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PUBLIC SERVICE COMMISSION

November 4, 2008

Ms. Illona Jeffcoat-Sacco
North Dakota Public Service Commission
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

RE: ***Midcontinent Communications, a South Dakota partnership v. Missouri Valley Communications, Inc.***
Case No. PU-08-61
OAH No. 20080079
Our File No. 28-16

Dear Ms. Jeffcoat-Sacco:

Enclosed for filing please find an original and eight copies of the following documents:

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

2. ***Affidavit of Service by Mail***

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

Sincerely,

John M. Olson
Attorney at Law

JMO/tbb
enclosures
cc David Hogue
J.G. Harrington
Nancy Vogel
Mary Lohnes
Annette Bendish

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Midcontinent Communications

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Petition for Reconsideration or Rehearing

Midcontinent Communications

John M. Olson, PC

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[3] Order at 1.
[4] Notice of Hearing at 1; Midcontinent Initial Brief at 5-9; Midcontinent Reply Brief at 3-6; Missouri Valley Initial Brief at 4, 15, 35-6; Missouri Valley Reply Brief at 1-5.
[5] *See* Missouri Valley Communications, Inc., Designated Eligible Carrier Application and Local Exchange Public Convenience and Necessity, *Findings of Fact, Conclusions of Law and Order*, Case Nos. PU-2779-02-451 and PU-2779-02-452 (Dec. 4, 2002) at 3 (¶ 5); *see also* Late-filed Exhibit C9, Attachment 3 (correspondence with Midcontinent).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Mr. Hanson: At the time that we performed the analysis we assumed it could go both ways, so I would say the analysis is relevant either way.
>
> Mr. Harrington: Okay.
>
> Mr. Hanson: either with or without co-location.
>
> * * * *
>
> Mr. Harrington: One more question about what might affect the impact analysis in this particular case. What if Midcontinent obtained indirect interconnection and connected via another carrier and did not require to have any facilities-based interconnection with you directly. How would that affect this analysis?
>
> Mr. Hanson: If there were another carrier that it could interconnect with in Missouri Valley to get access to all its customer locations, the analysis would be the same.[16]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Mr. Harrington: You just said that there'd be an impact on Midcontinent customers because if Missouri Valley's service got worse, Midcontinent customers would not have as viable as a choice.
>
> Mr. Hanson: I don't agree that Missouri Valley's service will necessarily get worse. I think that there will be a severe economic impact that will affect our ability to invest in the future at the rate that we are right now and reach the future definition of universal service.
>
> Mr. Harrington: All right. So I'll put it differently then. My understanding of your previous testimony is that you believe there's an impact on Midcontinent users because Missouri Valley would be unable to maintain the level of service that customers would expect going forward, is that correct?
>
> Mr. Hanson: I think we'd be able to maintain . . .[28]

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

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

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[28] Hanson Cross (Harrington)

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

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

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

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

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

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

[31] Simmons Cross (Hogue).

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

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

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

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[32] While many of these services are offered in conjunction with Nemont or other Nemont affiliates, those services should be considered for the reasons described below. *See infra* Section IV.D. However, Missouri Valley acknowledged that it provides DSL service on a wholesale basis, and DSL is a key element in the competitive mix described by Mr. Gates and the Raymond James study.

[33] Simmons Cross (Hogue).

[34] Gates Prefiled Direct at 25-9.

[35] *Id.* at 27.

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

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

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

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

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

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

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

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

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

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

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

[41] Order at 8.

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

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

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

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

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

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

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

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[45] *See* 47 C.F.R. § 51.403.

[46] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order,* 11 FCC Rcd 15499, 16118 (1996).

[47] 47 U.S.C. § 253(f) (limiting ability of states to prevent competition in rural carrier territories if rural carriers refuse to provide resale and interconnection).

[48] *See* Midcontinent Reply Brief at 16.

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

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

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

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

V. The Order Misinterprets the Undue Economic Burden Standard.

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

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

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[50] Midcontinent Initial Brief at 25.

[51] Order at 7.

[52] Definition of "undue," Merriam-Webster Online, at http://www.merriam-webster.com/dictionary/undue; *see also* Gates Prefiled at 38, Midcontinent Initial Brief at 12.

[53] *Wireless World, L.L.C. v. Virgin Islands Public Services Comm'n,* 2005 U.S. Dist. LEXIS 15061 at *16 (citing V.I.P.S.C. Docket No. 526, May 22, 2001).

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

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

VI. The Commission Should Grant Midcontinent Appropriate Relief.

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

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

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

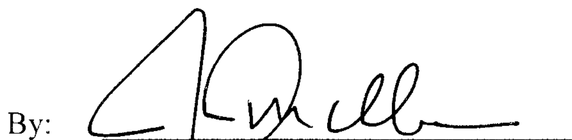
To the extent that the Commission does not conclude that immediate revision of the Order should be granted, it should grant rehearing to permit a fuller explication of the issues. The rehearing should be confined to the issues described above, and need not involve additional witness testimony, unless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

VII. Conclusion.

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

Respectfully submitted,

MIDCONTINENT COMMUNICATIONS

By: 

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November 4, 2008

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Case No. PU-08-61

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

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

Tara B. Brandner, being first duly sworn, deposes and says that she is of legal age and that on the 4th day of November, 2008, she served the attached ***Petition of Midcontinent Communications for Reconsideration or, in the Alternative, Rehearing*** in this matter upon the following by placing a true and correct copy thereof in an envelope addressed as follows:

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

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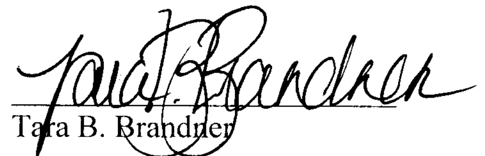
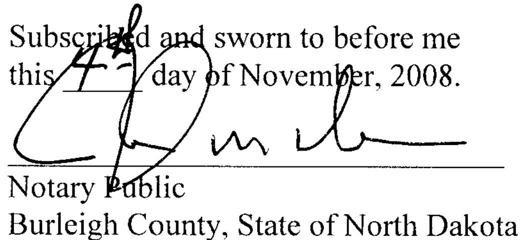
and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.



Tara B. Brandner

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



Notary Public
Burleigh County, State of North Dakota