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July 31, 2008

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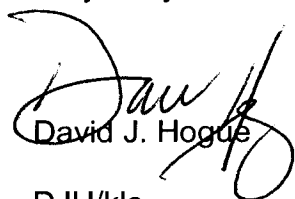
RE: *Midcontinent Communications, a South Dakota partnership v. Missouri Valley Communications, Inc. Case No. PU-08-61 and PU-08-176*

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

- 1. *Missouri Valley Communications, Inc.'s Brief In Support of Proposed Orders of Missouri Valley Communications, Inc.***
- 2. *Missouri Valley Communications, Inc.'s Proposed Findings of Fact, Conclusions of Law, and Order***

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

Very Truly Yours,



David J. Hogue

DJH/klo

Enclosures

cc: Mr. John Olson
Mr. Allen C. Hoberg
Mr. Shawn Hanson

14 **PU-08-176** Filed: 8/4/2008 Pages: 89
Brief in Support of Proposed Orders of Missouri Valley Communications - Proposed Findings of Fact, Conclusions of Law, Order
Missouri Valley Communications, Inc.

Pringle&Herigstad Attorney, David Hogue

32 **PU-08-61** Filed: 8/4/2008 Pages: 89
Brief in Support of Proposed Orders of Missouri Valley Communications - Proposed Findings of Fact, Conclusions of Law, Order
Missouri Valley Communications, Inc.

Pringle&Herigstad, Attorney David Hogue

id.com

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.)	

AFFIDAVIT OF SERVICE

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

Donna Erickson, being first duly sworn, deposes and says:

She is a citizen of the United States of America, of legal age and not a party to nor interested in this matter; on the 1st day of August, 2008, this affiant deposited in the mailing department of the United States Post Office of Minot, North Dakota, sealed envelopes with postage thereon, duly prepaid, containing true and correct copies of the following document in the above captioned action:

Missouri Valley Communications, Inc.'s Brief in Support of Proposed Orders of Missouri Valley Communications, Inc., and Missouri Valley Communications, Inc.'s Proposed Findings of Fact, Conclusions of Law, and Order

The envelopes were addressed as follows:

North Dakota Public Service Commission
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Each address shown is the respective addressee's last reasonably ascertainable post office address.

Donna Erickson
Donna Erickson

Subscribed and sworn to before me this 1st day of August, 2008.

LARAE A. THOMAS
Notary Public
State of North Dakota
My Commission Expires Nov. 24, 2009

Larae A. Thomas
Notary Public
For the State of North Dakota
My Commission expires: 11-24-09

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 not 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. Gates: 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. W. 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 CLECCed 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 Commission¹.

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 Valley². 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 in this case. Mr. Gates recognizes there is a continuum of competition between an 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 that 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

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, in 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. Lundquist 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 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 twist the 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 fund that 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 economic 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 third pre-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 Missouri 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 would fall 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):

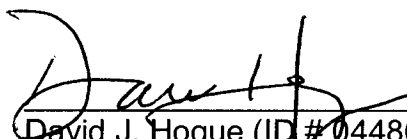
1. Midcontinent did not prove that Midcontinent's requested interconnection is not unduly economically burdensome.
2. Midcontinent did not prove that Midcontinent's requested interconnection is consistent with 47 U.S.C § 254.
3. The implementation schedule for compliance with Midcontinent's request for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

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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.)

Proposed Orders of Missouri Valley Communications, Inc.

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). By its filing of 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.

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

On April 9, 2008, Missouri Valley filed an Application for Suspension pursuant to 47 USC § 251 (f)(2). 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 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's 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.

Findings of Fact

1. Missouri Valley is the 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. Section 153(b)(37).

Missouri Valley provides the 9 services/functionalities designated in FCC rules 47 CFR 54.101. These include (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. MVC complies with the requirement to advertise the availability and charges for these 9 services. Furthermore, MVC 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.

In April, 2008, there were 8806 access lines in the Williston exchange, including 1575 lines resold to Midcontinent and 7231 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 serves the 8806 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 8806 access lines, approximately 7065 are inside the Williston City limits, including the lines that are resold to Midcontinent. 1741 lines served by Missouri Valley are outside of the Williston city limits.

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 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, subject to the rights of specific rural telephone companies under 47 U.S.C. § 251(f). (*Order, Case No. PU-04-546.*)

Bona Fide Request

3. Under § 252(a)(1) of the 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 § 251. Section 251(c) requires incumbent local exchange carriers to interconnect with competitive local exchange carriers and to negotiate the terms of interconnection agreements.
4. Under § 251(c), 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 at wholesale rates, (5) notice of network changes, and (6) collocation of equipment.
5. Under § 251(f)(1)(A), a rural telephone company is exempt from the requirements of § 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 § 254.
6. Missouri Valley acknowledged that Midcontinent's November 14, 2007 request for interconnection is a bona fide request.
7. We find Midcontinent has made a bona fide request for interconnection which a local exchange carrier must provide under § 251(c) of the Act, specifically facilities based interconnection with local number portability.

Rural Exemption

8. Under § 251(f)(1)(A), 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 the 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).

Undue Economic Burden

9. There can be no doubt that it is an economic burden on an incumbent local exchange carrier to provide interconnections that Congress has directed it to provide to new competitors. Midcontinent has the burden of proof that Midcontinent's requested interconnection is "not *unduly* economically burdensome," and that includes the burden of going forward with evidence. (*Act*, § 251(f)(B); *Iowa v FCC*.at 759-63).

10. Midcontinent presented opinion testimony of one witness (Gates) that Midcontinent's requested interconnection would not be unduly economically burdensome on Missouri Valley. Gates' opinion was based on his adoption of another of Midcontinent's witness's (Lundquist's) opinion about the amount of economic impact that Midcontinent's requested interconnection would impose on Missouri Valley. Gates did not participate in Lundquist's analysis about the projected amount of economic impact that Midcontinent's requested interconnection would impose on Missouri Valley. Gates did not vouch for Lundquist's methodology or the product of Lundquist's

analysis. Gates accepted Lundquist's opinion about the amount of economic impact that Midcontinent's requested interconnection would impose on Missouri Valley as if Lundquist's opinion amount were a fact. The amount of "likely economic impact" opined by Lundquist was a cumulative net revenue loss over the 2009-2012 timeframe of \$888,577, after applying four adjustments Lundquist proposed to the impact analysis supplied by Missouri Valley. Lundquist did not opine whether the amount of economic impact he opined would be unduly economically burdensome on Missouri Valley.

