UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

MIDCONTINENT COMMUNICATIONS,)
A SOUTH DAKOTA PARTNERSHIP,)
)
Plaintiff,)
)
v.)
)
NORTH DAKOTA PUBLIC SERVICE)
COMMISSION, KEVIN CRAMER,) Case No.: 1:09-cv-017
TONY CLARK, AND BRIAN KALK,)
in their official capacities as Commissioners)
of the North Dakota Public Service Commission)
)
and)
)
MISSOURI VALLEY COMMUNICATIONS)
INC.,)
)
Defendants.)
)

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

MIDCONTINENT COMMUNICATIONS

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John Olson, PC

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Memorandum in Support of Motion for Partial Summary Judgment (without attachments)

Midcontinent Communications

John Olson, PC

Midcontinent Communications ("Midcontinent") hereby moves for partial summary judgment,[1] seeking a ruling that the Rural Exemption Order issued by the North Dakota Public Service Commission ("NDPSC") is contrary to federal law.[2]

I. INTRODUCTION

Midcontinent is ready and willing – but not able – to provide full competitive telephone service to customers in the Williston area. It cannot do so only because Missouri Valley Communications, Inc. ("Missouri Valley") has refused to provide interconnection under Section 251(c) of the Communications Act. The Rural Exemption Order erroneously endorses Missouri Valley's conduct and should be reversed.

Missouri Valley is the incumbent monopoly telephone service provider in the Williston area and controls the legacy telephone network that all competitors must share to provide service to consumers. Midcontinent is a competitor. Congress enacted the Telecommunications Act of 1996 (the "1996 Act") to ensure that competitors could access incumbents' telephone networks, and the statute requires the type of facilities-based interconnection Midcontinent seeks here. In fact, Congress expressed a strong preference for facilities-based interconnection because it is most likely to provide consumers with the permanent benefits of competition, including lower rates, new services, and improved customer service.

Missouri Valley prefers the status quo and has relied on the "rural exemption," 47 U.S.C. Section 251(f)(1), to refuse interconnection to Midcontinent. This leaves Midcontinent as simply a "reseller" of Missouri Valley's services, with no way to provide a truly competitive choice.

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1 Midcontinent is not currently moving for summary judgment on its separate direct claim against Missouri Valley for violations of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201-276 (the "Communications Act"). Midcontinent's claims are based largely on portions of the Telecommunications Act of 1996, which amended and are codified as part of Title II of the Communications Act. For convenience, these statutes are referred to as provisions of the "1996 Act," but cited as codified in the Communications Act.

2 Midcontinent Communications/Missouri Valley Communications, Inc., Findings of Fact Conclusions of Law, and Order, Case Nos. PU-08-61, PU-08-176 (October 8, 2008) (the "Rural Exemption Order")

Section 251(f)(1) was not intended to insulate rural incumbents from competition, however, and, as shown below, Missouri Valley is not entitled to rely on the rural exemption.

First, Missouri Valley waived any right to rely on the rural exemption. Missouri Valley voluntarily assumed statutory interconnection obligations when, upon first acquiring the Williston Exchange, it adopted and promised to honor all of its predecessor's existing facilities-based interconnection agreements. This included an interconnection agreement with Midcontinent. Missouri Valley also adopted and reaffirmed these same obligations when it negotiated a subsequent Section 251(c) resale agreement with Midcontinent and submitted that agreement to the NDPSC for approval. The policy, text and structure of Section 251(f) support finding a waiver in this case, and the NDPSC erred in failing to enforce it. That alone warrants reversal of the Rural Exemption Order.

Second, entirely independent of whether Missouri Valley waived the rural exemption, the exemption must be lifted as to Missouri Valley under federal law. Section 251(f) does not permit a carrier to rely on the rural exemption unless interconnection would be "technically infeasible," "unduly economically burdensome," or harmful to universal service in the market. There is no dispute in this case that interconnection would be technically feasible; the only issues are whether the NDPSC erred in concluding that interconnection would be unduly economically burdensome and harmful to universal service. Both conclusions are contrary to law.

The NDPSC fundamentally erred in interpreting and applying the "unduly economically burdensome" standard. It is undisputed that all of the "costs" upon which Missouri Valley relied to show economic burden were the expected costs to its business of facilities-based competition from Midcontinent. But these are the costs of competition Missouri Valley would be required to shoulder regardless of whether it provided interconnection to Midcontinent under Section 251(c)

or under some other section of the statute. Thus, rather than assess the potential burden caused specifically by the request for Section 251(c) interconnection, the NDPSC relied solely on costs Missouri Valley would be obligated to incur under other provisions of the 1996 Act. This is incompatible with the federal statute. In fact, it is well established that the rural exemption was not intended to insulate incumbent rural carriers from competition. And, because the record shows there were no incremental costs associated with providing Section 251(c) interconnection to Midcontinent, the Rural Exemption Order should be reversed as a matter of law.

The NDPSC also erred by refusing to consider potential economic burden in the context of Missouri Valley's overall economic condition. Missouri Valley is part of a corporate structure in which its parent, Nemont Communications ("Nemont"), drains from Missouri Valley much of the revenue generated by the Williston exchange while assigning Missouri Valley all of the debt. As a result, Missouri Valley viewed in isolation appears to be in a precarious financial condition, so that any additional economic burden inaccurately appears to create an economic hardship. The NDPSC failed to consider these facts, in violation of Section 251(f).

The NDPSC's economic analysis also was erroneous under federal law because it incorrectly determined that Missouri Valley would not be eligible for federal "safety valve" financing from the universal service fund. This error would account for approximately 62% of Missouri Valley's claimed costs. None of Missouri Valley's other claimed costs are supported by evidence in the record. Moreover, even if all of Missouri Valley's claims as to the costs of competition were accepted, the record shows that it still would maintain sufficient net revenues to sustain its current level of investment in its plant and systems indefinitely.

Finally, the NDPSC misapplied the federal standard for determining whether a requested interconnection agreement would impair universal service. The NDPSC based its universal

service conclusion on its economic burden analysis, so it shares the fatal flaws identified above. In addition, even assuming a basis to find that interconnection could have caused some economic impairment (which there is not), that was insufficient to find that Missouri Valley's ability to provide "Lifeline service" to remote rural areas around Williston would be threatened as a result of interconnection. There is no question that NDPSC had the authority under Section 253(f) of the 1996 Act to require Midcontinent to become an eligible telecommunications carrier ("ETC") – with the specific obligation to provide Lifeline service – prior to authorizing interconnection. That would negate any possible finding of harm to universal service in this particular case.

Accordingly, Midcontinent respectfully requests that the Court declare that the Rural Exemption Order is contrary to law and enjoin its enforcement.

II. LEGAL BACKGROUND

The NDPSC rejected Midcontinent's request to lift Missouri Valley's rural exemption under Section 251(f) of the 1996 Act and thereby require interconnection under Section 251(c).

The rural exemption is part of a detailed and carefully crafted statutory structure Congress designed to open local telephone markets to competition. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999) ("Iowa Utilities Board I"). Fundamentally, the purpose of the 1996 Act was to transform what had been local telephone markets dominated by state-sanctioned monopolies into competitive markets that encouraged competition and its attendant benefits of lower prices and improved customer products and services.[3]

The 1996 Act established three models of market entry for competitors: (1) deployment of new competitive distribution network facilities; (2) partial deployment of new network

[3] Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996, First Report and Order, 11 F.C.C.R. 15,499, 15,505 (1996) (the "Local Competition Order"). Historically, state commissions like the NDPSC administered local telephone regulation pursuant to state law, but the 1996 Act replaced that system

facilities mixed with utilization of portions of the existing ILEC network; and (3) resale of existing ILEC service. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16,978, 16,984 (2003) ("Triennial UNE Order"). A party that provides resale essentially buys the service of another telephone company and then sells it at retail to its own customers. A carrier providing facilities-based service provides service to customers using its own deployed distribution facilities.

While Congress intended that all three would be used to enter the market, the ultimate goal of the 1996 Act to encourage carriers progressively to deploy more of their own facilities and eventually to achieve permanent, facilities-based competition in every local market that could sustain it.[4] The Federal Communications Commission ("FCC"), the expert agency Congress appointed to provide "authoritative" interpretations of the 1996 Act, NCTA v. Brand X Internet Svcs., 545 U.S. 967, 980 (2005), has determined that the 1996 Act should be interpreted to promote facilities-based competition rather than the resale and unbundled network element mode of entry.[5]

Foremost among the 1996 Act's market-opening mechanisms is its requirement that the monopoly incumbent local exchange carriers ("ILECs") link their distribution networks with competitive local exchange carriers ("CLECs") through a process known as interconnection. Iowa Utilities Board I, 525 U.S. at 371; see also 47 U.S.C. § 251(h) (defining incumbent local

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with a pro-competitive federal regulatory framework. Iowa Network Services, Inc. v. Qwest Corp., 363 F.3d 683, 685-86 (8th Cir. 2004); MCI Telecomm. Corp. v. Bell Atl. Pa., 271 F.3d 491, 497 (3d Cir. 2001).

