United States District Court
District of North Dakota

Midcontinent Communications, A South Dakota Partnership, Plaintiff, vs. North Dakota Public Service Commission and 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.	**DEFENDANT MISSOURI VALLEY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSING MIDCONTINENT'S MOTION FOR SUMMARY JUDGMENT** Case No: 1:09-cv-00017-DLH-CSM

I. INTRODUCTION

Midcontinent Communications ("Midcontinent") and Missouri Valley Communications, Inc. ("Missouri Valley" or "MVC") are telecommunications companies. Midcontinent claims rights to an interconnection with Missouri Valley's facilities, under § 251(c) of the Telecommunications Act of 1996. Missouri Valley claims exemption from § 251 (c) interconnection duties, under § 251(f)(1)(A).

In an "inquiry" under § 251(f)(1)(B), the North Dakota Public Service Commission ("Commission" or "PSC") determined that Midcontinent failed to prove the pre-requisites for Missouri Valley's exemption to be terminated. Midcontinent commenced this action for an injunction, declaratory relief and damages. Midcontinent seeks federal court review of the Commission's determination, not a new trial.

Missouri Valley moved to dismiss the complaint based on lack of subject matter jurisdiction. Missouri Valley responds to the merits of Midcontinent's motion for summary judgment, submitting

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Defendant Memorandum in Support of Motion for Its Summary Judgment and Opposing Plaintiff Motion for Summary Judgment
Missouri Valley Communications, Inc.
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this additional dispositive motion for summary judgment, and responding to Midcontinent's motion for summary judgment. Missouri Valley recognizes its present motion for summary judgment and Midcontinent's present motion for summary judgment may be rendered moot if the Court concludes it lacks subject matter jurisdiction.

The essence of Midcontinent's claim is the Federal district court should act as an appellate court to review and reverse action of the Commission taken by its "*Rural Exemption Order*" (a name coined in Midcontinent's complaint and used in this memorandum, sometimes abbreviated as *REO*). Order, October 8, 2008, North Dakota Public Service Commission Case No. PU-08-61. The essence of Missouri Valley's defense is the Federal district court, if it concludes it has subject matter jurisdiction, should act as an appellate court to review and affirm the Commission's *Rural Exemption Order*.

A. The Telecommunications Act & Rural Exemption History

In 1996, Congress enacted the Telecommunications Act of 1996, amending the 1934 Communications Act and codified as 47 U.S.C. § 151 et. seq. ("Act" or "Telecommunications Act"). The Act includes provisions to promote competition in local exchange telecommunications services. The provisions include imposition of duties on "incumbent local exchange carriers" (local exchange companies that had legal local monopolies before 1996, "ILECs") with respect to "competitive local exchange carriers" ("CLECs") that seek to provide alternative (competitive) local exchange telecommunications service in the ILECs' formerly exclusive service areas. ILECs' duties include "interconnection" (§ 251(c)(2)), "access to network elements" (§ 251(c)(3)), and "resale" §251(c)(4). ILECs are obliged to negotiate the terms of agreements to fulfill those duties. (§251(c)(1)). These duties are subject to specific exemptions affecting ILECs that are rural telephone companies. §251(f)(1).

Under § 251(f)(1)(A) of the Act, an ILEC that is a rural telephone company is exempt from the duties of § 251(c) until (1) the rural company has received a bona fide request and (2) the State commission conducts an "inquiry" under § 251(f)(1)(B) and determines to terminate the exemption. An inquiry is conducted after a CLEC notifies the State commission the CLEC has made a request of a rural telephone company for interconnection, resale or network elements. Section 251(f)(1)(B) provides specific standards to guide a State commission's inquiry and determination: whether the request is not unduly economically burdensome, whether the request is technically feasible, and whether the request is consistent with 47 U.S.C. § 254, regarding universal service principles.

After enactment of the Act, the Federal Communications Commission ("FCC") promulgated regulations for implementation of the Act. The regulations pertinent to the rural exemption provisions of the Act provided that State commissions' decisions on rural exemption issues are to be made on a case by case basis (47 CFR 51.401) and that rural telephone companies have the burden of proof to sustain the exemption (47 CFR 51.405). On judicial review, the burden of proof provisions of Rule 405 were vacated in Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, at 759-63. (8th Cir. 2000). ("Iowa v FCC.")

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

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

Despite the clear provisions of § 251(f)(1(B) and 47 CFR § 51.401 that State commissions shall determine on a case by case basis whether to terminate a rural telephone company's continuing rural exemption, Midcontinent claims North Dakota's Public Service Commission's

determination in this case is "invalid and unenforceable as a matter of federal law." (Complaint, prayer for relief, ¶1.) Midcontinent also claims Missouri Valley's statutorily created rural exemption disappeared through events Midcontinent describes as a "waiver."

B. Summary of Argument

1. As a matter of law under the undisputed facts, Missouri Valley's § 251(f)(1)(A) exemption from § 251 (c) (2) interconnection duties is not waived or foreclosed. The procedure for terminating the rural exemption is established by the Act. Midcontinent's "waiver" arguments are not recognized by the Act, federal case law, or NDPSC precedent construing the Act.

