefiled testimony, “Midcontinent has been competing against rural telephone companies in North Dakota and South Dakota since 2004 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.”³³ He confirmed this statement when he was being

³¹ Gates Prefiled at 38.

³² See, e.g., Hanson Prefiled at 26; Hanson Cross-examination (Harrington) (“Mr. Harrington: You just said that there’d be an impact on Midcontinent customers because if Missouri Valley’s service got worse, Midcontinent customers would not have as viable as a choice. Mr. Hanson: I don’t agree that Missouri Valley’s service will necessarily get worse. . . . Mr. Harrington: My understanding of your previous testimony is that you believe there’s an impact on Midcontinent users because Missouri Valley would be unable to maintain the level of service that customers would expect going forward, is that correct? Mr. Hanson: I think we’d be able to maintain[.]”).

³³ Exhibit M1, Prefiled Testimony of W. Thomas Simmons (“Simmons Prefiled”) at 11.

cross-examined by Missouri Valley, noting that “there has been no appreciable harm at all” to the rural carriers that compete against Midcontinent.³⁴

This evidence, essentially unchallenged during the hearing and unmentioned in Missouri Valley’s brief, is significant because it shows that the general rule in North Dakota and South Dakota is that facilities-based competition does not harm rural carriers. Thus, in the absence of some special factor in a particular market, the Commission should conclude that Section 251(c) interconnection will not result in an undue economic burden.

(c) Mr. Gates Demonstrated that Competition Does Not Harm Rural Companies that, Like Nemont and Missouri Valley, Offer Diverse Services to Their Customers.

The second element of Midcontinent’s proof that Missouri Valley will not suffer an undue economic burden was provided by Mr. Gates. In more than a dozen pages of prefiled testimony and more than 30 pages of exhibits, Mr. Gates demonstrated that rural carriers that offer diverse services are not harmed by competition and access line losses, that Missouri Valley and Nemont together offer such services and that Missouri Valley and Nemont are a fully integrated operation. This testimony was detailed, unchallenged and essentially un-cross-examined.³⁵ It also is unmentioned in Missouri Valley’s brief.³⁶

³⁴ Simmons Cross-examination (Hogue) (“It’s really been our experience in all the interconnections that we have accomplished in actually very many communities where there has been no appreciable harm at all. I don’t know of a single case where any of our competitors have asked for relief. In fact, they have become very aggressive in marketing their products against us and while it might cause us a little heartburn from time to time, the bottom line is that the consumer clearly benefits by the participation of both companies.”).

³⁵ The only question Missouri Valley’s counsel asked about these portions of the Gates prefiled testimony related to the issue of whether the Commission should consider Comcast to be Midcontinent’s parent company in the context of this proceeding. He also attempted to ask a question concerning the legal definition of an affiliate, but the objection to that question was sustained.

³⁶ Missouri Valley says that Mr. Gates discusses only Mr. Lundquist’s testimony and “the wonders of competition” and argues that the Commission should consider that Mr. Gates, in his

This evidence is highly relevant to the issues being considered by the Commission in this case. There is no doubt that the operations of Missouri Valley are fully integrated into Nemont. The companies share a general manager and other employees; their vehicles and computers are purchased together; Missouri Valley spends nearly 10 percent of its revenues on services it purchases from Nemont or other Nemont subsidiaries; and the Missouri Valley name was replaced with Nemont in 2006.³⁷ As described above, Missouri Valley also pays off the debt that Nemont incurred to purchase the Williston exchange in the first place.

Given this integration, it is entirely appropriate for the Commission to consider Nemont's resources and services when evaluating the economic impact of Midcontinent's request. As described in Midcontinent's brief, this is important for two reasons.

First, it demonstrates that Missouri Valley/Nemont is precisely the kind of company that will thrive when it faces competition. The diverse services offered by the combined enterprise,

more than 200 appearances as a witness, "has never testified an interconnection is unduly burdensome." Missouri Valley Initial Brief at 25-26. While the latter statement is true, it also is meaningless. As a review of the curriculum vitae attached to the prefiled testimony shows, only a handful of his cases have involved rural exemption issues. Gates Prefiled at Exhibit TJG-1. Missouri Valley's characterizations of this testimony as mere "opinion" and of Mr. Gates as prejudiced in favor of competition appear to be an attempt to divert the Commission from the detailed factual information and expert analysis that Mr. Gates provides. *See id.* at 29-39, Exhibit TJG-2, Exhibit TJG-3. Missouri Valley also mischaracterizes Mr. Gates's testimony during cross-examination, referring to the continuum he was asked to draw as describing "economic burden" when it actually was continuum of competitive impact. *Compare* Missouri Valley Initial Brief at 10 with Gates Cross-examination (Hogue) ("So this is the continuum of the impact of different types of competition on the incumbent with total service resale having the least impact not resulting in any effective competition or meaningful competition and full facilities-based, I'm just going to say FB for facilities-based, having the greatest impact on the incumbent because it actually is an alternative for the consumer.")

³⁷ *Compare* MVC Late-filed Exhibit -1 with Hanson Prefiled, Exhibit 1 at 1. Midcontinent's brief noted that it did not appear that Missouri Valley had filed its late-filed exhibit at the time of the brief. Midcontinent Initial Brief at 24, n.60. While Missouri Valley did file the exhibit, it did not reach the Commission until August 28, four days after it was due. In addition, Missouri Valley did not serve Midcontinent with that filing, even though the exhibit was filed in direct response to Midcontinent's request. As the cover letter reflects, the only individuals who were sent copies were Mr. Hanson and Missouri Valley's counsel.

are, as explained in the Raymond James study provided and analyzed by Mr. Gates, the same kinds of services that have permitted other rural carriers to respond to competition effectively.³⁸

The Commission should accept his expert opinion that “Nemont’s diversification provides a buffer to competitive inroads” that will protect it following facilities-based interconnection.³⁹

Second, when the Commission considers Missouri Valley/Nemont as a whole, it is evident that the economic burden will not be serious, let alone undue. As described in Midcontinent’s brief, Nemont has more than \$40 million in annual revenues, so even under Mr. Hanson’s analysis, the net impact of competition from Midcontinent would amount to less than 3 percent of Nemont’s revenues.⁴⁰ Such a small percentage cannot be deemed to be an undue burden.

