United States District Court
District of North Dakota

Midcontinent Communications, A South Dakota Partnership, Plaintiff, vs. North Dakota Public Service Commission Kevin Cramer, Tony Clark, and Brian Kalk, In their official capacities as Commissioners of the North Dakota Public Service Commission and Missouri Valley Communications, Inc., Defendants.	)	Case No: 1:09-cv-017

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS UNDER RULES 12(b) and 56
OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR LACK OF JURISDICTION,
and
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

GROUNDS FOR MOTION

Missouri Valley Communications, Inc. (“Missouri Valley”) moves to dismiss the action for the plaintiff’s failure to state a claim upon which relief can be granted and because the court lacks subject matter jurisdiction. The inter-related grounds for the motion are:

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Memorandum in Support of Motion to Dismiss
Pringle & Herigstad
David Hogue

1. Relief cannot be granted because the claim is precluded by prior adjudication. The plaintiff, Midcontinent Communications ("Midcontinent") has previously litigated the claims asserted in the complaint. Redundant litigation is barred by *res judicata*. Prior adjudication is shown by exhibits, matters outside the pleadings. Under Rule 12(d), Fed. R. Civ. P., the motion to dismiss must be treated as one for summary judgment under Rule 56, Fed. R. Civ. P.

2. The statute under which Midcontinent filed its complaint, 47 U.S.C. § 251, does not enact rights or duties to be enforced by exercise of the original jurisdiction of federal district courts under 28 U.S.C. § 1331.

The alternative grounds of the motion to dismiss are related by a single concept. The complaint is an untenable collateral attack on action taken by the North Dakota Public Service Commission ("PSC") on Midcontinent's proceeding against Missouri Valley asserting rights under 47 U.S.C. § 251. Midcontinent did not timely appeal the PSC's decision to the state district court, the appellate authority for the PSC. The matter is concluded. Midcontinent cannot revive its claim in federal district court.

THE TELECOMMUNICATIONS ACT

In 1996, the nation's developing policy to deregulate what were formerly regulated industries ("natural monopolies" and oligopolies) was applied to the nation's telecommunications industry. Competition had been growing in the long distance service market for years, supported by court and regulatory action in the wake of the AT&T anti-trust litigation. In 1996, Congress enacted the Telecommunications Act of

1996, amending the 1934 Communications Act and codified as 47 U.S.C. § 151 et. seq. (sometimes referred to herein as the "Telecommunications Act" or the "Act").

The Act as amended in 1996 includes provisions to promote competition in local exchange telecommunications services, including the obligations of "incumbent local exchange carriers" (local exchange companies that had legal local monopolies before 1996, "ILECs") to interconnect with "competitive local exchange carriers" ("CLECs") that seek to provide alternative (competitive) local exchange telecommunications service in the ILEC's formerly exclusive service areas. Under certain conditions interconnection is required under the Act to facilitate the emergence of competition by making available to new competitors, CLECs, the facilities in place and owned by old competitors, the ILECs. Act § 251.

The Act obliges ILECs to cooperate with CLECs who request interconnection so CLECs do not encounter barriers to entry into a market (formerly monopolistic) that new public policy mandates to be a market that shall be opened to competition. (Midcontinent and Missouri Valley currently compete for local exchange customers in the Williston Exchange. Complaint, ¶ 37.) The Act imposes on ILECs the obligation to negotiate the terms of interconnection (§ 251(c)(1)) and the Act created timelines and arbitration and mediation mechanisms (§ 252). These general obligations are subject to specific exemptions affecting ILECs that are rural telephone companies. Act § 251 (f).

Under § 251(f)(1)(A)of the Act, an ILEC that is a rural telephone company is exempt from the interconnection requirements of § 251(c) until (1) the rural company has received a bona fide request for interconnection and (2) the State commission

conducts an inquiry and acts to terminate or sustain the rural exemption after a CLEC notifies the state commission that it has requested interconnection with the rural ILEC. Section 251(f)(1)(B) provides specific standards to guide a state commission's inquiry and determination: Whether the requested interconnection is unduly economically burdensome, whether the request is technically feasible, and whether the request is consistent with 47 U.S.C. § 254, regarding universal service.

After the enactment of the 1996 Telecommunications Act, the FCC promulgated regulations for implementation of the Act. The essence of the regulations pertinent to the interconnection and rural exemption provisions of the Act was that state commissions' decisions on rural exemption issues are to be made on a case by case basis (47 CFR § 51.401). On judicial review, the Eighth Circuit determined that the requesting CLEC bears the burden of proof with respect to whether the interconnection request is not unduly burdensome, technically feasible, and consistent with the universal service principles contained § 254. Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, 759-63 (8th Cir. 2000). ("Iowa v FCC"). The Iowa v. FCC Court ruled:

> "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.

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). Relying on the evidence presented during the two day hearing,

the PSC concluded Midcontinent failed to meet its evidentiary burden with respect to prerequisites 1 and 3. Rural Exemption Order, p 10.

THE PARTIES

The plaintiff, Midcontinent, is a telecommunications company and a competitive local exchange carrier under the Act. The defendant, Missouri Valley, is a telecommunications company, an incumbent local exchange carrier and a rural telephone company under the Act. The defendants North Dakota Public Service Commission and individual commissioners are North Dakota's "State commission" under the Act, having jurisdiction to conduct inquiries under § 251(f)(1)(B) for the purpose of determining whether to terminate a rural telephone company's interconnection exemption under § 251(f)(1)(A).

PRIOR PROCEEDING

Missouri Valley regards the facts about the prior proceeding as "significant" for purposes of the motion and Local Rule 7.1(A)(2). Accordingly, each paragraph in this statement about the prior proceeding is followed by underscored reference to numbered paragraphs of the complaint, to the parties' submissions in the prior proceeding, exhibits DM1, DM2, DM3, DM4 and DM6., and to the *Rural Exemption Order* (abbreviated *REO),* exhibit DM5. The Commission's decision in the prior proceeding is referred to in Midcontinent's complaint (¶ 5) as *"the Rural Exemption Order."* That short-hand title is adopted in this memorandum.

On November 14, 2007, Midcontinent requested an interconnection and interconnection agreement with Missouri Valley Communications for the Williston exchange, invoking the procedures under Act § 251(f)(B). Complaint, ¶ 39; REO, p. 1.

On February 8, 2008, Midcontinent filed with the PSC Midcontinent's Notice of Bona Fide Request for Services and Interconnection and Petition to Find Rural Exemption Waived. Midcontinent requested that the PSC determine that Missouri Valley had waived its rural exemption, or in the alternative that the PSC conduct an inquiry under the provisions of 47 USC § 251(f)(1)(A) for the purpose of determining whether to terminate Missouri Valley's exemption from providing its services as requested by Midcontinent.
Complaint, ¶ 41; *REO*, p. 1.

On July 9 and 10, 2008, the Commission conducted a hearing in the matter. Complaint, ¶ 44; *REO*, p. 2. Following the hearing, Midcontinent and Missouri Valley submitted briefs and proposed findings of fact, conclusions of law, and order. Exhibits DM1 and DM2 as to Midcontinent and DM3 an DM4 as to Missouri Valley.

On October 8, 2008, the Commission made its Findings of Fact, Conclusions of Law and Order in the case it named Midcontinent Communications/Missouri Valley Communications, Inc. Rural Exemption Investigation. Detailed factual findings preceded the following:

“**Conclusions of Law**

“1. The Commission has jurisdiction over the parties and the subject matter of this proceeding.

“2. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome.

“3. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is consistent with 47 U.S.C. §254, regarding universal service.

“4. The issue of technical feasibility is moot, where Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection is unduly economically burdensome and not consistent with 47 U.S.C. §254, regarding universal service.

“From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

“**Order**

“The Commission Orders:

“The rural exemption under 47 U.S.C. § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated.”

REO, p. 10.

The rural exemption investigation was consolidated during the administrative hearing with a related "suspension" application case filed by Missouri Valley. Because the rural exemption was not terminated, the suspension application was moot. *Rural Exemption Order*, ¶ 45, exhibit DM5.

On November 4, 2008, Midcontinent filed with the PSC a Petition for Reconsideration or, in the Alternative, Rehearing, See exhibit DM 6. The PSC voted to reject Midcontinent's petition for rehearing on December 3, 2008. DM 7. Midcontinent had the opportunity to appeal within 30 days after the denial of its petition for reconsideration. § 28-32-42(1), NDCC. Midcontinent did not serve a notice of appeal.

ARGUMENT

1. Relief cannot be granted because the claim is precluded by prior adjudication. The plaintiff, Midcontinent Communications, has previously litigated the claims asserted in the complaint. Redundant litigation is barred by *res judicata*.

Rule 8, Fed. R. Civ.P requires a plaintiff's complaint to plainly state a claim. The claim stated in Midcontinent's complaint is, plainly, the same claim as the claim that was litigated in the prior proceeding that Midcontinent initiated in the North Dakota Public Service Commission.

Res judicata, also known as claim preclusion, is a basic principle governing civil litigation. A claim once litigated cannot be relitigated; the claim is barred or "estopped." Much legal scholarship is expended on the principle, its rationale and its limitations. The principle is often rationalized on two basic points. Parties to concluded litigation should be able to continue in their lives and enterprises, secure that past judgments will

not be undone by repetitious litigation. Courts should be able to attend to resolution of current cases, free of burdens imposed by vexatious nuisance litigation, past cases being relitigated by losers. Not to make a constitutional case out of the present litigation, "due process" is an apt term where *res judicata* is considered. Due process concepts include availing opportunities to make claims and defenses in litigation. One opportunity per claim. "No rematch after a defeat fairly suffered." Astoria Federal Savings and Loan Association v Solimino, 501 US 104, 107 (1991). *Res judicata* is civil litigation's counterpart to the criminal law principle of double jeopardy.

Before a litigant's claim is rejected in response to the adversary's assertion of the affirmative defense of *res judicata*, the adversary must show the current iteration of the claim was included in the prior litigation. Are the parties the same? Are the factual issues the same? Are the legal issues the same? Are there some issues in the current claim that were not explicitly presented but were available for consideration in the prior proceeding? Did the prior tribunal have jurisdiction of the parties and the issues? Is the prior litigation final? Barbara Lloyd Designs, Inc. v. Mitsui O.S.K. Lines Ltd., No. A1-03-79, 2003 WL 23101777, 2 (D.N.D. 2003). Res judicata bars not only relitigation of claims actually asserted, but also claims that "could have been raised in that action." Id. at 2 (citing Anderson v. Anderson, 214 F.Supp 2d 1036 (D.N.D. 2002)); see Lundquist v. Rice Memorial Hosp., 238 F.3d 975, 977 (8th Cir. 2001).

The claim might be allowed to be relitigated, saved by one of these limitations on *res judicata*. Not in this case.

Perusal of the principal documents in the prior proceeding, particularly the *Rural Exemption Order* (Exhibit DM5), show identity of parties, identity of factual and legal issues, identical to Midcontinent's claims in its new complaint in federal district court. It is an uncontested material fact that the *Rural Exemption Order* addressed all the arguments about the interconnection and exemption provisions of 47 U.S.C. § 251 and all the evidentiary arguments made by Midcontinent in the prior proceeding, all repeated as allegations in its complaint. It is particularly significant to compare the allegations of Midcontinent's complaint to the same points as raised by Midcontinent and addressed by the Commission in the *Rural Exemption Order*.

The elements of the rural exemption and whether the rural exemption was previously waived by Missouri Valley were issues raised by Midcontinent and rejected by the PSC. Midcontinent argued to the PSC that Missouri Valley's rural exemption was waived, DM 1, pp. 5-8, and that the rural exemption should be terminated under the statutory prerequisites of the Act. DM 1, pp. 9-26. Midcontinent now reasserts Missouri Valley's rural exemption was waive, Complaint ¶ 47, and that the rural exemption should be terminated based on the statutory prerequisites. Complaint, ¶¶ 50, 51.

The PSC's jurisdiction is not in doubt. Act § 251(f)(1)(B) and NDCC § 49-21-01.7(11). Exhibit DM7 shows the *the Rural Exemption Order's* finality. NDCC § 28-32-40(4) and § 28-32-42(1). Midcontinent did not exercise its statutory right to appeal the PSC's decisions to North Dakota's courts.

The complaint plainly states Midcontinent's claim that the federal district court should make the determination it first asked the PSC to make, that Missouri Valley's

exemption from interconnection should be terminated. Even if the jurisdiction of the federal district court includes cases arising under 47 U.S.C. § 251(f)(1)(A) (which it does not, as argued under point 2, below), even if Midcontinent had a choice of forums when it commenced the 2008 litigation, the court's jurisdiction should not be exercised on Midcontinent's complaint because the second effort is barred by adjudication in the forum first chosen by Midcontinent. The PSC having previously determined "The rural exemption under 47 U.S.C. § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated" (*Rural Exemption Order*, Exhibit DM5, page 11), Midcontinent's second claim is barred by *res judicata*.

Missouri Valley anticipates Midcontinent might argue its failed action at the PSC is "only" a state administrative agency's determination. The PSC's determination does not preclude re-litigation in federal district court because the commission's rank or status is not sufficient or high enough that its determinations must be regarded as a *res judicata* bar in federal court. The anticipated argument is wrong.

United States Supreme Court precedents establish that state agencies' decisions are a proper basis to apply *res judicata* to bar redundant litigation in federal courts. Where a federal court action follows a state administrative action that was not judicially reviewed, administrative estoppel is presumed in the absence of a legislative intent to the contrary. Astoria Federal Savings and Loan Association v Solimino, 501 US 104, 107-08 (1991).

> "We have long favored application of the common law doctrines of collateral estoppel (as to issues) and *res judicata* (as to claims) to those determinations of administrative bodies that have attained finality.
>
> " 'When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.'
>
> "Thus, where a common law principle is well established, as are the rules of preclusion, the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.' " Id. at 107-108. (Citations omitted.)

Astoria involved an age discrimination in employment claim under a statute that created federal rights including the right to litigate discrimination claims in federal court. In the absence of a clear declaration of legislative intent, the Court discerned a legislative intent that a state agency's determination in an age discrimination case did not preclude a subsequent action in federal court because the statute's procedural provisions "... plainly assume the possibility of federal consideration after state agencies have finished theirs." Id. at 111.

Application of Astoria analysis to Midcontinent's claim and Missouri Valley's *res judicata* defense presents this one question and its answer. Is there any evident

Congressional intent that the rules of preclusion should not apply to a state commission's determination under 47 USC 251(f)? No.

Nothing in the statute's procedural provisions "plainly assume the possibility of federal consideration after state agencies have finished theirs." Whereas the age discrimination statute specifically provided for claims to be pursued in federal district courts, there is no such provision in the interconnection provisions of the Telecommunications Act. To the contrary, the Act specifically provides that the determination to be made (whether a rural telephone company's exemption from interconnection shall be terminated) is to be made by state commissions alone. Nothing in 47 USC § 251 provides or assumes the possibility of federal courts consideration after state agencies have finished theirs. (This point is also addressed in the argument under the second ground for the motion to dismiss.)

Therefore, under the principles of Astoria, it is presumed that the rules of preclusion apply. Midcontinent's claims stated in its federal complaint are precluded, estopped, barred from re-litigation under the principle of *res judicata.*

2. The statute under which Midco filed its complaint, 47 U.S.C. § 251, is not within the original jurisdiction of federal district courts under 28 U.S.C. § 1331 or § 1332.

Rule 8 requires a plaintiff's complaint to plainly state a claim. Paragraph 1 of Midcontinent's complaint plainly states it claims rights to interconnection with Missouri Valley. Count I of the complaint, beginning at paragraph 68, asserts Midcontinent's claim, "count I, violation of 47 USC § 251." Count II is not another claimed right or

violation; it repeats count I and adds a prayer for declaratory relief. Paragraph 8 of the complaint asserts jurisdiction under 28 U.S.C. § 1331 "because this is a civil action arising under federal law." Diversity jurisdiction is also pleaded, under 28 U.S.C. § 1332, a wholly redundant pleading considering the claim is asserted under federal law.

As this Court recently noted in EOG Resources, Inc. v. Badlands Power Fuels, LLC, et al, Civ. No. 4:08-CV-38, 2009 WL 424431, 3 (D.N.D. 2009), it is well-established that "a district court 'has authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1).'" Harris v. P.A.M. Transp. Services, Inc., 339 F.3d 635, 637 n.4 (8th Cir. 2003) (quoting Osborn v. United States, 918 F.2d 724, 728 n.4 (8th Cir. 1990) (citing Land v. Dollar, 330 U.S. 731, 735 n.4 (1947))).

The burden of establishing the existence of subject matter jurisdiction rests upon the party asserting jurisdiction. Kenny v. Mid Dakota Clinic PC, No. A1-04-108, 2004 WL 2238796, 1 (D.N.D. 2004). The court may consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1). Wallette v. Thompson, 373 F. Supp. 2d 986, 989 (D.N.D. 2005).

The claim stated in Midcontinent's complaint is a claimed right to interconnection under § 251 of the Act, a right Midcontinent asserts is enforceable by action in federal district court. Midcontinent asserts the federal court should assume jurisdiction to administer § 251(f) of the Telecommunications Act as if it were a regulatory agency, a jurisdiction that the Act did not assign to courts but instead assigned to States' regulatory commissions.

Section 28 USC 1331 confers on federal district courts original jurisdiction of cases arising under the laws of the United States. This jurisdictional statute does not create substantive rights to commence civil actions under all statutes enacted by Congress. See Nelson v Farm Credit Services of ND, 380 F. Supp. 1061, 1064 (D.N.D. 2005). Some statutes, such as the age discrimination law referred to in Astoria, supra, specifically create private rights of action. Private rights of action might be implied under some statutes. Private rights of action cannot be implied under statutes that include a comprehensive system of enforcement that does not expressly include private rights of action. Transamerica Mortgage Advisors v Lewis, 444 U.S. 11 (1979).

> "Yet it is an elemental canon of statutory construction that, where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' " Id. at 19-20 (Citations omitted)

Section 251 of the Telecommunications Act does not expressly confer on CLECs such as Midcontinent a private right of action against rural telephone companies such as Missouri Valley. Section 251(f) of the Telecommunications Act does expressly confer on State commissions such as North Dakota's PSC the responsibility to determine claims such as the claim presented in the complaint. The particular provisions of § 251 relied on by Midcontinent are:1) ILECs' interconnection obligations under § 251(c); 2) a rural telephone company's exemption from those obligations under § 251 (f)(1)(A), and 3) a CLEC's opportunity for the exemption to be terminated under §

251 (f)(1)(B). All these are properly presented for resolution by the CLEC's submitting a notice to the State commission, to be resolved by the commission's inquiry whether the exemption shall be terminated. Act § 251 (f)(1)(B). None of these are properly presented for resolution by an action in federal district court. The comprehensive system of enforcement of § 251(f) by State commissions negates a private right of action in federal district court. There is no implied private right of action for a CLEC such as Midcontinent to assert against any rural telephone company such as Missouri Valley, asking the court to act like a regulatory agency and to terminate Missouri Valley's exemption from interconnection obligations.

Congress intended the interconnection and exemption provisions of §§ 251(c) and 251(f) of the Act to be administered by State commissions, not by private actions in federal courts.

Verizon Maryland v Public Service Commission of Maryland, 535 U.S. 635 (2002) confirmed federal question jurisdiction in a dispute under § 252 of the Act, consistent with the provisions of § 252 providing for federal district court review of state commission actions under § 252. The decision does not support Midcontinent's assertion of jurisdiction under § 251. There are distinctions between Verizon Maryland involving § 252 and the present litigation involving § 251(f), distinctions with significant differences.

Section 252(e)(6), the basis of Verizon's action, specifically enacted Congressional reliance on federal district courts for the enforcement of the requirements of § 252 for a particular reason. Section 252(d) imposed "pricing

standards" on interconnection agreements. This was a departure from the pre-1996 regulatory regime where States and States' commissions had rate jurisdiction. Section 252(e) requires interconnection agreements to be submitted to state commissions for approval. Sections 252(e)(1) and (2) limit states' commissions' scope of review of interconnection agreements. Section 252(e)(4) specifically withholds from state courts jurisdiction to review a state commission's action to approve or reject an interconnection agreement under section 252. Instead, § 252(e)(6) expressly created federal district court jurisdiction to review state commissions' determinations, to assure that federal law does reign supreme, regarding pricing standards and other provisions under § 252.