[4] See 1996 Act (Preamble) (describing legislation as "[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"); Triennial UNE Order, 18 F.C.C.R. at 17,025-26 & n.233.

[5] Triennial UNE Order, 18 F.C.C.R. at 17,025-26 & n.233 (2003) (citing Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 F.C.C.R. 3,696 (1999)).

exchange carrier).[6] Interconnection is the 1996 Act's most important requirement because without it CLECs could not complete calls to all users.

For local exchange carriers like Midcontinent and Missouri Valley, the 1996 Act creates a two-tiered system of interconnection obligations, depending upon whether a carrier is an ILEC or a CLEC. First, under Section 251(a) and (b), all ILECs and CLECs must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers,"[7] and they must offer their services to competitors for resale at retail rates, among other basic obligations. 47 U.S.C. § 251(a), (b). Second, under Section 251(c), ILECs have special obligations, including: (1) the duty to negotiate interconnection agreements in good faith; (2) the duty to provide interconnection at any technically feasible point on the incumbent's network that is equal in quality to that provided to itself or affiliates, on rates, terms and conditions that are fair, reasonable and nondiscriminatory; (3) the duty to offer competitors access to network elements on an unbundled basis; (4) the duty to allow competitors to purchase incumbent services for resale; (5) the duty to provide competitors notice of network changes; and (6) the duty to allow competitors to collocate their facilities on the incumbent carrier's premises on just, reasonable, and nondiscriminatory rates, terms and conditions. See 47 U.S.C. §§ 251(c).

A CLEC may voluntarily reach an agreement with an ILEC to fulfill its duties under the 1996 Act, or, should negotiations fail, it may compel arbitration before a state commission. Id. at §§ 251(c)(1), 252(b). The 1996 Act provides timelines and standards for state commissions to arbitrate agreements. Id. at § 252(b)-(c). In such arbitrations, the state commission must resolve

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[6] A "local exchange carrier" is defined as "any person that is engaged in the provision of telephone exchange service or exchange access. ...." 47 U.S.C. § 153(26). The terms "telephone exchange service" and "exchange access" are defined at 47 U.S.C. § 153(16) and (47).

[7] Section 251(a) actually requires all "telecommunications carriers" to interconnect their facilities, but the distinction between "local exchange carriers" and "telecommunications carriers," which is defined at 47 U.S.C. § 153(44), is not relevant to this case. Midcontinent and Missouri Valley both qualify as telecommunications carriers and local exchange carriers.

outstanding issues in accordance with federal law. See id. at § 252(c). Ultimately, all interconnection agreements must be submitted to and approved by the relevant state commission. See 47 U.S.C. § 252(e). In this case, any interconnection agreement between Midcontinent and Missouri Valley must be filed with the NDPSC, and it is deemed approved if the NDPSC does not act on it within 90 days.

Congress recognized that some ILECs serving rural areas face special economic and technical challenges due to the smaller and more dispersed populations they serve. Accordingly, qualified rural telephone companies were afforded: (1) a qualified exemption from the ILEC interconnection requirements of Section 251(c), and; (2) if they are subject to the requirements of Section 251(b) or (c), a process for seeking "suspension or modification of the application of a requirement or requirements of" Section 251(b) or (c). See 47 U.S.C. §§ 251(f)(1) and (f)(2).

Congress did not intend to insulate rural ILECs from competition, however, and it established a demanding standard for rural ILECs to avoid their Section 251(c) obligations. Under 47 U.S.C. § 251(f)(1), rural telephone companies are exempt from the special incumbent duties described in Section 251(c) only until: (1) a competitor provides the rural carrier with a bona fide request for interconnection, services, or network elements; and (2) a state commission determines that the requested interconnection would not be unduly economically burdensome, is technically feasible, and is consistent with the universal service provisions of 47 U.S.C. § 254. 47 U.S.C. § 251(f)(1)(A).[8] If a CLEC seeks interconnection that requires the rural ILEC to comply with the provisions of Section 251(c) and the rural ILEC refuses, the CLEC can petition the state commission to lift the exemption. Section 251(f)(1)(B) then requires the commission to conduct an inquiry and to terminate the rural exemption if it finds the elements of Section

[8] The exemption does not apply to rural telephone companies that provide video service. 47 U.S.C. § 251(f)(1)(C). Missouri Valley does not provide video services in Williston.

251(f)(1)(A) are met. In Section 251(f)(1) proceedings, the petitioning CLEC has the burden to demonstrate that the standards of the statute are satisfied.

All rural ILECs are subject to interconnection under Section 251(a), and some are subject to interconnection under Sections 251(b) and (c). Section 251(f)(2) allows rural ILECs to petition for a temporary exemption from individual obligations. 47 U.S.C. § 251(f)(2). In contrast to proceedings to lift the exemption under Section 251(f)(1), in proceedings under Section 251(f)(2) a state commission decides whether to suspend individual interconnection duties otherwise applicable to a petitioning rural ILEC. In addition, rural ILECs seeking suspension of individual obligations must satisfy a more demanding standard than they must meet to avoid termination of the exemption. The commission must find suspension is necessary to avoid (1) significant adverse economic impact on telecommunications users; (2) placing an undue economic burden on the rural telephone company; or (3) imposing a requirement that is technically infeasible; and it must find that suspension is consistent with the public interest, convenience, and necessity. 47 U.S.C. § 251(f)(2).

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Missouri Valley's Acquisition of the Williston Exchange and Its Promise To Fulfill Existing Interconnection Obligations.

Missouri Valley is an ILEC under 47 U.S.C. § 251(h), authorized to provide telephone services in the Williston Exchange. Missouri Valley also qualifies as a rural telephone company under the Communications Act and applicable FCC rules. See Exh. A at 7.

Missouri Valley is the third company to provide telephone service as an ILEC in the Williston Exchange. US West (now Qwest) was the ILEC until October 31, 2000, when it sold the market to Citizens Communications ("Citizens"). Then, in 2002, Citizens sold the Williston

market to Nemont Communications ("Nemont"), a Montana telephone company, which created Missouri Valley as a subsidiary to operate as the ILEC in Williston. See Exh. B at 2-3.

Nemont organized its operating units so that Missouri Valley would offer only local telephone service in Williston. See Exh. C at 22-24. All other retail services, including long distance, DSL high-speed Internet service, wireless service, and voice mail, are offered through other wholly-owned subsidiaries of Nemont. See id.; Exh. D at 99-101; Exh. E at 34. All of these services, including Missouri Valley's local telephone service, are sold to customers under the Nemont brand. See Exh. D at 98. As part of this arrangement, a large portion of the revenue generated by local telephone customers in the Williston exchange goes directly to Nemont rather than to Missouri Valley. See D at 99-101; Exh. E at 33-35. Nonetheless, Nemont assigned all the debt it incurred in acquiring the Williston exchange to Missouri Valley, and Missouri Valley pays the entire cost of servicing the debt on the Williston acquisition, even though it does not realize all the revenue the exchange produces. See Exh. F at 2, 3. As a result, Missouri Valley is required to pay more than $2 million dollars per year in debt service, which amounts to about 40% of its revenues from 2005-2007. See Exh. F at 2, 3. This expenditure has been more than double – and in one year nearly triple – the amount that Missouri Valley has spent on facilities investment over the period for which it provided data to the NDPSC. See Exh. G at 7-8.

In the fall of 2002, Missouri Valley acquired the facilities from Citizens and applied to the NDPSC for authority to serve the Williston Exchange. See Compl. at Exh. A. In requesting approval, Missouri Valley affirmatively represented to the NDPSC and to Midcontinent that it would continue to be bound by its predecessor's then-existing interconnection arrangements. Id. at 3; Exh. H, Attach. 2 at 1. The NDPSC approved the transaction by order dated December 4,

2002. In that order, the NDPSC noted that Missouri Valley "intends to honor existing interconnection agreements with exchange carriers[.]" Compl. Exh. A at 3.