11. Missouri Valley presented opinion testimony of one witness (Missouri Valley's general manager, Hanson) that Midcontinent's requested interconnection would be unduly economically burdensome on Missouri Valley. Hanson's opinion was based on a financial impact analysis in which he and other staff members prepared. The amount of financial impact opined by Hanson was a cumulative net revenue loss over the 2009-2012 timeframe of \$3.58 million. In Hanson's opinion, Midcontinent's requested interconnection would be unduly economically burdensome on Missouri Valley because Missouri Valley would lose substantial net revenue as a consequence of Missouri Valley's customers migrating to Midcontinent's service if Midcontinent's status as a competitive local exchange carrier in Williston were to change from reseller to facilities based competitive local exchange carrier. The magnitude of Midcontinent's requested interconnection's financial impact projected by Missouri Valley's evidence is a 31% reduction of annual net revenues in 2009 and escalating to 56% reduction of annual net revenues in 2012.

12. Hanson also testified that the loss of net revenues that would be caused by Midcontinent's requested interconnection would damage Missouri Valley's ability to invest in facilities upgrades and replacements.

13. The difference between the amounts of economic impact opined by Lundquist and Hanson, \$2.69 million over the 2009-2012 timeframe, is due to four adjustments Lundquist proposed to the impact analysis supplied by Missouri Valley. Three of the Lundquist adjustments are related to the two witnesses' differing analyses of historical data as they projected the revenues Missouri Valley

would realize if Midcontinent's request for interconnection were not implemented compared to lower projected revenues Missouri Valley would experience if Missouri Valley's rural exemption were terminated and interconnection were to be implemented. These three proposed adjustments were named and quantified as Migration Timing/\$154,300, Resale Line Growth Factors/\$572,600, and Special Access Revenues/ \$367,600, over the 2009-2012 timeframe. Lundquist's fourth proposed adjustment is related to a universal service fund subsidy that Lundquist testified *may* be available to Missouri Valley and that should be counted as offsetting revenues to reduce the cumulative net revenue impact projected by Hanson. The amount of the universal service fund subsidy adjustment proposed by Lundquist was \$2.234 million over the 2009-2012 timeframe. Lundquist's four proposed adjustments do not add up to the \$2.69 difference between the amounts of financial impact opined by these two witnesses, because certain adjustments proposed by Lundquist "interact." Lundquist did not explain how the proposed adjustments interact or how much each adjustment contributed to the \$2.69 million total of his four proposed adjustments.

14. Midcontinent used Missouri Valley's impact analysis that Midcontinent obtained in pre-hearing discovery and pre-filed testimony as Midcontinent's vehicle for going forward with evidence. Midcontinent has a) the burden to prove that the amount of economic impact shown by Missouri Valley's evidence, a cumulative net revenue loss over the 2009-2012 timeframe of \$3.58 million, is not unduly economically burdensome, or b) the burdens to prove that the economic impact is smaller than \$3.58 million and to prove that a smaller economic impact, if proven, is not unduly economically burdensome.

15. Midcontinent presented no testimony that the amount of economic impact shown by Missouri Valley's evidence, a cumulative net revenue loss of \$3.58 million over the 2009-2012 timeframe, is not unduly economically burdensome. Midcontinent presented evidence, the opinion of Lundquist, that the economic impact is smaller than \$3.58 million. Lundquist testified that "the likely economic impact on MVC of Midcontinent's requested interconnection would be, in

cumulative terms for the period 2009-2012, the - \$888,577 value shown in my Table 3 [sic., evidently meaning Table 4].” Lundquist did not opine whether the economic impact he opined would be unduly economically burdensome on Missouri Valley. Gates accepted Lundquist’s opinion about the amount of economic impact that Midcontinent’s requested interconnection would impose on Missouri Valley as if Lundquist’s opined amount were a fact. Gates opined that an economic impact of \$888,577 resulting from Midcontinent’s requested interconnection would not be unduly economically burdensome on Missouri Valley.

16. The basis of Lundquist’s opinion about the amount of economic impact was an impact analysis supplied by Missouri Valley in pre-hearing discovery and pre-filed testimony. (*Lundquist p. 3.*) The difference between the amounts of financial impact opined by Lundquist and Hanson, \$2.69 million over the 2009-2012 timeframe, is attributed to four adjustments Lundquist proposed to the economic impact analysis supplied by Missouri Valley. Midcontinent has the burden on each of its four proposed adjustments.

17. The factual basis for both Lundquist’s and Hanson’s opinion evidence was evidence as to historical experience concerning the migration of Missouri Valley’s customers to Midcontinent as a reseller, projection of that experience to a test years period of 2009 through 2012, and comparison of the revenues Missouri Valley would realize if Midcontinent’s request for interconnection were not implemented with lower revenues Missouri Valley would experience if Missouri Valley’s rural exemption were terminated and interconnection were to be implemented.

18. The different amounts of the two witnesses’ projections regarding the proposed three adjustments that are related to historical data are attributable to differing approaches to forecasting future financial impacts. The two witnesses offered differing analyses based on the same historical data. Midcontinent’s evidence is not more persuasive than Missouri Valley’s evidence on any of these three adjustments.

Regarding the Migration Timing/\$154,300 proposed adjustment, Lundquist’s analysis assumes that Midcontinent would take 6 months, from January 1 2009 through June of 2009 to

complete the process of switching its existing resale customers to Midcontinent's facilities.

Missouri Valley's analysis assumes Midcontinent would switch over all of its resale customers to Midcontinent's facilities as of January 1, 2009. The consequences of such a delayed phasing of Midcontinent switching over its customers is the financial impact on Missouri Valley would also be phased in and that produces a lower estimate of the financial impact of interconnection.

Lundquist's assumptions about the timing of migration of Midcontinent's existing customers are contradicted by the testimony of Midcontinent's other witnesses, Simmons and Gates, whose testimony supported Missouri Valley's projections about migration timing. Lundquist's projections about migration timing are not persuasive, not more persuasive than Hanson's.

Regarding the Resale Line Growth Factors/\$572,600 proposed adjustment, the difference in the two witnesses' analysis is that 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 who would migrate from Missouri Valley to the Midcontinent, and that produces a lower estimate of the financial impact of Midcontinent's requested interconnection. The data supporting Missouri Valley's forecasts of compounded growth are shown in the "subs" page of Missouri Valley's exhibit 1 that Lundquist adopted as the basis of his analysis. Missouri Valley's projections for the years 2009 through 2012 are based on 2007 and 2008 data. Lundquist's graphs based on the data he obtained from Missouri Valley did not show linear growth in the 2007-2008 timeframe. Whether projections are made on the basis of linear growth or compounding growth methodology, there is other evidence produced by Midcontinent that supports Hanson's growth projections. Missouri Valley's exhibit 1 shows the projected growth in Midcontinent's customer count, beginning at 1488 in 2007 growing to 3663 over the study period through 2012, a total growth of about 1800. That number is about 50% of Midcontinent's existing TV customers who are existing telephone customers of Missouri Valley, according to Midcontinent's answers to interrogatories. Midcontinent would need a 50% success rate in migrating its present TV customers to take telephone service

from Midcontinent in order for Missouri Valley's projections to be realized. Lundquist's growth projections are not more persuasive than Hanson's growth projections.