2. The *Rural Exemption Order* is in accordance with the law under which the order was made and under which the complaint is filed, 47 USC § 251. The *Rural Exemption Order* is not arbitrary or capricious. Midcontinent's complaint about the *Rural Exemption Order* should be dismissed under the applicable standard of review.

3. Midcontinent's claim for damages should be dismissed as a claim for which relief cannot be granted.

Missouri Valley's arguments in support of its motion for summary judgment also refute Midcontinent's motion for summary judgment. Appropriate cross-references are made in this single brief, in lieu of redundant arguments in two briefs.[1] Midcontinent's Memorandum in support of its motion for summary judgment is referred to as "Midcontinent Brief" and abbreviated as MB.

C. Uncontested Material Facts

[1] Missouri Valley's brief exceeds the 40 page limit of Rule 7.1 of the Local Rules for the United States District Court for the District of North Dakota. However, Missouri Valley brief is less than the 80 pages it would otherwise be entitled to by submitting a separate memorandum to respond to Midcontinent's motion and another memorandum for Missouri Valley's own motion.

Midcontinent and Missouri Valley have filed separate motions for summary judgment because there are no disputed issues of fact. Midcontinent has recognized "the administrative record developed before the PSC is the factual record in this case and it provides ample basis to evaluate Midcontinent's claims." Midcontinent's Consolidated Opposition to Motions to Dismiss, pp. 1, 2, 17 and 25. Its memorandum in support of its summary judgment motion says the same thing, in slightly different words. "The Court's review is based on the record developed before the NDPSC, and no additional factual development is necessary or appropriate. Summary judgment is appropriate if Midcontinent is entitled to judgment as a matter of law based on the existing record." MB, p. 13. Missouri Valley agrees. The record in North Dakota Public Service Commission Case No. PU-08-61 provides ample basis to evaluate Midcontinent's claims – and to dismiss the complaint.

D. The Parties

The plaintiff, Midcontinent, is a telecommunications company and a competitive local exchange carrier under the Act. The defendant Missouri Valley is a telecommunications company, an incumbent local exchange carrier and a rural telephone company under the Act. The defendants North Dakota Public Service Commission and individual commissioners are North Dakota's "State commission" under the Act, having jurisdiction to conduct inquiries under §251(f)(1)(B) for the purpose of determining whether to terminate a rural telephone company's interconnection exemption under §251(f)(1)(A). Complaint, ¶¶ 10 - 13 and 29; MVC's Answer, ¶ 6.

II. THE PROCEEDINGS BELOW: PSC INQUIRY

Missouri Valley regards facts about the PSC Inquiry as "significant" for purposes of the motion and Local Rule 7.1(A)(2), of the U.S. District Court Rules for the District of North Dakota.

Accordingly, each paragraph in this statement of uncontested material facts about the PSC Inquiry is followed by underscored reference to numbered paragraphs of the complaint, the answer, to the *Rural Exemption Order* (abbreviated *REO*), and to the record in the PSC Inquiry. The Commission's record is filed conventionally by Missouri Valley in support of its motion for summary judgment and opposing Midcontinent's. Where reference is made in this memorandum, evidentiary material and other docket entries (e.g. post hearing briefs) are identified consistent with the Commission's record of the inquiry. Hearing exhibits are referred to as PSC Inquiry Exhibit (abbreviated PIX).–Other items in the record are referred to as PSC Inquiry Record (abbreviated PIR). PIR 27 is the hearing exhibit list and all exhibits, including pre-filed written testimony that is also recorded as PIR 17 and 23.

On November 14, 2007, Midcontinent Communications (Midcontinent) requested an interconnection and interconnection agreement with Missouri Valley Communications for the Williston exchange. Complaint, ¶ 39; MVC's Answer, ¶ 7; *REO*, page 1.

On February 8, 2008, Midcontinent filed with the North Dakota Public Service Commission Midcontinent's Notice of Bona Fide Request for Services and Interconnection and Petition to Find Rural Exemption Waived. Midcontinent requested that the Commission determine that Missouri Valley had 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. Complaint, ¶. 41; MVC's Answer, ¶ 7; *REO*, page 1; PIR 1.

On July 9 and 10, 2008, the Commission conducted a hearing in the §251(f)(1)(B) inquiry case it named Midcontinent Communications/Missouri Valley Communications, Inc. Rural Exemption Investigation ("PSC Inquiry.") Complaint, ¶. 44; MVC's Answer, ¶ 7; *REO*, page 2.

Following the hearing, Midcontinent and Missouri Valley submitted briefs and proposed findings of fact, conclusions of law, and order. PIR 31 and 35 as to Midcontinent and PIR 32 and 34 as to Missouri Valley.

On October 8, 2008, the Commission made its Findings of Fact, Conclusions of Law and Order. Detailed findings preceded the following:

"**Conclusions of Law**

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

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

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

....