When Missouri Valley acquired the Williston Exchange, Midcontinent already was a party to an interconnection agreement with Citizens, and this was one of the interconnection agreements Missouri Valley promised to honor. Exh. H, Attach. 2 at 1. Midcontinent had entered the Williston telephone market in 1999 pursuant to a facilities-based and resale interconnection agreement with Qwest (then US West). See Id. at 1; NDPSC Docket No. PU-03-715. That agreement was modified when Citizens acquired the Williston exchange from Qwest in January 2001, and the modified agreement was filed with the NDPSC on January 29, 2001. See Exh. H at 1 & Attachs. 1, 2.

In February 2003, Citizens formally notified Midcontinent that Missouri Valley would negotiate a new agreement with Midcontinent and, in the meantime, "provide interconnection under the existing agreement." Compl. Exh. B. 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." Compl. Exh. C.

On November 4, 2003, Missouri Valley sent a letter purporting to terminate the existing interconnection agreement with Midcontinent and seeking negotiations for a new agreement. The reason for the purported 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.

Compl. Exh. D. Missouri Valley did not assert any right to terminate the existing agreement or to limit the terms of any new agreement based on the rural exemption. Id.

In 2004, Midcontinent and Missouri Valley renegotiated a portion of their interconnection agreement. See Exh. H at 2 & Att. 5. The renegotiated agreement required Missouri Valley to provide telecommunications services to Midcontinent for the purposes of "resale." See Exh. I; NDPSC Docket No. PU-04-638. The agreement specified that the services would be provided to Midcontinent at wholesale rates, and, in negotiating the resale agreement, Missouri Valley did not assert that it was excused from any Section 251 obligations under the rural exemption. The new agreement was filed with the NDPSC on December 3, 2004. See id.

B. Midcontinent's Efforts To Negotiate And Proceedings Before The NDPSC.

In 2007, Midcontinent prepared to improve its competitive business model from providing customers with the "resale" of Missouri Valley's service to providing full facilities-based competition using its own telecommunications plant. On November 14, 2007, Midcontinent made a bona fide request for facilities-based interconnection with Missouri Valley pursuant to Section 251(c) of the 1996 Act. See Exh. J at Attach. A. On January 30, 2008, Missouri Valley sent a letter to Midcontinent denying Midcontinent's interconnection request and claiming that the rural exemption excused it from providing Midcontinent with the requested interconnection. See id. at Attach. B.

On February 8, 2008, Midcontinent sought NDPSC intervention to require Missouri Valley to negotiate an interconnection agreement as provided under federal law. See id. at Attch B. Specifically, Midcontinent filed with the NDPSC a petition to lift Missouri Valley's rural exemption, which included: (1) a notice that it had made a bona fide request for interconnection with Missouri Valley, and (2) a petition asking the NDPSC to find that Section 251(f) did not exempt Missouri Valley from providing facilities-based interconnection to Midcontinent. See id.

Midcontinent argued, inter alia, that Missouri Valley had promised to honor interconnection agreements with existing carriers in the Williston exchange and that Missouri Valley had executed the Section 251(c)(4) resale agreement. See id. at 2; Exh. C at 5-9. Midcontinent argued that as a result of each of these acts independently, Missouri Valley had waived of any right it might have had to invoke the rural exemption. See id. Midcontinent also demonstrated that, apart from Missouri Valley's waiver, the standard under Section 251(f)(1) also required Missouri Valley to provide interconnection under Section 251(c). See Exh. C. at 9-30.

In response, on April 9, 2008, Missouri Valley, pursuant to 47 U.S.C. § 251(f)(2), filed a separate Application for Suspension of any modification of its duties it might have if the NDPSC decided that the rural exemption did not apply. See Exh. A at 2; Exh. K. Missouri Valley argued that if the NDPSC were to find that Missouri Valley had waived its exemption or that the exemption should be removed under Section 251(f)(1), the public interest supported suspension of Missouri Valley's ILEC interconnection obligations pursuant to Section 251(f)(2). See id.

The NDPSC consolidated Midcontinent's Petition to Lift the Rural Exemption and Missouri Valley's Application for Suspension. See id. The NDPSC took testimony and briefing on the questions of whether Missouri Valley's rural exemption should be lifted, and, if so, whether Missouri Valley's application for suspension of certain duties was warranted. See id. On July 9 and 10, 2008, the NDPSC held a hearing on these matters. See Exh. C.

C. The Rural Exemption Order.

On October 8, 2008, the NDPSC issued the Rural Exemption Order, denying Midcontinent's Petition to Lift the Rural Exemption. See Exh. A. The Rural Exemption Order concluded that lifting the rural exemption would unduly economically burden Missouri Valley and impair its universal service efforts. See id. at 10. Because it concluded that Midcontinent's

Petition to Lift the Rural Exemption should be denied, it dismissed as moot Missouri Valley's Application for Suspension of its obligations under Section 251(f)(2). See id.

On November 4, 2008, Midcontinent timely filed a Petition for Reconsideration, or, in the Alternative, Rehearing, identifying the numerous legal errors in the Rural Exemption Order. On November 17, 2008 Missouri Valley filed its opposition. On December 4, 2008, the NDPSC rejected Midcontinent's Petition for Reconsideration and upheld the Rural Exemption Order at a public meeting. The NDPSC did not issue a written decision memorializing this decision.

IV. ARGUMENT

A. Legal Standard

Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. UnitedHealth Group, Inc. v. Wilmington Trust Co., 548 F.3d 1124, 1127-28 (8th Cir. 2008). In this case, the administrative record is already established, and the material facts are not in dispute. The Court's review is based on the record developed before the NDPSC, and no additional factual development is necessary or appropriate. Summary judgment is appropriate if Midcontinent is entitled to judgment as a matter of law based on the existing record. Central South Dakota Co-op. Grazing Dist. v. Secretary of U.S. Dept. of Agriculture, 266 F.3d 889, 895 (8th Cir. 2001).

In evaluating whether a state commission's interpretation of the 1996 Act and related FCC rules comports with federal law, district courts apply a de novo standard of review. See WWC License, L.L.C. v. Boyle, 459 F.3d 880, 889 (8th Cir. 2005). In interpreting the statute, the Court defers to existing interpretations by the FCC, which Congress authorized to interpret and administer that statute. Id. at 890. If the state commission's interpretation of the 1996 Act conflicts in any way with federal law, its decision must be overruled. See id. at 893.

If the Court reviews the NDPSC's findings of fact and applications of law to facts, they are reviewed under the "arbitrary and capricious" standard. Id. at 889. To satisfy this standard, an agency action must have three features. First, it must be based on a consideration of all the relevant factors. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Menorah Medical Center v. Heckler, 768 F.2d 292, 295 (8th Cir. 1985). Second, it must be supported by substantial evidence. Dickinson v. Zurko, 527 U.S. 150, 164 (1999) (citing SEC v. Chenery Corp., 318 U.S. 80, 89-93 (1943)). And third, it must articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983); Menorah Medical Center, 768 F.2d at 295; Minnesota Milk Producers Ass'n v. Yeutter, 851 F. Supp. 1389, 1396 (D. Minn. 1994).

B. Midcontinent Is Entitled To Summary Judgment

1. Missouri Valley Waived Any Right To Rely on the Rural Exemption.

Although the Rural Exemption Order acknowledged Midcontinent's argument that Missouri Valley had waived any right to rely on the rural exemption, it did not address or provide any analysis of this dispositive issue. Missouri Valley has argued that the NDPSC rejected the argument without explanation. In any event, the NDPSC's action was unlawful under settled principles of administrative law because it failed to provide any reasoned justification for rejecting the argument. See Motor Vehicle Mfrs., 463 U.S. at 43.

More fundamentally, however, the Rural Exemption Order should be reversed because the facts and law require the conclusion that Missouri Valley waived any right to rely on the rural exemption. Parties can waive federal statutory rights, such as the right to claim the rural

exemption, either expressly or through their conduct.[9] Whether a federal right has been waived is an issue of federal law, subject to federal standards. See Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, 369 (1952). A party waives a federal right when it makes a knowing, voluntary, and intentional relinquishment or abandonment of it. See Ackerberg v. Johnson, 892 F.2d 1328, 1331 (8th Cir. 1989) (finding that defendants waived any federal statutory right to arbitrate 1933 Securities Act claims by litigating claims). A knowing and intentional waiver can be deduced from a party's acts when there is no other reasonable explanation of its conduct. See id.; Frontiervision, 2001 WL 220192 at *5. Courts disallow waivers of federal rights only when Congress expressly precludes it or when a finding of waiver would create an inherent conflict with the underlying purpose of the statutory right. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-27 (1991).

(a) Missouri Valley Waived Its Right To Rely on the Rural Exemption by Assuming the Interconnection Agreement With Midcontinent and by Negotiating a Subsequent Resale Interconnection Agreement with Midcontinent.