Missouri Valley does not rebut this evidence. Instead, it attempts to argue that consideration of Nemont is barred by the terms of Section 251(f)(1) and by due process requirements. These arguments are insubstantial.

First, Section 251(f)(1) does not contain any limitation that would prevent consideration of the integration of Missouri Valley into Nemont. Missouri Valley argues that, because the request for interconnection goes to “a rural carrier,” the Commission can consider only evidence as to the specific certificated entity that receives the request.⁴¹ This interpretation is

³⁸ Gates Prefiled at 29-30.

³⁹ *Id.* at 31. Missouri Valley’s claim that Mr. Gates said that Missouri Valley should have “unfettered access” to Nemont’s resources also is incorrect. Missouri Valley Initial Brief at 10-11. Rather, he indicated that “the resources of the parent should be available for their best use among all of the subsidiaries[.]” Gates Cross-examination (Hogue).

⁴⁰ Midcontinent Initial Brief at 25.

⁴¹ Missouri Valley Proposed Order at 16. It appears that the only place that Missouri Valley actually makes any argument about consideration of Nemont and its resources is in its proposed order. While Midcontinent notes that failure to make an argument in a party’s brief generally is viewed as constituting a waiver of that argument, and that a party’s proposed order is supposed to reflect the arguments in its brief, it has determined that it is appropriate to respond to these

unreasonable because it would require the Commission to import new words into the statute and because it would permit rural carriers to evade the termination provisions entirely.

While the words “a rural carrier” appear in Section 251(f)(1), they do not appear in the portions of either Section 251(f)(1)(A) or Section 251(f)(1)(B) that describe the issues to be considered in a rural exemption termination proceeding.⁴² Both of these paragraphs simply state that the Commission must determine whether the “request is not unduly economically burdensome, is technically feasible, and is consistent with section 254[.]”⁴³ These words do not contain any specific limit on consideration of the resources available to a rural carrier, and there is no reason why they should. A construction of Section 251(f)(1) that requires the Commission to add the words “on the rural carrier that received the request” to this language would be disfavored by the canons of statutory construction, which expect interpretation to be based on the words in the statute, not words that are not there. Indeed, because the language of Section 251(f)(1) “looks to the whole of the economic burden the request imposes, not just a discrete part,” it would be inappropriate to consider only one element of a carrier’s ability to bear that burden.⁴⁴

The other reason that the Commission should disfavor Missouri Valley’s interpretation is that, as explained in Midcontinent’s brief, Missouri Valley’s interpretation effectively would make it impossible to terminate any rural exemption. Under Missouri Valley’s interpretation, rural carriers would be able to organize their businesses, as Missouri Valley has, to shift

arguments and certain others that appear only in Missouri Valley’s proposed order to provide the Commission with a full record.

⁴² 47 U.S.C. § 251(f)(1)(A), (B).

⁴³ *Id.*

⁴⁴ *Iowa*, 219 F.3d 744, 761.

revenues away from the entity that holds the state certificate.⁴⁵ Because Congress expected that the rural exemption could be terminated, any interpretation that would permit this sort of evasion is not consistent with Congressional intent.

A broad understanding of what may be considered in the economic burden analysis also is consistent with the treatment of carriers under Section 251(f)(2). The FCC determined that carrier eligibility for suspensions and modifications would be based on the carrier's overall size, not the size of a subsidiary in a particular state.⁴⁶ This interpretation was necessary to prevent absurd results, such as an application for a suspension by Qwest in North Dakota. A similar approach in interpreting Section 251(f)(1) is appropriate here, and gives the Commission the necessary discretion to consider all relevant factors in its economic burden analysis.

Missouri Valley's due process argument is equally unavailing.⁴⁷ As a threshold matter, since the statute encompasses all relevant facts as to economic burdens (and as to universal service), Missouri Valley can be deemed to have notice that all of those facts could be considered.

However, Missouri Valley also had actual notice that the integration of Nemont and Missouri Valley would be considered in this proceeding, as well as an opportunity to respond. Missouri Valley should have been aware that its relationship with Nemont would be at issue from both its deposition, where there were extensive discussions of the relationship among Missouri Valley, Nemont and the other Nemont affiliates, and from Midcontinent's discovery requests, which included several questions about affiliate transactions, services offered by Missouri Valley, Nemont and other Nemont affiliates and customer purchases of services offered

⁴⁵ Midcontinent Initial Brief at 25.

⁴⁶ 47 C.F.R. § 51.403.

⁴⁷ Missouri Valley Proposed Order at 16.

by Missouri Valley, Nemont and other Nemont affiliates.⁴⁸ Many of the discovery responses required participation by Nemont, as the requested information would not have been in possession of Missouri Valley if it were a standalone entity and, of course, Mr. Hanson is the general manager of both Missouri Valley and Nemont, so notice to him in one capacity provided actual notice to him in the other.⁴⁹ If that were not enough to put Missouri Valley and Nemont on notice, the issue was discussed directly and at length in Midcontinent's prefiled testimony.⁵⁰

Missouri Valley also had every opportunity to confront and respond to Midcontinent's evidence and the underlying argument. It could have objected to the discovery requests. It could have cross-examined Mr. Gates on the integration of the companies or the relevance of the companies' integration.⁵¹ It could have, as it did on several other issues, had Mr. Hanson provide additional oral testimony at the hearing to respond to Mr. Gates.⁵² Missouri Valley took none of these steps.

These facts demonstrate that there is no basis at all for a due process claim. Due process claims require evidence that the party did not have actual notice and was prejudiced by the lack

⁴⁸ The responses to two of these discovery requests were admitted as exhibits. *See* Exhibits C2 (description of intracompany tax transactions) and C3 (description of interconnection with affiliates).

⁴⁹ In any event, there is no reason to think that it was necessary to provide notice to Nemont, as Nemont will not be required to take any action as a result of this proceeding.

⁵⁰ Gates Prefiled at 32-36.

⁵¹ As noted above, Missouri Valley actually asked Mr. Gates only one question that related to this issue, and did not challenge any of his factual statements or his expert opinion.