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

"**Order**

"The Commission Orders:

"The rural exemption under 47 U.S.C. § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." *REO*, page 10.

The following table shows the Commission's *Rural Exemption Order* addressed all the arguments about the interconnection and exemption provisions of 47 U.S.C. § 251 and all the evidentiary arguments made by Midcontinent in the PSC Inquiry.

Complaint paragraphs	*REO* Paragraphs	Midcontinent Arguments in PSC
53, 56 and 57 re undue economic burden	13-31	PIR 31, brief pages 11 - 26 and proposed findings 12- 26
58 re universal service	36-42	PIR 31, brief pages 26 - 30 and proposed finding 51.

The Commission considered Midcontinent's arguments and found that Midcontinent failed to prove what it needed to prove "to justify the termination of the otherwise continuing rural exemption" (Iowa v FCC, at 762) and that its evidence was not more persuasive than Missouri Valley's evidence. (*REO* ¶¶ 13 through 42). The findings led the Commission to conclude that Midcontinent failed to prove its requested interconnection with Missouri Valley is not unduly economically burdensome or is consistent with 47 U.S.C. §254, regarding universal service. *REO*, p. 10.

A. Critique of Midcontinent's Statement of Undisputed Material Facts.

Midcontinent's exhibits annexed to its motion for summary judgment and supporting memorandum include some but not all of the administrative record developed before the Commission. Midcontinent's memorandum does not explain why it selected only some but not all record items that were not hearing exhibits, items that Midcontinent regards as motion exhibits to show undisputed facts. Midcontinent's memorandum does not explain why it selected only some hearing exhibits, omitting, for significant example, Missouri Valley general manager Shawn Hanson's financial impact exhibit that is part of the hearing record and referred to on page 16 of Midcontinent's motion exhibit B. Mr.

Hanson is the only witness who originated any financial analysis; Midcontinent witnesses only assessed Hanson's financial data.

Midcontinent's exhibits annexed to its motion for summary judgment and supporting memorandum include some material that is not part of the administrative record developed before the Commission. Midcontinent's motion exhibit I is not part of the Commission's record. The transcript submitted by Midcontinent, exhibit D and named Hearing Transcript, is not part of the Commission's record. There is no official transcript

Midcontinent's citation of its witness's testimony (MB, p.9) does not transform that testimony to status as undisputed fact. Similarly, Midcontinent's citing its briefs in the PSC Inquiry (Midcontinent motion exhibits C and G, cited at MB, p. 9.) does not convert arguments into facts. The complete record includes not only the evidentiary record but also the parties' post-hearing arguments. But arguments are facts only in the limited but significant sense that arguments in the record prove that the Commission considered the evidence and the arguments, proof on judicial review that the *Rural Exemption Orde*r is not arbitrary or capricious.

Midcontinent's' motion exhibits lack coordination with the administrative record developed before the PSC. E.g., its motion exhibit N is marked and appears to be hearing exhibit C-9. No effort is made in this memorandum to coordinate Midcontinent's motion exhibits with the PSC's record.

Missouri Valley has requested from the Commission a complete record, assembled under NDCC § 28-32-44. PIR 63. That complete record (with no

transcript because there is none) is filed in support of Missouri Valley's motion for summary judgment and opposing Midcontinent's motion, to provide the complete record that is ample basis for the court to review Midcontinent's claims, and to dismiss the complaint.

These criticisms of Midcontinent's alleged "Statement of Undisputed Facts" (MB pp. 8-13) are pertinent to keeping Midcontinent focused on the nature of its action. Midcontinent does not present a genuine statement of undisputed facts. It is making an argument about facts that were disputed before the PSC, as if the Court would make an independent and different factual determination and then substitute that determination for the Commission's findings of fact.

"The administrative record developed before the PSC is the factual record in this case and it provides ample basis to evaluate Midcontinent's claims..." Midcontinent's Consolidated Opposition to Motion to Dismiss, pp. 1, 2, 17 and 25. For purposes of a review via summary judgment proceedings, what is undisputed and material is to identify the record of a dispute that was resolved by the Commission. The Court need only look at the record, not to any other facts, not to retry the facts that are in the record, and not to evaluate or re-evaluate Midcontinent's claims that are in the Commission's bailiwick. The record developed before the Commission provides ample basis for the court to evaluate Midcontinent's claims for judicial review and to determine that Midcontinent's complaint about the *Rural Exemption Order* should be dismissed under the applicable standard of review.

III. NATURE OF ACTION AND STANDARD OF REVIEW

Midcontinent describes its action as seeking legal review of an agency's action. "Midcontinent does not seek a retrial." "Midcontinent seeks legal review of the Rural Exemption Order, not a new trial of the facts in this matter. Midcontinent's seeking federal court review of a state agency decision interpreting federal law is comparable to seeking appellate court review of a trial court decision. Midcontinent "is not requesting a new hearing on the facts in a new forum. It merely seeks federal court review of matters of federal law." Midcontinent's Consolidated Opposition to Motions to Dismiss, pp. 1, 2, 17 and 25. MB, p. 13. [Underscoring by Midcontinent.]