In this case, Missouri Valley voluntarily and intentionally waived its right to rely on the rural exemption, twice: First, in 2002 it promised the NDPSC that it would maintain its existing interconnection agreements as a condition of acquiring the Williston Exchange. Second, in 2004 it concluded a Section 251(c)(4) resale interconnection agreement with Midcontinent and submitted it to the NDPSC for approval. The NDPSC's failure to recognize these waivers – indeed, its failure to even address Midcontinent's waiver argument – violated federal law.

[9] See, e.g., 14 Penn Plaza LLC v. Steven Pyett, 556 U.S. ___ (No. 07-581) (2009) (upholding contractual surrender of right to litigate rather than arbitrate ADEA claims); Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (upholding arbitration clause that waived right to litigate rather than arbitrate claims arising from the Securities Act of 1933); Frontiervision Operating Partners v. Town of Naples, No. 01-16-P-DMC, 2001 WL 220192 *4-5 (D. Me. March 7, 2001) (cable operator waived the right to enforce time limitations on franchise negotiations contained in the Communications Act by continuing to negotiate beyond the deadline).

Missouri Valley's 2002 promise to the NDPSC to maintain its existing interconnection agreements, including its facilities-based agreement with Midcontinent, was knowing, voluntary, and intentional. It is undisputed that Midcontinent's agreement with Citizens authorized full, facilities-based interconnection under Section 251(c), and that Missouri Valley voluntarily undertook those obligations. See Exh. H at Attch. 1. The NDPSC's order approving Missouri Valley's acquisition of the Williston Exchange stated that Missouri Valley had publicly committed on the record to the NDPSC its intention "to honor existing interconnection agreements with exchange carriers[.]" Compl. Exh. A at 3 (¶ 5) (Dec. 4, 2002).

Missouri Valley plainly knew the scope of its interconnection rights and obligations, and its promise constituted an affirmative commitment not to disturb existing interconnection arrangements.[10] Moreover, Missouri Valley's promise was intentional – it was calculated to obtain NDPSC approval of the transaction. Missouri Valley was a rural carrier at the time, and by waiving any objections to honoring the existing interconnection agreements – whether by asserting the rural exemption or on some other ground – it succeeded in obtaining approval to acquire the Williston Exchange. If Missouri Valley had not intended to honor Midcontinent's interconnection rights, it should have done so as part of the NDPSC approval process, giving Midcontinent the opportunity to oppose the proposed transaction. Plainly, Missouri Valley intended the NDPSC and all interested parties to believe that it would not invoke the rural exemption to deny CLECs' interconnection rights as they existed prior to the transaction.

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[10] That Missouri Valley knew its rights and obligations is further demonstrated by correspondence from Citizens to Midcontinent notifying it of the transfer of the Williston Exchange, which stated that Missouri Valley had "been made aware of existing Interconnection Agreement(s) and have agreed to negotiate new agreements with carriers that have ongoing interconnection activities related to the exchanges they purchase" and that Missouri Valley had agreed to "offer to provide interconnection under the existing agreement until new agreements can be completed." See Compl. at Exh. B.

Missouri Valley's post-acquisition conduct also shows that it knowingly and intentionally waived the rural exemption when it acquired the Williston exchange. In correspondence with Midcontinent following the transaction, Missouri Valley informed Midcontinent that it would "honor the current Interconnection Agreement that is in place between Citizens and Midcontinent Communications until a new agreement can be negotiated." See Compl. at Exh. C. Again, Missouri Valley did not mention the rural exemption or any attempt to diminish the facilities-based interconnection rights Midcontinent enjoyed under its agreement with Citizens.

In 2004, Missouri Valley again made clear its intention to waive its rural exemption by entering into a resale interconnection agreement with Missouri Valley under Section 251(c)(4). That agreement amended Midcontinent's existing facilities-based interconnection agreement with Citizens. See Exh. I. The parties confirmed their intention that the agreement was concluded pursuant to Sections 251(c) and 252 by specifying wholesale rates for resale (which are required by Section 251(c)(4) unless the rural exemption is asserted) and by submitting the agreement to the NDPSC, which approved the agreement through its normal process. See id.; see also NDPSC Docket No. PU-04-638. Again, Missouri Valley's participation in the Section 251 and 252 process demonstrated its knowledge and understanding of its rights, and its decision to execute a Section 251(c) agreement shows an intentional and voluntary relinquishment of its right to claim exemption from Section 251(c).

Missouri Valley's promise to honor (and assumption of) the interconnection agreement with Citizens, and its execution of the NDPSC-approved resale interconnection agreement with Midcontinent, both demonstrate Missouri Valley's knowing, voluntary, and intentional relinquishment of its right to assert the rural exemption. These facts cannot be disputed.

(b) The Language, Structure, and Policy of Section 251 Support Finding a Waiver.

Although courts may refuse to enforce waivers of federal rights when Congress explicitly forbids them or when enforcement is inconsistent with important federal policies, see Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 760 (9th Cir. 1996) (citing Gilmer, 500 U.S. at 26), that principle does not help Missouri Valley here. Recognizing rural exemption waivers like Missouri Valley's would further, not undermine, the policies underlying Section 251(f).

Nothing in the language of Section 251(f) suggests that Missouri Valley cannot waive its rural exemption. Missouri Valley argued to the NDPSC that the rural exemption cannot be waived because, under Section 251(f)(1), Missouri Valley's obligations do not begin until it rejects a bona fide request for interconnection and a state commission finds that the criteria of Section 251(f)(1) are met. See Exh. L at 5-6. But nothing in Section 251(f) prohibits Missouri Valley's prior, voluntary waiver of its right to asset the rural exemption in the first place; it merely prescribes the procedures to be followed if it asserts those rights and forces the CLEC to seek termination of the exemption. Indeed, Section 251(f)(1) does not even address a situation like the instant case, where the rural ILEC long ago accepted multiple Section 251(c) interconnection agreements but now wishes to limit its interconnection obligations.

Missouri Valley's arguments on this issue have been inconsistent and unpersuasive. It argued before the NDPSC that it could not have waived the rural exemption because termination of the exemption can occur only pursuant to Section 251(f)(1). Missouri Valley conceded, however, that by executing a resale agreement under Section 251(c)(4) it had waived any right to assert the rural exemption to escape its resale obligations. See Exh. I. That waiver was not accomplished pursuant to Section 251(f)(1). It was accomplished through Missouri Valley's own conduct, which demonstrates that its own conduct may constitute a waiver of the right to

rely on the rural exemption to avoid its other Section 251(c) interconnection obligations as well. Nothing in the language of Section 251(f) remotely suggests that selective waivers of the rural exemption are permissible but full waivers are forbidden.

Missouri Valley's logic suggests that there can be selective waivers under Section 251(f)(1), but this would be incompatible with the structure of Section 251(f). Section 251(f) already makes partial or selective relief available to rural ILECs pursuant to Section 251(f)(2), the provision that allows a rural ILEC to petition for suspension of particular obligations. See 47 U.S.C. § 251(f)(2). Indeed, Congress adopted a different process and legal standard for selective relief under Section 251(f)(2): The ILEC bears the burden of proof, and the elements required to modify or suspend a rural ILEC's obligations are distinct and more exacting than those required for terminating a rural exemption.

The Rural Exemption Order did not address the selective suspension of Missouri Valley's obligations under Section 251(f)(2). It improperly allowed Missouri Valley to selectively avoid obligations under Section 251(c), even though the proceeding was under Section 251(f)(1), Midcontinent retained the burden of proof, and Missouri Valley made no showing of a right or need for selective suspension of obligations. That is wrong as a matter of law. If Missouri Valley wishes to comply with some portions of Section 251(c) and not others, the proper procedure is the procedure Congress established under Section 251(f)(2).

Recognizing a waiver here also would support Congress's policy choices in adopting Section 251(f). "Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of local exchange service." First Report and Order, 11 F.C.C.R. at 16,118. It intended the rural exemption to be

"the exception rather than the rule, and to apply, only to the extent and for the period of time, that policy considerations justify such exemption." Id.

Missouri Valley also argued to the NDPSC that Section 251(f) entitles it to the rural exemption until the NDPSC specifically lifts it, regardless of Missouri Valley's previous conduct. See Exh. L at 2. That argument proves too much. It fails to recognize that rights can be waived by agreement or by conduct. Surely Missouri Valley cannot maintain that even after it executes an interconnection agreement, it is free to refuse to honor it whenever it wishes by relying on the rural exemption. Nothing in the statute requires or supports that interpretation.

In fact, Missouri Valley's argument demonstrates that it is attempting to accomplish precisely what Congress sought to prevent. Missouri Valley is selectively invoking the rural exemption – which it never before asserted – to prevent Midcontinent from becoming a facilities-based competitor. Midcontinent is prepared to make that investment in the Williston Exchange, and permitting Missouri Valley to prevent it is inequitable and contrary to congressional intent.

