

that qualify as rural telephone companies are exempt from the obligation to negotiate and to make interconnections with competitive local exchange companies (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 that particular rural ILEC. N.D. Cent. Code §49-21-01.7(11) and 47 USC § 251(f). To initiate a Commission proceeding under the law to terminate Missouri Valley's rural exemption, Midcontinent is required to submit to the Commission a Section 251(f)(1)(B) notice of its bona fide request. Under Section 251(f)(1)(C), the rural exemption from interconnection is not available to a rural telephone company if the competitive local exchange carrier that has requested interconnection is a cable operator providing video programming and the rural telephone company also provides video programming. Midcontinent is a cable operator, but Missouri Valley is not, so the exemption remains in effect unless it is terminated under Section 251(f)(1)(B).

Midcontinent argues that the waiver of the rural exemption stems from an existing agreement, from Missouri Valley's predecessors conduct, and from an expired interconnection agreement. None of these things include a waiver.

The Commission has also an established precedent in case number PU-06-345 and case number PU-06-400 (attached as Exhibit PSC-1 and PSC-2) that prevents Midcontinent from claiming a resale arrangement as a vehicle to evade rural telephone companies' exemption from facilities based interconnection.

2. The Commission did not fail to consider the waiver issue.

The Commission did not make a specific finding on this issue; however this does not mean that the Commission did not consider this issue. Numerous pleadings addressed this issue as well as testimony at the hearing held in these matters before the Commission.

Further, the Memorandum prepared by Patrick Fahn, Commission staff in preparation of the work session held on September 9, 2008, attached as Exhibit PSC-3, discusses the waiver issue. Specifically, staff pointed out each company's arguments regarding the waiver issue.

Finally, The Commission's Findings of Fact, Conclusions of Law, and Order states that "Midcontinent request 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." The Commission obviously had to consider the waiver issue before it conducted its inquiry to determine whether to terminate the exemption. The Commission conducted its inquiry and determined that Missouri Valley's rural exemption is not terminated. This is clearly a showing that the Commission did not fail to consider the waiver issue, but that the Commission determined that the request for determination of waiver was denied.

3. The evidence demonstrates that the requested Section 251(c) interconnection would cause Missouri Valley to suffer an undue economic burden and would adversely affect its ability to provide universal service under 47 U.S.C. § 251(f)(1).

The plain meaning of 47 U.S.C. §251(f)(1) 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 is not unduly economically burdensome, is technically feasible, and is consistent with section 254 regarding universal service. See 47 U.S. C. §§251 (f)(1)(A) and (B). The rural exemption is not a limited exemption 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 its request is not unduly economically burdensome.

The majority of the Commission found that Midcontinent did not meet its burden to prove that Missouri Valley would not suffer an undue economic burden. The Commission carefully considered the issue of undue economic burden under Section 251 (f)(1). See Findings of Fact, Conclusions of Law, and Order (Order) findings 13-33 (attached as Exhibit PSC-4). The Order specifically reviewed the testimony of Shawn Hanson, Scott Lundquist, and Timothy Gates. The Commission concluded that Midcontinent failed to meet its burden on the undue economic burden issue. See Order at findings 16, 18, 22, and 32.

The rural exemption is not limited to protection against the most extreme economic burdens such as threats to economic survival. Even though the loss of revenue might not threaten Missouri Valley's ability to offer existing services in the

immediate future, its efficiency in offering those services would be damaged because the revenue loss would unduly impair Missouri Valley's ability to invest in facility upgrades and replacements. Midcontinent's evidence that the economic impact is \$888,577 is not more persuasive than Missouri Valley's evidence that the impact is \$3.58 million.

Missouri Valley testified that the economic burdens of the interconnection would impair Missouri Valley's performance of its universal service obligations. Missouri Valley's annual net revenues would be substantially reduced as a consequence of the interconnection while its universal service obligations and the expenses to perform those obligations would be unchanged and likely increased. Loss of substantial proportions of revenue as a consequence of the interconnection would impair Missouri Valley's ability to perform its universal service obligations in the entire Williston exchange area, including the area outside of the City of Williston where its line costs are greater and where Midcontinent has no facilities.