Verizon Maryland exemplifies the problem foreseen by Congress and its resolution. Maryland's commission approved interconnection agreement terms contrary to the new federal statute. Verizon commenced an action in federal district court, relying on § 252(e)(6). The Supreme Court's decision assured that the Act's federal pre-emption of state law would be addressed in Federal district court.

> "Verizon seeks relief from the Commission's order 'on the ground that such regulation [by Maryland's PSC] is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail,' and its claim 'thus presents a federal question which the federal courts have jurisdiction under 28 U. S. C. § 1331 to resolve.'
>
> *   *   *   *
>
> "As we have said, "the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of

the United States are given one construction and will be defeated if they are given another,' unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" Id. at 642-43 (Citations omitted.)

A group of Eighth Circuit decisions in cases originating in Iowa also exemplify federal district courts' jurisdiction to review a state commission's actions under the 1996 Act, regarding inter-company compensation for interconnections. Rural Iowa Independent Telephone Association v Iowa Utilities Board 362 F. 3d 1027 (8th Cir. 2004); Iowa Network Services v Qwest Corp. 363 F. 3d 683 (8th Cir. 2004) (Iowa Network I); Iowa Network Services v Qwest Corp. 466 F. 3d 1091 (8th Cir. 2006) (Iowa Network II); Rural Iowa Independent Telephone Association v Iowa Utilities Board 476 F. 3d 572 (8th Cir. 2007); collectively the Iowa Cases.

Compare section 252 and Verizon Maryland to Midcontinent's action asserting federal rights under § 251.

First, Midcontinent v. North Dakota's PSC and Missouri Valley is not a case where the State commission has taken or is alleged to have taken some action under state law that contravenes federal law, like Verizon Maryland. No substantial issue of federal pre-emption of state law is present in Midcontinent's claim.

Second, Midcontinent's argumentative complaint makes no substantial claim that the district court has jurisdiction because the claimed right to recover under the complaint will be sustained if the Constitution and laws of the United States are given

one construction (by a federal district court) and will be defeated if they are given another (by North Dakota's PSC). Midcontinent's complaint does not raise a material or substantial issue of law. Midcontinent complains about the PSC's resolution of issues of fact. Midcontinent complains about the PSC's findings of fact and conclusions - applying federal law - that Midcontinent failed to prove what it needed to prove in order for Missouri Valley's interconnection exemption to be terminated.

> "2. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome.
>
> "3. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is consistent with 47 U.S.C. §254, regarding universal service.

REO, p. 10.

> "The plain meaning of the statute [47 USC §251(f)(1)] 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, 762 (8th Cir. 2000) ("Iowa v FCC").

Midcontinent's complaint about the PSC's fact finding under § 251(f)(1) does not present a substantial question of federal law. Nothing expressed or implied in § 251 supports Midcontinent's invocation of federal district court jurisdiction to pre-empt the PSC's fact finding.

Third , Verizon Maryland did not abandon the fundamental principle that a federal question does not exist merely on a plaintiff's pleading where it cites some federal statute, as Midcontinent has cited § 251 of the Telecommunications Act. If the statute itself does not provide for jurisdiction, the question must be asked and answered whether federal question jurisdiction is implied as a matter of Congressional intent. If a claim of jurisdiction is insubstantial, frivolous and made solely to obtain jurisdiction, the federal district court is not obliged to accept jurisdiction. 535 U.S. at 643.

Federal district court jurisdiction is not expressed under § 251 like the expression in § 252. The conclusion that jurisdiction is not implied under § 251 is reinforced by consideration of the expressed provisions of § 252. Any party aggrieved by a state commission's determination "under this section" [252] may bring an action in federal district court. Section 252(e)(6). There is no similar provision in § 251. The presence of these provisions in § 252 and the absence of such provisions in § 251 highlights the absence of any basis for federal question jurisdiction to be implied as to issues arising under § 251(f). Nothing in § 251 "reads like the conferral of a private right of action... ." like § 252. See Verizon Maryland, 535 U.S. at 664. Where Congress expressly conferred federal jurisdiction in § 252, it cannot be fairly implied that similar jurisdiction was intended where it was not expressed one section removed in the same statute. The only fair implication is Congress did not intend federal district courts to exercise federal question as to issues arising under § 251(f).

Section 252(e)(6) includes a cross-reference to § 251 which supports the conclusion that neither section supports federal question jurisdiction under section 251.

Any federal district court review under § 252(e)(6) addresses the question whether an interconnection agreement "meets the requirements of section 251 and this section [252]." The requirements of section 251 include the rural exemption under § 252(f)(1)(A) and its continuation in effect unless and until it were terminated by a state commission after an inquiry under § 252(f)(1)(B). Absent a state commission's "termination of the otherwise continuing rural exemption," Iowa v FCC, 219 F.3d at 762, there is no interconnection and no agreement subject to subject to a federal district court's review under § 252(e)(6). Where there is no review under the express terms of § 252 (e)(6) there is no basis for federal question jurisdiction to be implied under §251(f).

All these comparisons of Verizon Maryland to Midcontinent's action asserting federal rights under § 251 support dismissal for lack of federal question jurisdiction because Midcontinent's claim "'is wholly insubstantial and frivolous.'" 535 U.S. at 642-43.

Whether considered as a request for the court to function as if it were a state commission acting under § 251(f)(1)(B) or for the court to perform appellate functions like those authorized under § 252, Midcontinent has not met its burden of establishing jurisdiction under § 1331 or § 251 of the Act.

Summary and Conclusion

The alternative grounds for dismissal - *res judicata* and lack of federal question jurisdiction - are related. Under Astoria, *res judicata* does not apply where there is an evident congressional intent that jurisdiction may be exercised by a federal district court

following a state administrative agency proceeding. This principle was acknowledged and applied by the Eighth Circuit in Iowa Network I, regarding Act § 252. Conversely, where there is no federal question jurisdiction - as in this case of Midcontinent's assertion of jurisdiction under § 251 - the complaint is subject to dismissal on both alternative grounds.

Midcontinent might assert that its claimed federal right deserves the special attention of a federal judge, that its claimed federal right to interconnection is not sufficiently protected by the opportunity (now lost) to appeal the PSC's decision to North Dakota's state district court, or next to the North Dakota Supreme Court, and finally to the United States Supreme Court. Such an argument lacks merit. It lacks merit not only because the PSC is obliged to follow and did follow the federal Telecommunications Act in its *Rural Exemption Order*, it lacks merit because North Dakota's district courts and Supreme Court are also bound to follow the Act as they would consider Midcontinent's appeal from the *Rural Exemption Order* under the Supremacy Clause of the United States Constitution. Midcontinent's opportunity to take the claimed federal right through state courts and ultimately to the United States Supreme Court under 28 USC § 1257 is an adequate alternate appellate remedy, a more orderly remedy than its collateral attack on the PSC's *Rural Exemption Order*.

Every person asserting a federal right is not entitled to an opportunity to litigate the claim in federal district court. The claim may be barred by res judicata or may not be in the original jurisdiction of federal district courts. There is no reason to believe that Congress intended to provide a person claiming a federal right, such as Midcontinent

claiming a federal right to interconnection under § 251 of the Act, to have an unrestricted opportunity to relitigate an issue already decided by a state administrative agency simply because the issue arose in a state proceeding, the outcome of which was a loss fairly suffered.

For any or all of these reasons, the complaint should be dismissed.

Dated this 29th day of May, 2009.

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Exhibit DM – 1

Midcontinent Post Hearing Brief to the Public Service Commission

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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

Initial Brief of Midcontinent Communications

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August 1, 2008

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

Initial Brief of Midcontinent Communications

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

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Missouri Valley Has Waived Its Rural Exemption.

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

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

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

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

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

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

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

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

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

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

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

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

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

[5] *Id.* at 3 (¶ 5).

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

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

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

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

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

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

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

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

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

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

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

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

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[11] 47 U.S.C. § 251(f)(1)(B).

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

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

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

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

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

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

[13] *See supra* note 9. In fact, the agreement does not mention that Missouri Valley has waived its rural exemption. This suggests that Missouri Valley did not believe that it had any rural exemption rights at the time the agreement was negotiated.
[14] 47 U.S.C. § 251(f)(1)(B).

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

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

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

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

[17] Hanson Prefiled at 10.

[18] Hanson Prefiled at 29-30.

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

[20] 47 C.F.R. § 51.305(c).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] Lundquist Prefiled at 28.

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

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

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

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

Midcontinent's Evidence of Economic Impacts

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

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

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

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

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[30] Simmons Prefiled at 11.

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

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

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

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

Missouri Valley's Impact Analysis

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

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

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[34] Gates Prefiled at 34.

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

[36] Hanson Prefiled, Exhibit 1 at 2.

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

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

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

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

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

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

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

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

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

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

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

[40] Lundquist Prefiled at 8-10.

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

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

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

[44] *Id.* at 28.

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

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

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

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

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[45] *Id.* at 9.

[46] *Id.* at 13.

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

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

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

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

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

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

[49] 47 C.F.R. § 54.305(d)(2).

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

[51] 47 C.F.R. § 54.305(d)(2), (3).

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

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

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

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[52] Federal-State Joint Board on Universal Service; Multi- Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, *Fourteenth Report and Order, Twenty-Second Order on Reconsideration, Further Notice of Proposed Rulemaking and Report and Order*, 16 FCC Rcd 11244, 11285 (2001).
[53] Nemont Telephone Cooperative, Inc., et al., *Order*, 18 FCC Rcd 838, 842 (WCB 2003). This order also reports that all of the companies acquiring the Citizens exchanges "state that they will make extensive upgrades to the facilities being purchased from Citizens." *Id.* at 843.
[54] Lundquist Prefiled at 28.

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

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

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

Context of the Economic Burden Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[62] 47 U.S.C. § 251(f)(1)(B).

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

[64] Gates Prefiled at 35.

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

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

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

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

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

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

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

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

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

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

[68] Hanson Prefiled at 26.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[78] *See* Gates Prefiled at 24, 27.

[79] 47 U.S.C. § 253.

[80] 47 U.S.C. § 253(f).

[81] *See* Late-filed Exhibit C9.

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

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

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

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

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

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

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

[83] 47 U.S.C. § 251(f)(2).

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

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

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

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

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

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

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[85] Hanson Cross-Examination (Harrington).

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

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

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

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

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

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[86] Hanson Prefiled at 26.

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

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

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

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

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

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

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

IV. The Commission Should Adopt a Reasonable Implementation Schedule

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

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

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

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

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

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

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[95] Simmons Prefiled at 12.
[96] *Id.* at 13.
[97] *Id.* at 12-13.

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

V. Conclusion

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

---

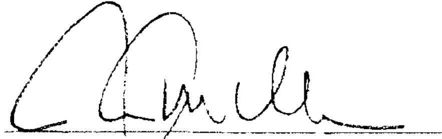
[98] *Id.* at 11.

[99] Hanson Prefiled at 30.

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

Respectfully submitted.

MIDCONTINENT COMMUNICATIONS

By: 

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August 1, 2008

Exhibit DM-2

Midcontinent Proposed Findings of Fact, Conclusions of Law, and Order for Judgment

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

MIDCONTINENT COMMUNICATIONS, A SOUTH DAKOTA PARTNERSHIP,	)	
COMPLAINANT	)	
VS.	)	U-08-61
	)	-0080079
MISSOURI VALLEY COMMUNICATIONS INC.,	)	
RESPONDENT	)	

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

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF MIDCONTINENT COMMUNICATIONS

Proposed Findings of Fact

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Conclusions of Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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

PROPOSED ORDER

SEPTEMBER , 2008

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

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

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

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

2. Whether the request of Midcontinent is technically feasible.

3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

4. The implementation schedule for compliance with the request should the exemption be terminated.

5. Whether suspension or modification is necessary.

6. Whether suspension or modification is consistent with the public interest, convenience and necessity.

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22. Missouri Valley will be able to continue meeting its current universal service obligations after providing Section 251(c) interconnection to Midcontinent.
23. There is no current requirement to expand the scope of the definition of universal service.
24. The only pending proposal at the FCC concerning broadband and universal service would not mandate broadband service and would provide financial support to rural carriers that invest in broadband.
25. Facilities-based competition can have universal service benefits.
26. There is no evidence that Section 251(c) interconnection will result in an adverse impact on users of telecommunications services generally.
27. Missouri Valley has not been investing at a sufficient level to bring advanced services to its customers in a timely fashion.
28. Competition benefits consumers by lowering prices, improving quality, creating incentives for innovation, encouraging better customer service and providing choice.
29. Competition in Williston is necessary because Missouri Valley is not offering advanced services to its customers and there is no real prospect for improvement without competition.
30. Current competition in Williston is not sufficient to put competitive pressure on Missouri Valley because the competitors are not offering true substitute services.
31. Missouri Valley's failure to offer video service is the result of a business decision, not an inherent competitive disadvantage.
32. Missouri Valley has competitive advantages, including its incumbent status, its integration with Nemont and its wireless affiliate.
33. It is realistic to adopt an implementation schedule that calls for an interim interconnection agreement in thirty days, interconnection in ninety days and a permanent interconnection agreement in nine months.

CONCLUSIONS OF LAW

1. Midcontinent has met the requirements for a bona fide request for the rural exemption under Section 251(f)(1) of the Communications Act to be lifted in Williston.
2. The Commission must grant Midcontinent's petition to lift the rural exemption in Williston if the criteria established in Section 251(f)(1) of the Communications Act are met or if the rural exemption has been waived.
3. A rural carrier can waive the exemption by agreeing to provide interconnection in compliance with Section 251(c).
4. Missouri Valley's actions in agreeing to accept Midcontinent's existing agreement with Citizens constitute a waiver of the rural exemption.

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

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

ORDER

The Commission orders:

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

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

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

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

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

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

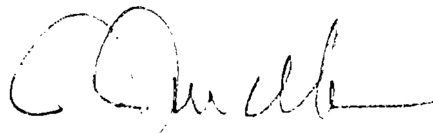
PUBLIC SERVICE COMMISSION

TONY CLARK	SUSAN E. WEFALD	KEVIN CRAMER
COMMISSIONER	PRESIDENT	COMMISSIONER

CERTIFICATE OF SERVICE

A copy of the foregoing **Initial Brief of Midcontinent Communications, Proposed Findings of Fact and Conclusions of Law of Midcontinent Communications, Proposed Order, and Certificate of Service**. was mailed to the following on August 15, 2008:

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



John M. Olson

Exhibit DM-3

Missouri Valley Post-Hearing Brief to the Public Service Commission

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.	)	

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. PU08-176
Missouri Valley Communications, Inc.,	)	
Respondent.	)	

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

INTRODUCTION

These consolidated hearings present the question whether Missouri Valley Communications Inc. (Missouri Valley) will be required to grant Midcontinent Communication's (Midcontinent) request for interconnection with Missouri Valley. This brief is one part of Missouri Valley's two part post hearing presentation.

Part one is a set of three proposed orders within a single document. The first proposed order is in Case No PU-08-61, proposing a decision favoring Missouri Valley. The second proposed order is in Case No PU-08-176, a proposed dismissal of the case as moot were the Commission to decide in favor of Missouri Valley in case No. PU-08-61. The third proposed order is an alternative order in Case No PU-08-176, proposing a decision favoring Missouri Valley if the Commission were not to decide in favor of Missouri Valley in case No. PU-08-61.

Part two of Missouri Valley's post hearing presentation is this brief. This brief summarizes the additional testimony presented at the June 9-10, 2008 hearing, explains why Missouri Valley's

rural exemption should be sustained and not terminated, explains why Missouri Valley is entitled to relief under the PU-08-176 Suspension/Modification proceeding, and addresses the two issues presented by Commissioners Wefald and Clark.

LEGAL HISTORY and BACKGROUND

In 1996, the nation's developing policy to deregulate what were formerly regulated industries ("natural monopolies" and oligopolies) was applied to the nation's telecommunications industry. Competition had been growing in the long distance service market for years, supported by court and regulatory action in the wake of the AT&T anti-trust litigation. In 1996, Congress enacted the Telecommunications Act of 1996, amending the 1934 Communications Act and codified as 47 U.S.C. § 151 et. seq. (sometimes referred to herein as the "Act" or the "federal act," as defined by N.D.C.C. § 49-21-01(5).

The federal act as amended in 1996 includes provisions to promote competition and protect "rural telephone" exchanges from the obligations of interconnection. The provisions that affect these cases are the obligations of "incumbent local exchange carriers" (local exchange companies that had legal local monopolies before 1996, ILECs) to interconnect with "competitive local exchange carriers" (CLECs) that seek to provide alternative (competitive) local exchange telecommunications service in the ILEC's formerly exclusive service areas.

Interconnection 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. Act § 251(c)(4). At the other extreme, a CLEC might install a facilities-based local exchange system that is interconnected with the ILEC's to facilitate "subscribers intercommunicating service of the character ordinarily furnished by a single exchange." Act §§ 251(c)(2) and 153 (47). In between, a CLEC might install an incomplete facilities-based local exchange system and purchase missing elements ("UNEs") from the ILEC. Act § 251(c)(2) & (3).

ILECs that qualify as rural telephone companies are exempt from the obligations to negotiate and to make interconnections with CLECs until the state regulatory commission conducts an inquiry and acts to terminate or sustain the exemption. Act §251 (f)(1). This is the "rural exemption."

The present proceeding involves all these background principles, principally the rural exemption. Missouri Valley is an ILEC and a rural telephone company, serving the Williston North Dakota exchange. Midcontinent is a CLEC that has requested an interconnection with Missouri Valley. Missouri Valley has declined the request, relying on its rural exemption. Midcontinent seeks termination of Missouri Valley's rural exemption. Midcontinent seeks interconnection but not resale or UNEs. Midcontinent wants to provide service only in the seven square miles where Midcontinent has cable TV facility in Williston. Midcontinent does not want to provide telecommunications service throughout the Williston exchange area, which is 390 square miles.

One basic background principle needs to be clarified at the threshold. The rural exemption is not an exemption from competition; that is not what § 251 (f)(1) provides. What the statute provides is an exemption from *interconnection* and from the duty to negotiate an interconnection agreement. Interconnection - not competition - is what the pending case is about.

Rural Exemption

Whether Missouri Valley will be required to grant Midcontinent's requested interconnection is affected by the "rural exemption." ILECs that qualify as rural telephone companies are exempt from the obligations to negotiate and to make interconnections with CLECs until the state regulatory commission conducts an inquiry and acts to terminate or sustain the exemption after a CLEC notifies the state commission that it has requested interconnection with a particular rural ILEC. In addition, a rural ILEC may request the state commission to grant "suspension or

modification" of the interconnection requirements affecting other ILECs. Act § 251(f)(1) and (2) and NDCC §§ 49-21-01.7(11) & (16).

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

Importantly, there is no "public interest" analysis in § 251(f)(1). The rural exemption analysis directs the Commission examine the effect on the rural telephone company, not broad public policy considerations. As set forth below, public interest analysis is appropriate in § 251(f)(2), suspension and modification.

Section 251(f)(1)(C) installs a single waiver on rural ILECs' exemption. The waiver under § 251(f)(1)(A) shall not apply if the CLEC is a cable operator providing video programming and the rural ILEC also provides video programming. Unlike several previous cases before this Commission, that waiver is not present in this case: Missouri Valley is <u>not</u> offering video programming.

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

particularly unfair where the CLEC would use the ILEC's facilities to take away the ILEC's customers.

Suspension and Modification

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

Suspension or modification may be granted if to do so:

(A) is necessary -

(i) to avoid a significant adverse economic impact on users of telecommunications services generally:

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience and necessity.

A § 251(f)(2) "suspension and modification" proceeding is different from a "termination of exemption" proceeding under § 251(f)(1) in several respects. First, and most importantly, (f)(2) contains the "public interest, convenience and necessity" element not found in the (f)(1) rural exemption analysis. This critical distinction was lost on Midcontinent's Mr. Gates, who repeatedly expressed the legal view, couched as expert fact testimony, that competition is in the public interest and part of the rural exemption analysis. Even when questioned by Commissioner Clark about the apparent absence of public interest analysis in § (f)(1), Mr. Gates persisted in his mistaken opinion that competition and public interest is a component of rural exemption analysis:

Commissioner Clark: Well but there is a public interest standard with the modification...