The record below establishes that Missouri Valley waived any right to rely on the rural exemption by its conduct over the past five years, since its acquisition of the Williston Exchange. The failure to recognize that waiver was an error of law that requires reversal.

2. The NDPSC's Analysis Of Missouri Valley's Qualification For The Rural Exemption Violated Federal Law.

Independent of the fact that Missouri Valley waived any right to rely on the rural exemption, Midcontinent demonstrated that Missouri Valley was not entitled to the exemption under the standards of Section 251(f)(1). Under Section 251(f)(1)(A), to maintain Missouri Valley's rural exemption, the NDPSC was required to find that Midcontinent's requested interconnection was (1) not "technically feasible;" (2) "unduly economically burdensome;" or

(3) inconsistent with the universal service requirements of Section 254 of the Communications Act. See 47 U.S.C. § 251(f)(1)(A).

Missouri Valley concedes that the requested interconnection is technically feasible. See Exh. A at 8.[11] As shown below, the NDPSC's determinations that the request would be "unduly economically burdensome" and inconsistent with the universal service requirements of Section 254, violated federal law in several ways.

(a) Midcontinent's Requested Interconnection Would Not Be "Unduly Economically Burdensome."

(1) The NDPSC Erred In Its Interpretation Of The "Unduly Economically Burdensome" Standard.

Under Section 251(f)(1), a state commission must determine whether the requested interconnection is "unduly economically burdensome." 47 U.S.C. § 251(f)(1); Iowa Utilities Board v. FCC, 219 F.3d 744, 761 (8th Cir. 2000) ("Iowa Utilities Board"). The NDPSC held that this standard would be satisfied if the requested interconnection would "damage" Missouri Valley's "efficiency in offering [existing] services" by limiting its "ability to invest in facility upgrades and replacements." See Exh. A at 7. The NDSPSC then relied on evidence that Missouri Valley would lose customers and revenue if it engaged in facilities-based competition by providing Section 251(c) interconnection to Midcontinent and, therefore, there would be a burden on its ability to invest in facility upgrades and replacements. Based on this evidence, the NDPSC held that the requested interconnection would be "unduly economically burdensome."

(A) The NDPSC Misinterpreted the Standard.

Section 251(f)(1) directs state commissions to determine whether requested interconnection under Section 251(c) would be "unduly economically burdensome." 47 U.S.C.

[11] The NDPSC's Conclusion of Law No. 4 describes this issue as "moot," but its factual finding of technical feasibility was consistent with the contentions of the parties. See Exh. A at 10.

§ 251(f)(1). Section 251(f)(1) leaves intact, even for rural ILECs, the interconnection obligations mandated under Sections 251(a) and (b). Those sections require all carries to interconnect – i.e., to connect their network facilities, directly or indirectly, and make other technical arrangements to ensure that all telephone calls go through to all telephone users.

There is no mechanism for rural ILECs to escape all interconnection obligations under Section 251(a) or the attendant costs of satisfying those obligations. Rural ILECs also cannot escape Section 251(b) interconnection obligations, unless they can convince a state commission to suspend the requirements under Section 251(f)(2). Rural ILECs can escape Section 251(c) interconnection obligations if they would be "unduly economically burdensome."[12]

Taking these provisions together, as settled principles of statutory construction require,[13] it is clear that there are economic burdens associated with all three types of interconnection. As a matter of logic, Congress did not consider mandatory interconnection under Sections 251(a) and (b) to be "unduly economically burdensome," or it would not have mandated such interconnection in the first place. Thus, for example, all carriers, even rural ILECs, must bear the basic burdens of interconnection under Section 251(a), no matter how significant.

Therefore, what is "unduly economically burdensome" under Section 251(c) cannot, as a matter of logic, rely solely on burdens that already are mandated – and, therefore, by definition are not "undue" – under Sections 251(a) and (b). While a state commission must consider all the burdens associated with an interconnection request under Section 251(c) in making its determination of whether the costs would be "unduly economically burdensome," it must

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[12] Section 251(c) interconnection is typically the same as interconnection under Sections 251(a) and (b), except that under Section 251(c) interconnection, the ILEC must make services available at cost-based rates.

[13] United States v. Atl. Research Corp., 127 S. Ct. 2331, 2336 (2007) ("Statutes must be read as a whole."); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) (explaining "the cardinal rule that a statute is to be read as a whole"); U.S. v. Talley, 16 F.3d 972, 976 (8th Cir. 1994) (same).

identify some incremental burden that would be caused specifically by interconnection under Section 251(c) to support a finding of undue economic burden.

Any other interpretation of the statute would be illogical. For example, if the burden of interconnection under Section 251(a) were exactly the same as the burden of interconnection under Section 251(c), and the former is mandated by Congress, it would make no sense to say that the latter might still be "unduly economically burdensome." Of course, the burden of Section 251(c) interconnection might be greater if, for example, the requirement to collocate equipment in the ILEC's facilities (as required under that provision) might impose an additional burden on the ILEC. Then the question is whether that incremental burden is "undue." But if the evidence shows that the burden caused by the request for interconnection under Section 251(c) is no different (or less) than the burden that would have been caused by interconnection under Section 251(a), there can be no finding of undue economic burden.

(B) Iowa Utilities Board Is Not to the Contrary.

The NDPSC rejected Midcontinent's argument on the proper standard, based on a misreading of the Eighth Circuit's decision in Iowa Utilities Board. In Iowa Utilities Board, the Eighth Circuit considered an FCC rule interpreting Section 251(f)(1) that required small and rural ILECs to demonstrate that the cost of requested interconnection would be "beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c). As relevant here, the Eighth Circuit rejected the FCC's rule because it impermissibly constrained state commissions from considering all the burdens that might be caused by providing what Congress required under Sections 251(b) or (c) and required them to consider only one "discrete part" of the burden. 219 F.3d at 761. The Eighth Circuit reasoned that the FCC had impermissibly limited the scope of the inquiry, and the Court held that state

commissions must assess "the full economic burden on the ILEC of meeting the request [to provide Section 251(c) interconnection]." Id.

As the Court made clear in Iowa Utilities Board, state commissions must consider all evidence of the economic burden in making assessments under Section 251(f)(1). But the Eighth Circuit did not hold, and did not even consider, whether a finding of undue economic burden could be based solely on evidence that the requested interconnection under Section 251(c) would impose no more burden than mandatory interconnection under Section 251(a). The Court was determining whether the FCC's rule was too restrictive, not whether the burden had been satisfied in a particular case or what evidence might be sufficient.

Here, Missouri Valley's entire argument – and all its evidence – is based on one theory of economic burden: that the requested interconnection under Section 251(c) would enable facilities-based competition by Midcontinent that would result in a loss of customers and revenues for Missouri Valley. Missouri Valley simply did not want the burden of competition. In this case, however, that burden is no more than the burden Missouri Valley would face if Midcontinent exercised its right to mandatory interconnection under Section 251(a). Congress certainly did not believe that facilities-based competition alone was an undue economic burden; in fact, encouraging facilities-based competition was a primary goal of the 1996 Act.

It is true that this interpretation of the statute means that rural ILECs might well be subjected to the burdens of competition. They might be required to interconnect under Section 251(c) even though the new entrant would then engage in competition for customers and, if successful, cause rural ILECs to lose some customers and revenue. That is precisely the "undue economic burden" argument Missouri Valley made before the NDPSC.

The FCC and the courts have made clear, however, that Section 251(f) does not shield rural ILECs from the costs of competition. See Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996, First Report and Order, 11 F.C.C.R. 15,499, 16,118 (1996). In fact, as one court explained, "[c]ompetition w[ill] 'almost always result in a negative revenue effect to the ILEC as it loses market share,'" so the term "unduly economically burdensome" requires something more than the costs of competition. 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).

The standard the NDPSC applied violates these principles. The NDPSC held that undue economic burden could be shown if the requested interconnection would "damage" Missouri Valley's "efficiency in offering [existing] services" by limiting its "ability to invest in facility upgrades and replacements." See Exh. A at 7. But a "damaged efficiency" standard proves too much because all costs marginally "damage" efficiency and, at least theoretically, decrease the ability to invest in facility upgrades and replacements. See Wireless World, L.L.C. v. Virgin Islands Public Services Comm'n, 2005 U.S. Dist. LEXIS 15061 at *16 (citations omitted). An "undue" burden must be one that is, in some way, "exceeding or violating propriety or fitness" or "excessive." Definition of "undue," Merriam-Webster Online, at http://www.merriam-webster.com/dictionary/undue; see also; Exh. E at 38, The "damaged efficiency" standard would encompass all decreases in business due to ordinary competition, no matter how inconsequential.