⁵² Some portions of Mr. Hanson's oral testimony do appear to have been intended to address elements of Midcontinent's showing. For instance, he suggested at one point that there might be financial constraints on Nemont's ability to shift funds to Williston, although he never explained how those constraints could prevent Nemont from choosing to invest in Williston rather than provide dividends to members of the Nemont cooperative in Montana.

of notice.⁵³ Neither of those tests is met here: Missouri Valley had ample notice from multiple sources, had several opportunities to respond to the issue and, equally important, to object to its consideration, and chose not to take advantage of those opportunities. Thus, all due process requirements were met.

(d) Corrections to Missouri Valley’s Economic Analysis Demonstrate that the Impact Is Even Less than Missouri Valley Acknowledges.

Mr. Lundquist’s testimony and other evidence establish that Missouri Valley’s economic analysis contains significant errors and omissions that must be addressed. When these corrections are made, it is evident that the economic impact on Missouri Valley and Nemont will be inconsequential.⁵⁴

Missouri Valley’s first objection is to Mr. Lundquist’s adjustment to account for the transition between resale and facilities-based service. Missouri Valley argues that there is some unspecified contradiction between Mr. Lundquist’s timeline and the timeline described by Mr.

⁵³ See, e.g., *St. Anthony Hospital v. U.S. Dept. of Health and Human Svcs.*, 309 F.3d 680, 708 (10th Cir. 2002) (denying relief because “as long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, the notice is sufficient”) and noting that due process violations require a showing that a party “has sustained prejudice as a result of the allegedly insufficient notice.”) (quoting *Savinia Home Indus., Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979)); *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431 (9th Cir. 1985) (“The purpose of the notice requirement . . . is satisfied, and there is no due process violation, if the party proceeded against ‘understood the issue’ and ‘was afforded full opportunity’ to justify his conduct.”) (quoting *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885 (9th Cir. 1972), cert. denied 412 U.S. 918 (1973)).

⁵⁴ Midcontinent notes that Missouri Valley objects to Mr. Lundquist’s evidence because it is a “critique,” not an independent study. For all the reasons described in Midcontinent’s brief, this characterization is incorrect. Midcontinent Initial Brief at 17, n.39. However, even if it were correct, it would not affect the validity of his proposed adjustments or the impact of those adjustments on the overall calculations. Missouri Valley’s characterization of Mr. Lundquist as an “opinion” witness is incorrect and irrelevant. See, e.g., Missouri Valley Initial Brief at 17. Most of his analysis was based on the same facts used by Mr. Hanson, which means his testimony was no more or less an opinion than Mr. Hanson’s, and as an expert witness his opinions may be relied upon by the Commission. Moreover, this testimony also was reviewed by Mr. Gates for accuracy. Gates Prefiled at 32, 38.

Simmons.⁵⁵ This is entirely unsupported by the record. Mr. Simmons describes both the timeline for implementing interconnection, 90 days, and the transition period from resale to facilities-based service, a period of six months.⁵⁶ That is entirely consistent with Mr. Lundquist's testimony, which assumes that interconnection will be implemented on January 1, 2009 and that it will take six months to effect the transition for all customers.⁵⁷ As Mr. Lundquist explained, his estimate of the transition period was based on Midcontinent's experience with both Missouri Valley and other carriers, so it is entitled to significant weight.⁵⁸

Missouri Valley next objects to Mr. Lundquist's analysis of growth rates. Initially, Missouri Valley mischaracterizes Mr. Lundquist's review of its calculations, stating that he improperly assumed that Missouri Valley included the ramp-up period when Midcontinent first started providing resold service in Williston.⁵⁹ Since Mr. Lundquist correctly noted that Missouri Valley's analysis started in January 2007, this is incorrect.⁶⁰ Next, Missouri Valley's claim that Mr. Lundquist's graph shows "accelerating" growth is simply incorrect; if growth were accelerating, the curve would point sharply upward, instead of leveling off.⁶¹ Missouri Valley also argues that the Commission should draw a negative inference concerning likely growth rates because Mr. Lundquist did not obtain information about other markets from Midcontinent.⁶² However, Missouri Valley provides no reason to think that Mr. Lundquist

⁵⁵ Missouri Valley Proposed Order at 8.

⁵⁶ Simmons Prefiled at 13.

⁵⁷ Exhibit M2, Prefiled Testimony of Scott C. Lundquist ("Lundquist Prefiled") at 8-10.

⁵⁸ *Id.* at 9.

⁵⁹ Missouri Valley Initial Brief at 18.

⁶⁰ Lundquist Prefiled at 11-12.

⁶¹ Missouri Valley Proposed Order at 9; Lundquist Prefiled at 14 (Figure 1).

⁶² Missouri Valley Initial Brief at 18. The case Missouri Valley cites for this proposition, *Medical Arts Clinic v. Franciscan Initiatives*, is entirely inapposite. That case holds that sanctions, including drawing an adverse inference, may be applied when a party refuses to

should have asked for that information, and the most relevant information about how a specific market will respond to competition is information on how that specific market already has responded. Moreover, Missouri Valley does not explain why an expert's judgment on this topic should be doubted when Missouri Valley itself did not ask for that information.

Missouri Valley also makes two arguments that are unrelated to the analysis that Mr. Hanson actually performed. The first is that it would be reasonable to expect a growth spike when Midcontinent begins to provide facilities-based service, and the second is that it is reasonable to believe that Midcontinent would achieve market share equal to 50 percent of its cable penetration.⁶³ However, neither of these arguments formed the basis for Mr. Hanson's proposed growth rate, which is a simple percentage extrapolation.⁶⁴ Because these arguments were not part of Mr. Hanson's analysis, they are simply post hoc rationalizations and cannot be used to demonstrate that it was correct. Moreover, neither of them has any other basis in the record. The evidence shows that Midcontinent's growth rate has leveled off, not increased or even remained steady, and Mr. Simmons testified that Midcontinent could lose customers, not gain them, in the transition to facilities-based service.⁶⁵ In addition, there is no evidence at all that a 50 percent penetration level is more or less likely than 30, 40 or 80 percent. Neither of

comply with a discovery order. *Med. Arts Clinic v. Franciscan Initiatives*, 531 N.W.2d 289, 297 (1995). There was no discovery request, let alone an order, concerning this issue and Midcontinent did not refuse to provide information to Missouri Valley, let alone to its own expert.