4. The analysis under Section 251(f)(1) in this case should not have considered the financial arrangements between Missouri Valley and its parent company in determining the impact of compliance with Section 251(c), and consideration of Missouri Valley's relationship with Nemont, by itself, demonstrates that there is no undue burden or impact on universal service under 47 U.S.C. § 251(f)(1).

Section 251(f)(1) refers to a request to a rural telephone company. Neither Section 215(f)(1), 47 C.F.R. §51.405, nor the FCC's local competition order was cited by Midcontinent at the hearing supports the opinion that the impact on the Nemont group of companies, or Nemont as a parent company, should be the consideration. Midcontinent's request for interconnection is addressed to Missouri Valley, not Nemont.

Nemont was not a party to these proceedings and was not sought to be a party by Midcontinent.

5. The Commission considered safety valve support under 47 C.F.R. § 54.305, and the inclusion of safety valve support, would not reduce the impact to the point that there is no undue economic burden or impact on universal service under 47 U.S.C. § 251(f)(1);

“Safety valve” is an expression used to describe a provision of 47 C.F.R. §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 universal service fund rules. The Commission considered the potential for safety valve support under 47 C.F.R. §54.305. This safety valve applies to the Williston exchange under Missouri Valley’s ownership. There are six categories of universal service support that are generally available to rural telephone companies. Five of these categories are unavailable to Missouri Valley because of the parent trap rule; one of the categories that is not available is safety valve support.

Specifically, the parent trap rule prevents a rural telephone company from receiving universal service funds to support or subsidize old investment in the exchange that was not made by the former owner. The safety valve permits a rural telephone company that is subject to the parent trap rule to receive some limited universal service fund support for post-acquisition new investments in rural infrastructure that are made by the rural telephone company. Universal service support would therefore, only be available to Missouri Valley for new investment made after Midcontinent would come in to the area.

Midcontinent presented testimony that interpreted the safety valve mechanism in such a way that Missouri Valley would receive universal service funds to replace lost revenues, not to support Missouri Valley's post-acquisition investments in rural infrastructure. These funds would be received only if Midcontinent is interconnected with Missouri Valley. This interpretation is inconsistent with Section 254.

CONCLUSION

The Commission's decision is in full accord with the federal Telecommunications Act, North Dakota's statutes affecting telecommunications, specifically North Dakota Century Code chapter 49-21, and the relevant case law. Midcontinent's Motion for Partial Summary Judgment should be denied.

Dated this 31th day of August, 2009.

/s/ Annette Bendish
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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Midcontinent Communications/Missouri Valley
Communications, Inc.
Rural Exemption
Investigation**

Case No. PU-08-61

**Missouri Valley Communications, Inc.
Suspend/Modify Interconnection Requirements
Application**

Case No. PU-08-176

**CORRECTED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

October 8, 2008

Appearances

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

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

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

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

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

Preliminary Statement

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

Midcontinent requests that the Commission determine that Missouri Valley has waived its rural exemption, or in the alternative that the Commission conduct an inquiry

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Order (Revised Page 10 - Signature)

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Order (Revised Page 10 - Signature)

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

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

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

1. Whether the request of Midcontinent is unduly economically burdensome.
2. Whether the request of Midcontinent is technically feasible.
3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (d)(1)(D) thereof).
4. The implementation schedule for compliance with the request should the exemption be terminated.
5. Whether suspension or modification is necessary.
6. Whether suspension or modification is consistent with public interest, convenience, and necessity.
7. The extent and duration should any suspension or modification be granted.