Mr. Gates: Absolutely.

Commissioner Clark: that doesn't exist with the actual termination of the exemption itself.

Mr. G[illegible]es: Well, I think there are public interest issues with both.

Commissioner Clark: But when you look in the list under FB, it'd be 251, F1B, yeah. It says the commission...when the actual exemption determination is adjudicated by the commission, the state commissions shall conduct an inquiry to determine: 1) if it's not unduly economically burdensome; 2) is it technically feasible? (I'm adding the 1, 2, and 3) And 3) is it consistent with 254 ? And then it's in this 251(f)(2), (f)(2) where the modification language comes in that there's the (i) avoid significant adverse economic impact, (ii) avoid imposing a requirement that's unduly economically burdensome, (iii) that is avoid imposing a requirement that's technically infeasible, and then B is consistent with the public interest standards.

Mr. Gates: All three of those that you just cited: 251(f)(i)(a) exemption, 251(f)(i)(b), and then the third one, I don't have that one in front of me, but they all refer to the same three prong test. They're exactly the same as identified here. Whether it's unduly economically burdensome, whether it's technically feasible, and whether it's consistent with universal service principles. So I believe the lawyers at most of these commissions have said they're all three the same issues, lets just do it all at once, rather than being in hearings for two or three years. [Day 1; 10:00 am session]

Three other differences between §§ (f)(1) and (f)(2) bear on this case. An § (f)(2) proceeding is commenced by the ILEC's request. Thus, Missouri Valley initiated a request to suspend its interconnection obligations should the Commission decide to terminate its rural exemption.

Third, an (f)(2) proceeding addresses not only interconnection obligations under 251(c), it also applies to other obligations under 251(b). In the event Missouri Valley's rural exemption is terminated, Missouri Valley seeks a suspension of its obligations under §§ 251(b) and (c) that are included in Midcontinent's request for interconnection. Fourth, suspension or modification is available to a rural telephone company that provides video programming.

Whether the § 251(f)(1) exemption from interconnection obligations shall be terminated or sustained is a yes or no question. Suspension or modification of interconnection or any other requirement under § 251(f)(2) allows the State commission to fine-tune its decision to fit the particular facts of a case.

Suspension or modification may be granted under § 251(f)(2) to the extent that, and for such duration as, the State commission determines that such suspension or modification is

necessary and consistent with the public interest, convenience and necessity. It is noteworthy that "public interest, convenience and necessity" are excluded from universal service considerations under section 251(f)(1) (by the exclusion of section 254 (c)(1)(D) from the exemption section), and that "public interest, convenience and necessity" are reinstated as considerations for a State commission's determination whether to grant suspension or modification under section 251(f)(2).

After the enactment of the 1996 Act, the FCC promulgated regulations affecting the implementation of the Act. The essence of the regulations pertinent to the local competition and rural exemption provisions of the Act was that state commissions' decisions on rural exemption issues are to be made on a case by case basis (47 CFR 51.401) and that rural telephone companies have the burden of proof to sustain the exemption in each case by showing that "application of the requirements of Section 215 (c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." (47 CFR 51.405 (a)(c) and (d)). On judicial review, these provisions of Rule 405 were vacated in Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, at 759-63. (8th Cir. 2000). (Herein Iowa v FCC.)

Burden of Proof

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

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

At the hearing, there was a discussion about which party has the burden of proof in case No. PU-08-176, Missouri Valley's application under section 251(f)(2) for suspension or modification of the interconnection and negotiation requirements under 251(c). It must be concluded that the party making the request for interconnection, Midcontinent, must prove not only

that the request meets the prerequisites to justify the termination of the exemption under section 251(f)(1), but also must prove that the exemption (if terminated) should not be suspended or modified under section 251(f)(2).

Consideration of the burden of proof under § 251(f)(2) might be a moot question. Suspension or modification could be sought only after the exemption was terminated. If a requesting CLEC failed to carry its burden in seeking termination of the exemption under section 251(f)(1), then any proceeding under section (f)(2) is moot; there is no burden of proof question in a moot case.

If a requesting CLEC succeeded in carrying its burden in seeking termination of the exemption under section 251(f)(1)), a related proceeding under section (f)(2) is not moot. But, as the Commission noted in the NDTC case, PU-05-451, the two sections are interpreted together, so the sections should proceed subject to the same assignment of the burden of proof. The FCC's package of erroneous interpretations of the meaning of the statutory words "unduly economically burdensome" and its upside down assignment of the burden of proof (47 CFR 51.405 (a)(c)and(d)) was entirely vacated by the court in Iowa v FCC. The broad protection of rural telephone companies means they have no burden of proof to sustain the exemption. In any case where the rural exemption is an issue, whether in a case involving "termination" or "suspension" or "modification," rural telephone companies have the benefit of the doubt under the statute and controlling precedent.

The (f)(2) case PU-08-176 case should be dismissed as moot as a consequence of the decision in the (f)(1) case that Missouri Valley's (f)(1)(A) exemption is not terminated because of Midcontinent's failure to prove all three pre-requisites for Missouri Valley's rural exemption to be terminated.

HEARING SUMMARY

Missouri Valley briefly summarizes the salient testimony of the June 9-10, 2008 hearing. Pre-filed testimony is referenced but not summarized.

Mr. Vv. Thomas Simmons.

Mr. Simmons is the vice president for public policy for Midcontinent. Mr. Simmons confirmed several facts previously made in his deposition and in his pre-filed testimony. First, as between Midcontinent and Missouri Valley, Mr. Simmons agrees that Missouri Valley is in the best position to assess the financial impact on Missouri Valley from the proposed physical interconnection. Second, Mr. Simmons admits Midcontinent's decision to serve customers outside the city limits of Williston would be driven primarily by economic considerations, not any sense of responsibility as a carrier of last resort or an ETC carrier. Meanwhile, Mr. Simmons acknowledges Missouri Valley is obliged to serve the 390 square miles of the entire exchange, not merely the seven miles within the city limits of Williston.

Mr. Simmons agreed that Midcontinent has a competitive advantage over Missouri Valley because Midcontinent bundles video and voice. Mr. Simmons was aware of the pre-filed testimony of Mr. Lundquist, but did not provide, nor is he aware of anyone else at Midcontinent, who provided Mr. Lundquist with data about Midcontinent's customers and growth rate in Williston, or other exchanges CLECed by Midcontinent. Tellingly, despite an abundance of market information about its experiences in Williston, Devils Lake, and the BEK exchanges, among others, Midcontinent provided none of it to its experts or, importantly, to the Commission[1].

Mr. Scot C. Lundquist.

Mr. Lundquist was called as an expert for Midcontinent. Though Mr. Lundquist is often retained and consulted to conduct economic analysis for regulators throughout the continental United States, he did not do any independent economic analysis of the burden imposed on

[1] Commissioner Cramer inquired about the same. Cramer: Will there be witnesses a little later that will be able to answer some of Mr Hogue's specific economic analysis questions that he asked of you?

Simmons: (01:02:27) Well I believe there will be witnesses later that would be in a very good position to answer those economic questions

Missouri Valley. Rather, he critiqued the analysis of Mr. Hanson of Missouri Valley[2]. Mr. Lundquist challenged four assumptions made by Missouri Valley but he did not challenge Missouri Valley's method of attempting to forecast the financial impact.

Timothy J. Gates.

Mr. Gates is the second expert witness retained by Midcontinent is this case. Mr. Gates recognizes there is a continuum of competition between and ILEC and a CLEC. At one end of the spectrum a CLEC competes by reselling the services of the ILEC. This is the existing arrangement between Midcontinent and Missouri Valley. According to Mr. Gates, it imposes little economic burden on the incumbent. At the other end of the competition spectrum is overbuilding the ILEC exchange with separate facilities. This represents the other end of competition spectrum. Midcontinent's request for physical interconnection falls between these two ends.

Despite testifying in over 200 cases in 44 states and US territories, Mr. Gates has never provided an opinion to a client or regulatory body that a proposed interconnection is unduly burdensome.

Mr. Gates is aware the Midcontinent enjoys facilities based interconnection in the Bismarck exchange. Though he supports Midcontinent's application for removal of the rural exemption as a method of enhancing competition in the Williston exchange, Mr. Gates was not surprised to know that Midcontinent offers the same services at the same prices in Bismarck (facilities based) as it offers in Williston (resale agreement).

Mr. Gates urges the Commission to look outside of Missouri Valley's resources when the Commission weighs the economic burden associated with Midcontinent's request. Without any

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[2] Mr Lundquist provided this explanation for his analysis: Mr Harrington: In describing your work to Commissioner Wefald you describe what you were doing as adjustments to Missouri Valley's model, can you explain why you did it that way?

LUNDQUIST: There's a couple reasons. One point of view is as a person jumping into the case, I started working on June 19, and it was going to be difficult to try to start from scratch with a full-blown analysis to do some alternative analysis, but more importantly, we had this frame work that MVC, Missouri Valley had provided, and my understanding is that that framework actually was the same framework that was developed by QSI, consulting, per another individual there, not me, in the prior case regarding North Dakota Tel, and made sense to first look at their analysis and see if it could be adjusted to adjust reality better than they had done. [Day 1, 10:00 am session]

legal authority to support his testimony, Mr. Gates speculates that because Nemont permits Missouri Valley to use its name and business reputation, and because Nemont and Missouri Valley have cost sharing arrangements for personnel and equipment, Missouri Valley has unfettered access to Nemont's capital resources.

Shawn Hanson

Mr. Hanson is the General Manager of Missouri Valley. Of the four witnesses who testified at the hearing, Mr. Hanson is the only one who prepared and submitted testimony and economic analysis about the financial impact of the interconnection on Missouri Valley. To be sure, Mr. Hanson is likely in the best position of the four witnesses to analyze the financial impact of a physical interconnection on Missouri Valley as the rural ILEC. As Mr. Hanson testified, he previously worked for McCleod USA and had the responsibility of moving ILEC customers to McCleod's network. Moreover, Mr. Hanson has first hand experience with Midcontinent's ability to migrate Missouri Valley customers into a Midcontinent video/voice bundle.

Mr. Hanson defended the assumptions made in his financial analysis. The largest assumption based on financial impact related to Missouri Valley's eligibility for "safety valve" USF support. Mr. Lundquist opined that Missouri Valley "may" qualify for safety valve relief. He used his speculative theory to reduce the financial impact on Missouri Valley by $2.2 million. Mr. Hanson testified Missouri Valley has made persistent efforts to qualify for the safety valve relief and to date has been unable to qualify. Mr. Hanson explained that Missouri Valley's CFO, Roger Del Fiacco, has pursued high cost loop support, including safety valve eligibility, for several years. Mr. Lundquist provided no evidence he has discussed Missouri Valley's eligibility with anyone at USAC.

Responding to questioning from Commissioner Clark about the nature of what is an "undue" economic burden, Mr. Hanson testified Missouri Valley requires all of its net revenue to be reinvested into the Missouri Valley plant and network. Commissioner Clark asked Mr. Hanson about Nemont's rate of return from ownership of the Williston exchange and Mr. Hanson testified:

Commissioner Clark: Is there any spreadsheet that's attached that would identify how much right now of the net operating margin or I don't know if you'd call it retained earnings or whatever, goes from MVC to the parent company?

Hanson: And that's a great question because we don't send any retained earnings right now to the, we don't send anything to the parent company, other than through the leases that we talked about yesterday. For the functions that are performed at the parent and the other things on behalf of Missouri Valley.

Commissioner Clark: So at least to this point for the parent Nemont, the benefit that they get from the Williston exchange is what, I mean, what's kind of the business case for operating it?

Hanson: From the Williston Exchange right now, there has been no financial return. Only to the extent that it might contribute to a tax benefit, as an example.

Commissioner Clark: Shared costs, perhaps...

Hanson: And they're spreading overhead further, yeah.

Commissioner Clark: Is the hope that at some point it becomes a profitable subsidiary to the parent.

Hanson: That would be the hope. [Day 2; 10:00 am session.]

On redirect, Mr. Hanson explained that since its acquisition, Missouri Valley has never returned net revenue to Nemont.

Mr. Hanson explained that the net revenue losses of 31% to 56% would have a substantial, detrimental effect on Missouri Valley's ability to meet its carrier of last resort obligations. Mr. Hanson is the only witness who testified about this issue and the larger issue of whether the request of Midcontinent is consistent with the Universal Service principles in § 254(e) of the Act.

SUMMARY OF ARGUMENT

Section 251(c) of the Act requires incumbent telephone companies (ILECs) to interconnect with telephone companies that want to enter incumbents' exchange areas as competitors (CLECs). Midcontinent is a CLEC that has requested an interconnection with Missouri Valley, a rural telephone company that is the ILEC in the Williston exchange.

Under § 251(f)(1)(A)of the Act, the "rural exemption," an ILEC that is a rural telephone company is exempt from the interconnection requirements of section 251(c). The exemption

continues in effect until and unless terminated under § 251(f)(B). Congress provided only one, narrow method for the rural exemption to be waived: the requesting CLEC is a cable operator and the rural telephone company is providing video programming. § 251(f)(1)(C). Though Midcontinent understandably argues for waiver under different facts, its argument is best made to Congress, the legislative body that created the lone method of waiver.

Under controlling precedent, the plain meaning of the statute requires Midcontinent to prove that its requested interconnection meets three statutory prerequisites to justify the termination of the otherwise continuing rural exemption. The three prerequisites are Midcontinent's requested interconnection (1) "is not unduly economically burdensome," (2) "is technically feasible," and (3) "is consistent with section 254....." regarding universal service. Act, §§ 251 (f)(1)(A) and (B). (Technical feasibility is not an issue in the pending case.) The rural exemption is not a limited exception to the general duty of interconnection. The rural exemption provides broad protection to rural telephone companies, protection from undoubted economic burdens of interconnection. Midcontinent has failed to prove that Midcontinent's requested interconnection "is not unduly economically burdensome."

Midcontinent's requested interconnection would impose undue economic burdens on Missouri Valley, burdens that would impair Missouri Valley's financial ability to perform its universal service obligations as a carrier of last resort and as an eligible telecommunications carrier providing universal service to low income consumers. Midcontinent's request and its evidence do not include any universal service obligations to be served by Midcontinent. Midcontinent has failed to prove that Midcontinent's requested interconnection " is consistent with section 254" regarding universal service.

Under § 251(f)(2) of the Act, any local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may request "suspension or modification" of the interconnection requirements under 251(c). Case No. PU-08-176, Suspend/Modify Interconnection Requirements Application, was opened by the Commission in

response to Missouri Valley's application to present Missouri Valley's alternative position: If the exemption is not sustained, it should not be entirely terminated but should be suspended under Act § 251(f)(2).

If the Commission reaches Missouri Valley's § 251(f)(2) application because the Commission removed Missouri Valley's rural exemption, it must consider the public interest, convenience and necessity of suspending interconnection obligations. In the present case, the public interest compels suspension of the interconnection obligations. Midcontinent asks the Commission to focus on the benefits of additional competition. But the record before the Commission lacks any evidence that, assuming Midcontinent is permitted to migrate to facilities based competition from resale, there will be any meaningful competition or consumer benefit. Indeed, Midcontinent provides the same services at the same prices in Williston as it does in Bismarck where it enjoys physical interconnection. Further, Midcontinent has no intention to serve outside the seven square miles in and around the city of Williston.

Missouri Valley invests all of its net revenue back into the network of the Williston exchange. Permitting Midcontinent to interconnect physically with Missouri Valley will siphon a substantial portion of the net revenue away from the network. Midcontinent's call for competition is thus an illusory benefit to the people of Trenton, Buford, and surrounding communities within the Williston exchange.

PREVIOUS NORTH DAKOTA CASES

The Commission has previously administered cases under federal act § 251 (f). In some cases under § (f)(1) where Midcontinent requested termination of a rural telephone company's exemption, the parties resolved the issue by stipulation, so it was unnecessary for the Commission to decide whether the exemption should be terminated or sustained. *See, e.g. Cases No. PU-05-449, PU-06-345 and PU-06-400.*

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

The only prior case under § (f)(2) did not involve ILEC and CLEC interconnection issues; it involved rural ILECs' relationships with interexchange carriers. In Case No. PU-405-99-204 and consolidated cases, the applications of 21 rural telephone companies for suspension and modification of dialing parity requirements were granted.

The Commission has not previously made any decision in any contested case whether a rural telephone company's exemption from facilities based interconnection under section 251(f)(1)(A) should be terminated under § 251(f)(1)(B) or whether the interconnection and related negotiation requirements should be suspended under § 251 (f)(2).

ARGUMENT

Missouri Valley's exemption under Act section 251(f)(1)(A) should be sustained, not terminated, because Midcontinent has not carried its burden of proof on the two contested issues, undue economic burden and universal service. Alternatively, if the exemption is not sustained, it should not be entirely terminated but should be suspended under Act section 251(f)(2). Suspension is necessary to avoid a significant adverse economic impact on users of telecommunications services generally and to avoid imposing a requirement that is unduly economically burdensome. Suspension and modification is consistent with the public interest, convenience and necessity.

The following argument replicates numbered paragraphs of Missouri Valley's proposed orders and presents arguments related to each proposal. References to the evidentiary record and citations of legal authorities are in *italics*. References to witnesses' written testimony are identified by the witness's surname.

Missouri Valley's arguments focus on the issues under Act § 251(f) as itemized in the notice of hearing, issues described by the court in Iowa v FCC as "pre-requisites" on which Midcontinent has the burden of proof. Despite the wide ranging testimony of some of the witnesses, most particularly, Gates' expounding about competition, this case is not about competition. Missouri Valley does not claim an exemption from competition; that is not what the Act provides. What the Act provides in § 251(f)(1)(A) is rural telephone companies are exempt from interconnection and negotiation duties of section 251 (c). Interconnection - not competition - is what the pending case is about.

There is no doubt that interconnection is one way the Act facilitates competition, but Midcontinent seems unaware of or unwilling to accept the controlling opinion:

> "In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the Congressional debates. . . . 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....." Iowa v FCC, at 761.

Midcontinent's Burden of Proof.

Burden of proof, specifically Midcontinent's burdens, is mentioned frequently in the proposed order. Proof means evidence, of which there are two kinds, facts, and opinions based

on facts. Of Midcontinent's three witnesses, Simmons, Gates and Lundquist, only one, Gates, testified in an effort to prove that Midcontinent's requested interconnection is "not unduly economically burdensome." Gates' testimony was an opinion. Gates offered no testimony about facts to support his opinion. Gates did not claim support for his opinion by relying on any testimony of Midcontinent's fact witness, Simmons. Gates did not claim support for his opinion by relying on any facts furnished by Midcontinent's other opinion witness, Lundquist. Gates claimed support for his opinion by relying on Lundquist's opinion as if that other opinion were a fact. (Lundquist opined only about an amount of economic impact of Midcontinent's requested interconnection; Lundquist did not opine whether the amount of economic impact he opined was "not unduly economically burdensome.")

It is a metaphorical challenge to describe this flimsy chain of evidence: house of cards; illegal forward lateral to an ineligible receiver. The state of Midcontinent's opinion evidence on the issue "not unduly economically burdensome," if it passes the minimum bar of admissibility, falls far short of persuasive or enough to carry a burden of proof.

Even if Gates' opinion based on Lundquist's opinion is admissible, Gates' opinion is ultimately unpersuasive for two reasons. First, Gates is just plain wrong in his understanding of the meaning of the statutory term "not unduly economically burdensome." Second, Lundquist's opinion, assuming it might be considered as a quasi-fact to support which Gates' opinion, is saddled with an obvious misunderstanding of the safety valve rule on which he relies. As Lundquist's opinion falls, its quasi-fact status evaporates and Gates' opinion also falls as an opinion lacking a factual basis. Rules 703, 705, N.D.R.Ev.

It is unnecessary to argue at length how Lundquist's first three proposed adjustments to Midcontinent's impact analysis are rebutted. That is covered in detail in proposed findings numbered 10 through 18. There are two more points to be made about the proposed adjustment he named Resale Line Growth Factors, also addressed in proposed finding 18.