(C) The NDPSC Must Be Reversed Because It Considered Only Costs That Were Not Caused By Section 251(c) Interconnection.

Applying the proper standard under Section 251(f)(1), there is no evidence in the record that granting Midcontinent's request for interconnection under Section 251(c) would be "unduly economically burdensome." All of the evidence of the burden that would be caused by granting

that request was evidence that Missouri Valley would lose customers and revenue as a result of competition with Midcontinent. The record contains no evidence that the costs of Midcontinent's requested interconnection under Section 251(c) would impose any burden on Missouri Valley beyond that imposed anyway under Section 251(a) or (b).

Missouri Valley has conceded this point. The pre-filed testimony of Missouri Valley's witness, Mr. Hanson, refers to the effects of facilities-based competition from Midcontinent, which Missouri Valley would have to face if Midcontinent had requested interconnection under Section 251(a). Mr. Hanson testified about the potential financial impact caused by interconnection with Midcontinent, all based on the typical burdens of new competition:

- "A facilities based interconnection would cause substantial negative financial impact on Missouri Valley." Exh. E at 13.
- "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." Id.
- "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." Id. at 16.
- "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 . . ." Id. at 17.

On cross-examination, Mr. Hanson acknowledged that his economic burden projections were not based on any unique costs that would result from granting interconnection under Section 251(c), as opposed to costs that would arise under any other form of interconnection. For example, Missouri Valley did not claim special burdens associated with providing Midcontinent the right to "collocate" its equipment in the ILEC's facilities, a requirement granted solely under Section 251(c)(6), or that the burdens would be less if Midcontinent exchanged traffic via indirect interconnection as specifically permitted by Section 251(a):

> 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.
>
> 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. See Exh. C at 108, 110.[14]

Thus, by Missouri Valley's own account, the economic burdens it identified were based solely on the effect of facilities-based competition by any means, and were not caused by Midcontinent's request for interconnection under Section 251(c).

There is no evidence that any costs Missouri Valley would have to bear would be caused by Section 251(c); the costs were merely those Missouri Valley would face from any facilities-based competitor. But the rural exemption was not designed to protect rural ILECs from such competition, and such costs alone cannot support retaining the rural exemption as "unduly economically burdensome." The NDPSC's determination on this factor is erroneous.

(4) The NDPSC's Considerations of the Individual Elements of Missouri Valley's Economic Burden Were Either Directly Contrary to Specific Provisions of Law Or Arbitrary and Capricious.

The NDPSC's "unduly economically burdensome" determination also violated federal law because each of its decisions regarding the individual cost factors cited by Missouri Valley

[14] Quotations from oral testimony are from an informal transcript Midcontinent prepared and attached as Exhibit C. These passages were quoted in Midcontinent's initial brief at the NDPSC and were not disputed by Missouri Valley.

was either in direct violation of federal law or was arbitrary and capricious under governing precedent. The cumulative effect of the NDPSC's errors wipes out at least 75 percent of the alleged economic burden that the NDPSC found justified Missouri Valley's rural exemption. In light of these errors, the NDPSC's finding that Midcontinent's requested interconnection would be "unduly economically burdensome" cannot be sustained.

(A) The NDPSC Unlawfully Failed To Consider Missouri Valley's Relationship With Its Parent Company.

The NDPSC ruled that it should consider the effect of Midcontinent's requested interconnection on Missouri Valley without considering the relationship between Missouri Valley and its parent company, Nemont. See Exh. A at 8. That decision was inconsistent with the plain language and intent of Section 251(f).

Section 251(f)(1) directed the NDPSC to determine whether the requested interconnection was "unduly economically burdensome." 47 U.S.C. § 251(f)(1). There is no basis within the language of this provision to restrict the inquiry solely to the economic effects reported on the books of the rural telephone company alone, without inquiry into whether that would be a fair measure of the economic burden. As the Eighth Circuit made clear in Iowa Utilities Board, the NDPSC must consider "the full economic burden on the ILEC of meeting the request" for interconnection. 219 F.3d at 761.

Here, the "full economic burden" on Missouri Valley cannot be assessed without considering its financial arrangement with its parent, Nemont, and the relevant facts are clearly and minutely depicted in the record. The undisputed evidence showed that Nemont structured its relationship with Missouri Valley so that a large portion of the revenue generated by the Williston Exchange would go to Nemont rather than to Missouri Valley, in the form of charges for long distance, voice mail, and other services. See Exh. E at 34. At the same time, however,

Nemont assigned to Missouri Valley the debts that Nemont incurred for acquiring the Williston Exchange and portions of Nemont's operating expenses, such as rent for Nemont's corporate headquarters in Scobey, Montana. See id.; Exh. D at 22-24. Thus, the record before the NDPSC showed that Nemont realized a great deal of revenue from the Williston Exchange while assigning considerable expenses to Missouri Valley. See Exh. G at 14-16; Exh. F. These arrangements distort the financial picture for Missouri Valley by making it appear that the company is performing poorly and could not pay for facilities maintenance and upgrades, which the NDPSC specifically found would be endangered by Missouri Valley's projected revenue losses. See Exh. A at 7-8. The NDPSC considered these indicators of poor economic health an "economic burden" but failed to account for the fact that Nemont was manipulating the revenues and expenses. The NDPSC also failed to consider Nemont as a potential source of funding for the facilities maintenance and upgrades the NDPSC believed would be endangered.

Indeed, Missouri Valley's relationship with Nemont was critical in this case because it was a significant reason the NDPSC found that Midcontinent's requested interconnection would place economic burdens on Missouri Valley. For example, the NDPSC repeatedly found that the requested interconnection would be unduly economically burdensome because it would interfere with Missouri Valley's ability to make investments in its Williston infrastructure. See Exh. A at 7, 9. But the NDPSC ignored evidence that the "undue economic burdens" were being placed on Missouri Valley by Nemont, not by Midcontinent. The NDPSC majority also ignored undisputed evidence provided by Missouri Valley showing that Missouri Valley's largest expense by far was servicing the debt Nemont incurred to acquire the Williston Exchange, a debt that it assigned entirely to Missouri Valley. See Exh. F. This assignment requires Missouri

Valley to spend more than $2 million each year on debt service alone. See id. These expenditures greatly decrease Missouri Valley's cash flow available for facilities investment.

Indeed, Missouri Valley's facilities investment totaled just $861,000 in 2006 and $679,000 in 2007. See Exhibit G at 7-8 & Exh. 1; see also Exh. E. These totals represent only 44% of Missouri Valley's reported net operating revenue margin in 2006 and only 35% in 2007. See id. And even these percentages were inflated because Missouri Valley's calculation of its "net margin" included depreciation expenses as a cash outlay, even though those expenses are an accounting mechanism to account for past investment, not a current expenditure. See Exh. G at 7 & Exh. 1. When depreciation expenses are removed, as they properly must be, Missouri Valley's investments in its Williston network decrease to 29 percent of operating cash flow in 2006 and 22 percent of operating cash flow in 2007. See id. As former NDPSC Commissioner Susan Wefald recognized, Missouri Valley's claims regarding impaired investment were specious given the low percentage of operating cash flow Missouri Valley was currently investing. See Exh. A, Dissent of Commissioner Susan Wefald.

The NDPSC's analysis of the economics of the rural carrier find no support in Section 251(f)(1) and violate its requirement, as explained by the Eighth Circuit in Iowa Utilities Board, that the commission consider "the full economic burden on the ILEC of meeting the request" for interconnection. 219 F.3d at 761. That decision must be rejected under federal law.

(B) The NDPSC Erred In Determining That Missouri Valley Is Not Entitled To Safety Valve Financing.

The NDPSC's conclusion that Missouri Valley is ineligible for "safety-valve" financing is contrary to federal law. The NDPSC's finding that Midcontinent's requested interconnection would be unduly economically burdensome rested in large part on its acceptance of Missouri Valley's allegation that the requested interconnection would cause Missouri Valley to suffer lost

net revenue of $3.58 million between 2009 and 2012. See Exh. A at 8. However, Midcontinent demonstrated that under the FCC's "safety-valve" rule, Missouri Valley could recover $2.234 million – or more than 62% – of its claimed loss through additional disbursements from the federal Universal Service Fund. See 47 C.F.R. § 54.305; see also Exh. M; Exh. A at 6-7. The NDPSC relied on non-expert testimony from Missouri Valley and its own misinterpretation of the FCC's Fourteenth Universal Service Report and Order in finding that Missouri Valley is ineligible for "safety valve" funding.