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

Findings of Fact

The Commission finds:

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

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

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

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

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

Bona Fide Request

6. Under Section 252(a)(1) of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 (Act), an incumbent local exchange carrier may negotiate and enter into a binding agreement with a requesting telecommunications

carrier upon receiving a request for interconnection, service or network elements under Section 251. Section 251(c) requires incumbent local exchange carriers to interconnect with competitive local exchange carriers and to negotiate the terms of interconnection agreements.

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

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

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

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

Rural Exemption

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

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

Undue Economic Burden

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

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

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

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

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

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

19. Regarding the Special Access Revenues proposed adjustment of \$367,600, Lundquist testified Midcontinent could offer special access services over its existing cable TV facilities without the interconnection, so Missouri Valley's estimate of net revenue loss due to customer migration to Midcontinent's special access service would not occur because of the interconnection. Therefore, Lundquist's adjustment reflects no net revenue loss to Missouri Valley due to interconnection-related migration of special access service customers.

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

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

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

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

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

and incumbent line loss to CLECs in rural areas should be closely monitored (*Id.* Para 101, 124, 131.)

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

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

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

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

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

In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the Congressional debates. ... There can be no doubt that it is an economic burden on an incumbent local exchange carrier (ILEC) to provide what Congress has directed it to provide to new competitors in 251(b) or 251(c). Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily granted exemption should continue unless the state commission found all three pre-requisites for terminating the exemption. By limiting the phrase 'unduly economically burdensome' to exclude burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. (*Iowa v FCC*, at 761)

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

the revenue loss would unduly impair Missouri Valley's ability to invest in facility upgrades and replacements.

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

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

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

Technical Feasibility

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

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

Consistent with Section 254

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

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

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

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

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

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

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

Implementation Schedule

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

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

Suspension of Interconnection Requirements

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

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

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding.
2. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome.
3. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is consistent with 47 U.S.C. §254, regarding universal service.
4. The issue of technical feasibility is moot, where Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection is unduly economically burdensome and not consistent with 47 U.S.C. §254, regarding universal service.

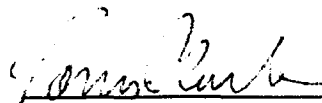
From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

Order

The Commission Orders:

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

PUBLIC SERVICE COMMISSION



Tony Clark
Commissioner

Voting Nay

Susan E. Wefald
President



Kevin Cramer
Commissioner

DISSENT
Commissioner Susan Wefald

October 8, 2008

**Midcontinent Communications/Missouri
Valley Communications, Inc.
Rural Exemption
Investigation**

Case No. PU-08-61

**Missouri Valley Communications, Inc.
Suspend/Modify Interconnection
Requirements
Application**

Case No. PU-08-176

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

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

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

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


Susan E. Wefald, Commissioner

Memorandum

To: Commissioners, Legal

From: Patrick Fahn

Date: September 8, 2008

Re: Case No. PU-08-61 and PU-08-176: Staff summary for September 9, 2008 work session

Case No. PU-08-61

Midcontinent requests facilities based interconnection and Commission must determine whether to terminate the Missouri Valley's rural exemption.

May 7, 2008 Notice of Consolidated Hearing issues:

1. Whether the request of Midcontinent is unduly economically burdensome.
2. Whether the request of Midcontinent is technically feasible.
3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).
4. The implementation schedule for compliance with the request should the exemption be terminated.

	Midcontinent	Missouri Valley
Current status of rural exemption	<p>Missouri Valley waived its rural exemption when it agreed to honor the requirements of the previous interconnection agreement for the Williston exchange acquired from Citizens.</p> <p>Missouri Valley's existing resale agreement with Midcontinent constitutes a waiver of its rural exemption. (PU-04-638)</p> <p>Missouri Valley interconnects with a number of other carriers using a variety of interconnection agreements.</p> <p>A rural carrier can waive its rural exemption rights through its voluntary actions and Missouri Valley has voluntarily waived its rural exemption as evidenced by existing agreements for resale and facilities-based interconnection.</p> <p>The Commission ruled in another rural exemption case just two years ago that "a bona fide request for any interconnection, service, or</p>	<p>Missouri Valley states that Midcontinent provided no evidence.</p> <p>The existing resale agreement makes no reference to the rural exemption, makes no reference to an interconnection of facilities, and makes no use of the word waiver.</p> <p>Nothing in Midcontinent's proposed interconnection agreement proposes an amendment to the existing resale agreement.</p> <p>The Commission should follow its earlier decisions in Cases PU-06-345 and PU-06-400 that prevent Midcontinent from claiming a resale arrangement as a vehicle to evade rural telephone companies' exemption from facilities based interconnection.</p> <p>Missouri Valley does not provide video programming.</p>