Lundquist's criticisms of Missouri Valley's analysis is grossly distorted. Lundqusit criticizes Missouri Valley's compounding growth projections and endeavors to support his linear projections by including an illustration of "ramp-up" experience in 2006. *(Lundquist, pp. 13-14, figure 1.)* Lundquist got the data from Missouri Valley's exhibits, but he neglected to show or acknowledge that Missouri Valley's forecasts of compounded growth are not distorted or skewed by 2006 data, as plainly shown in the "subs" page of Missouri Valley's impact analysis, exhibit 1. Missouri Valley's projections for the years 2009 through 2012 are based only on 2007 and 2008 data. If one looks at Lundquist's graph, figure 1 on page 14, ignoring the 2006 data, it is seen that the 2007 and 2008 data show growth that is not flat-lined but is accelerating.

At the hearing, witnesses on both sides testified about Midcontinent's competitive advantage in its ability to bundle telephone and television services. Considering that, it is reasonable to expect that interconnection, if that were to happen, would be followed by some "ramp-up" in the migration of customers, meaning Missouri Valley would lose more customers after interconnection than it would lose if Midcontinent continued doing resale without interconnection. But Midcontinent's projections of customer migration do not include any "ramp-up" projection for 2009 or any year. Missouri Valley's projection of customer migration is conservative and realistic, not "unrealistic" as claimed by Lundquist. *(Lundquist, p. 13.)* Mr. Hanson's assumptions on growth were based on historical facts. Midcontinent, with experience in not less than five communities in North Dakota, could have easily rebutted Mr. Hanson's growth assessment. Midcontinent did not rebut. From Midcontinent's silence, the Commission may draw an inference the data it declined to offer to meet its evidentiary burden is, in fact, adverse to Midcontinent. See, e.g., *Medical Arts Clinic v. Franciscan Initiatives, Inc.*, 531 N.W. 2d 289, 297 (N.D. 1995) (where a party does not produce evidence it is required to produce, "the hearing officer and agency may draw an adverse inference that evidence not produced is unfavorable to the nonproducing party").

Lundquist's fourth proposed adjustment, an imagined "offset" based on his interpretation of the safety valve provisions of the universal service funding regulations, deserves more attention.

Obviously, attention is attracted because of the size of the proposed USF adjustment, $2.234 million or 62.4% of the economic impact of Midcontinent's requested interconnection. Lundquist's proposed USF adjustment does not deny $2.234 million of economic impact of Midcontinent's requested interconnection. On the contrary, Lundquist assumes "...MVC experiences the line and revenue losses projected in the Interconnect Model scenario," and he admits the underlying assumptions are "... likely to happen if MVC loses lines in the case of Midcontinent's entry." *(Lundquist, pp. 24-25.)* Lundquist does not contend that $2.234 million of economic impact will not occur due to Midcontinent's requested interconnection; he contends that likely economic impact is not an economic burden because the impact *might* be "offset" by universal service funds.

Attention must be paid because Lundquist's proposed USF adjustment depends on the availability of universal service support under the safety valve mechanism, a proposal that not only invites but demands examination of the proposal for compliance with the rules that regulate universal service support.

PARENT TRAP/SAFETY VALVE HISTORY

It is a matter of common knowledge in the telecommunications industry that a fad swept through rural service areas in the early 1990s. RBOCs, notably US West, that provided telecommunications in rural areas offered to sell their small town rural exchanges to neighboring rural telephone companies. The rationale on both sides of these transactions was simple. The RBOCs' rural service areas resembled RTCs.' High costs, low numbers of customers and low density of customers in an small rural town's service area, declining populations, etc. Though the service areas were objectively comparable, they were subjectively different. From the point of view of the RBOCs, service in small town rural exchanges did not produce acceptable levels of net profit and in fact impaired the profitability of an entire company as revenues from urban exchanges provided an internal subsidy to support higher costs of service in the small town rural exchanges. It was as if the RBOCs bore a universal service obligation without access to support from the

universal funds to which they contributed and which were available to their neighboring rural telephone companies. That was one point of view.

From the point of view of any rural telephone company, the opportunity to acquire a small town exchange near or inside its rural service area was an opportunity to improve its financial stability, not only a gain in the numbers of customers and amounts of revenue, but also an offset to the common experience of declining rural population. And the rural company's costs of acquisition and service were partially offset by universal service funds that would be available to support the rural company's service in its newly acquired service area.

Regulators' oversight of these transactions might have seen these transactions as win win win situations. The RBOCs were happy to be rid of rural small town exchanges. The RTCs were happy to gain rural small rural town exchanges. Regulatory commissions were happy that the small town rural exchanges would be served by companies that were happy to do so and more inclined than the previous owners to invest in infrastructure.

But there was a cow in the room, the universal service fund that was fed by the RBOCs, a cash cow that might now be milked. It is no surprise or secret that RBOCs over-priced the rural exchanges they sold, claiming a premium over book value as a perceived fair share/present value of RTC buyers' future receipt of RBOC provided universal service funds to support service in the exchange areas being transferred.

In response, the FCC began a program of universal service reform. As noted in the 14th order in the Universal Service docket, the 1st order installed 47 CFR 54.305, the so-called "parent trap" rule. *(Universal Service Order, Par. 91).* As first ordered, 47 CFR 54.305 barred a rural telephone company from receiving universal service support for an acquired exchange that was not eligible for support under its former ownership. The original parent trap rule had the effect that a rural telephone company such as Missouri Valley bore the financial burden to support universal service in an acquired exchange such as Williston with internal resources only, without the availability of universal service funds

The 14th order amended the parent trap rule by adding a " safety valve," 47 CFR 54.305(d). As testified by Hanson and acknowledged by Lundquist, the parent trap rule as amended applies to the Williston exchange under Missouri Valley's ownership. As Hanson explained, there are six categories of universal service support available to rural telephone companies generally, five of which - including safety valve - are unavailable to Missouri Valley because of the parent trap rule. *(Hanson, pp. 3-5, 31-32; Lundquist, 23-26. See also Universal Service Order, Par. 92.)*

The 14th order addressed an "unintended consequence" of the parent trap rule as first ordered. The unintended consequence was that customers in high cost rural exchanges involved in transfers might be 'doomed' to poor service as a consequence of the absolute disqualification of a transferred exchange's eligibility for universal service support. *(Universal Service Order, Par. 93.)* The problem facing Missouri Valley's Williston exchange and any other rural exchange formerly owned by US West and now subject to the parent trap rule is similar to the problems facing US West's retained rural exchanges, a problem recognized by the Commission in its recent filings with the FCC and referred to in Hanson's testimony. *(Hanson, pp. 4-5.)*

The FCC's solution was"... to provide a 'safety valve' that provides support for additional investment made in acquired exchanges." *(Universal Service Order, Executive Summary, Par. 12)* The FCC modified Rule 54.305 adding subsection (d) and explained the purpose of the safety valve was to "... provide additional support to rural carriers that make substantial investments after acquiring exchanges." and to "... provide appropriate incentives for rural carriers operating recently-acquired exchanges to invest in rural infrastructure."

To summarize the interaction of the parent trap rule as modified by the safety valve installed under the 14th order: A) The parent trap rule prevents a rural telephone company from receiving universal service funds to support or subsidize old investment in the exchange, investment that was not made by the rural telephone company but was made by former owners. B) The safety valve permits a rural telephone company that is subject to the parent trap rule to receive some limited USF support for post-acquisition new investments in rural infrastructure,

investments that are made by the rural telephone company. Avoidance of excessive fund growth and avoidance of claims against the universal service fund not related to investment in rural infrastructure are common principles underlying all of the Universal Service Order.

Analysis of Lundquist's proposed USF adjustment exposes the proposal to be unsupported by the FCC's Universal Service Order that installed the safety valve mechanism, for the basic and obvious reason that the economic justification for safety valve support must be a rural ILEC's post acquisition new investment in rural infrastructure, not a rural ILEC's losses of revenues. Universal service support may be available to Missouri Valley via the safety valve mechanism after the fact of Missouri Valley's new investment made in response to the incentive to invest in rural infrastructure. Safety valve money is not intended to replace rural ILECs' loss of revenues to CLECs. *(See Universal Service Order, par. 97-98, 101,124 and 131.)*

The fundamental flaw is this: If the Commission were to accept Lundquist's theories, then as a consequence of interconnection Midcontinent would receive revenues and Missouri Valley would lose revenues with no assurance or certainty that the FCC or its contracted universal service administrator, USAC, would accept Missouri Valley's future application - inspired by Lundquist - for safety valve funds to "offset" revenue losses caused by Midcontinent's requested interconnection. In proposing the USF adjustment, Lundquist has assumed a role as if he were Missouri Valley's consultant with respect to universal service issues, which he is not. And he implicitly suggests the Commission should assume jurisdiction to approve in advance Missouri Valley's future application for safety valve universal service funds, as if the Commission were the FCC or USAC, which it is not. Nor can the Commission confidently conclude in 2008 that the FCC or USAC will approve any future application for safety valve universal service funds (inspired by Lundquist) unsupported by evidence of investments in rural infrastructure.

Where expert witnesses of various academic and real world backgrounds testify while denying legal expertise, it must be acknowledged that Lundquist has presented an interesting

performance of jailhouse lawyering about another's case, his advice that Missouri Valley should twis .ne words of the safety valve mechanism and ignore the FCC's limiting principle, Safety Valve One O One: "...acquiring carriers will only receive safety valve support for new investment in rural infrastructure." *Universal Service Order, Par. 101.)* Though his opinion is offered to carry a burden of proof, Lundquist's testimony exudes uncertainty and/or built in deniability of responsibility for anticipated possible future failure of his advice:

> "*Potential* changes to MVC's subsidies from the Universal Service Fund ("USF")" *(Lundquist, p.18)*
>
> "To summarize, despite the 'parent trap' rule, MVC *may be able* to receive significant additional USF subsidies for its "Citizens" lines, via the Safety Valve mechanism."
>
> "This *would happen if* the per line cost associated with MVC's 'Citizens' lines increases above 115% of the national benchmark, which is likely to happen if MVC loses lines in the case of Midcontinent's entry."
>
> "MVC would receive his support under the Safety Valve mechanism which .... *could be a significant offset* to the revenue losses MVC is claiming in its Interconnect Model scenario." *(Lundquist, p. 24-25)*

Lundquist's opinion should be dismissed or discounted on the basis of his careful choice of words. That kind of equivocation does not rise to the level of convincing opinion evidence. (The most positive of Lundquist's assertions is that it is likely that Missouri Valley will lose lines and revenues in the case of Midcontinent's entry, a fact that supports Missouri Valley's position more than Midcontinent's.)

What is wrong is Midcontinent's scheme is a variation of the abuse of the universal service funu ınat led to the parent trap rule in the first place. An important side effect of the parent trap rule is it forecloses old ILECs such as US West and Citizens from selling an exchange at a premium price as part of a scheme by which a rural telephone company would collect universal service funds and pass the money (via the inflated price) to the old ILEC that was not eligible to receive universal service funds. But Lundquist and Midcontinent imagine they have discovered a variation of the RBOCs' old scheme, a loophole not foreclosed by the parent trap rule, as they read the safety valve provisions. They think they have discovered a loophole in the parent trap rule as modified by the safety valve, a formula that can be finagled so a CLEC can indirectly reap universal service funds for which it is not eligible under basic principles of universal service policy.

Missouri Valley's exemption from Midcontinent's requested interconnection should not be terminated because Midcontinent's economic burden evidence depends on a misappropriation and diversion of universal service funds. That would be an unintended consequence of the safety valve mechanism and is not consistent with section 254. Because Midcontinent's and Lundquist's opinion about the economic impact or economic burden is based on an interpretation of the universal service rules that is not consistent with section 254, the opinion evidence does not meet Midcontinent's burden of proof that Midcontinent's requested interconnection "is not unduly economically burdensome."

Gates's mistaken view of the Act.

As stated, Mr. Gates is just plain wrong in his understanding of the meaning of the statutory term "not unduly economically burdensome." His proposed definition is the term means "if the competition [sic; evidently meaning interconnection] harmed MVC to the point where it was damaging its ability to operate efficiently or to continue to offer services, then the exemption would apply." He also testified that individuals may interpret the standard differently, and he opined that ultimately it is the Commission's interpretation that will rule the day.

All the economic evidence in the case now before the Commission indicates there is an ecc mic burden, no less that $888,577 of net revenues lost by Missouri Valley over the 2009-2012 and more likely $3.58 million of lost revenues. (More likely, because $3.58 million was both parties' beginning number, and Midcontinent has the burden of proof to show the amount of economic burden is less, a burden not met as shown by Missouri Valley's proposed findings 9 through 29.)

Gates' opinion or definition of the statutory term "*unduly* economically burdensome" is like the FCC's vacated rule; his opinion would impermissibly weaken the rural exemption. "By limiting the phrase 'unduly economically burdensome' to exclude burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies." Iowa v FCC, at 761. As the Court rejected the FCC's rule, so also the Commission should reject Gates' opinion because his opinion limiting the phrase "*unduly* economically burdensome" to mean "damage to a rural telephone company's ability to operate efficiently or to continue to offer services" would impermissibly weaken "the broad protection Congress granted to small and rural telephone companies." Gates' definition of the term "*unduly* economically burdensome " is wrong because the rural exemption is not limited to protection against the most extreme economic burdens, threats to economic survival. Gates' limited opinion is impermissibly inconsistent with the broad protection Congress granted to small and rural telephone companies. Like the FCC's rule, 47 CFR 51.405, Gates' definition is overruled by the opinion of the court in Iowa v FCC, so Gates' definition cannot be adopted by the Commission.

Gates' testimony is only his opinion, an opinion unsupported by facts known to him. His opinion is based on another witness's (Lundquist's) opinion testimony and related exhibit showing that other witness's economic impact Analysis. Notably, Lundquist did not opine whether the financial impact that would be caused by interconnection was or was not "unduly economically burdensome." Gates' testimony is clear that he did not participate in Lundquist's economic impact

analysis, and Gates did not vouch for Lundquist's methodology or work product or in any way justify his acceptance of Lundquist's numbers as if they were facts. In a sort of tag-team exercise, Lundquist produced a number that was uncritically adopted by Gates, an amount that Gates acknowledged is not "trivial" but "does not rise to an 'unduly economically burdensome' level" *(Gates, pp 5, 32, 37.)*

All of Gates' other testimony, his discourse on the wonders of competition is instructive but incomplete background about the Act. His zealot's attachment to his one-size-fits-all opinion about competition in telecommunications markets leads him to overlook or minimize a central point of the Court's decision in the Iowa v FCC case: "In the Act, Congress sought both to promote competition and to protect rural telephone companies" Iowa v FCC, at 761. Not surprisingly, though Mr. Gates has provided testimony in over 200 cases in 44 states, he has never testified an interconnection is unduly burdensome to the ILEC.

Gates predilection to competition leads him to opine, erroneously, that "... the [rural companies'] exemption from the 251(c) [interconnection] requirements was to be an ***exception*** and not the rule. .... The intention was that the exemption would be used only when it was absolutely necessary to preserve universal service." *(Gates, p. 16.)* There are almost as many mistakes in this statement as there are words. Gates is correct to say the 251(f) rural exemption from the 251(c) interconnection requirement is an exception to the general rule, but ordinary rules of statutory interpretation are clear. Where there is a general rule and an exception, the exception prevails. So, the "... statutorily granted exemption [from interconnection] should continue unless the state commission found all three pre-requisites for terminating the exemption....." Iowa v FCC, at 761. And, "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. All three pre-requisites. Not one pre-requisite of absolute necessity to preserve universal service, but consistency with universal service principles under section 254,

and "not unduly economically burdensome," properly understood. Act, Section 251(f)(1)(B). (The thir re-requisite, technical feasibility, is not a contested issue.)

Midcontinent's request is incompatible with Universal Service Principles.

In 1996, the federal act enacted a long standing regulatory policy that consumers in all regions of the Nation, including those in rural, insular, and high cost areas, should have access to telecommunications services that are reasonably comparable in quality and cost to services provided in urban areas. *(Act § 254; Universal Service Order, Par. 2.)* In addition to the fundamental concern of keeping all consumers in every exchange area connected to telecommunications network, there is also the concern that affordable telecommunications service should be available to low income consumers. *(§§ 214 (e) and 254.)*

The rural exemption protects not only rural telephone companies from undue economic burdens, the exemption also protects consumers by imposing as a pre-requisite that termination of the exemption must be consistent with universal service policy under section 254. *(Act § 251(f)(1)(B).)* For Missouri Valley to interconnect with Midcontinent is not consistent with universal service principles under Act § 254 for two reasons: universal service policy that applies to the whole universe of telecommunications consumers and universal service policy that applies to low income consumers.

For Missouri Valley to suffer a negative economic impact caused by Midcontinent's requested interconnection would be a double-edged loss. The negative economic impact that is an undue economic burden also impairs Missouri Valley's performance of universal service obligations, a result of Midcontinent's requested interconnection that is not consistent with 47 U.S.C. 254. To whatever extent Missouri Valley's performance of universal service obligations is impaired, universal service is impaired and the damage to universal service will not be repaired by Midcontinent.

Midcontinent has the burden of proof on the universal service pre-requisite to termination of Mis   ɹri Valley's exemption from interconnection. Midcontinent's only evidence about the universal service pre-requisite was the testimony of its expert witness Gates, who testified only about his faith that "competition" would somehow offset impairment of Missouri Valley's ability to perform its universal service obligations. *(Gates, pp. 22-24.)* Neither Gates nor Midcontinent's fact witness, Simmons, testified about facts to show how Midcontinent's interconnection would be consistent with the universal service provisions of § 254. Particularly, neither testified about any action by Midcontinent that would offset impairment of Missouri Valley's ability to perform its universal service obligations. Not only did Gates and Simmons avoid testifying about what Midcontinent would do for universal service, each made it clear that Midcontinent assumes no obligations of telecommunications service in the Williston exchange where Midcontinent does not offer cable TV services. *(Simmons, p. 8; Gates, p.13.)* Midcontinent's other witness, Lundquist, did not purport to testify about interconnection's consistency with section 254. On the contrary, Lundquist's testimony on the economic burden issue proposed a perverse interpretation of the universal service funding mechanism that would divert universal service funds to Midcontinent's treasury while Midcontinent bears no universal service obligations. That is less than consistent with section 254.

On the basis of this paragraph alone, the Commission should find that Midcontinent has failed to carry its burden of proof on the universal service pre-requisite to termination of Missouri Valley's exemption from interconnection. But there is more, Missouri Valley's rebuttal evidence, and consideration of the aspects of universal service concerning low income consumers.

The negative financial impact on Missouri Valley caused by Midcontinent's requested interconnection, the economic impact that is an undue economic burden, also has the effect to impair Missouri Valley's performance of universal service obligations. The economic burden of interconnection would not be borne only by Missouri Valley's owners, but from the universal

service perspective, the undue economic burden of Midcontinent's requested interconnection wou. ,all on consumers in the entire Williston exchange area.

Hanson testified and Midcontinent's impact analysis showed that Missouri Valley's annual net revenues would be substantially reduced as a consequence of Midcontinent's requested interconnection while its universal service obligations and the expenses to perform those obligations would be unchanged and likely increased. Hanson testified the industry is at a dynamic point in time when universal service is literally being redefined and the new expanded definition of universal service will likely include broadband Internet access and this will require that ILECs and ETCs have reliable, predictable, and sufficient financial resources to upgrade its network for compliance with this expanded and redefined definition of universal service. *(Hanson 3-5; 11-12; 31-32; 35-37)*

As shown by the preceding discussion of the "parent trap" rule, Missouri Valley bears the obligation of universal support in the 390 square mile Williston exchange without access to universal service support funds that are available to other rural telephone companies in other exchanges, so the Commission should be especially reluctant to take any action that would reduce the amount of Missouri Valley's net revenues available for re-investment in the Williston exchange, particularly where Midcontinent's evidence is clear it has no plans to assume universal service obligations. Every dollar of revenue lost by Missouri Valley as a consequence of Midcontinent's requested interconnection is a dollar lost to support universal service in the Williston exchange, including all the area outside the City of Williston where Midcontinent has no facilities.