Where a federal district court reviews determinations of a State commission under the Telecommunications Act, the court reviews the commission's interpretation of federal law *de novo* and its factual determinations and mixed questions of law and fact under a deferential standard, affirming unless the Commission's decision is arbitrary and capricious. WWC License, L.L.C. v Boyle, 459 F.3d 880, (8th Cir. 2006); Qwest Corp. v Koppendrayer, 436 F.3d 859, 863 (8th Cir. 2006); Ace Telephone Association v Koppendrayer, 432 F.3d 876, 878 (8th Cir. 2005); (8th Cir.2006); Qwest Corp. v Minnesota Public Utilities Comm'n. 427 F.3d 1061, 1064 (8th Cir. 2005). (None of these cases was a review of a State commission's determination under §251(f)(1)(B).) "[T]he arbitrary and capricious standard is the same as the substantial evidence standard. As long as the [agency's] factual findings are supported by substantial evidence in the record as a whole, we will uphold those findings and the

reasonable inferences that the [agency] drew from them." Ace, 432 F. 3d at 880. (It is noteworthy that these judicial principles as to review of States' agencies' actions are the same as the statutory principles as to review of Federal agencies' actions. 5 U.S.C. § 706.)

In support of its claim of federal question jurisdiction, Midcontinent summarized the issues it wants to be reviewed.

"First, Midcontinent's waiver argument required the NDPSC to determine whether Section 251(f) permitted Missouri Valley to engage in selective waivers of its rural exemption - claiming it in some cases while not in others. See Comp.¶ ¶ 47-48, 73"

"Second, Midcontinent raised the issue of the appropriate standard for satisfying the statutory requirement that Midcontinent's requested interconnection was `not unduly economically burdensome.' See Comp. ¶ 50. ... Midcontinent's argument required the NDPSC to construe the meaning of the statutory language ` unduly economically burdensome.' "

"Third, Midcontinent argued ... that the `unduly economically burdensome' standard required the NDPSC to consider Missouri Valley's overall financial condition, including an examination of the relationship between Missouri Valley and its Montana-based parent company, Nemont Communications (`Nemont'). See Comp. ¶ 57."

Fourth, Midcontinent argued about universal service standards referenced in section 251 (f)(1)(B). See Comp. ¶ 52, 58 and 75.

"Fifth, Midcontinent argued that the NDPSC's `unduly economically burdensome' and universal service analyses must incorporate Missouri Valley's eligibility for federal `safety valve' funding .... See Comp.¶ 51, 58." Midcontinent's Consolidated Opposition to Motions to Dismiss, July 24, 2009, pp. 7-9. See also Complaint ¶¶ 73 and 75 where all Midcontinent's allegations are summarized.

Each of these 5 points and their development in Midcontinent's memorandum in support of its summary judgment motion is addressed in order below. Each of these points is subjected to the question, is this a question of law to be reviewed *de novo*? If Yes, address the question with legal arguments. If No, move on to the question, is the Commission's determination supported by substantial evidence? This order of analysis is suggested by the WWC opinion. The parties might have different positions whether an issue is reviewed under one or the other standard. Generally, Midcontinent considers its points to be questions of law to be reviewed de novo because it accords no deference to the Commission's decision. Missouri Valley's arguments address all of Midcontinent's' points in the WWC order of analysis, concluding that the Commission made no errors of law and its determinations on factual issues and mixed issues of law and fact are not arbitrary or capricious.

Midcontinent's claim for damages is separately addressed as not stating a claim on which relief can be granted.

IV. ARGUMENT

A. As a Matter of Law Under the Undisputed Facts, Missouri Valley's § 251(f)(1)(A) Exemption from § 251 (c) Interconnection Duties Is Not Waived or Foreclosed.

The *Rural Exemption Order* is in accordance with federal law, is supported by substantial evidence and is not arbitrary or capricious. Applying the legal principles under which courts review the actions of administrative agencies, the court should summarily dismiss the complaint—effectively affirming the Commission's *Rural Exemption Order*. But Midcontinent argues neither the Commission nor the Court should consider whether Midcontinent has met its burden of proof under §251(f)(1)(B) that Missouri Valley's exemption from interconnection should be terminated, because, according to Midcontinent, Missouri Valley waived the exemption before Midcontinent requested interconnection and before Midcontinent requested the Commission to conduct an inquiry under §251(f)(1)(B) to determine whether to terminate Missouri Valley's exemption from interconnection. Complaint, ¶¶ 46, 47, 73; prayer for relief 1a. & b.

Midcontinent complains that the Commission failed to "address" or "discuss" or "resolve" or "provide any analysis" of Midcontinent's claim that Missouri Valley had waived its rural exemption with respect to Midcontinent. Complaint, ¶ 55; MB p. 14-15.