	<p>network element...triggers a Commission determination concerning termination of the rural exemption with regard to the entire list of obligations under Section 251(c) for the rural carrier in its entire service area. The Commission should conclude that a waiver of the rural exemption for one purpose is a waiver for all purposes, the resale agreement contains no language that would limit the impact of Missouri Valley's waiver only to resale."</p> <p>A resale agreement is a Section 252 interconnection agreement, subject to the same approval processes as any other Section 252 agreement.</p>	
<p>Economic burden</p>	<p>Missouri Valley's analysis regarding undue burden should be rejected because it is not related to any Section 251(c) interconnection obligation.</p> <p>The evidence shows that facilities-based competition in Williston will not impose an undue economic burden on Missouri Valley.</p> <p>Experience in other rural areas of North Dakota and across the country shows that interconnection does not impose an undue economic burden.</p> <p>Missouri Valley would continue to generate significant net operating margins.</p> <p>Missouri Valley would be able to reduce its costs if it lost customers to Midcontinent.</p> <p>Missouri Valley and Nemont should be treated as an integrated operation for this issue.</p> <p>Undue burden refers to the point where the harm was damaging the ILEC's ability to operate efficiently or to continue to offer services.</p>	<p>Customers will migrate to Midcontinent. Midcontinent's quantification of economic impact (cumulative net revenue loss over the 2009-2012 timeframe of \$888,577) was developed by applying four adjustments (Migration Timing/ \$154,300, Resale Line Growth Factors/ \$572,600, and Special Access Revenues/ \$367,600; USF subsidy/ \$2.234 M) to the analysis supplied by Missouri Valley (cumulative net revenue loss over the 2009-2012 timeframe of \$3.58 million). Midcontinent's evidence is not more persuasive than Missouri Valley's evidence on any of the adjustments. Midcontinent has failed to carry its burden of proof on the proposed USF revenue</p> <p>Adjustment regarding safety valve support.</p> <p>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. The reduction of annual net revenues would damage Missouri Valley's ability to invest in facilities upgrades and replacements.</p> <p>Midcontinent presented testimony that the economic impact is smaller, but presented no evidence that the impact is not unduly economically burdensome. Midcontinent stated an \$888,577 impact would not be unduly economically burdensome.</p>

		<p>Midcontinent did not testify that any amount larger than \$888,577 was not unduly economically burdensome.</p> <p>MV does not qualify for USF safety valve support.</p>
Technically feasible	Parties agree that interconnection with number portability is technically feasible.	Parties agree that interconnection with number portability is technically feasible.
Impact on universal service	<p>Interconnection and facilities-based competition does not have an adverse impact on universal service.</p> <p>The sooner the Commission acts, the sooner Williston residents will enjoy the benefits of facilities-based competition. Facilities-based competition can have universal service benefits.</p> <p>Current competition in Williston is not sufficient because competitors are not offering true substitute services.</p>	<p>Midcontinent testified that the issue of unduly economically burdensome also affects whether interconnection will harm MV's ability to maintain its universal service obligations. Midcontinent considered no other factor.</p> <p>Missouri Valley's annual net revenues would be substantially reduced while its universal service obligations and the expenses to perform those obligations would be unchanged and likely increased.</p> <p>A new expanded definition of universal service will likely require that ILECs and ETCs have reliable, predictable, and sufficient financial resources to upgrade.</p> <p>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, would be impaired from a loss of substantial revenue.</p> <p>Missouri Valley's ability to provide Lifeline would be impacted.</p>
Implementation schedule	An interim interconnection agreement within 30 days, interconnection in 90 days, and a permanent interconnection agreement in place within nine months.	Missouri Valley states interconnection could be implemented within 90 days.