Every dollar of revenue that Missouri Valley loses as a result of Midcontinent's requested interconnection would not be available to support universal service in Williston but would instead go to Midcontinent in Sioux Falls (to be shared with its cable TV partner, Comcast). To say that first or the second or even the hundredth dollar lost is inconsistent with section 254 would be ludicrous. That is not what Missouri Valley argues. The argument is that so many dollars lost,

hundreds of thousands of dollars lost annually, aggregating $3.58 over the 2009-2012 test period, are not only an undue economic burden, but those losses would harm Missouri Valley's ability to meet its universal service requirements.

How many dollars of economic impact or economic burden is low enough that Midcontinent's requested interconnection might still be "consistent with section 254? " Midcontinent, the party with the burden of proof offered no evidence, no facts and no opinion about that. Gates' opinion evidence on the "not unduly economically burdensome" issue, his opinion that $888,577, though not "trivial" did not rise to the level of "unduly economically burdensome" *(Gates, pp. 5, 37)* did not find its way into his testimony that Midcontinent's requested interconnection is consistent with section 254. Gates might have said but he did not say Missouri Valley's loss of $888,577, though not "trivial" "is consistent with section 254." But that more than trivial amount is or should be off the table, for all the reasons stated in Missouri Valley's proposed findings 9 through 29 and the related arguments, *supra*. The undue economic burden of Midcontinent's requested interconnection that will impair or harm Missouri Valley's ability to meet its universal service requirements is $3.58 million, over the 2009-2012 timeframe.

If any other amount is to be considered under the universal service pre-requisite, that number is $2.234 million, not because that is a lower amount of economic impact, but because it is contained within the whole $3.58 million of economic impact. Missouri Valley does not recognize $2.234 million as a discrete component of the whole economic burden. That number was produced by Midcontinent's and Lundquist's distorted notion that the safety valve mechanism within the universal service support system may be available to reimburse Midcontinent for that much of the economic burden that would result from Midcontinent's requested interconnection.

Because Midcontinent's evidence in support of its request for termination of Missouri Valley's exemption from interconnection is based on an interpretation of the universal service rules that is not consistent with section 254, Midcontinent has failed to carry its burden of proof that Midcontinent's requested interconnection "is consistent with section 254."

Universal service policy necessarily includes an expectation on the part of consumers and their governmental institutions that one, at least one, telecommunications carrier will provide telephone exchange service and access to interexchange carriers. The familiar shorthand expression is "carrier of last resort."

Carrier of last resort is a familiar expression often used, but research has disclosed only one instance of the concept being an issue in telecommunications regulation in North Dakota. In Case No. 2096-99-241, a group of rural telephone companies complained about US West's abandoning its obligations as intra-state long distance carrier of last resort. The issue was resolved not by litigation, but by stipulation after the rural companies made arrangements to replace US West as the interexchange carrier of last resort.

Missouri Valley bears the carrier of last resort responsibility in Williston. Missouri Valley's legal status under its certificate of public convenience and necessity to provide facilities based incumbent local exchange telecommunications services in the Williston exchange *(Order, Case No PU-2779-02-451)* is different from Midcontinent's status under its certificate of public convenience and necessity to provide competitive local exchange telecommunications services in North Dakota. *(Order, Case No PU-04-546.)*

Missouri Valley, like its ILEC predecessors, must maintain its loop throughout the entire exchange area, ready, willing and able to provide service to all, not picking and choosing sub-markets in the exchange area, as a CLEC might. This distinction is particularly pertinent in comparing Missouri Valley to Midcontinent, because Midcontinent's TV cables are limited to the City of Williston and its outskirts, whereas Missouri Valley's responsibilities encompass the entire Williston exchange area that is many times larger than the area of the city (390 square miles v. 7 square miles). A CLEC may leave a market if it deems that to be in its interests, without Commission oversight. Missouri Valley, like its ILEC predecessors, is obliged to remain in the market ready, willing and able to provide service to the entire community unless and until it were to

arrange for another carrier to assume those fundamental obligations of an ILEC." *(Hanson, p. 37)* *See Orders in PSC Cases No. PU-2173-99-520 and No. PU-2779-02-452.*

Missouri Valley bears these COLR responsibilities to provide service to the entire community, including Midcontinent's customers; Midcontinent has no such responsibilities, not even to its own customers.

All this rebuttal evidence is more than sufficient to rebut Midcontinent's only evidence on the universal service issue, Gates' opinion that somehow competition (but not Midcontinent as a competitive local exchange carrier) would somehow offset interconnection's "harm to MVC's ability to meet the universal service requirements." *(Gates, p. 4, 24-25.)* Weak as that opinion is, unsupported by factual evidence, the opinion at least attempted to address universal service in the comprehensive sense. None of Midcontinent's witnesses uttered a word about the part of universal service policy focusing on low income consumers.

Commissioner Wefald's Question

Near the conclusion of the hearing, Commissioner Wefald observed: "It appears to me that the Commission has this option, to require Midcontinent to meet the requirements in Section 214(e)(2) for designation as an eligible telecommunications carrier for the service area, the whole exchange, the 890 square miles. So, I know this is a legal question, and so I would like to ask if the parties will please brief this issue of whether of the commission, if it chose to do this, what would you think?" [Day 2; 11:00 am session.]

Under the specific terms of Act § 251(f)(1), it is necessary for the Commission to consider the parties' status and records and their future obligations with respect to universal service as the Commission decides whether to terminate Missouri Valley's exemption from Midcontinent's requested interconnection. That consideration may be informed by also considering § 253, a central provision of the 1996 Act's pro-competitive policy. That section generally forbids States from prohibiting the ability of any entity to provide any telecommunications service. That provision is not only tempered by the rural exemption from interconnections under section 251(f), section

253's general provisions are subject to an important limitation and consideration of Lifeline service in the case of rural markets.

> (f) RURAL MARKETS. - It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214 (e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply -
>
> > (1) to a service area served by a rural telephone company that has obtained an exemption, suspension or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214 (e)(1); and
> >
> > (2) to a provider of commercial mobile services."

Neither of Midcontinent or Missouri Valley is a provider of commercial mobile services, i.e. a cellular telephone company, so section 253(f)(2) is not relevant. Missouri Valley is a rural telephone company that has not obtained (and does not seek to obtain) an exemption, suspension, or modification of section 251(c)(4) (regarding ILECs' duties of resale to CLECs), so section 253(f)(1) is also not relevant.

Midcontinent is a telecommunications carrier that seeks to provide telephone exchange service in Williston, a rural market, a service area served by a rural telephone company. Under section 253 (f), the State of North Dakota, acting through its legislature or through the Commission's exercise of its delegated powers, is allowed by the federal act to require Midcontinent to meet the requirements in section 214 (e)(1) and be designated as an eligible telecommunications carrier (ETC) and to participate in the universal service/Lifeline program before Midcontinent is permitted to provide service as a facilities based CLEC.

Midcontinent has a statewide PC&N certificate, subject to the provisions of § 251(f) *(Order, Case No.04-546),* but it has applied for ETC status only in Qwest service areas. *(Order, Case*

No.05-272). Midcontinent has not applied to be designated as an ETC in the Williston exchange. If Midcontinent were to apply to be designated as an ETC in the Williston exchange, it must offer all services required of an ETC throughout the study area. *NDCC § 49-21-01.8.*

Missouri Valley is an ETC in the Williston exchange; Midcontinent is not. (*Orders, Cases No. PU-2779-02-451 and PU-05-272.*) Missouri Valley is not only designated as an ETC eligible to receive universal service support under Act §§ 214 (e)(1) and 254, Missouri Valley also provides funds to support Lifeline services. *(Hanson, pp.33-34.)* Midcontinent - providing package deals of telephone service and video entertainment and not providing basic telecommunications to low-income consumers - would provide no financial support to universal service to low income consumers in the Williston exchange comparable to the contribution paid by Missouri Valley, not even to those low income consumers who are able to afford cable TV! Midcontinent's failure to participate in the universal service/Lifeline plan is ample reason for the Commission to conclude that termination of Missouri Valley's exemption from interconnection requirements is not consistent with universal service policy.

Considering a) how Midcontinent's requested interconnection would harm Missouri Valley's ability to meet its universal service requirements, b) how Midcontinent's requested interconnection would affect COLR responsibilities affecting the entire Williston exchange, c) how Midcontinent assumes no responsibilities to make telecommunications services available to low income consumers, or d) how Midcontinent proposes the universal service fund and the safety valve should be tapped to provide financial cover for the economic burdens of Midcontinent's requested interconnection, the Commission should find that Midcontinent has not met its burden of proof that termination of Missouri Valley's rural exemption from the requirements of Act section 251(c) is consistent with section 254. Each one of these considerations is enough to show that Midcontinent has not met that burden of proof . Taken together, the evidence is overwhelming that termination of Missouri Valley's rural exemption from the requirements of Act section 251(c) is not consistent with universal service policy.

Implementation Schedule

An implementation schedule for compliance with Midcontinent's request for interconnection would need to be established only "should the exemption be terminated." (Notice, Issue 4.) In the Midcontinent/NDTC case No. PU-05-451, a 90 day implementation schedule was ordered, and further hearings were scheduled to address financial issues.

As Mr. Hanson pointed out during live testimony however, it is difficult to forecast the length of an implementation schedule without knowing what Midcontinent wants. Based on the conflicting testimony of Messrs. Gates and Simmons, Missouri Valley remains unclear about the nature of the proposed interconnection.

Waiver; Commissioner Clark's Question re History of resale Agreement

The Notice of Hearing noted Midcontinent's request that the Commission determine that Missouri Valley has waived its rural exemption, or in the alternative that the Commission conduct an inquiry for the purpose of determining whether to terminate Missouri Valley's rural exemption. The fact that the Commission has conducted a hearing and inquiry implicitly indicates that the request for a determination of waiver is denied, but the request has not yet been explicitly denied.

Midcontinent presented no testimony and no documents establishing facts, no opinion evidence relevant or material to an issue of contract law, no evidence of any kind to support its request that the Commission determine that Missouri Valley has waived its rural exemption. Nothing in the existing resale agreement (filed with the Commission under docket no PU-04-638) contains any use of the word "waiver" or any synonym. Nothing in the existing resale agreement includes any reference to the rural exemption under § 251(f)(1). Nothing in the existing resale agreement includes any reference to an interconnection of facilities. Nothing in the proposed interconnection agreement submitted by Midcontinent with its November 2007 bona fide request for an interconnection describes the proposal as an amendment to the existing resale agreement.

The resale agreement includes a boilerplate provision (section 2.26) that the document records the parties' entire agreement, foreclosing any argument that a right unmentioned in the agreement (the rural exemption) was waived.

Midcontinent presented no evidence under principles of contract law regarding waiver to support its request that the Commission "determine that Missouri Valley has waived its rural exemption." Midcontinent's request ignores the difficult issue whether the Commission has any jurisdiction to resolve contract disputes. *See* *Williams Electric Cooperative v. Montana-Dakota Utilities Co.*, *79 N.W. 2d 508 (N.D. 1956.).* Where there is a dearth of evidence to support Midcontinent's waiver claim, the Commission need not face those issues that Midcontinent has avoided. In the absence of evidence, it may be said that Midcontinent has waived its waiver claim.

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 interconnection. The Commission convened a rural exemption investigation when Midcontinent requested a resale agreement with North Dakota Telephone Company (NDTC). NDTC first challenged that its rural exemption should be terminated, but later changed its position, so the only remaining issue in the case was a schedule for implementation of a resale agreement. After the hearing, Midcontinent requested the Commission to require the parties to begin the section 252 negotiation process for facilities-based interconnection. The Commission found that Midcontinent had not yet made a bona fide request for facilities-based interconnection. NDTC's forbearance to challenge termination of its exemption in a resale case was not a waiver of its exemption in a later case of Midcontinent's bona fide request for a facilities based interconnection. This was not merely a matter of procedure under federal or state telecommunications law; the Commission based this decision on constitutional due process principles. See Amended Order, June 7,2006, Case No. PU-05-451, ¶¶ 11 and 19.

See also Order in Case No. PU-06-345, where the Commission declared a stipulated termination of the (f)(1) exemption for North Dakota Telephone's interconnection with Midcontinent in one exchange would not be considered a precedent for any future cases under Act § 251(f), and Order in Case No. PU-06-400, where the Commission declared a stipulated termination of the (f)(1) exemption for Consolidated Telecom's resale services to Midcontinent would not be considered a precedent for any future cases under Act § 251(f).

Summary and Conclusion

Missouri Valley's exemption under Act section 251(f)(1) should be sustained, not terminated, because Midcontinent has not carried its burden of proof on the two contested issues, undue economic burden and universal service. Alternatively, if the exemption is not sustained, it should not be entirely terminated but should be suspended under Act § 251(f)(2). Suspension is necessary to avoid a significant adverse economic impact on users of telecommunications services generally and to avoid imposing a requirement that is unduly economically burdensome. Suspension is consistent with the public interest, convenience and necessity.

It has been iterated and reiterated that this case is not about competition, the mantra repeatedly recited by Midcontinent. This case does not present the Commission with the burden to make a policy decision whether competition in telecommunications is good policy or bad policy to be implemented in the Williston exchange. This case is about interconnection. This case presents the Commission with the decision whether Missouri Valley's exemption from interconnection will be terminated.

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):

A. Suspension is necessary to avoid a significant adverse economic impact on users of telecommunications services generally, and

B. Suspension is necessary to avoid imposing a requirement that is unduly economically burdensome; and is (B) consistent with the public interest, convenience and necessity, and

C. Suspension is consistent with public interest, convenience, and necessity.

Dated this 31st day of July, 2008.

PRINGLE & HERIGSTAD, P.C.

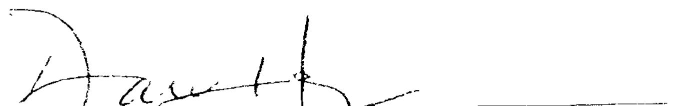

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Exhibit DM-5

Public Service Commission's Rural Exemption Order

Public Service Commission
State of North Dakota

COMMISSIONERS

Kevin Cramer
Tony Clark
Brian P. Kalk

Executive Secretary
Darrell Nitschke

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STATE OF NORTH DAKOTA)
)**ss** **CERTIFICATION**
COUNTY OF BURLEIGH

I, the undersigned, as Execut' 5 .e Public Service Commission of the State of North Dakota and Custo. ,, the records thereof, do hereby certify that the attached is a true and correct copy of **Findings of Fact, Conclusions of Law and Order in Case No. PU-08-61**, which appears of record and is on file in the office of the Public Service Commission of the State of North Dakota.

IN WITNESS WHEREOF, I have set my hand and affixed the seal of the Public Service Commission in the city of Bismarck, North Dakota, this **7th** day of **May, 2009.**

Darrell Nitschke, Executive Secretary
Public Service Commission
State of North Dakota

(S E A L)

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications/Missouri Valley Communications, Inc. Rural Exemption Investigation	**Case No. PU-08-61**
Missouri Valley Communications, Inc. Suspend/Modify Interconnection Requirements Application	**Case No. PU-08-176**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Appearances

Commissioners Susan E. Wefald, Kevin Cramer, and Tony Clark.

John M. Olson, John M. Olson, P.C., 418 East Broadway, Suite 9, Bismarck, ND 58501, and J.G. Harrington, Dow Lohnes, PLLC, 1200 New Hampshire Ave., NW. Suite 800, Washington, D.C. 20036, on behalf of Midcontinent Communications.

David J. Hogue, Pringle & Herigstad, P.C. 2525 Elk Drive, Minot, ND 58702-1000, on behalf of Missouri Valley Communications, Inc.

Annette Bendish, Public Service Commission, State Capitol, 600 E Boulevard Ave., Bismarck, North Dakota 58505, on behalf of the Public Service Commission.

Allen Hoberg, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, North Dakota 58501-1882, as Administrative Law Judge.

Preliminary Statement

On November 14, 2007, Midcontinent Communications (Midcontinent) made a request for a facilities based interconnection agreement with local number portability (LNP) services for the Williston North Dakota exchange from Missouri Valley Communications, Inc. d/b/a Nemont (Missouri Valley). On February 8, 2008, Midcontinent filed with the Commission its Notice of Bona Fide Request for Services and Interconnection and Petition to Find Rural Exemption Waived, Case No. PU-08-61.

Midcontinent requests that the Commission determine that Missouri Valley has waived its rural exemption, or in the alternative that the Commission conduct an inquiry under the provisions of 47 USC § 251(f)(1)(A) for the purpose of determining whether to

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Public Service Commission

38 PU-08-61 Filed: 10/8/2008 Pages: 11
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Public Service Commission

terminate Missouri Valley's exemption from providing its services as requested by Midcontinent.

On April 9, 2008, Missouri Valley filed an Application for Suspension under 47 USC § 251(f)(2), Case No. PU-08-176. Missouri Valley requests that the Commission grant to Missouri Valley a suspension of the requirements of subsections (b) and (c) of section 251 for Missouri Valley's telephone exchange service facilities in the Williston exchange area for such duration as the Commission determines.

On May 1, 2008, Administrative Law Judge Allen Hoberg issued an Order for Consolidation and Scheduling pursuant to Stipulation for Consolidation filed by the parties consolidating these cases for hearing.

On May 7, 2008, the Commission issued a Notice of Consolidated Hearing scheduling a hearing in Cases No. PU-08-61 and No. PU-08-176 for July 9, 2008, and identifying the following issues:

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

2. Whether the request of Midcontinent is technically feasible.

3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (d)(1)(D) thereof).

4. The implementation schedule for compliance with the request should the exemption be terminated.

5. Whether suspension or modification is necessary.

6. Whether suspension or modification is consistent with public interest, convenience, and necessity.

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

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

Findings of Fact

The Commission finds:

1. Missouri Valley is an incumbent local exchange carrier authorized by the Commission to provide telecommunications services in the Williston exchange. Missouri Valley is a rural telephone company as defined under 47 U.S.C. § 153(b)(37).

2. Midcontinent is a South Dakota general partnership registered with the Commission to provide local exchange telecommunications services. Midcontinent is a competitive local exchange carrier and is a reseller of telecommunications service in the Williston exchange (Case No. PU-04-638). Midcontinent is also a cable operator providing video programming. Midcontinent has a certificate of public convenience and necessity to provide facilities based competitive local exchange telecommunications services throughout North Dakota (Case No. PU-04-546).

3. Missouri Valley provides the nine services or functionalities designated in Federal Communications Commission (FCC) rules, 47 CFR 54.101. These are: (1) voice grade access to the public switched network; (2) flat rated local service pricing where the incremental cost of local usage to the customer is free; (3) dual tone multi-frequency (DTMF) signaling, commonly referred to as touch tone to support efficient call set up; (4) single party service; (5) access to emergency services through compliance with E911 requirements; (6) access to operator services; (7) 1 plus equal access to interexchange carriers; (8) access to directory assistance through the dialing of 411; and (9) toll limitation for qualifying low-income consumers and the offering of lifeline service. Missouri Valley complies with the requirement to advertise the availability and charges for these nine services.

4. Missouri Valley complies with the requirement to provide the supported services throughout the designated service area of the entire Williston exchange to all customers making a reasonable request for service, including low income, low density, rural insular, and high cost customers in a manner that is reasonably comparable and at rates equivalent to those charged in the municipality of Williston.

5. In April 2008, there were 8,806 access lines in the Williston exchange, including 1,575 lines resold to Midcontinent and 7,231 lines served by Missouri Valley. The Williston exchange area is 390.6 square miles, including approximately 7.3 square miles that comprise the City of Williston. As of April 2008, Missouri Valley served the 8,806 access lines in the area over a network of 933.3 network route miles of telecommunications cable, of which 477 miles are in the City of Williston and 456.3 miles serve the rural portion of the exchange beyond the city limits. Of the 8,806 access lines, approximately 7,065 are inside the Williston City limits, including the lines that are resold to Midcontinent. 1,741 lines served by Missouri Valley are outside of the Williston city limits.