Regarding the Special Access Revenues/ \$367,600 proposed adjustment, Lundquist contends Midcontinent could offer special access services over its existing cable TV facilities without an interconnection with Midcontinent, so Missouri Valley's net revenue loss due to customer migration to Midcontinent's special access service would not occur as a consequence of Midcontinent's requested interconnection. At the hearing, Hanson rebutted Lundquist's contention, contending, based on his experience as a manager, that business customers will move to special access at the same time as voice service.

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

19. Lundquist's fourth proposed adjustment is different from the other three. The other three proposed adjustments relate to Missouri Valley's projections of line and revenue losses due to interconnection, losses that Lundquist contends will not occur. Lundquist's fourth proposed adjustment assumes "...MVC experiences the line and revenue losses projected in the Interconnect Model scenario." Lundquist contends that \$2.234 million of the economic impact that would be caused by Midcontinent's requested interconnection should not be counted as part of the economic burden within the meaning of the rural exemption provisions, because, according to him, "To summarize, despite the 'parent trap' rule, MVC may be able to receive significant additional USF subsidies....via the Safety Valve mechanism." According to Lundquist, this would happen if Missouri Valley's per line costs increase, "...which is likely to happen if MVC loses lines in the case of Midcontinent's entry. MVC would receive this support under the Safety Valve mechanism,..."

and "...could be a significant offset to the revenue losses MVC is claiming in its Interconnect Model scenario."

Hanson testified that there are six universal service support categories that are applicable to rural ILECs, that Missouri Valley does not qualify to receive universal support under five categories, and that safety valve support is one of the categories for which Missouri Valley does not qualify. Hanson's testimony at the hearing disputed Lundquist's testimony about the safety valve mechanism.

The Commission is not persuaded that Missouri Valley may be able to receive significant additional USF subsidies if Missouri Valley experiences line and revenue losses in the case of Midcontinent's entry. It is not necessary for the Commission endeavor to reconcile the conflicts in the evidence between Lundquist's calculations of USF subsidies that he speculated Missouri Valley may be able to receive and Hanson's testimony at the hearing disputing Lundquist's calculations.

Where Lundquist states that "MVC may be able to receive significant additional USF subsidies...[that]...could be a significant offset..." his words connoting possibility rather than probability or certainty do not rise to the level of opinion evidence sufficient to carry a burden of proof.

Lundquist's proposed adjustment related to universal service funding and the safety valve mechanism is not supported by analysis of the safety valve mechanism on which Lundquist's proposed USF adjustment depends. "Safety valve" is an official shorthand expression to describe a provision of 47 CFR 54.305 which 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. 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.*)

Lundquist proposes an interpretation of the safety valve exception that would permit Missouri Valley to receive universal service funds by manipulation of the safety valve formulae. Lundquist proposes that Missouri Valley should 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 MVC loses lines in the case of Midcontinent’s entry.” Midcontinent’s evidence includes Lundquist’s recommendation that Commission accept as a certainty Lundquist’s uncertain opinion that Missouri Valley may be able to receive universal service funds, not to support new investments in rural infrastructure but to “offset” revenue losses that would be caused by Midcontinent’s requested interconnection.

Lundquist’s fourth proposed adjustment is based on his interpretation of the safety valve provisions of the universal service fund rules, so his proposed adjustment must also be considered under the issue, the third pre-requisite, whether Midcontinent’s requested interconnection is consistent with section 254, regarding universal service. Because we find that Lundquist’s fourth proposed adjustment is not consistent with section 254, we find that Missouri Valley should not be expected to receive USF support under the safety valve rule “in the case of Midcontinent’s entry.”

Midcontinent has failed to carry its burden of proof on the proposed USF revenue adjustment.

20. Midcontinent has the burden of proof that Midcontinent’s requested interconnection is “not unduly economically burdensome,” and that includes the burden of going forward with evidence.

Midcontinent has the burden to prove that the amount of financial impact shown by Missouri Valley's evidence, a cumulative net revenue loss over the 2009-2012 timeframe of \$3.58 million, is not unduly economically burdensome, or the burden to prove that the financial impact is smaller than \$3.58 million and that a smaller financial impact, if proven, is not unduly economically burdensome. Midcontinent has the burden on each of its four proposed adjustments that it proposes to prove that the financial impact is smaller than \$3.58 million. (*Act, Section 251(f)(B); Iowa v FCC.at 759-63*).

21. We find that Midcontinent has not carried its burden of proof on its proposed Migration Timing/\$154,300 adjustment. Midcontinent's evidence about migration timing is not more persuasive than Missouri Valley's evidence.

22. We find that Midcontinent has not carried its burden of proof on its proposed Resale Line Growth Factors/\$572,600 adjustment. Midcontinent's evidence about resale line growth is not more persuasive than Missouri Valley's evidence.

23. We find that Midcontinent has not carried its burden of proof on its proposed Special Access Revenues/ \$367,600 adjustment. Midcontinent's evidence about special access revenues is not more persuasive than Missouri Valley's evidence.

24. We find that Midcontinent has not carried its burden of proof on its proposed USF revenues adjustment. Midcontinent's evidence and arguments is not more persuasive than Missouri Valley's evidence. We also find that Midcontinent has not carried its burden to go forward with the evidence on its proposed USF revenues, because the proposal is inconsistent with section 254 of the Act, regarding universal service.

25. We find that the amount of economic burden that Midcontinent's requested interconnection would impose on Missouri Valley would be \$3.58 million over the 2009-2012 time frame. 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.

26. Gates accepted Lundquist's opinion about the amount of financial impact that Midcontinent's requested interconnection would impose on Missouri Valley as if Lundquist's opined amount were a fact. We have found that the amount of economic burden that Midcontinent's requested interconnection would impose on Missouri Valley would be \$3.58 million over the 2009-2012 time frame. Gates did not testify that any amount larger than \$888,577 was not unduly economically burdensome. Hanson testified that \$3.58 million would be unduly economically burdensome.

27. Gates' opinion on the issue whether Midcontinent's requested interconnection would be unduly economically burdensome was also based on his definition of the statutory term "not unduly economically burdensome" to mean "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, opined that ultimately it is the Commission's interpretation that will rule the day, that there are limits in the statutory language, that Congress wanted and expected competition so it is not enough for a rural ILEC to show that complying with Section 251(c) will impose some costs, and that "The standard of unduly economically burdensome' refers to costs that would impose an excessively burden on the ILEC, compared to the costs that it would experience if the request for interconnection were not granted."