The FCC's Universal Service Fund provides significant subsidies to telephone companies that provide service to rural and other high cost areas. See generally, High-Cost Universal Service Support, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 F.C.C.R. 6,475, 6,490. These subsidies are determined based on the telephone company's costs of providing service. See id. These costs are reported to the FCC and the agencies it has appointed to administer the Universal Service program through periodic filings. See 47 C.F.R. §§ 54.301-.303; 36.601, et seq.. To ensure that carriers do not abuse the system, however, the rules generally restrict carriers that acquire rural exchanges from claiming additional Universal Service subsidies over and above the level their predecessors were receiving at the time of the acquisition. See id. § 54.305(b). If, however, the acquiring carrier's per-line costs increase in the years following the acquisition, the "safety valve" rule permits the acquiring carrier to receive half of the per-line cost increase. See id. at § 54.305(d).

In adopting the "safety valve" rule, the FCC sought to structure the rule to ensure that it would not encourage rural carriers to spin off unprofitable rural exchange areas to smaller carriers that could not operate those exchanges as efficiently and that would seek to make up the difference through additional Universal Service subsidies. See Federal-State Joint Board on

Universal Service, Fourteenth Report and Order, 16 F.C.C.R. 11,244, 11, 281-83 (2001). Thus, the first year following the acquisition of the exchange was adopted as the "index year," and all subsequent years must be compared to the "index year" to ensure that the increases in per-line costs are not due to the acquisition itself, but rather are due to actual increased per-line costs. See id. at 11,285-88; 47 C.F.R. § 54.305(d)(2). The FCC described this structure as designed to guarantee that acquiring companies "will only receive support for new investment in rural infrastructure." Id. at 11,286.

The NDPSC found that the FCC's reference to "new investment" in the Fourteenth Universal Service Report and Order means that Missouri Valley cannot gain safety valve funding for increased per-line costs that result in part from the loss of lines occasioned by competition. See Exh. A at 6-7. This misinterprets the safety valve rule. The per-line costs relevant to determining eligibility for safety-valve financing include all plant investment. See Fourteenth Universal Service Report and Order, 16 F.C.C.R. at 11,285-86. All the rule requires is that the expenses claimed by the carrier be incurred after the index year. See id. at 11,285 ("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."). The rule is unqualified, and 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 Rural Exemption Order should have concluded that Missouri Valley would be eligible for safety valve relief.

Thus, even if the costs Missouri Valley identified were properly included in the analysis of "undue economic burden" (which they were not), the NDPSC's mistaken conclusion that

safety-valve support would not be available to Missouri Valley constitutes an additional error. When this error is corrected, more than 62% of Missouri Valley's claimed economic burden could not be included in the "unduly economically burdensome" calculation as a matter of law, and Missouri Valley's claim of an undue burden becomes untenable.

(C) The NDPSC Did Not Adequately Explain Its Rejection Of Midcontinent's Cost Adjustments.

The NDPSC rejected three other adjustments to Missouri Valley's claimed economic burdens Midcontinent identified, without providing any explanation whatsoever for the rejection. Although the Court does not substitute its judgment for that of the agency, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (1983). In this case, the NDPSC failed to provide even a cursory explanation for its refusal to accept Midcontinent's cost adjustments.

First, Midcontinent demonstrated the need for a $572,600 adjustment to Missouri Valley's claimed economic burden based on its use of a linear model for customer line growth. See Exh. A at 5. This adjustment amounted to about 16% of Missouri Valley's claimed economic burden. This recommendation was based on the unusually large line-growth projected by the compounding line growth model relied upon by Missouri Valley. See Exh. M at 10-16. As Midcontinent's witness Scott Lundquist explained, Missouri Valley's projections presumed that Midcontinent would continue acquiring customers at essentially the same rate as it acquired them during its first 8 months in the market (between January and November of 2006), whereas Midcontinent showed that its customer growth rate going forward would be closer to the stable, linear rate of growth from November 2006 through April 2008. See id. at 11-14. Missouri Valley, in comparison, assumed that Midcontinent would experience compound growth rates of

up to 76 percent for the four years after a decision. See id. at 13. The NDPSC rejected Midcontinent's linear line growth model without any analysis, stating only that "Midcontinent has not met its burden of proof on its proposed . . . adjustment." Exh. A at 5. The NDPSC's decision is devoid of explanation and cannot be upheld under the State Farm standard. Consequently, the line-growth portion of Missouri Valley's claimed economic burden cannot be considered as part of the "undue economic burden" calculation.

Second, the NDPSC rejected Midcontinent's recommended adjustment to Missouri Valley's claimed economic burden of $154,300 to correct Missouri Valley's unrealistic timelines for Midcontinent's migration of customers from its currently-provided resale service to its contemplated facilities-based offerings. See Exh. A at 5. Midcontinent offered evidence that in similar situations in South Dakota it took five to seven months for Midcontinent to migrate customers from resale to facilities-based service, whereas Missouri Valley's calculations assumed an almost instantaneous migration of 1,488 customers following the conclusion of proceedings before the NDPSC and negotiation of an interconnection agreement. See Exh. M at 8-10; Exh. B (Exhs. 1, 2) (showing then-current line count). To accommodate a reasonable migration schedule, Midcontinent added approximately six months to the timetable presented by Missouri Valley. See Exh. B at 8-10. Again, the NDPSC rejected Midcontinent's proposed change without explanation, finding only that "Midcontinent's evidence about migration timing is not more persuasive than Missouri Valley's evidence." Exh. A at 5. As with the line growth decision, the NDPSC failed to provide a reasoned justification for its decision under State Farm.

Third, the NDPSC accepted Missouri Valley's entirely speculative argument that Midcontinent's requested interconnection would cause Missouri Valley to lose $367,600 in special access revenues between 2009-2012. Exh. A at 6. Neither Missouri Valley nor the

NDPSC ever explained how these supposed losses could be attributed to Midcontinent's requested interconnection. The undisputed evidence showed that Midcontinent already is free to offer special access services to business customers using its own facilities. See Exhibit M at 18. No evidence suggested that Midcontinent has gained any significant market share in that area.[15] There must be some substantial evidentiary basis in the record to support an agency's finding. Dickinson v. Zurko, 527 U.S. at 164. Here, the Rural Exemption Order cites no evidence to support the finding that Missouri Valley's special access forecast is accurate.

(D) Even Assuming The NDPSC Applied The Proper Standard And Properly Evaluated The Evidence, The Record Does Not Support The NDPSC's "Unduly Economically Burdensome" Determination.

Even assuming that the NDPSC's "unduly economically burdensome" standard were correct (which it is not) and that the NDPSC properly weighed the evidence of economic burden (which it did not), the Rural Exemption Order still must be reversed for another, independent reason. The NDPSC based its ruling largely on its finding that the economic burdens that Section 251(c) interconnection would place on Missouri Valley would impair its ability to invest in its Williston facilities. But Missouri Valley's own evidence shows that its available cash flow for investment would exceed in every year the largest single-year investment Missouri Valley has made in those facilities. That fact alone undermines the NDPSC's reasoning.

Missouri Valley claims that after four years of competition, with annual line losses that grow each year, its net operating margin would be approximately $930,000. See Exh. B (Exhs. 1, 2. The evidence demonstrates that this figure is misleading. See Exh. G at 7. But even if it were correct, that would be 21% more than its average facilities investment of $770,000 over the

[15] For instance, Mr. Hanson's economic analysis on behalf of Missouri Valley assumes that Midcontinent had taken no special access revenue from Missouri Valley at the time the testimony was filed. See Exh. B (Exh. 1).

three years for which Missouri Valley provided the NDPSC with data. See id. at Ex. 1 at 3-4. And, although Missouri Valley claimed it would be required to make additional facilities investments in the future, it provided no projections or concrete evidence regarding what those additional expenditures might entail. See, e.g., Exh. B at 11-12.

The NDPSC did not explain how Missouri Valley would be impaired in making investments when neither Missouri Valley nor the NDPSC could foresee a year where Missouri Valley's projected investments would approach (let alone exceed) its free operating cash flow. There is no rational connection between the facts the NDPSC found and its legal conclusion that Missouri Valley would suffer an undue economic burden. Consequently, the NDPSC's determination is contrary to law and must be reversed.

(b) The Requested Interconnection Would Not Negatively Impact Universal Service.

Section 251(f)(1) also required Midcontinent to show that its requested interconnection is consistent with Section 254. See 47 U.S.C. § 251(f)(1). Section 254 lists six principles that form the basis for federal universal service policy and are relevant to the Section 251(f)(1) inquiry. 47 U.S.C. § 254(b)(1)-(6). The Rural Exemption Order cited these standards, but found that the only principle that was potentially threatened by Midcontinent's requested interconnection was the need to ensure service to high-cost areas. See Exh. A at 8-9.