Bona Fide Request

6. Under Section 252(a)(1) of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 (Act), an incumbent local exchange carrier may negotiate and enter into a binding agreement with a requesting telecommunications carrier upon receiving a request for interconnection, service or network elements under Section 251. Section 251(c) requires incumbent local exchange carriers to interconnect

with competitive local exchange carriers and to negotiate the terms of interconnection agreements.

7. Under Section 251(c) of the Act, an incumbent local exchange carrier is obligated to provide (1) good faith negotiation, (2) facilities and equipment interconnection, (3) unbundled network elements, (4) retail services as wholesale rates, (5) notice of network changes, and (6) collocation of equipment.

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

9. Missouri Valley acknowledged that Midcontinent's November 14, 2007 request for interconnection is a bona fide request.

10. Midcontinent has made a bona fide request for interconnection, which a local exchange carrier must provide under Section 251(c) of the Act. Midcontinent has specifically requested facilities-based interconnection with local number portability.

Rural Exemption

11. Under Section 251(f)(1)(A) of the Act, Missouri Valley is exempt from the requirement to provide the service requested until Missouri Valley has received a bona fide request from Midcontinent and the Commission determines (under subparagraph B) that such "...request is not unduly economically burdensome, is technically feasible, and is consistent with section 254..." To initiate a Commission proceeding to terminate Missouri Valley's rural exemption, Midcontinent is required to submit to the Commission a Section 251(f)(1)(B) notice of its bona fide request. Under Section 251(f)(1)(C), the rural exemption from interconnection is not available to a rural telephone company if the competitive local exchange carrier that has requested interconnection is a cable operator providing video programming and the rural telephone company also provides video programming. Midcontinent is a cable operator, but Missouri Valley is not, so the exemption remains in effect unless it is terminated under Section 251(f)(1)(B).

12. Under Section 251(f)(1)(B) of the Act and *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744, at 759-763 (8th Cir. 2000) Midcontinent has the burden of proving that Midcontinent's requested interconnection is not unduly economically burdensome, is technically feasible, and is consistent with Section 254.

Undue Economic Burden

13. Shawn Hanson, General Manager of Missouri Valley, testified that the economic impact from Midcontinent's requested interconnection would be a cumulative net

revenue loss over the 2009-2012 timeframe of $3.58 million due to Missouri Valley customers migrating to Midcontinent as a facilities-based service provider rather than as a service reseller. This impact would be a 31% reduction of annual net revenues in 2009 and a 56% reduction of annual net revenues in 2012. Hanson testified that such a loss of revenues would not damage Missouri Valley's ability to continue to offer service but would damage Missouri Valley's ability to invest in facility upgrades and replacements. Hanson testified that a loss of $3.58 million would be unduly economically burdensome.

14. Midcontinent witness Scott Lundquist testified that the economic impact from the interconnection would be a cumulative net revenue loss over the 2009-2012 timeframe of $888,577. The $2.69 million difference between Lundquist's and Hanson's economic impact is due to four adjustments Lundquist proposed to Missouri Valley's impact analysis. The four adjustments were named and calculated as Migration Timing $154,300, Resale Line Growth Factors $572,600, Special Access Revenues $367,600 and $2.234 million adjustment to universal service fund (USF) revenue; or $3.33 million total adjustment. Lundquist's testimony indicated the adjustments "interact" and therefore actually result in the $2.69 million difference. Lundquist did not explain how the proposed adjustments interact or how much each adjustment contributed to the $2.69 million.

15. Lundquist based his Migration Timing adjustment of $154,300 on an assumption that Midcontinent would take six months, from January 1, 2009 through June 2009 to migrate its existing resale-based customers to Midcontinent's facilities. Missouri Valley's analysis assumes Midcontinent would complete the migration by January 1, 2009.

16. Midcontinent has not met its burden of proof on its proposed Migration Timing adjustment of $154,300. Midcontinent's evidence about migration timing is not more persuasive than Missouri Valley's evidence.

17. Regarding the Resale Line Growth Factors adjustment of $572,600, Lundquist projected linear growth and Hanson projected compounding growth in the numbers of Missouri Valley customers migrating to taking service from Midcontinent. Linear growth projections produce a lower estimate of the numbers of customers, and that produces a lower estimate of the financial impact of the interconnection. Missouri Valley's Exhibit 1 shows the projected growth in Midcontinent's customer count, beginning at 1,488 in 2007 growing to 3,663 over the study period through 2012, a total growth of about 1,800.

18. Midcontinent has not met its burden of proof on its proposed Resale Line Growth Factors adjustment of $572,600. Midcontinent's evidence about resale line growth is not more persuasive than Missouri Valley's evidence.

19. Regarding the Special Access Revenues proposed adjustment of $367,600, Lundquist testified Midcontinent could offer special access services over its existing cable TV facilities without the interconnection, so Missouri Valley's estimate of net

revenue loss due to customer migration to Midcontinent's special access service would not occur because of the interconnection. Therefore, Lundquist's adjustment reflects no net revenue loss to Missouri Valley due to interconnection-related migration of special access service customers.

20. Hanson testified that business customers would move special access service at the same time voice service is moved.

21. Lundquist's testimony that there should be no net revenue loss to Missouri Valley due to migration of its customers to become special access customers of Midcontinent is not more persuasive than Hanson's testimony that there would be a net revenue loss due to migration of its customers to become special access customers of Midcontinent.

22. Midcontinent has not met its burden of proof on its proposed Special Access Revenues adjustment of $367,600, but Missouri Valley makes a compelling argument that, over time with full facilities-based competition, special access service revenue to Missouri Valley will decline.

23. Lundquist testified that the interconnection-related revenue losses to Missouri Valley could be offset by significant additional federal universal service funding obtained via the safety valve mechanism. Lundquist therefore proposed a $2.234 million adjustment to Missouri Valley's net revenue loss. Lundquist testified that additional funding under the federal Safety Valve mechanism would be available to Missouri Valley as line and revenue losses drive up per line costs.

24. Hanson testified that Missouri Valley does not qualify for support from the safety valve mechanism. Safety valve is an official shorthand expression to describe a provision of 47 CFR 54.305 that is unofficially referred to as the parent trap rule. The parent trap rule limits a rural telephone company's receipt of universal service funds for an acquired exchange that was not historically qualified under USF rules. Missouri Valley is a rural telephone company affected by the parent trap rule, because the Williston exchange was not qualified under USF rules when it was owned by Citizens Telecommunications Company of North Dakota, Inc. Specifically, the parent trap rule prevents a rural telephone company from receiving universal service funds to support or subsidize old investment in the exchange, investment that was not made by the rural telephone company but was made by the former owner. The safety valve exception permits a rural telephone company that is subject to the parent trap rule to receive some USF support for post-acquisition new investments in rural infrastructure, investments that are made by the rural telephone company. ("Universal Service Order," Fourteenth Report and Order, FCC 01-257 (May 23, 2001) Paragraphs 91-135.) The FCC's explanation of the safety valve exception emphasized that rural telephone companies "will only receive support for new investment in rural infrastructure." *Id.* The FCC also stated that excessive fund growth related to the impact on the fund of competitive entry and incumbent line loss to CLECs in rural areas should be closely monitored (*Id.* Para 101, 124, 131.)

25. Lundquist proposed in his testimony that Missouri Valley apply for USF support under the safety valve rule where the post-acquisition number in the formulae is not new investments made by Missouri Valley, but is a post acquisition per line costs increase, "...which is likely to happen if Missouri Valley loses lines in the case of Midcontinent's entry."

26. The argument that Missouri Valley would be able to receive additional USF subsidies under the safety valve mechanism if Missouri Valley experiences interconnection-related line and revenue losses in the case of Midcontinent's entry is not persuasive.

27. Midcontinent witness Timothy Gates testified that a cumulative net revenue loss over the 2009-2012 timeframe of $888,577 would not be unduly economically burdensome. Gates' testimony did not speak to whether any amounts larger than $888,577 were not unduly economically burdensome.

28. Gates testified that unduly economically burdensome is a point at which the competition damages Missouri Valley's ability to operate efficiently or to continue to offer services.

29. The Commission's interpretation is guided by the opinion of the Court in *Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744 (8th Cir. 2000)* which states in pertinent parts:

> In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the Congressional debates. ... There can be no doubt that it is an economic burden on an incumbent local exchange carrier (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. By limiting the phrase 'unduly economically burdensome' to exclude burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. (*Iowa v FCC, at 761*)

30. The rural exemption is not limited to protection against the most extreme economic burdens such as threats to economic survival. Even though the loss of revenue might not threaten Missouri Valley's ability to offer existing services in the immediate future, its efficiency in offering those services would be damaged because the revenue loss would unduly impair Missouri Valley's ability to invest in facility upgrades and replacements.

31. Gates testified that the impact on the Nemont group of companies in total should be the relevant benchmark for determining undue economic burden. Neither Section 251(f)(1) of the Act, 47 CFR 51.405, nor the FCC's Local Competition Order supports a finding that the impact on the Nemont group of companies in total should be the relevant benchmark. The Commission agrees that consideration as to economic burden that the interconnection would impose must be limited to the economic burden that the interconnection would impose on Missouri Valley.

32. Midcontinent has not proven that a cumulative net revenue loss over the 2009-2012 timeframe of $3.58 million is not unduly economically burdensome, or that a smaller financial impact is not unduly economically burdensome.

33. Midcontinent's evidence that the economic impact is $888,577 is not more persuasive than Missouri Valley's evidence that the economic impact is $3.58 million.

Technical Feasibility

34. Midcontinent presented testimony that the interconnection with number portability is technically feasible. Missouri Valley does not contend that interconnection is not technically feasible.

35. The interconnection, with number portability, is technically feasible.

Consistent with Section 254

36. Under 47 U.S.C. § 254, the policies for the preservation and advancement of universal service are based on the principles that quality services should be available at just, reasonable, and affordable rates; that advanced telecommunications and information services should be provided in all regions of the Nation; that consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services that are reasonable comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas; that elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services.

37. Gates testified that the "...key issue" of 'unduly economically burdensome' also affects "... whether interconnection will harm Missouri Valley's ability to meet its universal service requirements." Gates testified the interconnection would not be unduly economically burdensome to Missouri Valley and that "Midcontinent's interconnection with Missouri Valley will not harm Missouri Valley's ability to maintain its universal service obligations."

38. Hanson testified that economic burdens of the interconnection would impair Missouri Valley's performance of its universal service obligations. Hanson testified

Midcontinent's impact analysis showed that Missouri Valley's annual net revenues would be substantially reduced as a consequence of the interconnection while its universal service obligations and the expenses to perform those obligations would be unchanged and likely increased. Hanson testified that universal service is being redefined and the new expanded definition of universal service will likely include broadband Internet access. ILECs and eligible telecommunications carriers will likely be required to have reliable, predictable, and sufficient financial resources to upgrade facilities to comply with this revised definition of universal service. Loss of substantial proportions of revenue as a consequence of the interconnection would impair Missouri Valley's ability to perform its universal service obligations in the entire Williston exchange area, including all the area outside the city of Williston where its line costs are far greater and where Midcontinent has no facilities.

39. Hanson testified that Missouri Valley does not have the same financial resources as other rural telephone companies to perform its universal service obligations. There are six universal service support categories that are applicable to rural ILECs. Missouri Valley does not qualify to receive universal service support under five categories. Missouri Valley, designated as an eligible telecommunications carrier in the Williston exchange, is eligible to receive universal service support for providing Lifeline services.

40. Lundquist testified, "... despite the 'parent trap' rule, Missouri Valley may be able to receive significant additional USF subsidies...via the safety valve mechanism," $2.234 million over the 2009-2012 timeframe. The Commission is not persuaded that Missouri Valley would be able to receive additional USF subsidies under the safety valve mechanism.

41. Missouri Valley provides discounts to Lifeline consumers. Hanson testified that the interconnection resulting in Missouri Valley's declining revenues would have a negative impact on Missouri Valley's ability to continue to offer the Lifeline discount. Midcontinent has not requested and is not designated as an eligible telecommunications carrier to receive universal service support for providing Lifeline services in the Williston exchange (Order, Case No. PU-05-272).

42. Missouri Valley's testimony regarding the parent trap rule and safety valve mechanism are persuasive and Midcontinent has not met its burden of proof that the interconnection would be consistent with 47 U.S.C. § 254 regarding universal service.

Implementation Schedule

43. Midcontinent witness Tom Simmons testified that implementation should allow 30 days for negotiations and 60 days for actual connection and that interconnection could be implemented sooner than 90 days. Missouri Valley testified that interconnection could be implemented within 90 days.

44. An implementation schedule for the interconnection is an issue if the Missouri Valley's rural exemption is terminated, the issue is moot if the rural exemption is not terminated.

Suspension of Interconnection Requirements

45. Suspension of Missouri Valley's interconnection requirements is an issue if the Missouri Valley's rural exemption is terminated, the issue is moot if the exemption is not terminated.

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding.

2. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome.

3. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is consistent with 47 U.S.C. §254, regarding universal service.

4. The issue of technical feasibility is moot, where Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection is unduly economically burdensome and not consistent with 47 U.S.C. §254, regarding universal service.

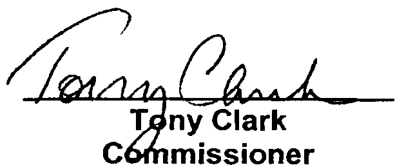
From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

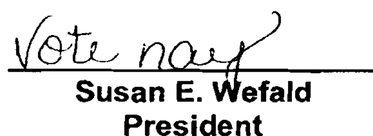
Order

The Commission Orders:

The rural exemption under 47 U.S.C. § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated.

PUBLIC SERVICE COMMISSION





Tony Clark	**Susan E. Wefald**	**Kevin Cramer**
Commissioner	**President**	**Commissioner**

DISSENT
Commissioner Susan Wefald

October 8, 2008

Midcontinent Communications/Missouri Valley Communications, Inc. Rural Exemption Investigation	**Case No. PU-08-61**
Missouri Valley Communications, Inc. Suspend/Modify Interconnection Requirements Application	**Case No. PU-08-176**

I do not agree with Conclusion of Law #2 in this Order which states that "Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome."

The Findings of Fact in this Order, #s 14, 15, 17, 19, 23, demonstrate that Midcontinent put forth strong factual arguments on the potential economic impact to Missouri Valley if the rural exemption is lifted. For example, in Finding of Fact #15, the order notes that Midcontinent witness Lundquist based his Migration Timing adjustment of $154,300 on an assumption that Midcontinent would take six months, from January 1, 2009 through June 2009, to migrate its existing resale-based customers to Midcontinent's facilities. Missouri Valley's analysis assumes Midcontinent would complete the migration by January 1, 2009. I agree with Midcontinent on this matter, since Missouri Valley has a limited ability to handle new orders, and some 1570 customers need to be migrated. Midcontinent's testimony stated that in similar situations in South Dakota, it has taken five to seven months to migrate its embedded customer bases from resold service to Midcontinent's own facilities.

Also, the Commission's Findings of Fact in this Order do not reflect any of the information that was presented by Midcontinent regarding depreciation expenses, and that Missouri Valley did not invest all, most, or even one-third of their cash flow in 2007 ($2.75 million) in its plant and network. (pages 7 and 8, Reply Brief of Midcontinent Communications dated August 11, 2008.)

My preference in this case, based on the facts, would have been to terminate Missouri Valley's rural exemption and then require a suspension of that termination until Midcontinent met the requirements in 47 USC Section 214 E 1 to be a designated eligible communication carrier. This would require Midcontinent to serve the entire service area (not just the City of Williston) as an eligible communication carrier, just as Missouri Valley does now.

Susan E. Wefald, Commissioner

Exhibit DM-6

Midcontinent Petition for Rehearing

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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

Petition of Midcontinent Communications for Reconsideration or, in the Alternative, Rehearing

Midcontinent Communications ("Midcontinent"), by its attorneys, hereby petitions for reconsideration or, in the alternative, rehearing of the Commission's Findings of Facts, Conclusions of Law and Order (the "Order") in the above-referenced proceeding.[1] As shown below, the Order should be reconsidered for five distinct reasons,

[1] All references to the Order in this petition are to the Corrected Findings of Fact, Conclusions of Law and Order, released on October 30, 2008.

any one of which would provide a sufficient basis to reverse the Order and grant the relief requested by Midcontinent in this proceeding.[2]

First, although the Order notes that Midcontinent based its initial Petition, in part, on a claim that Missouri Valley Communications ("Missouri Valley") had waived its rural exemption, the Order fails to address that issue. For the reasons described in Midcontinent's briefs and below, Missouri Valley has waived the exemption.

Second, the Order does not distinguish between impacts on Missouri Valley caused by facilities-based competition in general and those caused specifically by the interconnection requested by Midcontinent. Because Section 251(f)(1) requires consideration of the impact of the requested interconnection, the Order must be reconsidered.

Third, the Order fails to consider the impact of safety valve universal service funding because it credits the testimony of Shawn Hanson rather than analyzing the specific legal requirements to qualify for safety valve relief. As a matter of law, Missouri Valley would qualify for safety valve relief if the competitive impact of interconnection were as significant as Mr. Hanson claimed.

Fourth, the Order does not consider significant evidence – and including evidence that was unchallenged – concerning the impact of the competition on Missouri Valley. This evidence goes directly to the core issues in this proceeding and must be addressed.

Finally, the Order misapplied the "unduly economically burdensome" test. If the test were applied correctly, the conclusions in the Order would be reversed.

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[2] Although this petition specifies only a limited number of errors in the Order, Midcontinent does not waive any right it may have to seek judicial review of the Order or any subsequent Commission action as to any other issue raised by the Order.

Each of these errors is sufficient, by itself, to warrant reconsideration and reversal of the Order. Consequently, the Commission should take such action.

I. The Order Erroneously Failed to Consider Missouri Valley's Waiver of Its Rural Exemption.

The Order acknowledges that Midcontinent sought a determination by the Commission that Missouri Valley waived its rural exemption.[3] This issue also was included in the Notice of Hearing for this proceeding, and was briefed by both parties.[4] Nevertheless, the Order does not decide the issue, and does not mention it after reciting that Midcontinent's petition included a claim that the exemption has been waived. It is plain error not to have addressed this issue.

First, the waiver issue plainly was raised in Midcontinent's petition and in the briefs. Therefore it is ripe for Commission decision.

Second, the record shows that Missouri Valley has waived the exemption in two distinct ways. Missouri Valley initially waived the exemption when Nemont acquired the Williston exchange. It did so on the record before the Commission by agreeing to maintain the existing facilities-based interconnection agreements entered into by Citizens, including the agreement with Midcontinent. This waiver is memorialized not just in correspondence between Missouri Valley and the Commission and correspondence between Missouri Valley and Midcontinent, but in the Commission's own order approving the sale of the Williston exchange.[5] That order does not include any provision

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[3] Order at 1.

[4] Notice of Hearing at 1; Midcontinent Initial Brief at 5-9; Midcontinent Reply Brief at 3-6; Missouri Valley Initial Brief at 4, 15, 35-6; Missouri Valley Reply Brief at 1-5.

[5] *See* 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); *see also* Late-filed Exhibit C9, Attachment 3 (correspondence with Midcontinent).

that permits Missouri Valley to stop offering facilities-based interconnection to Midcontinent or to any other carrier. Missouri Valley's agreement to continue offering facilities-based interconnection was unqualified and contained no time limits. Indeed, had Missouri Valley been unwilling to agree to maintain the interconnection agreement with Midcontinent, Midcontinent would have had grounds to oppose the proposed transaction. Thus, Midcontinent was entitled to rely on Missouri Valley's representation that facilities-based interconnection would remain available, and that is more than sufficient basis for the Commission to conclude the Missouri Valley waived its exemption in 2002.

Missouri Valley also waived any exemption it might have had when it entered into the current resale agreement with Midcontinent. As described in Midcontinent's brief and reply brief, and as Missouri Valley said in its own brief, the rural exemption "is a yes or no question."[6] A resale agreement is a Section 252 interconnection agreement, and entering into such an agreement without having been ordered to do so by the Commission constitutes a waiver, whether the agreement says so or not.[7]

Failure to consider this issue is erroneous because the issue is dispositive. Since Missouri Valley has waived the exemption, there is no basis to conduct a Section

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Missouri Valley argued that this issue is a matter of contract law. *See, e.g.*, Missouri Valley Reply Brief at 3. The real issue, however, is that Missouri Valley made specific representations to the Commission when Nemont acquired the Williston exchange, and now is attempting to deny that those representations were binding. That plainly is a matter within the Commission's jurisdiction.