The Commission's interpretation and the limits in the statutory language are constrained by the opinion of the Court in Iowa v FCC which stated 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 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.

As the Court rejected the FCC's rule, so also the Commission rejects 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.” 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.

Even if Gates' limited definition were adopted, Midcontinent's evidence shows that Midcontinent's requested interconnection would damage Missouri Valley's ability to operate efficiently. Losses of revenue resulting from interconnection would damage Missouri Valley's ability to operate efficiently, because costs would remain unchanged while revenues decrease, so its costs per customer or as a percent of revenue would increase, unduly. Even though the loss of revenue might not damage Missouri Valley's ability to continue to offer service in the near future, its efficiency in offering those services would be damaged, because of costs that do not change as to total amounts but increase on any per unit basis. Missouri Valley's evidence shows Midcontinent's requested interconnection is unduly economically burdensome under Gates' limited definition that unduly economically burdensome means excessively heavy burdens as compared to experience if the request for interconnection were not granted.

28. Gates also opined that “The impact on Nemont in total should be the relevant benchmark.” and he cited some information about Nemont Telephone Cooperative that Missouri Valley

provided in pre-hearing discovery. Section 251 (f)(1) refers to a request to “a rural telephone company.” “A rural telephone company is a singular term. Neither Section 251(f)(1), 47 CFR 51.405, nor the FCC’s Local Competition Order often cited by Gates supports his opinion that the impact on the Nemont group of companies in total should be the relevant benchmark.

Midcontinent’s request for interconnection is addressed to Missouri Valley, not to Nemont.

Because the Notice of Hearing is based on Midcontinent’s “request for facilities based interconnection agreement with local number portability (LNP) for the Williston, North Dakota exchange from Missouri Valley Communications, Inc. d/b/a Nemont” and neither the request nor the Notice of Hearing was addressed to or served on Nemont Telephone Cooperative, due process requires that the Commission limit its consideration to the economic burden that Midcontinent’s requested interconnection would impose on Missouri Valley. (*Order, Case No.PU-05-451, par. 10. June 7, 2006.*)

29. [Intentionally omitted.]

Technical Feasibility

30. Midcontinent presented testimony that Midcontinent’s requested interconnection with number portability is technically feasible. Missouri Valley does not contend that interconnection is not technically feasible. Hanson testified that there are technical implementation issues to be addressed including the costs of implementation.

31. We find Midcontinent’s requested interconnection with number portability is technically feasible. The issue of technical feasibility is moot where there are other reasons to sustain the rural exemption from interconnection.

Universal Service

32. Midcontinent has the burden of proof that Midcontinent's requested interconnection "is consistent with § 254" regarding universal service and that includes the burden of going forward with evidence. (*Act*, § 251(f)(B); *Iowa v FCC at 759-63*).

33. Gates testified that the "...key issue" of 'unduly economically burdensome' also affects "... whether interconnection will harm MVC's ability to meet its universal service requirements." Gates testified that "Midcontinent's interconnection with MVC will not harm MVC's ability to maintain its universal service obligations." Gates did not testify how his consideration of the key issue of unduly economically burdensome led him to conclude that "Midcontinent's interconnection with MVC will not harm MVC's ability to maintain its universal service obligations." Gates did not testify whether Midcontinent's requested interconnection was consistent with section 254 on the basis of any consideration other than the key issue of unduly economically burdensome. No other witness testified on behalf of Midcontinent that Midcontinent's requested interconnection is consistent with section 254. No witness testified on behalf of Midcontinent about Midcontinent's performing universal service obligations.

Simmons and Gates' testimony that Midcontinent intends to provide service in the Williston exchange area with its own facilities that exist only in the city of Williston and without purchasing wholesale service or unbundled network elements from Missouri Valley infers that Midcontinent's requested interconnection excludes a purpose to serve the entire Williston exchange area.

34. Hanson testified that economic burdens of Midcontinent's requested interconnection would have an adverse impact on universal service and would substantially 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 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. For Missouri Valley to lose substantial proportions of its revenues as a consequence of Midcontinent's requested interconnection would impair Missouri Valley's ability to perform its universal service and carrier of last resort obligations in the entire Williston exchange area, including all the area outside the city of Williston where Midcontinent has no facilities.

35. 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. Safety valve support is one of the categories for which Missouri Valley does not qualify. Hanson's testimony at the hearing disputed Lundquist's testimony that Missouri Valley may be able to receive more universal service support than anticipated by Hanson, via the safety valve Mechanism.

36. In his testimony about the "unduly economically burdensome" issue, Lundquist contended that "... despite the 'parent trap' rule, MVC may be able to receive significant additional USF subsidies...via the Safety Valve mechanism," \$2.234 million over the 2009-2012 timeframe. That testimony is also relevant and material to the issue whether Midcontinent's requested interconnection is consistent with section 254 regarding universal service.

37. "Safety valve" is an official shorthand expression to describe a provision of 47 CFR 54.305 which 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 US West or Citizens. 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. 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.*)

38. Lundquist proposes an interpretation of the safety valve mechanism that would permit Missouri Valley to receive universal service funds by manipulation of the safety valve formulae. Lundquist proposes that Missouri Valley should 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 MVC loses lines in the case of Midcontinent’s entry.”

39. Lundquist proposes an interpretation of the safety valve mechanism that would permit Missouri Valley to receive universal service funds to replace lost revenues, not to support Missouri Valley’s post-acquisition investments in rural infrastructure. Specifically, Lundquist proposes an interpretation that would permit Missouri Valley to receive universal service funds to replace lost revenues, an undoubted economic burden of Midcontinent’s requested interconnection, “which is likely to happen if MVC loses lines in the case of Midcontinent’s entry.”

40. Under Lundquist’s scenario, Missouri Valley may be able to receive significant additional USF subsidies via the safety valve mechanism despite the ‘parent trap’ rule only if Midcontinent is interconnected with Missouri Valley. The Commission does not believe it is consistent with § 254 that the universal service support system should bear any of the economic burden of Midcontinent’s requested interconnection with Missouri Valley. (*“Universal Service Order,”*

Fourteenth Report and Order, FCC 01-257 (May 23, 2001) Paragraphs 91-135.) We find that Lundquist's contention that "... despite the 'parent trap' rule, MVC may be able to receive significant additional USF subsidies...via the Safety Valve mechanism," is not consistent with § 254.