Case No. PU-08-176

Missouri Valley requests that the Commission suspend requirements to provide interconnection for such duration as the Commission determines.

May 7, 2008 Notice of Consolidated Hearing issues:

5. Whether suspension or modification is necessary.
6. Whether suspension or modification is consistent with public interest, convenience and necessity.
7. The extent and duration should any suspension or modification be granted.

Suspension or modification of interconnection obligations	Midcontinent	Missouri Valley
<p>To avoid a significant adverse economic impact on users; to avoid imposing a requirement that is unduly economically burdensome</p>	<p>There is no evidence that requiring Missouri Valley to meet its Section 251(c) obligations will have an adverse impact on users of telecommunications services.</p> <p>The public interest strongly supports requiring Missouri Valley to meet its Section 251(b) and (c) obligations.</p>	<p>If the rural exemption is not sustained, it should not be entirely terminated but should be suspended or modified.</p> <p>Suspension is necessary to avoid significant adverse impact on users and avoid imposing a requirement that is unduly economically burdensome.</p> <p>Suspension is consistent with public interest, convenience and necessity because</p>
<p>Public interest, convenience and necessity</p>	<p>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.</p>	<p>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, would be impaired from a loss of substantial revenue. 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.</p> <p>Missouri Valley's ability to provide Lifeline would be impacted.</p> <p>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.</p> <p>The Williston exchange has a sufficient level of competitors to ensure consumers have high quality, affordable choices.</p>

<p>Legal issues ?</p>	<p>Definition of interconnection agreement.</p> <p>Definition of "unduly" economically burdensome.</p> <p>Consideration of Missouri Valley and Nemont companies as a group for determination of economic burden of interconnection.</p> <p>Definition of public interest, convenience and necessity for the issue of suspension or modification.</p> <p>Is a resale agreement an interconnection agreement?</p>
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Commissioner Wefald's question to be addressed by brief:

The Commission's option to require Midcontinent to meet the requirements for designation as an ETC the service area, the whole Williston exchange, the 890 square miles.

Missouri Valley states that under 253 (f) the state is allowed to require Midcontinent to meet the requirements of 214(e)(1) and be designated as an ETC before Midcontinent is permitted to provide service as a facilities-based CLEC.

Commissioner Clark's question to be addressed by brief:

Does Missouri Valley's existing resale agreement with Midcontinent constitutes a waiver of its rural exemption. (Does a resale agreement constitute an interconnection agreement?)

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Midcontinent Communications/Consolidated Telecom
Rural Exemption
Investigation**

Case No. PU-06-400

ORDER APPROVING STIPULATION

November 8, 2006

On May 18, 2006, June 20, 2006 and July 13, 2006, Midcontinent Communications (Midcontinent) made bona fide requests under 47 U.S.C. § 251(c) for wholesale resold services for the Mott, Killdeer, Halliday, Bowman, Richardton and Rhame, North Dakota exchanges from Consolidated Telecom (Consolidated). By its filing on September 8, 2006 Midcontinent notified the Commission of its bona fide request. Midcontinent requested that the Commission conduct an inquiry for the purpose of determining whether to terminate the Consolidated's 47 U.S.C. § 251(f)(1)(A) exemption from providing its services for resale.

On October 24, 2006, the parties filed a Stipulation with the Commission which provides for the entry of an order by the Commission terminating the rural exemption of Consolidated within Consolidated's Mott, Killdeer, Halliday, Bowman, Richardton and Rhame, North Dakota exchanges solely with respect to Midcontinent's request of Consolidated for Section 251(c) interconnection. A copy of the Stipulation of the parties marked as Attachment 1 is attached to this order and is incorporated herein in its entirety.