⁶³ Missouri Valley Initial Brief at 18; Missouri Valley Proposed Order at 10. The second argument is based on a fact that was not placed in evidence in this proceeding, which is Midcontinent's cable penetration in Williston.

⁶⁴ Hanson Prefiled at 17.

⁶⁵ Simmons Cross-examination (Hogue) ("I don't know that our plans were looking at growth potential in those particular customers. We were looking for an opportunity simply to move our customers from the wholesale/resale basis over to the facilities basis. I don't know if that in itself would generate more customers, in fact, it's our experience that it hasn't in the past. In some cases we've even lost customers.").

these arguments provides a reason to believe Mr. Hanson's extrapolated percentages or doubt Mr. Lundquist's use of recent actual data to calculate the growth rate in the model.

The only reason Missouri Valley gives in its brief for ignoring Mr. Lundquist's special access adjustment is that customers will change their special access service at the same time they change their facilities-based voice service.⁶⁶ This claim is contradicted by Mr. Hanson's own testimony, however, because he acknowledged that there already "are some private line circuits, special access, that are provisioned by Midco."⁶⁷ Moreover, his argument is not that special access revenues depend on interconnection, but that they depend on the other carrier's ability to get customers to switch their voice service.⁶⁸ Since business customers in Williston already can buy resold voice service from Midcontinent, it is apparent that a lack of Section 251(c) interconnection imposes no barrier to Midcontinent competing in the special access market.

Missouri Valley's arguments against Mr. Lundquist's universal service adjustment have changed since the hearing. At the hearing, Mr. Hanson said that it was impossible to obtain safety valve relief.⁶⁹ Now, Missouri Valley claims that taking advantage of the safety valve would be inconsistent with the intent of the rule.⁷⁰

These concerns are baseless. As described in Midcontinent's brief, eligibility under the safety valve rule is based entirely on average loop cost, which is calculated according to the

⁶⁶ Missouri Valley Proposed Order at 10.

⁶⁷ Hanson Cross-examination (Harrington).

⁶⁸ Hanson Oral Direct (Hogue) ("And with that [voice service] they're going to be pitching the special access and it will be lost as a natural consequence.")

⁶⁹ Hanson Oral Direct (Hogue) ("Mr. Hogue: And so far, your efforts to date, you have not been able to get out from underneath the parent trap. Mr. Hanson: Despite the best efforts of staff and their day-to-day work with USAC, we cannot do it."). As noted in Midcontinent's brief, it is likely that the real reason Missouri Valley does not qualify for safety valve relief is that it has not invested enough in Williston. Midcontinent Initial Brief at 19, n.48.

⁷⁰ Missouri Valley Initial Brief at 22.

FCC's rules.⁷¹ If a carrier meets those standards, it qualifies for additional support, just as a taxpayer can qualify for a tax deduction by meeting the specific rules that govern the deduction, whether or not the underlying purpose of the deduction is met. Moreover, Missouri Valley's testimony demonstrates that it has no qualms about accepting any additional universal support that it can obtain, as Missouri Valley has been "endeavoring to get around" the parent trap since at least the time Mr. Hanson became general manager.⁷² Given these efforts, there is no reason to believe that Missouri Valley would choose not to accept safety valve relief once it became available.

Missouri Valley also argues that the safety valve offset should be rejected because Mr. Lundquist is not certain enough that Missouri Valley would be eligible.⁷³ It makes this argument by selectively excerpting quotations from his prefiled testimony, but those quotations stop at the point where Mr. Lundquist performs his analysis of the actual impact of the safety valve calculation. After he does the calculation, he says:

I have determined that the per line USF cost . . . would increase significantly, so that the [Missouri Valley] lines would qualify for the High Cost Loop support as soon as 2009. This qualitative shift in the MVC's per line cost would cause a sizable increase in the federal USF subsidies, even the when the safety valve's limitation to 50% of the calculated expense change is accounted for.⁷⁴

These statements are not contingent or uncertain. They, and Mr. Lundquist's associated calculations, demonstrate that safety valve funding will be available and that it will be significant. Consequently, the Commission cannot credit Missouri Valley's argument.

⁷¹ Midcontinent Initial Brief at 20-21.

⁷² Hanson Oral Direct (Hogue).

⁷³ Missouri Valley Initial Brief at 23.

⁷⁴ Lundquist Prefiled at 26.

Finally, Missouri Valley's assertion that its costs will not change as its revenues decline should be dismissed.⁷⁵ As Mr. Lundquist explains, it is more realistic to expect that total costs would go down as Missouri Valley responded to competition.⁷⁶ Moreover, the testimony and other evidence demonstrate that there are areas in which Missouri Valley could reduce its costs. For instance, Mr. Hanson acknowledged that Missouri Valley will be renegotiating its union contract in 2009, which will present an opportunity to save labor and related costs.⁷⁷ In addition, because so many of Missouri Valley's costs come from affiliate transactions, there are significant opportunities to readjust those relationships. In particular, Missouri Valley now pays Nemont \$289,000 a year, or just over \$24,000 a month, for use of a portion of the Nemont headquarters building in Scobey, Montana.⁷⁸ Considering that Missouri Valley has fewer than 20 employees and already has a building in Williston, it seems likely that Missouri Valley could reduce its costs by using less of the Nemont headquarters building or by not using it at all.

Taken together, all of Midcontinent's adjustments reduce the potential impact of Section 251(c) interconnection to a level that is effectively negligible. The \$367,000 impact that Mr. Lundquist calculates for 2012 (which does not consider any possible cost reductions or win-back opportunities) would leave Missouri Valley with ample revenues to maintain or significantly increase its current level of investment in Williston. And, when measured as a percentage of Nemont's revenues, this impact would have no meaningful effect at all. In light of these

⁷⁵ Missouri Valley Proposed Order at 15.

⁷⁶ Lundquist Prefiled at 22, n.30.

⁷⁷ Hanson Cross-examination (Harrington). Mr. Hanson also noted that Missouri Valley's non-union employees were paid at the same rates as union employees. *Id.* Missouri Valley need not cut wages to reduce its projected costs, which assume significant increases in labor expense.