It is an undisputed fact that the waiver claim was presented to the Commission. The waiver claim was not ignored. Midcontinent's waiver claim was acknowledged in the *Rural Exemption Order*, in the preliminary statement on

p. 1, a fact admitted by the Complaint, ¶ 55. It is an undisputed fact that the *Rural Exemption Order* did not specifically "discuss" Midcontinent's claim that Missouri Valley had waived its exemption from interconnection. The interpretation suggested by Midcontinent is the Commission did not "resolve" the waiver claim. Complaint, ¶ 55; MB p.14. There is an alternative interpretation. The Commission *did* address the claim at *REO*, p. 1, and did resolve—and reject—the waiver claim.

While it is true that the *Rural Exemption Order* did not specifically discuss or analyze Midcontinent's waiver claim, that does not mean the Commission failed to consider the claim that was addressed in both parties' briefs. PIR 31, 32, 34 and 35. The Order's preliminary statement described this case's beginning: "Midcontinent requests that the Commission determine that Missouri Valley has waived its rural exemption, or in the alternative that the Commission conduct an inquiry under the provisions of 47 USC § 251(f)(1)(A) for the purpose of determining whether to terminate Missouri Valley's exemption from providing its services as requested by Midcontinent." *REO*, p. 1. If Missouri Valley had waived its exemption, then the Commission would not have conducted an inquiry to determine whether to terminate the exemption. The fact that the Commission conducted an inquiry and ordered that Missouri Valley's rural exemption is not terminated clearly indicates that Midcontinent's alternative request for a determination of waiver was rejected. The waiver claim was not discussed but it was resolved by the *Rural Exemption Order*.

Midcontinent asserts the waiver claim as a question of law that must be addressed *de novo*. Thus, the fact that the Commission did not discuss the waiver claim is a red herring fact, immaterial and irrelevant to the merits of the claim. Whether or not the Commission had discussed the waiver claim, its rejection would be reviewed *de novo*. The analysis below shows Missouri Valley is entitled to judgment of dismissal of Midcontinent's waiver claim as a matter of law.

Midcontinent's waiver claim has alternative versions. Under one theory, Missouri Valley waived its rural exemption in the process of acquiring the Williston exchange in 2002, before Midcontinent requested interconnection in November of 2007 ("2002 Waiver Theory"). Complaint ¶ 46; MB 15-16. Under another waiver theory, Missouri Valley waived its rural exemption in the process of making a resale agreement with Midcontinent in 2004, also before Midcontinent requested interconnection in November of 2007 ("2004 Waiver Theory). Complaint ¶ 47; MB 15-17. "Midcontinent demonstrated to the NDPSC that Missouri Valley was not legally entitled to assert the Rural Exemption because Missouri Valley's conduct, on at least two separate occasions, constituted a waiver of any right Missouri Valley might have had to assert the rural exemption." Complaint ¶ 73.

The 2004 Waiver Theory was Midcontinent's initial and only waiver argument. Midcontinent's initial filing with the Commission, its Notice of Bona Fide Request and Petition to Find Rural Exemption Waived filed on February 8, 2008, averred that "MVC has waived its right to the rural exemption under the Act

by previously entering into an interconnection agreement with Midcontinent for the purpose of resale. Said interconnection agreement was filed with this Commission on December 3, 2004, as PU-04-638." PIR 1.

Later, Midcontinent sought to persuade the Commission in its post-hearing brief—and its district court complaint alleges—that Missouri Valley waived its rural exemption earlier, when it acquired the Williston exchange in 2002. PIR 31 , pp. 5-7; Complaint, ¶¶ 30-36 and 46. MB p. 15-16.

The 2002 Waiver Theory does not present an issue of federal law to be reviewed *de novo* under the Act. The asserted basis of the 2002 Waiver Theory is one sentence in the Commission's order where it granted Missouri Valley a certificate of public convenience and necessity for the Williston exchange in Case No PU-2779-02-452. "In that order, the NDPSC noted that Missouri Valley `intends to honor existing interconnection agreements with exchange carriers[.]' " Complaint, ¶ 33; Exhibit A of Midcontinent's complaint to the district court, the "*Williston Approval Order*". "Midcontinent's conduct when it obtained regulatory approval to acquire the Williston constituted a waiver of any right Missouri Valley might have had to invoke the rural exemption by committing to honor existing interconnection agreements." Complaint, Prayer ¶1.a.

Midcontinent's 2002 Waiver Theory claims some sort of third party beneficiary rights created by the "*Williston Approval Order.*" Midcontinent's complaint exhibit A (not a part of the record in the PSC Inquiry) shows as undisputed facts that Midcontinent was not a party to that proceeding, that the proceeding involved no issues of federal law other than Missouri Valley's

qualifications to provide universal service, that the proceeding addressed no issues about any contract obligations of former owners of the Williston exchange, that Missouri Valley made no "promise" affecting Midcontinent (MB pp. 16-17), and that the ordering clauses in "*Williston Approval Order*" did not impose on Missouri Valley any contract obligations of former owners of the Williston exchange generally, or obligations to Midcontinent in particular. The "*Williston Approval Order*" is the Commission's order issued in 2002 under Title 49 of the North Dakota Century Code; its interpretation is not an issue of federal law in 2009 in proceedings under Act §251(f)(1)(B). Midcontinent's *ex post facto* discovery or invention of Missouri Valley's "relinquishment of its right to assert the rural exemption" (MB p. 17) in 2002 is not only incredible, it is also contradicted by Midcontinent's conduct and arguments.