The parties stipulated the request of Midcontinent, as applied solely to Consolidated and to Consolidated's Mott, Killdeer, Halliday, Bowman, Richardton and Rhame, North Dakota exchanges (1) is not unduly economically burdensome, (2) is technically feasible, and (3) is consistent with the goals of 47 U.S.C. § 254, other than sections (b)(7)(D) thereof.

The parties agree that for purposes of establishing the time frames established in Section 252 of the Act for negotiation, arbitration and resolution of the request for interconnection, that the request from Midcontinent was received by Consolidated on July 13, 2006.

The Commission finds the Stipulation of the parties is acceptable and hereby makes the following:

ORDER

The Commission orders:

1. The Stipulation is approved in its entirety without modification.
2. Consolidated's rural exemption under Section 251(f)(1) of the Act for wholesale resold services is terminated with respect to the Midcontinent request and solely with respect to Consolidated and solely to Consolidated's Mott, Killdeer, Halliday, Bowman, Richardton and Rhame, North Dakota exchanges.
3. Approval of the Stipulation and issuance of this order shall not be considered as precedent for any future cases involving termination of a rural exemption under N.D.C.C. § 49-21-01.7(11) and Section 251(f)(1) of the Act.

PUBLIC SERVICE COMMISSION

Susan E. Wefald
Commissioner

Tony Clark
President

Kevin Cramer
Commissioner

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Midcontinent Communications, a
South Dakota Partnership,**

Case No. PU-06-345

Complainant,

vs.

North Dakota Telephone Company,

Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
ON STIPULATION ADDRESSING REQUEST FOR SECTION 251(c)
INTERCONNECTION**

September 6, 2006

Appearances

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

Don Negaard, Pringle & Herigstad, P.C., P.O. Box 1000, Minot, North Dakota 58702, appearing on behalf of North Dakota Telephone Company, Devils Lake, North Dakota.

Patrick W. Durick, Pearce & Durick, P.O. Box 400, Bismarck, ND 58502-0400, appearing on behalf of Midcontinent Communications.

Preliminary Statement

By "NOTICE OF BONA FIDE REQUEST FOR SERVICES" (herein "the NOTICE") dated August 2, 2006, Midcontinent Communications, a South Dakota Partnership (herein "Midcontinent") requested the North Dakota Public Service Commission (herein the "Commission") to conduct an inquiry on a request to provide certain telecommunications services in North Dakota Telephone Company (herein "NDTC") Devils Lake, ND exchange (herein sometimes referred to as the "Exchange") under an interconnection agreement for certain services under Section 251(c) of the Communications Act of 1934, as amended (the "Act"). We will refer to Midcontinent and NDTC as the "Parties" or individually as a "Party."

Order Approving Stipulation
Case No. PU-06-345
Page 1

The Parties have entered in to a Stipulation dated August 29, 2006 (the "Stipulation") which has been filed herein and is incorporated in its entirety by reference. The Stipulation provides for the entry of an Order by the Commission as provided for in the Stipulation, thereby terminating the rural exemption of NDTC within its Devils Lake, North Dakota exchange solely with respect to the Midcontinent request for Section 251(c) interconnection that Midcontinent made of NDTC.

The Commission having reviewed the positions of the Parties as reflected in the Stipulation and being fully advised hereby adopts the following:

FINDINGS OF FACT

1. Midcontinent filed a request with NDTC for facilities based interconnection for the NDTC Devils Lake exchange and the Parties have stipulated, with the approval by the Commission of the Stipulation, that the date on which the request was received by NDTC would be June 1, 2006.