The NDPSC's finding that Midcontinent's requested interconnection is inconsistent with Section 254 was based on several subsidiary findings, each made as part of the "unduly economically burdensome" analysis, which, as shown above, itself was contrary to law. Generally, the NDPSC found that Midcontinent's requested interconnection would so financially impair Missouri Valley that eventually Missouri Valley would be unable to provide Lifeline services to rural and high-cost areas in the Williston Exchange. Exh. A at 9. As Midcontinent

has shown, however, that finding is contrary to law because, among other things, (1) none of the burdens on which Missouri Valley rely constitute burdens caused by the request for Section 251(c) interconnection; (2) Missouri Valley is eligible for safety valve financing that would offset as much as 62% of Missouri Valley's claimed economic loss; (3) the NDPSC provided no explanation for its acceptance of Missouri Valley's other alleged economic losses; and (4) Missouri Valley's subsidization of Nemont drains Missouri Valley of funds that could be used to sustain all Missouri Valley's services if there were any threat. Because, as shown above, the NDPSC's decision that the requested interconnection would be "unduly economically burdensome" is contrary to law, those findings cannot support the conclusion that the interconnection would be inconsistent with Section 254.

Moreover, Missouri Valley's numbers do not support the finding that its ability to provide Lifeline Universal Services in the Williston area would be threatened by Midcontinent's requested interconnection. To the contrary, Missouri Valley forecasts that it will have $930,000 in net margins, considerably more than it currently invests in the facilities necessary to provide all its services, including Lifeline services. See Exh. B at 7-8 & Exh. 1.

The NDPSC also erred in accepting Missouri Valley's speculation that regulatory changes to the Universal Service rules might require Missouri Valley to invest additional funds to satisfy new broadband requirements. See Exh. A at 8. Missouri Valley provided no evidence of the potential cost of such changes, and it cited no specific rule changes under consideration at the FCC that would require the additional expenditures it feared.[16] In short, Missouri Valley posited speculative and unquantified additional costs, and the NDPSC decided that the mere fear of those potential costs and their potential affect on Missouri Valley's capacity to provide

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[16] In fact, the FCC has not adopted any such changes in the twelve months since the end of the hearing.

Lifeline services justified exempting Missouri Valley from all facilities-based interconnection requirements.

In addition, even if the NDPSC's concerns about Lifeline Universal Service had some foundation, they still could not form the basis for upholding the rural exemption under the Communications Act. Under 47 U.S.C. § 253(f)(1), state commissions like the NDPSC have the power to require CLECs seeking to serve areas that already are served by rural ILECs to apply for eligible telecommunications carrier ("ETC") status under Section 214(e), and the state commission can withhold authorization until they are so certified. 47 U.S.C. § 214(e). ETCs are required to provide service to all customers throughout their service territory. Id.

Therefore, even if the NDPSC were justifiably concerned with maintaining service to customers outside the city of Williston (and the economic evidence shows this was not a justified concern), the NDPSC could address the issue under Section 214. There is simply no need to block the introduction of facilities-based competition. Midcontinent, like all carriers in North Dakota, is obligated to provide service within its certificated territory, which includes the entire Williston exchange. See Exh. N. The NDPSC's contrary conclusion is inconsistent with the 1996 Act and its purpose to stimulate facilities-based competition.

C. The Court Should Issue A Declaratory Ruling That The NDPSC May Not Permit Missouri Valley To Claim The Rural Exemption.

Declaratory and injunctive relief are appropriate remedies when state commission rulings are found to violate the Communications Act. Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 641, 644 (2002).

The Rural Exemption Order relied on several misinterpretations and misapplications of federal law to uphold Missouri Valley's rural exemption despite a record of undisputed facts that demonstrates that (1) Missouri Valley waived any right it had to rely on the rural exemption, and

(2) Midcontinent's requested interconnection is technically feasible, not "unduly economically burdensome," and consistent with Section 254. The proper remedy is a declaratory ruling that the NDPSC incorrectly applied federal law and an injunction against enforcement of the Rural Exemption Order.

Specifically, Midcontinent respectfully requests that the Court declare as follows:

1. Missouri Valley has waived its right to rely on the rural exemption and therefore cannot invoke it;

2. The NDPSC's failure to consider the waiver issue was a violation of Midcontinent's due process rights;

3. Section 251(f)(1) requires a state commission to analyze the burden of complying with Section 251(c), as opposed to the burden of competition in general, and therefore evidence that does not demonstrate a unique burden resulting from Section 251(c) interconnection does not demonstrate an undue economic burden under 47 U.S.C. § 251(f)(1);

4. The evidence demonstrates that the requested Section 251(c) interconnection would not cause Missouri Valley to suffer an undue economic burden and would not adversely effect its ability to provide universal service under 47 U.S.C. § 251(f)(1);

5. The analysis under Section 251(f)(1) in this case should have considered the financial arrangements between Missouri Valley and its parent company in determining the impact of compliance with Section 251(c), and consideration of Missouri Valley's relationship with Nemont, by itself, demonstrates that there is no undue burden or impact on universal service under 47 U.S.C. § 251(f)(1);

6. The NDPSC erred as a matter of law by failing to consider safety-valve support under 47 C.F.R. § 54.305, and the inclusion of safety-valve support, even without considering other factors, would reduce the impact of competitive entry by Midcontinent to the point that there is no undue economic burden or impact on universal service under 47 U.S.C. § 251(f)(1);

7. The Rural Exemption Order is contrary to federal law and is unenforceable;

8. Missouri Valley is not entitled to the rural exemption under Section 251(f)(1), 47 U.S.C. § 251(f)(1).

9. The NDPSC and Missouri Valley may not take any actions inconsistent with the Court's declaration, and Missouri Valley must comply with its obligations under Section 251(c) to negotiate an interconnection agreement in good faith; and

10. Any request for suspension under 47 U.S.C. § 251(f)(2) based on the facts before the NDPSC in this case must fail, because the failure of the evidence to satisfy the criteria established by Section 251(f)(1) forecloses any demonstration of the more exacting criteria of Section 251(f)(2).

Midcontinent also requests that the Court issue an injunction to ensure that the NDPSC and Missouri Valley do not take any actions inconsistent with the Court's declaration and to require Missouri Valley to comply with its obligations under Section 251(c) to negotiate an interconnection agreement in good faith.

IV. CONCLUSION

For the foregoing reasons, Midcontinent respectfully requests that its motion for partial summary judgment be granted and that the Court grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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July 31, 2009

Its Attorneys

EXHIBIT LIST

A. Rural Exemption Order

B. Prefiled Direct Testimony of Mr. Shawn Hanson, NDPSC Case No. PU-08-61

C. July 9-10 Hearing Transcript, NDPSC Case No. PU-08-61

D. Initial Brief of Midcontinent Communications, NDPSC Case No. PU-08-61

E. Prefiled Direct Testimony of Timothy J. Gates, NDPSC Case No. PU-08-61

F. Midcontinent Exhibit C-1 (Missouri Valley financial statements), NDPSC Case No. PU-08-61

G. Reply Brief of Midcontinent Communications, NDPSC Case No. PU-08-61

H. Midcontinent Late-filed Exhibit C-8, NDPSC Case No. PU-08-61

I. Interconnection Agreement Between Midcontinent and Missouri Valley, NDPSC Docket No. PU-04-638.

J. Midcontinent Notice of Bona Fide Request for Services and Interconnection and Request to Find Rural Exemption Waived, NDPSC Case No. PU-08-61

K. Missouri Valley Application for Suspension, NDPSC Case No. PU-08-61

L. Reply Brief in Support of Proposed Orders of Missouri Valley Communications, Inc., NDPSC Case No. PU-08-61

M. Prefiled Direct Testimony of Scott Lundquist, NDPSC Case No. PU-08-61

N. Midcontinent Late-filed Exhibit C9, NDPSC Case No. 08-61

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

MIDCONTINENT COMMUNICATIONS, A SOUTH DAKOTA PARTNERSHIP,

Plaintiff,

v.

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.

CERTIFICATE OF SERVICE

Case No. 1:09-cv-017

I hereby certify that on July 31, 2009, the following document:

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

David J. Hogue (dhogue@srt.com)
Annette Marie Bendish (abendish@nd.gov)

I further certify that a copy of the foregoing documents will be mailed by first class mail, postage paid, to the following non-ECF participants:

(NONE)

Dated: July 31, 2009

s/ Tara B. Brandner
Tara B. Brandner