It is undisputed that the old pre-2002 agreement between Midcontinent and the former owner of the Williston exchange was replaced by the 2004 resale agreement. Complaint, ¶ 36, including Exhibit D; MVC's Answer, ¶ 8; MB p. 17. It defies the most uncomplicated of legal logic that Midcontinent would assert in 2008 or 2009 that Missouri Valley is obliged under Midcontinent's pre-2002 contracts to which Missouri Valley was not a party, contracts which Missouri Valley expressly disavowed in 2004 without objection from Midcontinent, contracts which were replaced to Midcontinent's satisfaction in 2004. It may be said Midcontinent's "post-acquisition conduct" (MB p 17) waived or relinquished its rights under its pre-2002 contracts with the former owners of the Williston exchange when it made a new resale agreement with Missouri Valley in 2004.

Whether addressed *de novo* or under the substantial evidence standard of review, Midcontinent's 2002 version of its waiver claim should be dismissed.

The 2004 Waiver Theory has two parts, one of which does present an issue of federal law under the Telecommunications Act to be reviewed de novo. The other part rests on assertions of facts that lack evidentiary support.

Midcontinent's 2004 Waiver Theory seems to follow this course. Section 251(c)(1) imposes on Missouri Valley the duty of all ILECs to negotiate agreements to perform duties under §§251(b) & (c). One of those duties is to offer its retail services to CLECs at wholesale rates for resale. §251(c)(4). Missouri Valley's duties as to resale were performed, in 2004. Interconnection is another duty. §251(c)(2). When the resale agreement was made in 2004, that set the stage for a later interconnection under §251 (c)(2) with the §251(f)(1)(A) exemption short-circuited--according to Midcontinent. Midcontinent alleges Missouri Valley's making the agreement for resale services in 2004 "foreclosed" Missouri Valley from claiming its exemption from interconnection:

> "Missouri Valley's acquiescence to the requirements of section 251(c) in concluding the resale agreement foreclosed it from later claiming that the rural exemption would shield Missouri Valley from its other Section 251(c) obligations." Complaint, ¶ 47; denied as argumentative, MVC's Answer ¶ 4.

How did "waiver" become "foreclosure;" how did waiver or foreclosure happen in 2004? It happened one or of both of two ways. According to Midcontinent, "[i]n negotiating the resale agreement, Missouri Valley did not assert that it was

immune from any Section 251 obligations under the rural exemption." Complaint, ¶ 37. Midcontinent's Notice of Bona Fide Request and Petition to Find Rural Exemption Waived, filed on February 8, 2008, averred that "MVC has waived its right to the rural exemption under the Act by previously entering into an interconnection agreement with Midcontinent for the purpose of resale. Said interconnection agreement was filed with this Commission on December 3, 2004, as PU-04-638." PIR 1. In 2008, Midcontinent decided to call its 2004 *resale* agreement an *interconnection* agreement. In 2009, Midcontinent has shown as undisputed fact that the agreement (Midcontinent's motion exhibit I) is labeled a resale agreement and does not include the word "interconnection" anywhere in the agreement. Nor does the document include a waiver of Missouri Valley's exemption under §251(f)(1)(A).

Midcontinent's primary 2004 waiver/foreclosure argument is not based on arguments about facts, disputed or undisputed. The argument is presented as a matter of law, to be addressed *de novo.* Midcontinent does not cite any provision in the Act that supports its claim that "MVC has waived its right to the rural exemption under the Act ..." PIR 1. There is no provision of the Act relating to waiver of the rural exemption. Midcontinent's waiver/foreclosure argument is based on Midcontinent's self serving interpretation of the rural exemption statute, §251(f)(1).

According to Midcontinent, Missouri Valley is foreclosed from claiming the rural exemption from interconnection because "Section 251(f)(1) does not permit selective application of the rural exemption to different obligations; either the

exemption applies or it does not." Complaint, ¶ 26. Or, "Midcontinent's waiver argument required the NDPSC to determine whether Section 251(f) permitted Missouri Valley to engage in selective waivers of its rural exemption - claiming it in some cases while not in others." Midcontinent's Opposition to Motions to Dismiss, p.7; MB 18-20. Or, "Section 251(f) does not permit a carrier to partially invoke the exemption; the context and language of that provision demonstrate it is an all-or-nothing proposition." PIR 31, pp. 8-9. (Strangely, Midcontinent's complaint paragraph 26 includes a quotation attributed to the *REO* as a claimed endorsement of Midcontinent's selective application theory. There is nothing remotely resembling the quoted words anywhere in the *REO*. Nor is the claim repeated in Midcontinent's memorandum supporting its motion for summary judgment.)