⁷⁸ MVC Late-filed Exhibit -1. Midcontinent notes that an Internet search for commercial real estate in Scobey showed that one 7,500 square foot property there was available to rent for \$700 per month, so it is not apparent that Missouri Valley is paying market rates. *See* <http://www.gndc.org/scobey.htm>.

adjustments and all of the other factors described above, it is apparent that facilities-based competition will not cause an undue economic burden on Missouri Valley. Therefore, the Commission should conclude that Section 251(c) interconnection will not impose an undue economic burden on Missouri Valley.

IV. There Will Be No Negative Effect on Universal Service.

The next contested issue is the effect that Section 251(c) interconnection will have on universal service. This issue is connected to the question of economic burden because if Missouri Valley is not unduly burdened it almost certainly will have the resources necessary to meet universal service goals. In fact, the bulk of Missouri Valley's argument is related to its claims concerning the economic burden of interconnection.⁷⁹

Missouri Valley's brief, however, is contradicted by Mr. Hanson's repeated statements that Missouri Valley will continue to meet its universal service obligations even after Midcontinent offers facilities-based competition in Williston. He made these statements in his prefiled testimony⁸⁰ and he made them during cross-examination.⁸¹ These statements are notable because they were not concessions or admissions. In both cases, they were made entirely of his own volition.

While Mr. Hanson's statements, standing alone, are sufficient for the Commission to conclude that Missouri Valley expects to be able to meet its current universal service obligations,

⁷⁹ See Missouri Valley Initial Brief at 27-29.

⁸⁰ Hanson Prefiled at 26.

⁸¹ Hanson Cross-examination (Harrington) ("Mr. Harrington: You just said that there'd be an impact on Midcontinent customers because if Missouri Valley's service got worse, Midcontinent customers would not have as viable a choice. Mr. Hanson: I don't agree that Missouri Valley's service will necessarily get worse. . . . Mr. Harrington: My understanding of your previous testimony is that you believe there's an impact on Midcontinent users because Missouri Valley would be unable to maintain the level of service that customers would expect going forward, is that correct? Mr. Hanson: I think we'd be able to maintain[.]").

the remaining evidence supports that conclusion as well. Nothing in Missouri Valley's brief affects this result.

First, there is no evidence that connects any of the supposed harms to the specific interconnection request. Missouri Valley's brief provides no evidence or analysis on this point, but simply assumes that competition and Section 251(c) interconnection are one and the same. In the absence of a connection between the supposed harm and Section 251(c) interconnection, the Commission cannot conclude that interconnection would harm universal service.⁸²

Second, the economic impact analysis discussed above shows that Missouri Valley will have ample resources to meet its universal service obligations after interconnecting with Midcontinent. Most important, Missouri Valley will retain operating cash flow that far exceeds its current levels of investment in its facilities, which means that it actually will have sufficient cash to invest much more than it does today.⁸³ This analysis is buttressed by the findings of the Raymond James study, and the conclusion that diversified rural carriers compete successfully.⁸⁴

Missouri Valley's first rebuttal to these facts is Mr. Hanson's claim that universal service burdens will increase.⁸⁵ This claim is inconsistent, however, with the actual proposals that are being considered by the FCC, which do not impose new obligations and which actually would provide additional targeted funding for broadband investment.⁸⁶ Thus, there is no reason to believe that Missouri Valley will be subject to additional obligations, let alone obligations for

⁸² Midcontinent Initial Brief at 26-27.

⁸³ *See supra* Section III.A.

⁸⁴ *See supra* Section III.B.2(c).

⁸⁵ Missouri Valley Proposed Order at 17-18.

⁸⁶ Midcontinent Initial Brief at 28-29; *see High-Cost Universal Service Support, Notice of Proposed Rulemaking*, 23 FCC Rcd 1531, 1543-4 (2008).

which it is not compensated. Even if that were to happen, however, Missouri Valley would have the opportunity to seek relief at that time.

Missouri Valley also argues that its obligations to serve the entire Williston exchange should affect the Commission's analysis. Once again, however, the facts disagree with Missouri Valley's claims. Most notably, unlike many other rural carriers, Missouri Valley does not experience significantly different costs for customers inside and outside the Williston city limits. Missouri Valley's average loop length, the most important factor in costs, is not much longer outside the city limits than inside.⁸⁷ Thus, even if Midcontinent served only customers within the Williston city limits, there would not be a significant difference between the facilities required to serve Midcontinent customers and the facilities required to serve Missouri Valley customers.

In addition, Missouri Valley's obligations to serve outside the Williston city limits are not materially different from Midcontinent's. Both companies are subject to the same statutory requirement to serve any customer that is willing to pay the cost of extending lines to the customer's premises, and both have the same right to refuse service to a customer who will not pay.⁸⁸ As Commissioner Clark noted during the hearing, this is not the same as a traditional carrier of last resort obligation.⁸⁹

⁸⁷ See Exhibit C3.

⁸⁸ N.D. CENT. CODE § 49-21-23.2; *see also* Exhibit C3 (Missouri Valley policy on extension of lines, requiring payment for certain line extensions). Missouri Valley suggests that Mr. Simmons and Mr. Gates claimed that Midcontinent has no universal service obligations outside Williston city limits. Missouri Valley Initial Brief at 28, *citing* Simmons Prefiled at 8, Gates Prefiled at 13. There are no such statements in the testimony of either witness, either at the cited pages or anywhere else.

⁸⁹ Hanson Cross-examination (Clark) ("Commissioner Clark: There's been some reference to COLR obligations. It's my understanding as I'm often told by my counsel, from a North Dakota standpoint and statute we don't have what you'd call carrier of last resort.").

In fact, Midcontinent already does provide service outside the city limits. While these customers all are relatively close to the boundary, this nevertheless demonstrates that Missouri Valley's claim that Midcontinent will restrict its service to the city itself are untrue.⁹⁰ For that matter, the Commission should give no weight to Missouri Valley's claim that Midcontinent could withdraw from the market.⁹¹ There is no evidence suggesting that Midcontinent would withdraw, and it is absurd to think that a few requests for service in Williston would result in Midcontinent turning in its CLEC certificate.⁹²

Missouri Valley's claims about money flowing out of its pockets and potential effects on universal service can be dismissed even more easily.⁹³ Today, more than 70 percent of the operating cash flow generated by Missouri Valley already leaves the market in the form of repayment of the debt that Nemont incurred to buy the Williston exchange, and any profits that Missouri Valley might generate would benefit Nemont's cooperative members in Montana.⁹⁴ Moreover, Midcontinent's facilities-based entry will result in new, additional spending in Williston on plant, equipment and personnel. Most important, the reality is that a significant portion of whatever revenues Missouri Valley loses will go to Williston consumers in the form

⁹⁰ See Late-filed Exhibit C9. In light of these facts, Missouri Valley's argument that the Commission could infer that Midcontinent will not serve customers outside the city limits is frivolous. Missouri Valley Proposed Order at 17.