41. Missouri Valley is designated as an eligible telecommunications carrier in the Williston exchange, eligible under 47 U.S.C. 214(e)(1) to receive universal service support for providing Lifeline services. (*Order, Case No. PU-2779-02-451.*) Missouri Valley also provides discounts to Lifeline consumers. Hanson testified that Midcontinent's requested 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. We find that Midcontinent has not carried its burden of proof that Midcontinent's requested interconnection would be consistent with 47 U.S.C. § 254 regarding universal service. Midcontinent's evidence that "Midcontinent's interconnection with MVC will not harm MVC's ability to maintain its universal service obligations" is not more persuasive than Missouri Valley's evidence that Midcontinent's requested interconnection would substantially impair Missouri Valley's performance of its universal service obligations.

43. We find that Midcontinent's requested interconnection is not consistent with § 254.

Implementation Schedule

44. An implementation schedule for Midcontinent's requested interconnection is an issue "should the exemption be terminated." Midcontinent's fact witness testified implementation should be expected to require 30 days for negotiations and 60 days for actual connection. (*Simmons, p. 13*) Midcontinent's opinion witness testified the two companies could implement interconnection

sooner than 90 days. Missouri Valley's witness testified interconnection could be implemented within 90 days.

45. We find that an implementation schedule for Midcontinent's requested interconnection is moot where the exemption is not terminated.

Waiver

47. We find that Midcontinent has not proved its claim that Missouri Valley waived its exemption under Act section 251 (f)(1).

Conclusions of Law

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

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

50. 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.

51. 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 Section 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Missouri Valley Communications Inc.

Case No. PU-08-176

Suspend/Modify Interconnection Requirements Application

Proposed Order of Missouri Valley Communications, Inc.

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. (Missouri Valley). By its filing of 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.

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

On April 9, 2008, Missouri Valley filed an Application for Suspension pursuant to 47 USC 251 (f)(2). 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 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's 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.

Findings of Fact

1. Missouri Valley is the 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).

Missouri Valley provides the 9 services/functionalities designated in FCC rules 47 CFR 54.101 These include (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. MVC complies with the requirement to advertise the availability and charges for these 9 services. Furthermore, MVC 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.

In April, 2008, there were 8806 access lines in the Williston exchange, including 1575 lines resold to Midcontinent and 7231 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 serves the 8806 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 8806 access lines, approximately 7065 are inside the Williston City limits, including the lines that are resold to Midcontinent. 1741 lines served by Missouri Valley are outside of the Williston city limits.

Missouri Valley is a local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide.

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 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, subject to the rights of specific rural telephone companies under 47 U.S.C. § 251(f). (*Order, Case No. PU-04-546.*)

3. Under § 252(a)(1) of the 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 § 251. Section 251(c) requires incumbent local exchange carriers to interconnect with competitive local exchange carriers and to negotiate the terms of interconnection agreements.

Rural Exemption

4. Under § 251(f)(1)(A), 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 the 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 § 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 § 251(f)(1)(B).

Suspension/Modification

5. Missouri Valley's position in the Rural Exemption Investigation Case No. PU-08-61 was its rural exemption under Act § 251 (f)(1)(A) should be sustained, not terminated.

Suspension/Modification Application Case No. PU-08-176 involves Missouri Valley's alternative position: If the exemption is not sustained, it should not be entirely terminated but should be suspended or modified under Act § 251(f)(2).

6. 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.

7. Under NDCC § 28-32-24(7) and N.D. Administrative Rules 69-02-05-08, the Commission takes notice of its Order in Case No. PU-08-61, that Missouri Valley's rural exemption under § 251 (f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated.

8. We find issues No. 5 and 6, under § 251(f)(2) of the Act, are moot where the Commission ordered In Case No. PU-08-61 that Missouri Valley's rural exemption under § 251 (f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated.

From the foregoing findings of fact, the Commission makes the following:

Conclusions of Law

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

10. Whether suspension of the interconnection requirements under § 251(c) is (A) necessary (i) to avoid a significant adverse economic impact on users of telecommunications services generally

and (ii) to avoid imposing a requirement that is unduly economically burdensome; or is (B) consistent with the public interest, convenience and necessity, are moot because the Commission ordered In Case No. PU-08-61 that Missouri Valley's rural exemption under Section 251 (f)(1) for interconnection in Missouri Valley's Williston exchange is not terminated.

From the foregoing findings of fact and conclusions of law, the Commission makes the following:

Order

The Commission Orders:

Missouri Valley's application for a suspension of the requirements of subsections (b) and (c) of § 251 for Missouri Valley's telephone exchange service facilities in the Williston exchange area is dismissed as moot.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Missouri Valley Communications Inc.

Case No. PU-08-176

Suspend/Modify Interconnection Requirements Application

Proposed Order of Missouri Valley Communications, Inc.

ALTERNATIVE Proposed Order of Missouri Valley Communications, Inc.

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). By its filing of 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.

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

On April 9, 2008, Missouri Valley filed an Application for Suspension pursuant to 47 USC 251 (f)(2). Missouri Valley requests that the Commission grant to Missouri Valley a suspension of

the requirements of subsections (b) and (c) of § 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 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's 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.

Findings of Fact

1. Missouri Valley is the 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. Section 153(b)(37).

Missouri Valley provides the 9 services/functionalities designated in FCC rules 47 CFR 54.101 These include (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. MVC complies with the requirement to advertise the availability and charges for these 9 services. Furthermore, MVC 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.

In April, 2008, there were 8806 access lines in the Williston exchange, including 1575 lines resold to Midcontinent and 7231 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 serves the 8806 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 8806 access lines, approximately 7065 are inside the Williston City limits, including the lines that are resold to Midcontinent. 1741 lines served by Missouri Valley are outside of the Williston city limits. (Hanson, pp.6-7.)

Missouri Valley is local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide.

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 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, subject to the rights of specific rural telephone companies under 47 U.S.C. § 251(f). (*Order, Case No. PU-04-546.*)

3. Under § 252(a)(1) of the 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.

Rural Exemption

4. Under § 251(f)(1)(A), 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 the 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 § 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 § 251(f)(1)(B).

Suspension/Modification

5. Missouri Valley's position in the Rural Exemption Investigation Case No. PU-08-61 was its rural exemption under Act § 251 (f)(1)(A) should be sustained, not terminated.

Suspension/Modification Application Case No. PU-08-176 involves Missouri Valley's alternative position: If the exemption is not sustained, it should not be entirely terminated but should be suspended or modified under Act § 251(f)(2).

6. 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.

7. Under NDCC § 28-32-24(7) and N.D. Administrative Rules 69-02-05-08, the Commission takes notice of its Order in Case No. PU-08-61, that Missouri Valley's rural exemption under § 251 (f)(1)(A) for interconnection in Missouri Valley's Williston exchange is terminated.