[6] Midcontinent Reply Brief at 5, quoting Missouri Valley Initial Brief at 6.

[7] Midcontinent Reply Brief at 5. It is conceivable that parties could attempt to enter into an agreement that constitutes a partial waiver of the exemption, but the current resale agreement contains no language that would suggest that Missouri Valley was waiving part of the rural exemption and not all of it, or that Midcontinent agreed that there was a partial waiver.

251(f)(1) inquiry into whether the exemption should be lifted. As a result of Missouri Valley's waiver, at least as to Midcontinent, the rural exemption does not exist. Failure to address this issue, therefore, is a material and reversible error.

II. The Order Erroneously Failed to Distinguish Between Impacts Caused by Facilities-Based Competition and Impacts Caused by the Requested Interconnection.

Under Section 251(f)(1)(B), any analysis of the impact of compliance with incumbent carrier obligations under Section 251(c) must be made in the context of "the request" for interconnection under Section 251(c).[8] This element of the analysis is critical because even rural carriers operating under exemptions are not entitled to deny interconnection completely, or to prevent competition. Rather, if Section 251(c)(2) interconnection is unavailable, a competitive carrier is entitled to interconnection under Section 251(a)(1), which applies to all carriers, regardless of size or location.[9] Section 251(a)(1) interconnection is sufficient to support facilities-based competition, even if it is not the preferred interconnection method for competitive carriers.[10]

The Order recites the correct standard, but does not apply it. In paragraph 12, the Order states that "Midcontinent has the burden of proving that Midcontinent's *requested interconnection* is not unduly economically burdensome, is technically feasible, and is consistent with Section 254."[11] However, the analysis in the remainder of the order does not follow this approach. While it recites in some places that the impact on Missouri

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[8] 47 U.S.C. § 251(f)(1)(B).
[9] 47 U.S.C. § 251(a)(1) (imposing a duty on all carriers to "to interconnect directly or indirectly.")
[10] In fact, Mr. Hanson testified that he considered wireless providers to be competitors, and they interconnect with Missouri Valley on an indirect basis. Hanson Prefiled Direct at 44 (describing Verizon, AT&T and Sagebrush Cellular as competitors in the Williston market).
[11] Order at 4 (emphasis supplied).

Valley results from the "requested interconnection," the Order fails to acknowledge that the record demonstrates that the impact claimed by Missouri Valley would be a result not of Section 251(c) interconnection, but of *any* facilities-based competition from Midcontinent. This was plain from Mr. Hanson's prefiled testimony and was acknowledged by Mr. Hanson during the hearing.

Mr. Hanson's prefiled testimony refers repeatedly to the impacts of facilities-based competition from Midcontinent and never ties any of those impacts to a particular method of interconnection. His specific statements include the following:

- "A facilities based interconnection would cause substantial negative financial impact on Missouri Valley."[12]
- "If Midcontinent were a facilities based local exchange carrier in the Williston exchange area, it would no longer buy lines from Missouri Valley to service Midcontinent's customers."[13]
- "If Midcontinent were to persuade some of Missouri Valley's present business customers to become voice and special access customers of Midcontinent, that would cause Missouri Valley to lose additional revenues."[14]
- "The second part of the analysis . . . shows the Missouri Valley's projected total revenue and net operating margins during the years 2009 through 2012, assuming Midcontinent changes its status as a reseller to a facilities based CLEC in Williston . . . "[15]

Mr. Hanson's testimony during the hearing on this point also is quite clear. On cross-examination, Mr. Hanson acknowledged that his projections would be unaffected if Midcontinent did not obtain collocation or if Midcontinent exchanged traffic via indirect interconnection:

> Mr. Harrington: I'll ask specifically The impact analysis here, is it affected by whether or not Midcontinent uses co-location. I'm referring just to the impact analysis and not to any other costs you might incur.

[12] Hanson Prefiled Direct at 13.
[13] *Id.*
[14] *Id.* at 16.
[15] *Id.* at 17.

> Mr. Hanson: At the time that we performed the analysis we assumed it could go both ways, so I would say the analysis is relevant either way.
>
> Mr. Harrington: Okay.
>
> Mr. Hanson: either with or without co-location.
>
> * * * *
>
> 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 to have 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.[16]

Thus, by Missouri Valley's own account, the analysis it provided is based entirely on the effect of facilities-based competition by any means, and not on the request for interconnection.

Moreover, this is not a matter of the weight of the evidence. There is no evidence at all that the impacts of competition on Missouri Valley have anything to do with whether Midcontinent has direct or indirect interconnection, or are affected by whether that interconnection is provided under Section 251(c) or some other provision. As a result, there is no basis to conclude that "the requested interconnection" would create an undue burden.

Once that error is corrected, then the conclusions in the Order also must be modified accordingly. First, the conclusion that the requested interconnection would be unduly economically burdensome must be reversed, as the evidence does not support such a conclusion. Second, the conclusion that lifting the exemption would be inconsistent with Section 254 also must be reversed. This conclusion is based entirely on

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[16] Hanson Cross-Examination (Harrington). As in Midcontinent's initial and reply briefs in this proceeding, the quotations are from an informal transcript prepared by Midcontinent and available to the Commission upon request.

the analysis of economic burdens, and once that analysis is corrected there no longer is a basis to conclude that the requested interconnection would have negative universal service impacts.

III. The Order Erroneously Failed to Consider the Impact of Relief under the FCC's Safety Valve Mechanism.

The Order finds that the FCC's safety valve mechanism would not be available to Missouri Valley on the basis of its conclusion that "Missouri Valley's testimony regarding the parent trap rule and safety valve mechanism are persuasive."[17] This finding is erroneous for two reasons.

First, the availability of the safety valve mechanism is a legal issue, and is not a matter for witness testimony. There is no dispute that, under Missouri Valley's financial analysis, Missouri Valley would meet the financial criteria for safety valve relief.[18] There also is no dispute about the amount that would be available if the safety valve applied.[19] The only dispute is whether the safety valve is available to a carrier if it becomes eligible after the first year following an acquisition. This is a matter of law, not a factual question subject to Mr. Hanson's opinion.

This is a matter of law because eligibility for the safety valve adjustment is set by the FCC's rules. As described in Midcontinent's briefs, those rules, the original order adopting those rules and even the FCC's order approving the acquisition of the Williston exchange demonstrate that a carrier becomes eligible for the adjustment in any year when the financial criteria under the rule are met.[20] There is no language in the rule that limits

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[17] Order at 9.
[18] *See, e.g.*, Missouri Valley Initial Brief at 22-24.
[19] The only testimony on this issue is from Mr. Lundquist, and Missouri Valley did not cross examine him on this issue.
[20] Midcontinent Initial Brief at 19-21; Midcontinent Reply Brief at 22-3.

eligibility to carriers that qualify in the year immediately following an acquisition. Rather, the rule specifies that a carrier's per-line expenses in *any* subsequent year will be compared to the carrier's expenses in the first year after an acquisition to determine the amount of safety valve support that will be available.[21]

The FCC order adopting the rule also speaks directly to this point: "We conclude that safety valve support should be provided for up to 50 percent of any positive difference between the rural incumbent local exchange carrier's index year expense adjustment for the acquired exchanges and subsequent year expense adjustments."[22] This statement, like the rule, is unqualified – it does not require a carrier to make any type or amount of investment at any time. All that is required to qualify for safety valve support is an increase in the carrier's per line expenses. Consequently, as a matter of law, the Order should have concluded that Missouri Valley would be eligible for safety valve relief.

This analysis requires no interpretation of the FCC's rules, which are unambiguous and consistent with the order that adopted them. The only response that Missouri Valley had to this analysis was that it was inconsistent with the FCC's intent, but Missouri Valley did not cite a single passage from the FCC's underlying order to

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[21] 47 C.F.R. § 54.305(d)(2), (3). In addition, and as noted in Midcontinent's initial brief, Mr. Hanson's assertion that a carrier has to qualify in the year immediately following an acquisition cannot be correct because that year is the "index year" that is used for the comparison to later years. Midcontinent Initial Brief at 20.

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

support this claim.[23] Against the plain meaning of the rule, this argument is of no effect, and, consequently, it was error for the Order not to recognize that the safety valve rule would apply if Missouri Valley experienced the impact it claims in its financial analysis.

It also was error to credit Mr. Hanson's statements concerning the safety valve mechanism. Mr. Hanson has no expertise in this area, as he demonstrated during his testimony. Most notably, he misstated the timing of the index year under the safety valve rule.[24] He also specifically disclaimed expertise on the safety valve rule or knowledge of its purpose, even in response to a question from his own counsel during his oral direct testimony:

> Mr. Hogue: Can you just describe what is the safety valve?
>
> Mr. Hanson: Mr. Del Fiacco could probably describe it better . . . .[25]
>
> * * * *
>
> Mr. Harrington: Can you tell me if you know . . . the reason that the FCC gave for adopting the safety valve rule?
>
> Mr. Hanson: I would have to defer to Mr. Del Fiacco on the specifics of that.
>
> Mr. Harrington: So no, you don't?
>
> Mr. Hanson: Not specifically, no.[26]

Consequently, even if the question of eligibility for safety valve relief were susceptible to expert opinion, Mr. Hanson would not qualify as an expert on this topic, and there would be no basis for the Commission to rely upon his opinion.

In practice, however, this is not a matter that is susceptible to expert opinion because it depends entirely upon the plain text of the FCC's rules. Under those rules, if Missouri Valley experiences the reductions in customers it claims will result from

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[23] Missouri Valley Initial Brief at 24.
[24] *See supra* n. 21
[25] Hanson Oral Direct.
[26] Hanson Cross (Harrington)

facilities-based competition, it will become eligible for safety valve relief.[27] It was error to fail to consider this relief in determining whether Missouri Valley would suffer an undue burden or whether there would be effects on universal service. Moreover, given the magnitude of the adjustment that results from accounting for safety valve relief – nearly $1.1 million over the four year period in the analysis, with about 40 percent of that total in the last year – making this adjustment reduces the impact sufficiently that it is apparent that Missouri Valley would not suffer an undue burden and that there would not be an adverse impact on universal service.

IV. The Order Erroneously Failed to Consider Significant Evidence Concerning the Impact of Competition on Missouri Valley.

The Order contains four significant errors when evaluating the evidence concerning the impact of competition on Missouri Valley. First, it fails to account for Mr. Hanson's repeated insistence that, under his analysis, Missouri Valley would continue to be able to provide its services to its customers. Second, the Order does not consider significant and entirely unchallenged evidence concerning the impact of competition on rural incumbent carriers, both nationally and in North and South Dakota. Third, the Order fails to account for all of the operating cash flow available to Missouri Valley. Fourth, the Order erroneously determined not to consider the impact of Missouri Valley's relationship with Nemont, yet nevertheless did include some elements of that relationship in its analysis. Any one of these errors, if corrected, would justify reversing the Order's conclusions concerning the undue burden and universal service issues.

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[27] Of course, Missouri Valley's eligibility for safety valve relief depends on whether it actually suffers the losses it claims it expects. However, if it did not suffer those losses, then it also would not have any basis to claim that there was an undue burden.

A. The Order Errs by Not Crediting Mr. Hanson's Statements That Missouri Valley Would Continue to Be Able to Meet Its Current Standard of Service.

Mr. Hanson's statements during the hearing concerning how Missouri Valley would operate following the advent of facilities-based competition directly contradict the findings in the Order. He was asked twice whether the impacts would prevent Missouri Valley from providing appropriate levels of service to its customers, and both times he answered that they would not:

> 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. I think that there will be a severe economic impact that will affect our ability to invest in the future at the rate that we are right now and reach the future definition of universal service.
>
> Mr. Harrington: All right. So I'll put it differently then. 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 . . .[28]

This testimony is particularly telling because Mr. Hanson specifically was asked to confirm that Missouri Valley would not be able to maintain its current level of service following the advent of competition and in both cases refused to do so. Nevertheless, it is not mentioned, let alone addressed, by the Order.

Mr. Hanson's statements resolve two specific issues relating to both the undue burden test and the universal service test. First, they demonstrate that competition would not prevent Missouri Valley from continuing to provide its current level of service. Thus, there is no basis to conclude that lifting the rural exemption would be inconsistent with

[28] Hanson Cross (Harrington)

universal service requirements.[29] Second, his statements establish that, under any reasonable definition of the term, Missouri Valley would not suffer an undue economic burden from facilities-based competition. However that term is defined, if an affected rural incumbent will continue to be able to meet its current standards of operation after it complies with Section 251(c), the burden cannot be undue.[30]

B. The Order Failed to Consider Any of Midcontinent's Affirmative Evidence Concerning the Impact of Competition.

Midcontinent provided significant affirmative evidence on the question of whether competition would impose an undue economic burden on Missouri Valley. This evidence was based on Midcontinent's actual experience in North and South Dakota, on the expert opinion of Mr. Gates and on a recent independent study conducted by Raymond James & Associates. The evidence from Mr. Gates and the Raymond James study was entirely unchallenged by Missouri Valley, even during cross examination, and Missouri Valley did not dispute that, as Mr. Simmons stated, facilities-based competition has caused "no appreciable harm at all" in any rural market where Midcontinent competes and that no incumbents in those markets have asked for regulatory relief.[31]

This Order does not mention, let alone address, any of this evidence. As a consequence, it fails to weigh Midcontinent's affirmative, empirical showing that

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[29] Mr. Hanson's statements concerning "the future definition of universal service" are irrelevant because they are entirely speculative. Placing any weight on those claims would be erroneous for that reason alone. Moreover, as also established at the hearing, the proposals under consideration would provide new funding for advanced services, and that funding would be unaffected by the "parent trap." *See* High-Cost Universal Service Support, *Notice of Proposed Rulemaking*, 23 FCC Rcd 1531, 1543-4 (2008) (describing proposal for broadband fund); *see also* Midcontinent Initial Brief at 28-9.

[30] Moreover, as described below, the correct application of the undue burden test would result in a conclusion that there is no such burden in this case. *See infra* Section V.

[31] Simmons Cross (Hogue).

Missouri Valley is unlikely to suffer an undue burden against Missouri Valley's hypothetical analysis of potential burdens.

The combination of the evidence provided by Mr. Gates and Mr. Simmons is particularly significant in this proceeding. Mr. Gates, based in large part on the Raymond James study, demonstrated that rural carriers that offer diverse services are successful in responding to competition and that Missouri Valley offers such diverse services.[32] Mr. Simmons noted that rural incumbents that are in markets where Midcontinent offers facilities-based services "have become very aggressive in marketing their products against us[.]"[33] As Mr. Gates noted, Missouri Valley would have the opportunity to consider and deploy new services, and there are no technical or legal barriers to doing so.[34] In fact, Missouri Valley already has responded to competition by increasing the speed of its DSL service.[35]

The failure to consider this evidence at all constitutes material error because, in essence, it puts a thumb on the scale by weighing only potential harms without considering ways those harms could be (and, in other markets, actually are) addressed. Moreover, the failure to consider this evidence assumes that Missouri Valley will not try to mitigate any potential harm that might result from facilities-based competition, an assumption that is demonstrably incorrect in light of Missouri Valley's response to

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[32] While many of these services are offered in conjunction with Nemont or other Nemont affiliates, those services should be considered for the reasons described below. *See infra* Section IV.D. However, Missouri Valley acknowledged that it provides DSL service on a wholesale basis, and DSL is a key element in the competitive mix described by Mr. Gates and the Raymond James study.
[33] Simmons Cross (Hogue).
[34] Gates Prefiled Direct at 25-9.
[35] *Id.* at 27.

competition to its DSL service. If this evidence had been considered and evaluated properly, it is highly likely that the conclusions in the Order would have been reversed.

C. The Order Did Not Account for Missouri Valley's Actual Available Cash Flow.

Midcontinent's reply brief demonstrated that Missouri Valley's calculations of its operating cash flow were incorrect because they treated depreciation, a non-cash expense, as a deduction from cash flow.[36] This is an egregious error, and correcting it increases Missouri Valley's operating cash flow by 41 percent in 2007 and by 86 percent when applied to Mr. Hanson's estimate for 2102. The Order does not address or mention this correction. Failing to do so was error for two reasons.

First, reflecting the actual effect of depreciation demonstrates that, even assuming that Missouri Valley's impact calculation is correct, Missouri Valley's operating cash flow would far exceed the company's capital needs. As described in Midcontinent's reply brief, over the past two years Missouri Valley has invested an average of about $770,000 a year in plant and equipment.[37] Even using Missouri Valley's calculations (corrected for the treatment of depreciation), there would be $1.73 million in operating cash flow, or more than twice that amount, available for investment.[38] This demonstrates that the Order's conclusion that "the revenue loss would unduly impair Missouri Valley's ability to invest in facility upgrades and replacements" is incorrect.[39] As Commissioner Wefald explained in her dissent, the Order should have concluded "that Missouri Valley did not invest all, most, or even one-third of their cash flow in 2007 ($2.75 million) in its

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[36] Midcontinent Reply Brief at 7.
[37] *Id* Exhibit 1 at 3-4.
[38] Midcontinent Reply Brief at 8. Since Missouri Valley's investment has been declining over the past two years, $1.73 million actually is 2-1/2 times Missouri Valley's investment in 2007. *Id.*
[39] Order at 8.

plant and network" and, consequently, concluded that competition would not impose an undue economic burden.[40]

Second, correcting the depreciation error drastically changes the context of the revenues that Missouri Valley says it would lose. As Midcontinent's reply brief explains, rather than a decline of more than half in operating cash flow, the correct figures show a drop of 37 percent. While this amount is not insignificant, it also is not so great as to constrain Missouri Valley from making investments at its current level, or even at a level that is significantly larger than its investment today. Consequently, correcting the error in Missouri Valley's calculations by properly treating depreciation as a non-cash expense demonstrates that Missouri Valley would not suffer an undue economic burden and universal service would not be harmed.

D. It Was Legal Error for the Order to Exclude Consideration of Missouri Valley's Relationship with Nemont.

The Order states that "Neither Section 251(f)(1) of the Act, 47 CFR 51.405, nor the FCC's Local Competition Order supports a finding that the impact on the Nemont group of companies in total should be the relevant benchmark."[41] The Order provides no basis or explanation for this conclusion, and it is incorrect.

This conclusion is incorrect for several reasons. First, and as described in Midcontinent's initial brief, interpreting Section 251(f)(1)(B) to prevent consideration of all of the resources available to a rural telephone company is inconsistent with the plain language of that provision and with the structure and purpose of the Communications

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[40] *Id.* at 11 (dissent of Commissioner Wefald). As Commissioner Wefald also noted, the Order erred in its analysis of individual elements of Missouri Valley's study, such as the timing of the transition to facilities-based service, and Midcontinent submits that the Order should be revised in that respect as well. *Id.*

[41] Order at 8.

Act.[42] Section 251(f)(1)(B) does not contain any language that requires or permits such a restriction. Rather, it simply tells state commissions to consider whether "the request is [] unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)."[43] There is no reference in this provision to "the rural telephone company" that is the subject of the request. That means that the Commission is free to consider any facts that bear on the economic burden imposed by an interconnection request.[44]

An interpretation that looks at the economic burden issue only in the context of a specific certificated entity, rather than in the context of the entity's ownership and general operations, moreover, is impermissibly narrow. For one thing, it would result in analysis of only half of the issue – the extent of the burden, but not the full ability to bear that burden. Moreover, it would insulate business decisions made by a carrier's parent from any scrutiny, even to the extent that they artificially hamstring the rural carrier. In this case, it would mean that Nemont's business decision to offer every service but local exchange service through affiliates, rather than through Missouri Valley, and to strip Missouri Valley even of the retail revenue from DSL service, would operate to insulate Missouri Valley from compliance with Section 251(c).