⁹¹ Missouri Valley Initial Brief at 31.

⁹² Missouri Valley also claims that its current expenditures on Lifeline service are significant to the universal service analysis. However, according to Mr. Hanson, these expenditures amount to \$3.50 a month per Lifeline customer, for a total of less than \$20,000 a year. Hanson Prefiled at 34. The net savings for a consumer who switches service from Missouri Valley to Midcontinent could well exceed \$3.50 per month. Regardless of whether Midcontinent participates in the Lifeline program in Williston, such savings would benefit low income customers as much as or more than they would benefit other customers. Moreover, Missouri Valley does not explain how Midcontinent could participate in Lifeline in Williston today, since pure resellers are ineligible for designation as eligible telecommunications carriers. 47 C.F.R. § 54.201(d)(1).

⁹³ *Id.* at 29-30.

⁹⁴ See *supra* Section III.A.

of reduced bills for telephone and high speed Internet service, and those customers also will benefit from more advanced services, such as the 10 Mbps Internet service that Midcontinent offers today.

Indeed, Missouri Valley's brief makes no mention of any benefits to consumers from facilities-based competition, let alone the universal service benefit of making lower-priced and more advanced services available to consumers. As Mr. Gates noted, this is a significant reason to promote competition, and the Commission should recognize that it far outweighs the remote possibility of any universal service harms.⁹⁵

V. The Public Interest Will Benefit from Facilitating Competition in Williston.

Public interest considerations are relevant only to the Commission's consideration of Missouri Valley's application for Section 251(f)(2) suspension or modification.⁹⁶ The public interest analysis also, however, confirms the wisdom of lifting the exemption in Williston because there will be significant public interest benefits to encouraging facilities-based competition in that market.

Nearly all of the evidence of public interests benefits is unrebutted. In particular, it is evident that competition would be good for Williston consumers, who have not had the benefit of improvements in DSL speeds, in reduced costs for features and other services, improved customer service and the other positive effects of competition.⁹⁷ These types of benefits are well-understood and are significant to consumers.

Missouri Valley's public service arguments focus on economic harms, pricing and its claims about a level playing field. For the reasons described above and in Midcontinent's initial

⁹⁵ Gates Prefiled at 24-25, 30-32.

⁹⁶ 47 U.S.C. § 251(f)(2)(B).

⁹⁷ Midcontinent Initial Brief at 33-35; Gates Prefiled at 31-32, 39; Simmons Prefiled at 10-11.

brief, the economic harm argument is incorrect, as Missouri Valley will continue to have the resources necessary to invest in Williston.⁹⁸ The problem in Williston never has been the availability of revenues to support investment; it is Missouri Valley's unwillingness to invest, despite its commitment when it bought the exchange.

Missouri Valley also suggests that there will be no public interest benefits because Midcontinent offers the same features and services in Williston as in Bismarck.⁹⁹ This argument is wrong as a matter of fact, because review of Midcontinent's web site demonstrates that some services available in Bismarck, such as voice mail, are unavailable in Williston.¹⁰⁰ More important, it does not account for improvements in service that are available only to facilities-based customers because Midcontinent has control over the network. These improvements can include greater reliability, new features or inclusion of existing features in service packages at no additional charge.¹⁰¹ For instance, as Mr. Simmons noted in his testimony, "Midcontinent's

⁹⁸ See *supra* Sections III.A, IV.

⁹⁹ Missouri Valley Initial Brief at 10; see also Hanson Oral Direct (Hogue) (stating that Midcontinent offers the same services in Bismarck as in Williston). Missouri Valley appears to have abandoned its suggestion at the hearing that the Midcontinent switch outage earlier this year provides a reason to suspend Missouri Valley's obligations. However, to the extent that Missouri Valley revives this argument in its reply brief, it should be dismissed. As Mr. Simmons testified, Midcontinent has had one switch failure in the entire time it has provided local telephone service and, more significantly, Midcontinent continuously invests in increasing the reliability of its network through such mechanisms as self-healing fiber rings. Simmons Prefiled at 5-7; Simmons Cross-examination (Wefald) ("Commissioner Wefald: As still a lay person, would you help me understand the self-healing fiber ring? Mr. Simmons: I wish I had a map to show you. It's actually one of our greatest points of pride. Over the last few years, Midcontinent has built ring architecture to deliver our services to our individual communities. The rings are fiber optic and what happens in a ring concept is if you have a break that occurs on one side of the ring, the service will automatically reverse, virtually in the blink of an eye, to go the other way around and there is no service interruption.").

¹⁰⁰ The services available in individual markets can be accessed by navigating to the service locator page on the Midcontinent web site and inputting street addresses in each market. The service locator page is located at <http://www.midcocomm.com/resourcecenter/index.cfm/189/Customer-Service/Service-Locator>.

¹⁰¹ See Gates Prefiled at 11; Simmons Prefiled at 10-11.

standard [facilities-based] phone service includes call waiting, three-way calling and other calling features at no charge, when many incumbent phone companies charge for these services.”¹⁰² The evidence in this proceeding also includes a specific example of how competition benefits consumers, because Mr. Hanson acknowledged that Missouri Valley’s recent increase in DSL speeds was forced, in part, by competition.¹⁰³

Missouri Valley’s final argument, again, is that Midcontinent has a competitive advantage over Missouri Valley because Midcontinent is a cable operator.¹⁰⁴ This argument might have some weight if Missouri Valley were legally prohibited from providing video services and if Missouri Valley did not have competitive advantages of its own. However, as discussed in Midcontinent’s initial brief, neither of these conditions exists.¹⁰⁵ Missouri Valley has made a business decision not to offer video, one it could change at any time, and one that could be changed with little or no investment by reselling satellite TV service. In addition, Missouri Valley has its own competitive advantages, including affiliation with a wireless provider and its incumbent status in the market, that are not available to Midcontinent at this time. Indeed, even if the Commission were to conclude that Midcontinent has a competitive advantage, that would be no reason to prevent Midcontinent from competing with Missouri Valley. The entire purpose of the Telecommunications Act of 1996 was to encourage competition and permit competitors that could develop advantages based on the services they offered to the public to succeed and maximize consumer welfare. That sort of competition is not present in Williston today, and it is what Midcontinent seeks to bring to this community.