Avoidance of Significant Adverse Economic Impact on Users of Telecommunications

Services Generally:

8. Missouri Valley presented evidence that the loss of net revenues that would be caused by Midcontinent's requested interconnection would damage Missouri Valley's ability to invest in facilities upgrades and replacements and would impair Missouri Valley's ability to perform its universal service and carrier of last resort obligations. These consequences would be a significant adverse economic impact on users of telecommunications services generally.

9. Midcontinent did not present any evidence whether suspension or modification of the interconnection requirements under 251(c) is necessary to avoid a significant adverse economic impact on users of telecommunications services generally.

10. We find that Missouri Valley's evidence that suspension of the interconnection requirements under § 251(c) is necessary to avoid a significant adverse economic impact on users of telecommunications services generally is more persuasive than Midcontinent's evidence.

11. We find suspension of the interconnection requirements under § 251(c) is necessary to avoid a significant adverse economic impact on users of telecommunications services generally.

Undue Economic Burden

12. There can be no doubt that it is an economic burden on an incumbent local exchange carrier to provide interconnections that Congress has directed it to provide to new competitors. (*Act, § 251(f)(B); Iowa v FCC.at 759-63*).

13. Midcontinent presented opinion testimony of one witness (Gates) that Midcontinent's requested interconnection would not be unduly economically burdensome on Missouri Valley. Gates' opinion was based on his adoption of another of Midcontinent's witness's (Lundquist's) opinion about the amount of economic impact that Midcontinent's requested interconnection would impose on Missouri Valley. Gates did not participate in Lundquist's analysis about the projected amount of economic impact that Midcontinent's requested interconnection would impose on Missouri Valley. Gates accepted Lundquist's opinion about the amount of economic impact that Midcontinent's requested interconnection would impose on Missouri Valley as if Lundquist's opined amount were a fact. The amount of "likely economic impact" opined by Lundquist was a cumulative net revenue loss over the 2009-2012 timeframe of \$888,577, after applying four adjustments Lundquist proposed to the impact analysis supplied by Missouri Valley. Lundquist did not opine whether the amount of economic impact he opined would be unduly economically burdensome on Missouri Valley.

14. Missouri Valley presented opinion testimony of one witness (Missouri Valley's general manager, Hanson) that Midcontinent's requested interconnection would be unduly economically burdensome on Missouri Valley. Hanson's opinion was based on a financial impact analysis

prepared by him and staff members. The amount of financial impact opined by Hanson was a cumulative net revenue loss over the 2009-2012 timeframe of \$3.58 million. In Hanson's opinion, Midcontinent's requested interconnection would be unduly economically burdensome on Missouri Valley because Missouri Valley would lose substantial net revenue as a consequence of Missouri Valley's customers migrating to Midcontinent's service if Midcontinent's status as a competitive local exchange carrier in Williston were to change from reseller to facilities based competitive local exchange carrier. The magnitude of Midcontinent's requested interconnection's financial impact projected by Missouri Valley's evidence is a 31% reduction of annual net revenues in 2009 and escalating to 56% reduction of annual net revenues in 2012.

15. Hanson also testified that the loss of net revenues that would be caused by Midcontinent's requested interconnection would damage Missouri Valley's ability to invest in facilities upgrades and replacements.

16. The difference between the amounts of economic impact opined by Lundquist and Hanson, \$2.69 million over the 2009-2012 timeframe, is due to four adjustments Lundquist proposed to the impact analysis supplied by Missouri Valley. Three of the Lundquist adjustments are related to the two witnesses' differing analyses of historical data as they projected the revenues Missouri Valley would realize if Midcontinent's request for interconnection were not implemented compared to lower projected revenues Missouri Valley would experience if Missouri Valley's rural exemption were terminated and interconnection were to be implemented. These three proposed adjustments were named and quantified as Migration Timing/\$154,300, Resale Line Growth Factors/\$572,600, and Special Access Revenues/ \$367,600, over the 2009-2012 timeframe. Lundquist's fourth proposed adjustment is related to a universal service fund subsidy that Lundquist testified may be available to Missouri Valley and that should be counted as offsetting revenues to reduce the cumulative net revenue impact projected by Hanson. The amount of the universal service fund subsidy adjustment proposed by Lundquist was \$2.234 million over the 2009-2012 timeframe. Lundquist's four proposed adjustments do not add up to the \$2.69 difference between the

amounts of financial impact opined by these two witnesses, because certain adjustments proposed by Lundquist “interact.” Lundquist did not explain the how the proposed adjustments interact or how much each adjustment contributed to the \$2.69 million total of his four proposed adjustments.

17. Midcontinent used Missouri Valley’s impact analysis that Midcontinent obtained in pre-hearing discovery and pre-filed testimony as Midcontinent’s vehicle to present opinion evidence that the amount of economic impact of Midcontinent’s requested interconnection is smaller than \$3.58 million.

18. Midcontinent presented no testimony that the amount of economic impact shown by Missouri Valley’s evidence, a cumulative net revenue loss of \$3.58 million over the 2009-2012 timeframe, is not unduly economically burdensome. Midcontinent presented evidence, the opinion of Lundquist, that the amount of economic impact is smaller than \$3.58 million. Lundquist testified that “the likely economic impact on MVC of Midcontinent’s requested interconnection would be, in cumulative terms for the period 2009-2012, the - \$888,577 value shown in my Table 3 [sic., evidently meaning Table 4].” Lundquist did not opine whether the economic impact he opined would be unduly economically burdensome on Missouri Valley

19. [Intentionally omitted.]

20. The factual basis for both Lundquist’s and Hanson’s opinion evidence was evidence as to historical experience concerning the migration of Missouri Valley’s customers to Midcontinent as a reseller, projection of that experience to a test years period of 2009 through 2012, and comparison of the revenues Missouri Valley would realize if Midcontinent’s request for interconnection were not implemented with lower revenues Missouri Valley would experience if Missouri Valley’s rural exemption were terminated and interconnection were to be implemented.

21. The different amounts of the two witnesses’ projections regarding the proposed three adjustments that are related to historical data are attributable to differing approaches to forecasting future financial impacts. The two witnesses offered differing analyses based on the

same historical data. Midcontinent's evidence is not more persuasive than Missouri Valley's evidence on any of these three adjustments.

Regarding the Migration Timing/\$154,300 proposed adjustment, Lundquist's analysis assumes that Midcontinent would take 6 months, from January 1 2009 through June of 2009 to complete the process of switching its existing resale customers to Midcontinent's facilities. Missouri Valley's analysis assumes Midcontinent would switch over all of its resale customers to Midcontinent's facilities as of January 1, 2009. The consequences of such a delayed phasing of Midcontinent switching over its customers is the financial impact on Missouri Valley would also be phased in and that produces a lower estimate of the financial impact of interconnection. Lundquist's assumptions about the timing of migration of Midcontinent's existing customers are contradicted by the testimony of Midcontinent's other witnesses, Simmons and Gates, whose testimony supported Missouri Valley's projections about migration timing. Lundquist's projections about migration timing are not persuasive, not more persuasive than Hanson's.