According to Midcontinent's line of reasoning, the resale agreement was Missouri Valley's one and only opportunity to claim all of the exemption under §251(f)(1)(A). Missouri Valley did not "assert" the exemption when it made the 2004 resale agreement. That non-action waived the exemption for one purpose (resale) and that was also a waiver for all future purposes, including interconnection when that was requested by Midcontinent in 2007, because "selective waivers under Section 251(f)(1) [would be] incompatible with the structure of Section 251(f)." That is the theory, as a matter of law—according to Midcontinent. MB p. 19.

The context and language and structure of §251(f) do not support Midcontinent's interpretation. There is no provision of the Act relating to waiver

of the rural exemption. There is only one element of §251(f) that remotely relates to Midcontinent's "selective waiver" theory, §251(f)(1)(C), affecting rural telephone companies that provide video programming. Rural telephone companies that select to enter that line of business are not exempt from interconnection with a cable operator. "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)." *REO* ¶ 11. Congress was explicit that such conduct by a rural telephone company has the effect to make the exemption unavailable. Congress did not enact that any other conduct would make the exemption unavailable. The context and structure of the statute do not support Midcontinent's interpretation that its "selective waiver" theory should be read into §251(f)(1)(A) or (B).

The several subjects of the exemption - duties that shall not apply to rural telephone companies - are separated by commas and the disjunctive "or" in §251(f)(1)(A) and in §251(f)(1)(B). The interconnection obligation is stated in §251(c)(2), separate from the resale obligation in §251(c)(4). The interconnection and resale obligations are subjects of 47 CFR Part 51, with subparts D and G separately addressing interconnection and resale. Interconnection and resale obligations under the Act were separately addressed by the FCC in the Order that installed the regulations. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, 11 FCC Rcd. 15449, (First Report and Order), Section IV, ¶¶ 172 -225 and Section VIII, ¶¶863 - 984. The context and language and structure of

§251(c) and §251(f) support the interpretation that the rural exemption applies separately to interconnection and to resale.

Resale and interconnection are defined terms. "'*Interconnection*' is defined as the linking of two networks for the mutual exchange of traffic." 47 CFR 51.5. "Resale" is an ILEC's wholesale rate sale to a CLEC for resale the services the ILEC offers at retail. 47 USC § 251(c)(4) and 47 CFR 51.605(a). Resale is a service Missouri Valley provided to Midcontinent on Missouri Valley's network, not a linking with Midcontinent's network. There was no exchange of traffic under the resale agreement. Interconnection is not resale and resale is not interconnection because resale is not a linking of networks for the exchange of traffic.

The differences between resale and interconnection are acknowledged by Midcontinent's pleading. "In 2007, Midcontinent prepared to improve its competitive business model from providing customers with the 'resale' of Missouri Valley service to providing full facilities-based competition using its own telecommunications plant. ... To make this improvement Midcontinent needed interconnection with Missouri Valley to allow for the exchange of telephone traffic between their respective networks." Complaint ¶ 38.

There is a substantial economic difference between resale and interconnection arrangements. Missouri Valley knows that, so does Midcontinent, and so did the Commission. *REO* ¶ 13-33. Resale arrangements do not cause an undue economic burden on an ILEC, because the wholesale prices an ILEC receives from the CLEC for services sold for resale are its retail

prices discounted to reflect avoided costs. 47 USC § 252(d)(3); 47 CFR 51.607 and 611; First Report and Order, ¶¶ 907 - 934. The undue economic burden issue does not arise in the resale context. If and when interconnection is requested, that is when the undoubted economic burden is presented by the request and the question whether interconnection is *not unduly* burdensome becomes an issue.

The entire record of the Commission's inquiry to determine whether Missouri Valley's exemption under §251(f)(1)(A) should be terminated shows the dominant issue was whether Midcontinent met its burden of proof under §251(f)(1)(B) that its request was "not unduly economically burdensome." That economic issue can arise only where the request is for interconnection; that economic issue is absent where the request is for resale services.

The distinction between resale and interconnection has a difference measured in millions of dollars. The economic difference was demonstrated in the economic impact exhibits and all the testimony in the hearing that resulted in the *Rural Exemption Order*. (See the following section of this memorandum. See also Midcontinent's Complaint ¶ 67.) The economic distinction between resale and interconnection highlights the fundamental flaw in Midcontinent's proposed statutory interpretation that a rural telephone company that has made a resale agreement under §251(c)(4) is not exempt under §251(f)(1)(A) from interconnection under §251(c)(2). When interconnection is requested, whether the undoubted economic burden of interconnection is not unduly burdensome is

an issue not "waived" or "foreclosed" by a previous resale agreement that was not burdensome.

The waiver/foreclosure argument inspires a question that tests Midcontinent's selective waiver theory: What might have happened if Missouri Valley had asserted the rural exemption when the resale agreement was negotiated in 2004? There is a frame of reference for that question to be addressed, the Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation, PSC Case No. PU-O5-451.