¹⁰² Simmons Prefiled at 10.

¹⁰³ Hanson Cross-examination (Harrington) (“ . . . if we’re truthful, it’s in response in part to competition.”).

¹⁰⁴ Missouri Valley Proposed Order at 44.

¹⁰⁵ Midcontinent Initial Brief at 35.

VI. All Remaining Issues Should Be Decided in Favor of Midcontinent.

The four issues discussed above are the principal areas of dispute in this proceeding. Several other issues, however, must be considered under Section 251(f)(1) and Section 251(f)(2). Each of them should be decided in Midcontinent's favor.

A. Missouri Valley Bears the Burden of Proof on Its Application for Suspension or Modification.

Missouri Valley asserts that, because the burden of proof for a Section 251(f)(1) exemption proceeding falls on the requesting carrier, “[i]t must be concluded that the party making the request for interconnection . . . must prove that the exemption (if terminated) should not be suspended or modified under Section 251(f)(2).”¹⁰⁶ Missouri Valley bases this claim on the court's decision in *Iowa*, which vacated the FCC's burden of proof rules for Section 251(f)(1) exemption proceedings.

Missouri Valley neglects to mention, however, that there is a specific FCC rule on the burden of proof in suspension cases and that the *Iowa* court did not vacate that rule.¹⁰⁷ That rule remains in effect, and it states that a carrier seeking a suspension or modification “must prove to the state commission . . . that it is entitled” to the suspension or modification.¹⁰⁸ Thus, there is a binding, effective rule that requires that the burden of proof in a suspension proceeding must be placed on the carrier that asks for the suspension. Therefore the burden of proof in the Section 251(f)(2) docket is on Missouri Valley.

¹⁰⁶ Missouri Valley Initial Brief at 7-8.

¹⁰⁷ See *Iowa Utils. Bd. v. FCC*, 219 F.3d at 762 (vacating 47 C.F.R. § 51.405(a), (c) and (d), but not 47 C.F.R. § 51.405(b)).

¹⁰⁸ 47 C.F.R. § 51.405(b).

B. There Is No Dispute that It Is Technically Feasible for Missouri Valley to Comply with Midcontinent's Request.

Midcontinent's initial brief demonstrated that it is technically feasible for Missouri Valley to interconnect with Midcontinent.¹⁰⁹ Missouri Valley does not dispute this fact and its proposed order recites that "Midcontinent's requested interconnection with number portability is technically feasible."¹¹⁰ Consequently, the Commission should conclude that the technical feasibility test under both Section 251(f)(1) and Section 251(f)(2) has been met.

C. Facilities-based Competition Will Not Have an Adverse Economic Impact on Users of Telecommunications Services.

As described in Midcontinent's initial brief, the Section 251(f)(2) analysis requires the Commission to consider whether "users of telecommunications services" will suffer "a significant adverse economic impact" if a suspension or modification is not granted.¹¹¹ Midcontinent has shown that there would be no harm to Williston consumers if Missouri Valley is required to provide Section 251(c) interconnection and that there will be significant consumer benefits, particularly in light of Missouri Valley's current go-slow approach to upgrading its service.¹¹²

Missouri Valley's analysis of this issue rests entirely on its claims about damage to Missouri Valley if facilities-based competition emerges.¹¹³ This, of course, is not the relevant test, because Section 251(f)(2) addresses impacts on consumers of telecommunications services, not on carriers. Moreover, for all of the reasons described above, the evidence does not support

¹⁰⁹ Midcontinent Initial Brief at 10-11.

¹¹⁰ Missouri Valley Proposed Order at 43.

¹¹¹ 47 U.S.C. § 251(f)(2), Midcontinent Initial Brief at 32-33.

¹¹² Midcontinent Initial Brief at 32-33. Given Missouri Valley's recent disinvestment, "go slow" may be an unduly optimistic description. *See supra* n. 21.

¹¹³ Missouri Valley Proposed Order at 33-34.

these claims.¹¹⁴ In addition, Missouri Valley, while claiming that Midcontinent did not provide any evidence on this issue, ignores all of the evidence of consumer benefits from facilities-based competition. This combination – no evidence of negative impacts on customers and significant evidence of consumer benefits – demonstrates that Missouri Valley cannot meet this prong of the Section 251(f)(2) test.

D. The Commission Should Adopt Midcontinent’s Proposed Implementation Schedule.

Missouri Valley’s brief does not dispute that the 90 day implementation schedule proposed by Midcontinent is feasible or reasonable. All it argues is that it is “unclear about the nature of the proposed interconnection” because of supposed conflicts in the testimony.¹¹⁵

Missouri Valley does not describe the basis for this claim or even what it is unclear about. Regardless of Missouri Valley’s claim, the evidence is clear that Midcontinent seeks facilities-based interconnection, collocation and number portability, and that its needs would be met through the terms of any existing Midcontinent interconnection agreement that provides for those capabilities.¹¹⁶ There is no conflict between Mr. Simmons and Mr. Gates, and their testimony specifies exactly the same elements for Midcontinent’s request.

In any event, Missouri Valley provides no reason to think that any questions about Midcontinent’s specific needs could not be addressed and resolved during the 90 day implementation period described in Midcontinent’s testimony. Consequently, the Commission should adopt that schedule when it lifts Missouri Valley’s rural exemption.

¹¹⁴ See *supra* Sections III.A, III.B.2.

¹¹⁵ Missouri Valley Initial Brief at 35.

¹¹⁶ Simmons Prefiled at 7-9, 11-13; see also Gates Prefiled at 13 (listing Section 251(c) elements and indicating which ones Midcontinent seeks to obtain).