Regarding the Resale Line Growth Factors/\$572,600 proposed adjustment, the difference in the two witnesses' analysis is that 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 who would migrate from Missouri Valley to the Midcontinent, and that produces a lower estimate of the financial impact of Midcontinent's requested interconnection. The data supporting Missouri Valley's forecasts of compounded growth are shown in the "subs" page of Missouri Valley's exhibit 1 that Lundquist adopted as the basis of his analysis. Missouri Valley's projections for the years 2009 through 2012 are based on 2007 and 2008 data. Lundquist's graphs based on the data he obtained from Missouri Valley did not show linear growth in the 2007-2008 timeframe. (*Lundquist, p.14*). Whether projections are made on the basis of linear growth or compounding growth methodology, there is other evidence produced by Midcontinent that supports Hanson's growth projections. Missouri Valley's exhibit 1 shows the projected growth in Midcontinent's customer

count, beginning at 1488 in 2007 growing to 3663 over the study period through 2012, a total growth of about 1800. That number is about 50% of Midcontinent's existing TV customers who are existing telephone customers of Missouri Valley, according to Midcontinent's answers to interrogatories. Midcontinent would need a 50% success rate in migrating its present TV customers to take telephone service from Midcontinent in order for Missouri Valley's projections to be realized. Lundquist's growth projections are not more persuasive than Hanson's growth projections.

Regarding the Special Access Revenues/ \$367,600 proposed adjustment, Lundquist contends Midcontinent could offer special access services over its existing cable TV facilities without an interconnection with Midcontinent, so Missouri Valley's net revenue loss due to customer migration to Midcontinent's special access service would not occur as a consequence of Midcontinent's requested interconnection. At the hearing, Hanson rebutted Lundquist's contention, contending Lundquist's opinion testimony that there would be no net revenue loss to Missouri Valley due to interconnection-related migration of its customers to become special access customers of Midcontinent is not more persuasive than Hanson's opinion testimony that there would be a net revenue loss due to interconnection related migration of its customers to become special access customers of Midcontinent.

22. Lundquist's fourth proposed adjustment is different from the other three. The other three proposed adjustments relate to Missouri Valley's projections of line and revenue losses due to interconnection, losses that Lundquist contends will not occur. Lundquist's fourth proposed adjustment assumes "...MVC experiences the line and revenue losses projected in the Interconnect Model scenario." Lundquist contends that \$2.234 million of the economic impact that would be caused by Midcontinent's requested interconnection should not be counted as part of the economic burden within the meaning of the rural exemption provisions, because, according to him, "To summarize, despite the 'parent trap' rule, MVC may be able to receive significant additional USF subsidies....via the Safety Valve mechanism." According to Lundquist, this would happen if

Missouri Valley's per line costs increase, "...which is likely to happen if MVC loses lines in the case of Midcontinent's entry. MVC would receive this support under the Safety Valve mechanism,..." and "...could be a significant offset to the revenue losses MVC is claiming in its Interconnect Model scenario."

Hanson testified that there are six universal service support categories that are applicable to rural ILECs, that Missouri Valley does not qualify to receive universal support under five categories, and that safety valve support is one of the categories for which Missouri Valley does not qualify. testimony at the hearing disputed Lundquist's testimony about the safety valve mechanism.

The Commission is not persuaded that Missouri Valley may be able to receive significant additional USF subsidies if Missouri Valley experiences line and revenue losses in the case of Midcontinent's entry. It is not necessary for the Commission endeavor to reconcile the conflicts in the evidence between Lundquist's calculations of USF subsidies that he speculated Missouri Valley may be able to receive and Hanson's testimony at the hearing disputing Lundquist's calculations.

Where Lundquist states that "MVC may be able to receive significant additional USF subsidies...[that]...could be a significant offset..." his words connoting possibility rather than probability or certainty do not rise to the level of opinion evidence sufficient to carry a burden of proof.

Lundquist's proposed adjustment related to universal service funding and the safety valve mechanism is not supported by analysis of the safety valve mechanism on which Lundquist's proposed USF adjustment depends. "Safety valve" is an official shorthand expression to describe a provision of 47 CFR 54.305 which 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. 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.*)

Lundquist proposes an interpretation of the safety valve exception that would permit Missouri Valley to receive universal service funds by manipulation of the safety valve formulae. Lundquist proposes that Missouri Valley should 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 MVC loses lines in the case of Midcontinent’s entry.” Midcontinent’s evidence includes Lundquist’s recommendation that Commission accept as a certainty Lundquist’s uncertain opinion that Missouri Valley may be able to receive universal service funds, not to support new investments in rural infrastructure but to “offset” revenue losses that would be caused by Midcontinent’s requested interconnection.

Lundquist’s fourth proposed adjustment is based on his interpretation of the safety valve provisions of the universal service fund rules, so his proposed adjustment must also be considered under the issue in the termination proceeding, Case No. PU-08-61, whether Midcontinent’s requested interconnection is consistent with section 254, regarding universal service. Because we found in Case No. PU-08-61 that Lundquist’s fourth proposed adjustment is not consistent with section 254, we find that Missouri Valley should not be expected to receive USF support under the safety valve rule “in the case of Midcontinent’s entry.”

Lundquist’s fourth proposed adjustment includes a contention that the significant additional USF subsidies he projects should be counted as an “offset” to reduce the amount of economic

impact shown by Missouri Valley's evidence. We find any USF subsidies that Missouri Valley receives are a "collateral source" that may not be counted as an offset against the economic burden that would be caused by Midcontinent's requested interconnection.

23. Midcontinent presented Lundquist's opinion as Midcontinent's evidence that the amount of economic impact of Midcontinent's requested interconnection is smaller than the economic impact shown by Missouri Valley's evidence, a cumulative net revenue loss over the 2009-2012 timeframe of \$3.58 million.

24. We find that Midcontinent's evidence in support of its proposed Migration Timing/\$154,300 adjustment is not more persuasive than Missouri Valley's evidence.

25. We find that Midcontinent's evidence in support of its proposed Resale Line Growth Factors/\$572,600 adjustment is not more persuasive than Missouri Valley's evidence.

26. We find that Midcontinent's evidence in support of its proposed Special Access Revenues/\$367,600 adjustment is not more persuasive than Missouri Valley's evidence.

27. We find that Midcontinent's proposed USF revenues adjustment, \$2.234 million is inconsistent with § 254 of the Act.

28. We find that the amount of economic burden that Midcontinent's requested interconnection would impose on Missouri Valley would be \$3.58 million over the 2009-2012 time frame. 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.