Such a result is inconsistent with the intent of Congress and with FCC interpretations of related provisions. For instance, the FCC's interpretation of Section 251(f)(2) demonstrates that a carrier's ownership is a relevant consideration in

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[42] Midcontinent Initial Brief at 25.
[43] 47 U.S.C. § 251(f)(1)(B).
[44] *See* Midcontinent Reply Brief at 16.

determining whether relief from Section 251(c) should be available.[45] The FCC adopted its Section 251(f)(2) rule precisely to address the problems that would arise if carriers were permitted to treat their subsidiaries as entirely separate for purposes of the suspension requirement.[46]

Moreover, an interpretation that allows a holding company like Nemont to parcel out the services it offers among various subsidiaries to avoid competition is inconsistent with the intent of Congress to promote competition throughout the country. This intent is reflected not just in the preamble to the 1996 Act, but in other provisions that specifically prevent rural carriers from thwarting competition, such as Section 253(f).[47] Indeed, because it is plain that Congress expected that competitors would be able to meet the requirements of Section 251(f)(1)(B), any interpretation that creates an opportunity for rural incumbents to avoid having the exemption lifted must be incorrect. In this case, that means that the conclusion that only the specific corporate entity that is the subject of the request can be considered is impermissible, since that would allow all rural carriers to avoid providing interconnection simply by restructuring their operations.[48]

Even if the interpretation of Section 251(f)(1)(B) adopted in the Order were permissible, the Order does not apply the conclusion that Missouri Valley must be considered as a standalone entity on a consistent basis. In fact, the Order treats Missouri Valley as separate from Nemont only in ways that magnify the potential burden of competition, without considering how a separated Missouri Valley actually would

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[45] *See* 47 C.F.R. § 51.403.
[46] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 16118 (1996).
[47] 47 U.S.C. § 253(f) (limiting ability of states to prevent competition in rural carrier territories if rural carriers refuse to provide resale and interconnection).
[48] *See* Midcontinent Reply Brief at 16.

operate. For instance, the Order does not consider the revenues and diversification benefits that Nemont enjoys by virtue of offering voice mail, long distance, retail DSL and wireless service to Missouri Valley customers. However, if Missouri Valley were an independent entity it would not be constrained, as it is today, to offer these services through Nemont; instead, it could offer those services itself and take advantage of the diversification strategies that Mr. Gates and the Raymond James study have demonstrated protect rural carriers from competitive harm. Equally important, Missouri Valley would not be required to pay 10 percent of its revenues to Nemont for services and facilities, including $289,000 a year in rent for use of a portion of Nemont's headquarters building in Scobey, Montana, where other commercial property is available for $700 a month.[49] While there may be savings that could be attributed to sharing employees, it is unlikely that those savings begin to approach the extra costs incurred for rent alone. Put simply, the approach adopted in the Order assumes that all of the costs of integrated operation should be considered without any consideration of the benefits. This is inconsistent both with the Order's conclusions about how Section 251(f)(1)(B) should be interpreted and with the requirements for reasoned decision-making.

Adopting the correct interpretation of Section 251(f)(1)(B) would result in consideration of Nemont's resources in the burden analysis (or, at a minimum, those portions of Nemont's operations that relate to Williston, including the long distance, retail DSL, voice mail and wireless business). Doing so would demonstrate that the net effect on combined revenues would be much smaller than the effect on standalone

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[49] Midcontinent Initial Brief at 14 & n.37; Midcontinent Reply Brief at 24, *citing* MVC Late-filed Exhibit -1.

revenues for Missouri Valley – less than three percent, which is effectively negligible.[50] In that context, the Order's conclusion that there would be an undue economic burden would be plain error.

V. The Order Misinterprets the Undue Economic Burden Standard.

In considering whether the burden imposed by Midcontinent's facilities-based entry, the Order states that a burden is "undue" if it "damage[s]" a carrier's "efficiency in offering" existing services.[51] This approach is inconsistent with the plain meaning of the phrase "unduly economically burdensome" and, even if it were applied in this case, would not justify a finding that an undue burden exists.

First, the standard cannot be that any "damage" to "efficiency" would constitute an undue burden. As described in Midcontinent's briefs, an "undue" burden must be something more than any burden, and the standard definitions of "undue" describe it as meaning "exceeding or violating propriety or fitness" or "excessive."[52] Moreover, because "competition would 'almost always result in a negative revenue effect to the ILEC as it loses market share,'" the term "unduly" is a central component of the burden test.[53] This conclusion is consistent with basic statutory construction principles, which require the Commission to interpret Section 251(f)(1)(B) to give effect to every word in the statute. Thus, to conclude that there is an undue burden, the Commission must find that the burden imposed by providing Section 251(c) interconnection would impair more than Missouri Valley's efficiency; rather, the burden must significantly impair "Missouri

[50] Midcontinent Initial Brief at 25.
[51] Order at 7.
[52] Definition of "undue," Merriam-Webster Online, at http://www.merriam-webster.com/dictionary/undue; *see also* Gates Prefiled at 38, Midcontinent Initial Brief at 12.
[53] *Wireless World, L.L.C. v. Virgin Islands Public Services Comm'n*, 2005 U.S. Dist. LEXIS 15061 at *16 (citing V.I.P.S.C. Docket No. 526, May 22, 2001).

Valley's ability to offer existing services[.]"[54] Based on the findings in the Order and Mr. Hanson's testimony, this is not possible, and therefore the Commission must conclude that there is no undue economic burden.

In fact, even using the interpretation adopted in the Order, the facts do not support the conclusion that Missouri Valley's "ability to invest in facility upgrades and replacements" would be impaired.[55] As noted above, when depreciation properly is treated as a non-cash expense, Missouri Valley's own calculations show that it would have more than twice as much operating cash flow as would be necessary to support its current rate of capital expenditures.[56] In other words, there would be no effect on Missouri Valley's ability to invest at current levels, or even to increase its investments significantly. Consequently, there is no basis to conclude that Section 251(c) interconnection would be unduly burdensome under either the standard adopted in the Order or the standard required by the statute.

VI. The Commission Should Grant Midcontinent Appropriate Relief.

As shown above, the Order contains significant errors in each of five different areas. The impact of these errors is severe, in that adopting the correct conclusion as to any one of them would have led to a different result in this proceeding.

For that reason, the most appropriate relief is to revise the Order to grant Midcontinent's request to lift the rural exemption, and to require Missouri Valley to provide Section 251(c) interconnection on a reasonable schedule. Such a result would be consistent with both the legal requirements of Section 251(c) and the evidence adduced in this proceeding.

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[54] Order at 7.
[55] *Id.* at 8.
[56] *See supra* Section IV.C.

To the extent that the Commission does not conclude that immediate revision of the Order should be granted, it should grant rehearing to permit a fuller explication of the issues. The rehearing should be confined to the issues described above, and need not involve additional witness testimony, unless otherwise directed by the Commission. Rather, the parties would be given an opportunity to present argument on the legal issues raised by this petition.

VII. Conclusion.

For all these reasons, the Commission should reconsider the Order or, in the alternative, grant a rehearing to Midcontinent.

Respectfully submitted,

MIDCONTINENT COMMUNICATIONS

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Its Attorneys

November 4, 2008

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Case No. PU-08-61

Midcontinent Communications, a South Dakota Partnership,	)	
Complainant,	)	
vs.	)	***AFFIDAVIT OF SERVICE BY MAIL***
Missouri Valley Communications, Inc.,	)	OAH File No. 20080079
Respondent.	)	

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 4th day of November, 2008, she served the attached ***Petition of Midcontinent Communications for Reconsideration or, in the Alternative, Rehearing*** 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

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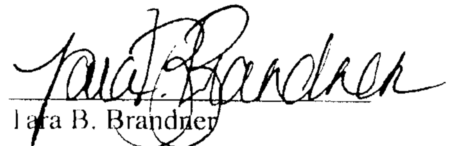
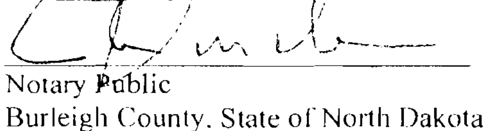
and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

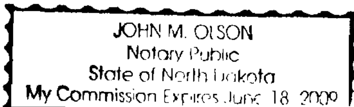


Tara B. Brandner

Subscribed and sworn to before me
this 4th day of November, 2008.



Notary Public
Burleigh County, State of North Dakota



Public Service Commission
State of North Dakota

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STATE OF NORTH DAKOTA)
)**ss** **CERTIFICATION**
COUNTY OF BURLEIGH)

I, the undersigned, as Executive Secretary of the Public Service Commission of the State of North Dakota and Custodian of the records thereof, do hereby certify that the attached is a true and correct copy of **the official minutes of the Public Service Commission meeting held December 3, 2008,** a copy of which appears of record and is on file in the office of the Public Service Commission of the State of North Dakota.

IN WITNESS WHEREOF, I have set my hand and affixed the seal of the Public Service Commission in the city of Bismarck, North Dakota, this **29th** day of **May, 2009.**

Darrell Nitschke
Executive Secretary
Public Service Commission
State of North Dakota

(S E A L)

December 3, 2008

The Public Service Commission convened in the Commission Hearing Room, State Capitol, Bismarck, North Dakota, on December 3, 2008, 11:00 a.m. Present were Commissioners Wefald, Cramer and Clark.

Minutes

Mr. Cramer: I move the minutes of November 20, 26, 2008 be approved.
Mr. Clark: I second the motion.
Roll Call: All voting "Aye."

Bills

Mr. Cramer: I move the following bills, as reviewed by the Commission, be approved and paid:

B & C Concrete Pumping, Inc.	113,460.00
Gratech Company, Ltd.	84,275.01
Hanson's Excavating, Inc.	22,750.00
HB Sound & Light	928.00
ND Newspaper Association	552.24
ND State Board of Registration	534.00
Kadrmas, Lee & Jackson, Inc.	13,297.99
Bruce E. Beechie	7.50
Bruce Johnson	7.50
Stephan A. Schroeder	22.50
Guy Welch	15.00
Mark Knell	546.56
William E. Dodd	209.90
Timothy Erdmann	331.50
Rick Fillbrandt	294.00
Susan E. Wefald	875.88
James R. Deutsch	466.20
Anthony T. Clark	783.51
Wayne Grangaard	472.55
Leo D. Praus	99.01
Phyllis G. Richter	650.79
JP Robbins	298.00
Raymond Kelsch	711.19
Country Grain Cooperative, Inc.	1,049.94
OAH – 10 & 11/08 exp	1,707.22
OMB – 09 risk mgmt contribution	3,555.00
OMG – 11/08 postage	489.91
GE Corporate Payment Services	4,971.23

Mr. Clark: I second the motion.
Roll Call: All voting "Aye."

Case No. AD-08-488
Sixty-first Legislative Session (2009)
Misc. Case

Mr. Cramer: I move the Commission submit the following to the Legislative Council as pre-filed bill drafts for the Sixty-first Legislative Assembly of North Dakota:

Reclamation:

Amend and reenact subsection 18 of section 38-14.1-24 and subsection 2 of section 38-14.2-14 of the North Dakota Century Code, relating to the time period for successful revegetation on lands permitted for surface coal mining and reclamation operations and limitations for filing liens on abandoned mine lands that are reclaimed.

Public Service Commission:

Amend and reenact section 49-01-02 of the North Dakota Century Code, relating to the election of one public service commissioner as chairman.

Public Utilities:

Amend and reenact subsection 6 of section 49-02-02, and sections 49-05-04, 49-05-04.2, 49-05-04.3 and 49-05-16 of the North Dakota Century Code, relating to powers of the public service commission and electric and gas public utility application fees.

Testing and Safety:

Amend and reenact section 49-07-05.1 of the North Dakota Century Code, relating to assessing the costs of investigating a potential violation of pipeline safety standards and to provide a continuing appropriation.

Licensing:

Amend and reenact sections 60-02-19.1and 60-02.1-14, and subsection 4 of section 60-02.1-01 of the North Dakota Century Code, relating to public grain warehouse credit-sale contract transfers and the definition of a facility-based grain buyer.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-05-47
PPM Energy, Inc.
Rugby Wind Farm - Pierce County
Siting Application

Mr. Cramer: I move the Commission issue a corrected First Reissued Certificate of Site Compatibility Number 5 recognizing the correct name change to Rugby Wind, LLC instead of Iberdrola Renewables, Inc., Case No. PU-05-47.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-08-48
Minnkota Power Coop., Inc.
Pillsbury-Fargo 230 kV
Transmission Line
Siting Application

Mr. Cramer: I move the Commission grant the withdrawal of Minnkota Power Cooperative's sampling plan from its tree and shrub inventory filed July 10, 2008 and acknowledge that no shrubs are being cleared from the transmission line right-of-way in Case No.PU-08-48, Minnkota Power Cooperative's Pillsbury to Fargo 230 kV Transmission Line.
Mr. Clark: I second the motion.
Roll Call: All voting "Aye."

Case No. PU-08-691
Otter Tail Corporation
BNSF Railway - Signa Lights – Cass County, ND
Public Convenience & Necessity

Mr. Cramer: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Otter Tail Corporation to extend electric service to Burlington Northern Santa Fe Railway for signal lights at a location in Cass County, North Dakota, Case No. PU-08-691.
Mr. Clark: I second the motion.
Roll Call: All voting "Aye."

Case No. PU-08-692
Otter Tail Corporation
BNSF Railway - Switch Station – Cass County, ND
Public Convenience & Necessity

Mr. Cramer: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Otter Tail Corporation to extend electric service to Burlington Northern Santa Fe Railway for a switch station at a location in Cass County, North Dakota, Case No. PU-08-692.
Mr. Clark: I second the motion.
Roll Call: All voting "Aye."

Case No. PU-08-721
Otter Tail Corporation
Dustin Burchill - Cass County, ND
Public Convenience & Necessity

Mr. Cramer: I move the Commission adopt the Order and issue a Certificate of Public Convenience and Necessity authorizing Otter Tail Corporation to extend electric service to Dustin Burchill at a location in Cass County, North Dakota, Case No. PU-08-721.
Mr. Clark: I second the motion.
Roll Call: All voting "Aye."

Case No. PU-05-305
PPM Energy, Inc.
230 kV Transmission Line
Siting Application

Mr. Cramer: I move the Commission issue corrected First Reissued Certificate of Corridor Compatibility Number 89, and corrected First Reissued Route Permit Number 99 recognizing the correct name change to Rugby Wind, LLC instead of Iberdrola Renewables, Inc., Case No. PU-05-305.
Mr. Clark: I second the motion.
Roll Call: All voting "Aye."

Case No. PU-07-596
Belle Fourche Pipeline Company
8-Inch Crude Oil Pipeline/
McKenzie County
Siting Application

Mr. Cramer: I move the Commission approve the Tree/Shrub Replanting Plan filed on November 4, 2008 by Belle Fourche Pipeline Company, Case No. PU-07-596.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. RR-08-833
J-Sons Inc., Contractors
Rail Clearance Variance –
Ray Farmers Union
Application

Mr. Cramer: I move the Commission acknowledge the request of J-Sons Inc. to withdraw its application for a rail clearance variance at the Ray Farmers Union Elevator, Case No. RR-08-833, J-Sons Inc., Contractors, Rail Clearance Variance – Ray Farmers Union, Application.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. AU-08-903
Jeremy J. Ferderer
Auctioneer
License Application

Mr. Cramer: I move the Commission approve the auctioneer license application for Jeremy J. Ferderer, Bismarck, North Dakota.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-07-169
Basin Electric Power Coop Inc.
230 kV Transmission Line/
Stark to Bowman Ctys
Siting Application

Mrs. Wefald: I move the Commission adopt the Findings of Fact, Conclusions of Law, and Order issuing corridor certificate and route permit to Basin Electric Power Cooperative for its proposed 230 kV electric transmission line in Bowman County, North Dakota, Case No. PU-07-169.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. AM-08-9
Columbus
2008 Phase 9 Construction
Project

Mrs. Wefald: I move the Commission award a contract to the Burke County Soil Conservation District for tree and shrub planting at the Columbus Phase 9 abandoned mine land site in Burke County.

Mr. Cramer: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-08-766
Otter Tail Corporation
49.5mw Wind Farm - Luverne -
Barnes/Steele Cntys
Public Convenience & Necessity

Mrs. Wefald: I move the Commission adopt the Order Granting Certificate of public convenience and necessity for Otter Tail Corporation to construct and own a 49.5 MW portion of the 157 MW Luverne Wind Farm and 13 miles of 230 kV transmission line proposed in Barnes and Steele Counties, North Dakota, Case No. PU-08-766.

Mr. Clark: I second the motion.

Roll Call: All voting "Aye."

Case No. PU-08-862
Otter Tail Corporation
Electric Rate Increase
Application

Mrs. Wefald: I move the commission adopt the Order on Interim Rates authorizing interim electric rates in Otter Tail Power Company's Electric Rate Increase application, Case No. PU-08-862.
Mr. Clark: I second the motion.
Roll Call: All voting "Aye."

Case No. AM-08-888
2009 - 2012 ND Reclamation
Simplified Grant
Application

Mrs. Wefald: I move the Commission approve the Williams County Road 9, Phase 4, and Hazen-West, Phase 2 projects as the major AML projects for abandoned mine reclamation in 2009.
Mr. Cramer: I second the motion.
Roll Call: All voting "Aye."

Case No. AM-08-753
2008 AML Coal Fire
Suppression Grant
Application

Mrs. Wefald: I move the Commission authorize procurement of construction services using competitive sealed bidding procedures for suppressing coal fires at numerous sites in western North Dakota.
Mr. Cramer: I second the motion.
Roll Call: All voting "Aye."

Case No. PU-08-885
Montana-Dakota Utilities Co.,
a Division of MDU
December 2008
Fuel Cost Adjustment

Case No. PU-08-901
Northern States Power Company
December 2008
Fuel Cost Adjustment

Discussion Only

Case No. PU-08-898
Northern States Power Company
December 2008
Cost of Gas

Case No. PU-08-902
Great Plains Natural Gas Co.
December 2008
Cost of Gas

Discussion Only

Case No. PU-08-578
Midcontinent Communications /
ND Telephone Co.
Interconnection Agreement
Amendment
Application

Mr. Clark: I move the Commission adopt the order approving an amendment negotiated to an existing interconnection agreement between Midcontinent Communications and ND Telephone Company, Case No. PU-08-578.
Mr. Cramer: I second the motion.
Roll Call: All voting "Aye."

Case No. PU-08-815
Midcontinent Communications /
Consolidated Telcom
Interconnection Agreement
Application

Mr. Clark: I move the Commission adopt the order approving an interconnection agreement negotiated between Midcontinent Communications and Consolidated Telcom, Case No. PU-08-815.
Mr. Cramer: I second the motion.
Roll Call: All voting "Aye."

GISTC Funding For 2009 NAIP
Aerial Photography

Mr. Cramer: I move the Commission participate in the Geographic Information System Technical Committee (GISTC) cooperative funding for completion of the 2009 NAIP aerial photography.
Mrs. Wefald: I second the motion.
Roll Call: All voting "Aye."

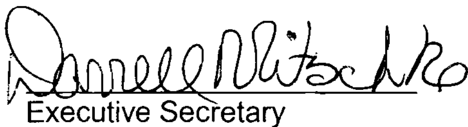
Case No. PU-08-61
Midcontinent Communications/
Missouri Valley Communications, Inc.
Rural Exemption
Investigation

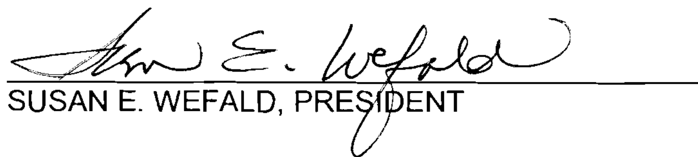
Case No. PU-08-176
Missouri Valley Communications, Inc.
Suspend/Modify Interconnection
Requirements
Application

Mrs. Wefald: I move the Commission approve the Petition for Reconsideration or Rehearing in Midcontinent Communications/Missouri Valley Communications, Inc., Rural Exemption, Investigation, Case No. PU-08-61 and Missouri Valley Communications, Inc., Suspend/Modify Interconnection Requirements, Application, Case No. PU-08-176.
Mr. Cramer: I second the motion.
Roll Call: Wefald "Aye"
Cramer "Nay"
Clark "Nay."

ATTEST

THE COMMISSION ADJOURNED AT 12:25 P.M.


Executive Secretary


SUSAN E. WEFALD, PRESIDENT