VII. Conclusion

The evidence in this case is specific, detailed and overwhelming. It shows that requiring Missouri Valley to fulfill its Section 251(c) obligations will not impose an undue economic burden; will be technically feasible; will not harm universal service; will not harm consumers; and will bring public interest benefits to Williston. In light of this evidence and the requirements of Section 251(f)(1) and Section 251(f)(2), it is apparent that the Commission should grant Midcontinent's petition and deny Missouri Valley's application. Midcontinent respectfully requests that the Commission take those actions.

Respectfully submitted,

MIDCONTINENT COMMUNICATIONS

By:



John M. Olson ID# 03053
John M. Olson, PC
418 East Broadway, Suite 9
Bismarck, North Dakota 58501

J.G. Harrington
Dow Lohnes, PLLC
1200 New Hampshire Ave., NW
Suite 800
Washington, DC 20036

Its Attorneys

August 11, 2008

Exhibit 1
Calculations

Exhibit 1

Calculations

Operating Cash Flow

Operating cash flow, as calculated below, is the difference between operating revenues and operating expenses. It measures the amount of cash generated and available for investment, payment of debt, distribution to ownership or other purposes.

2006

Line	Item	Amount	Source
1	Plant specific operating expense	\$2,002,018	Exhibit C1, Missouri Valley financial statements, at 3
2	Plant nonspecific operating expense	\$498,371	Exhibit C1, Missouri Valley financial statements, at 3
3	Customer operating expense	\$681,769	Exhibit C1, Missouri Valley financial statements, at 3
4	Corporate operating expense	\$916,435	Exhibit C1, Missouri Valley financial statements, at 3
5	Total cash operating expense	\$4,098,593	Sum of lines 1 to 4
6	Operating revenues	\$7,041,820	Exhibit C1, Missouri Valley financial statements, at 3
7	Operating cash flow	\$2,943,227	Line 6 minus line 5

2007

Line	Item	Amount	Source
1	Plant specific operating expense	\$1,996,976	Hanson Prefiled, Exhibit 1
2	Plant nonspecific operating expense	\$513,197	Hanson Prefiled, Exhibit 1
3	Customer operating expense	\$626,551	Hanson Prefiled, Exhibit 1
4	Corporate operating expense	\$402,393	Hanson Prefiled, Exhibit 1
5	Total cash operating expense	\$3,539,117	Sum of lines 1 to 4
6	Operating revenues	\$6,290,774	Hanson Prefiled, Exhibit 1
7	Operating cash flow	\$2,751,657	Line 6 minus line 5

2012

Line	Item	Amount	Source
1	Plant specific operating expense	\$2,420,710.60	Hanson Prefiled, Exhibit 1
2	Plant nonspecific operating expense	\$626,379.42	Hanson Prefiled, Exhibit 1
3	Customer operating expense	\$725,401.68	Hanson Prefiled, Exhibit 1
4	Corporate operating expense	\$537,723,09	Hanson Prefiled, Exhibit 1
5	Total cash operating expense	\$4,312,214.79	Sum of lines 1 to 4
6	Operating revenues	\$6,045,500	Hanson Prefiled, Exhibit 1
7	Operating cash flow	\$1,735,285.21	Line 6 minus line 5

Plant Investment and Net Investment

These calculations determine plant investment, which is the amount of spending on plant in the year, and net investment, which is the actual change in plant from year to year. To determine these amounts, the difference between net plant in the current year and net plant in the previous year must be adjusted to account for the effects of depreciation and amortization.

2006

Line	Item	Amount	Source
1	Current year net plant	\$21,081,639	Exhibit C1, Missouri Valley financials, at 2.
2	Previous year net plant	\$22,294,841	Exhibit C1, Missouri Valley financials, at 2
3	Change	-\$1,213,202	Line 1 minus line 2
4	Amortization	\$1,101,717	Exhibit C1, Missouri Valley financials, at 2, 9. <i>See Note 1</i>
5	Depreciation	\$973,254	Exhibit C1, Missouri Valley financials, at 3. <i>See Note 3.</i>
6	Depreciation plus amortization	\$2,074,971	Exhibit C1, Missouri Valley financials, at 3.
7	Investment	\$861,769	Sum of line 3 and line 6
8	Net investment	-\$111,485	Investment minus depreciation

Notes:

1. Based on Note G to the Missouri Valley financial statements, the telecommunications plant adjustment of \$16,525,753 is being amortized on a straight line basis over a period of 15 years. The amount shown here is 1/15th of the total. This also is the amount reported for amortization in 2007 in Exhibit 1 to Mr. Hanson's prefiled testimony.

2. Depreciation is calculated as the amount shown for depreciation and amortization in the Missouri Valley financial statements minus amortization as calculated in line 4.

2007

Line	Item	Amount	Source
1	Current year net plant	\$19,854,238	Missouri Valley discovery responses
2	Previous year net plant	\$21,081,639	Exhibit C1, Missouri Valley financials, at 2.
3	Change	-\$1,227,401	Line 1 minus line 2
4	Amortization	\$1,101,717	Hanson Prefiled, Exhibit 1
5	Depreciation	\$804,777	Hanson Prefiled, Exhibit 1
6	Depreciation plus amortization	\$1,906,494	Sum of line 5 and line 6
7	Investment	\$679,193	Sum of line 3 and line 6
8	Net investment	-\$125,684	Investment minus depreciation

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Case No. PU-08-61

Midcontinent Communications, a)
South Dakota Partnership,)
)
Complainant,)
vs.)
)
Missouri Valley Communications, Inc.,)
)
Respondent.)

**AFFIDAVIT OF SERVICE
BY MAIL**

OAH File No. 20080079

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF BURLEIGH)

Tara B. Brandner, being first duly sworn, deposes and says that she is of legal age and that on the 11th day of August, 2008, she served the attached **Reply Brief of Midcontinent Communications, with Exhibit 1** in this matter upon the following by placing a true and correct copy thereof in an envelope addressed as follows:

David J. Hogue
Attorney at Law
Pringle & Herigstad, P.C.
P.O. Box 1000
Minot, ND 58702

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.


Tara B. Brandner

Subscribed and sworn to before me
this 11th day of August, 2008.


Notary Public
Burleigh County, State of North Dakota