29. [Intentionally omitted.]

30. Gates' opinion on the issue whether Midcontinent's requested interconnection would be unduly economically burdensome was also based on his definition of the statutory term "not unduly economically burdensome" to mean "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, opined that ultimately it is the Commission's interpretation

that will rule the day, that there are limits in the statutory language, that Congress wanted and expected competition so it is not enough for a rural ILEC to show that complying with Section 251(c) will impose some costs, and that “The standard of unduly economically burdensome’ refers to costs that would impose an excessively burden on the ILEC, compared to the costs that it would experience if the request for interconnection were not granted.”

The Commission’s interpretation and the limits in the statutory language are constrained by the opinion of the Court in Iowa v FCC which stated 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 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.

As the Court rejected the FCC’s rule, so also the Commission rejects 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.” 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.

Even if Gates' limited definition were adopted, Midcontinent's evidence shows that Midcontinent's requested interconnection would damage Missouri Valley's ability to operate efficiently. Losses of revenue resulting from interconnection would damage Missouri Valley's ability to operate efficiently, because costs would remain unchanged while revenues decrease, so its costs per customer or as a percent of revenue would increase, unduly. Even though the loss of revenue might not damage Missouri Valley's ability to continue to offer service in the near future, its efficiency in offering those services would be damaged, because of costs that do not change as to total amounts but increase on any per unit basis. Missouri Valley's evidence shows Midcontinent's requested interconnection is unduly economically burdensome under Gates' limited definition that unduly economically burdensome means excessively heavy burdens as compared to experience if the request for interconnection were not granted.

31. Gates also opined that "The impact on Nemont in total should be the relevant benchmark." and he cited some information about Nemont Telephone Cooperative that Missouri Valley provided in pre-hearing discovery. Section 251 (f)(1) refers to a request to "a rural telephone company." "A rural telephone company is a singular term. Neither Section 251(f)(1), 47 CFR 51.405, nor the FCC's Local Competition Order often cited by Gates supports his opinion that the impact on the Nemont group of companies in total should be the relevant benchmark. Midcontinent's request for interconnection is addressed to Missouri Valley, not to Nemont. Because the Notice of Hearing is based on Midcontinent's "request for facilities based interconnection agreement with local number portability (LNP) for the Williston, North Dakota exchange from Missouri Valley Communications, Inc. d/b/a Nemont" and neither the request nor the Notice of Hearing was addressed to or served on Nemont Telephone Cooperative, due process requires that the Commission limit its consideration to the economic burden that Midcontinent's requested interconnection would impose on Missouri Valley. (*Order, Case No. PU-05-451, par. 10. June 7, 2006.*)

32. We find that Missouri Valley's evidence that suspension of the interconnection requirements under 251(c) is necessary to avoid imposing a requirement that is unduly economically burdensome is more persuasive than Midcontinent's evidence.

33. We find that suspension of the interconnection requirements under 251(c) is necessary to avoid imposing a requirement that is unduly economically burdensome.

Technical Feasibility

34. Midcontinent presented testimony that Midcontinent's requested interconnection with number portability is technically feasible. Missouri Valley does not contend that interconnection is not technically feasible. Hanson testified that there are technical implementation issues to be addressed including the costs of implementation.

35. We find Midcontinent's requested interconnection with number portability is technically feasible. The issue of technical feasibility is moot where there are other reasons to suspend the interconnection requirements under 251(c).

Public interest, convenience, and necessity.

36. Missouri Valley's witness testified it is a matter of public interest, convenience and necessity that universal service policy be considered in the suspension/modification case, just as universal service must be considered in the rural exemption termination case, PU-08-61. Missouri Valley bears ETC responsibilities and COLR universal service responsibilities in the entire Williston exchange area. For Missouri Valley to lose substantial proportions of its revenues as a consequence of Midcontinent's requested interconnection would impair Missouri Valley's ability to perform its universal service and carrier of last resort obligations in the entire Williston exchange area, including all the areas outside the City of Williston where Midcontinent has no facilities. If one company bears universal service obligations and the other does not, and if the company with universal service obligations suffers financial impacts, there is a consumer interest, a public interest that these impacts be avoided so that universal service can be sustained.

37. Missouri Valley is designated as an eligible telecommunications carrier in the Williston exchange, eligible under 47 U.S.C. § 214(e)(1) to receive universal service support in accordance with § 254. Midcontinent is not designated as an eligible telecommunications carrier in the Williston exchange.

38. Midcontinent is not only a competitive local exchange carrier, it is also a cable TV company providing video programming in the city of Williston and its outskirts. Missouri Valley does not provide video programming. If Missouri Valley were obliged to interconnect with Midcontinent, Midcontinent would have an obvious competitive advantage as it offers bundles of telephone and cable TV service. Midcontinent's witness testified it is necessary and in the public interest that interconnection obligations imposed on Missouri Valley are suspended or modified, so long as Missouri Valley does not offer cable TV service.

39. Missouri Valley's witness testified that the Williston exchange has a sufficient level of competitors to ensure consumers have high quality, affordable choices. (Hanson, p 43-44.)

40. Midcontinent did not present any evidence whether suspension or modification of interconnection requirements under 251(c) is consistent with the public interest, convenience and necessity.

41. We find that Missouri Valley's evidence that suspension of the interconnection requirements under 251 (b) and (c) is consistent with the public interest, convenience and necessity is more persuasive than Midcontinent's evidence.

42. We find that suspension of the interconnection requirements under 251 (b) and (c) is consistent with the public interest, convenience and necessity.

Suspension/Modification of Negotiation Requirements

43. Section 251(c) includes the duty to negotiate in good faith the terms and conditions of interconnection. The duty to negotiate is one of the requirements that may be suspended under § 251(f)(2). If the Commission suspends the interconnection requirement, then it should also

suspend the negotiation requirement because there is nothing to negotiate while interconnection is suspended.

From the foregoing findings of fact, the Commission makes the following:

Conclusions of Law

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

45. Suspension of the interconnection requirements under § 251 (b) and (c) is (A) necessary (i) to avoid a significant adverse economic impact on users of telecommunications services generally and (ii) to avoid imposing a requirement that is unduly economically burdensome; and is (B) consistent with the public interest, convenience and necessity.

From the foregoing findings of fact and conclusions of law, the Commission makes the following:

Order

The Commission Orders:

The application of the negotiation and interconnection requirements of 47 USC § 251 (b) and (c) to Missouri Valley's telephone exchange service facilities in the Williston exchange area are suspended until:

- a) Missouri Valley provides video programming in the Williston exchange area, and
- b) Midcontinent meets the requirements in section 214 (e)(1) for designation as an eligible telecommunications carrier for the Williston exchange area.