2. The Parties' Stipulation states that they agree, and we so find, that (a) based on the specific scope of the request made by Midcontinent limiting such request to the Exchange and (b) the fact that NDTC currently anticipates providing video programming services for the Exchange in competition with Midcontinent in February 2007 or shortly thereafter, the Commission may enter an order, specifically finding that the request of Midcontinent, as applied solely to NDTC and solely to the NDTC Devils Lake exchange: (1) is not unduly, economically burdensome, (2) is technically feasible, and (3) is consistent with the goals of 47 USC Section 254, other than sections (b)(7)(D) thereof.

3. Utilization of the Section 252 time frames for the negotiation/mediation/arbitration for purposes of the procedures to address the Midcontinent request is reasonable and appropriate and consistent with the Parties' agreement contained in the Stipulation.

4. Absent the entry of an Order by the Commission as provided for in the Stipulation the Parties will be engaged in further litigation and additional resource commitments will need to be made by the Commission and the Parties.

From the foregoing Findings of Fact, the Commission makes the following:

CONCLUSIONS OF LAW

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

2. The criteria for termination of NDTC's rural exemption with respect to the Midcontinent request under 47 USC Section 251(f)(1) are (a) whether Midcontinent's

request is unduly economically burdensome; (b) whether Midcontinent's request is technically feasible; and (c) whether Midcontinent's request is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

3. The entry of an Order as provided for in the Stipulation is in the public interest as it will avoid further litigation and allow the Parties to proceed with the negotiation/mediation/arbitration process envisioned under Section 252 of the Act. The Commission's actions also fosters private entities' ability to reach a reasonable compromise and settlement of conflicting positions and results in the avoidance of resource commitments by not only the Parties but also the Commission.

4. The request by Midcontinent as applied solely to NDTC and solely to the NDTC Devils Lake exchange (1) is not unduly, economically burdensome, (2) is technically feasible and (3) is consistent with the goals of 47 USC Section 254, other than sections (b)(7)(D) thereof.

5. The times frames established under Section 252 of the Act for the negotiation/mediation/arbitration processes shall begin the day after the request for interconnection made by Midcontinent to NDTC was received (which the Parties agree that the receipt date shall be June 1, 2006), thus making the implementation date of any negotiated agreement March 1, 2007.

6. Either Party may seek the assistance of the Commission through mediation by a letter to Commission no sooner than 10 days following a letter to the other Party indicating that there is an impasse on an issue or issues during the negotiation period prescribed by Section 252 of the Act.

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

ORDER

The Commission orders:

1. The Stipulation is approved in its entirety without modification.
2. The rural exemption afforded NDTC under Section 251(f)(1) for facilities based interconnection is terminated with respect to the Midcontinent request and solely with respect to NDTC and solely to the NDTC Devils Lake exchange.
3. The Commission retains jurisdiction of the matter for the purpose of mediating or arbitrating the terms of the interconnection agreement, if necessary; and for establishing an implementation schedule, if necessary.

PUBLIC SERVICE COMMISSION

**Susan E. Wefald
Commissioner**

**Tony Clark
President**

**Kevin Cramer
Commissioner**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

MIDCONTINENT COMMUNICATIONS,
A SOUTH DAKOTA PARTNERSHIP,

Plaintiff,

v.

NORTH DAKOTA PUBLIC SERVICE
COMMISSION, KEVIN CRAMER,
TONY CLARK, AND BRIAN KALK,
in their official capacities as Commissioners
of the North Dakota Public Service Commission

and

MISSOURI VALLEY COMMUNICATIONS, INC.,

Defendants.

CERTIFICATE OF
SERVICE

Civ. A. No. 1:09-CV-017

I certify that on the 31st day of August, 2009, I caused the following documents:

Response to Motion for Partial Summary Judgment

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

John Olson (olsonpc@midconetwork.com)
J.G. Harrington (jharrington@dowlohnes.com)
David E. Mills (dmills@dowlohnes.com)
David Hogue (dhogue@srt.com)

I further certify that on the 31st day of August, 2009, a copy of the foregoing documents and the Notice of Electronic Filing will be mailed by first-class mail, postage paid, to the following non-ECF participants: None

/s/ Annette Bendish

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