In that case, Midcontinent requested a resale agreement in the Devils Lake exchange. North Dakota Telephone Company ("NDTC," a rural telephone company within the meaning of the Act) asserted the rural exemption. Midcontinent notified the Commission and requested an inquiry whether the NDTC rural exemption should be terminated. After hearing, NDTC conceded that its exemption could be terminated, regarding resale in the Devils Lake exchange.

In the NDTC case, post-hearing developments disclosed Midcontinent's effort to parlay the termination of NDTC's exemption as to resale to include termination of its exemption as to interconnection. The argument now reasserted by Midcontinent in the Missouri Valley case. NDTC objected, and the Commission's final order in Case No. PU-05-451 clarified the termination of the exemption applied only to resale in the Devils Lake exchange because resale was what Midcontinent requested. Likewise, if Missouri Valley's exemption under §251 (f)(1)(A) were terminated as to resale in 2004, the termination of the

exemption is limited as to resale, and the exemption as to interconnection remains, continuing in effect unless and until terminated by the Commission after a bona fide request and inquiry under §251 (f)(1)(B) . The exemption continues in effect as to interconnection not only because Missouri Valley did not waive the interconnection exemption in 2004, but also because of what Midcontinent did not do in 2004. Midcontinent did not make a bona fide request for interconnection; it did not request an inquiry and determination by the Commission for termination of Missouri Valley's exemption from interconnection under § 251(f)(1)(B).

(Copies of the Commission's initial order, order on reconsideration and final order in Case No. PU-05-451 are submitted in support of Missouri Valley's and opposition to Midcontinent's motions for summary judgment.) Perusal of those documents discloses the source of Midcontinent's misplaced claim in complaint paragraph 26, a quotation attributed to the *REO* and claimed as endorsing Midcontinent's "selective waiver" theory. The quoted words are in paragraph 13 of the first (April 26, 2006) order, words that were absent in the final (June 7, 2000) order where the Commission limited its decision as not extending beyond resale.)

The 2004 resale agreement was not the subject of a separate Commission proceeding. The agreement was filed and assigned a case number, PU-04-638, but there was no inquiry under §251(f)(1)(B) to address the rural exemption under §251(f)(1)(A). Midcontinent did not make a bona fide request for interconnection or file a notice of bona fide request for interconnection to

initiate an inquiry by the Commission. No inquiry was made and no determination was made by the Commission in 2004 under §251(f)(1)(B) in case No. PU-04-638 as to any factors affecting termination of the §251(f)(1)(A) exemption from interconnection under §251(c)(2) or resale under §251(c)(4).

Midcontinent did not initiate an inquiry in 2004 when the resale agreement was filed. There was no purpose for Missouri Valley to assert its §251(f)(1)(A) exemption from interconnection duties under §251(c)(2) when the resale agreement was negotiated. Both parties to the 2004 resale agreement conducted themselves in 2004 exactly as expected by the Federal Communications Commission when it promulgated the resale rules in 1996. The avoided cost pricing rules were intended to facilitate the development of competition under resale arrangements made in voluntary negotiations without the necessity of litigation about the economic burdens of interconnection. First Report and Order,¶ 907.

Not only was the rural exemption not addressed, waived or foreclosed in case No. PU-04-638, the rural exemption was preserved in Case No. PU-04-546 where the Commission granted Midcontinent a certificate of public convenience and necessity. The Commission specified that granting Midcontinent a certificate on a statewide basis was not a ruling that affects the rights of rural telephone companies under 47 U.S.C. § 251(f).

> "In this Case, as in other cases in which statewide authority was requested, the Commission will adhere to the precedent established in the AT&T certificate case, Case No. PU-453-96-83. In AT&T, the Commission

> held that its determination of the public interest with regard to the service territories of rural telephone companies is subject to any future proceedings under Section 251(f)(1) or (2) of the Telecommunications Act of 1996 (47 U.S.C. §251(f)(1) or (2)). The Commission also held that granting the certificate on a statewide basis is not a ruling that affects the rights of specific rural telephone companies under 47 U.S.C. §251(f)."

Not only does the Commission's clear language in Case No. PU-04-546 preserve rights of rural telephone companies under §251(f)(1) vis-à-vis Midcontinent, the Commission has made orders in other cases to assure that Midcontinent would not be permitted to leverage a resale agreement to bypass a rural telephone company's exemption from interconnection. The final order in Case No. PU-05-451 has already been cited. In two later cases, before the Missouri Valley case, in PSC Cases PU-06-345 and PU-06-400 the Commission approved Midcontinent's stipulations with other rural telephone companies for limited termination of the rural exemption in connection with negotiations for resale arrangements. Apparently "selective waiver" is selectively acceptable to Midcontinent. (Copies of the Commission's orders in Cases No. PU-04-546, 06-345 and PU-06-400 are submitted in support of Missouri Valley's and opposition to Midcontinent's motions for summary judgment.)

The waiver/foreclosure argument inspires another question that tests Midcontinent's selective waiver theory, a question invited by Midcontinent's invoking the FCC as supporting the theory. MB.19-20. Considering the decision where the 8th Circuit Court of Appeals vacated the FCC's "cramped"

interpretation that "impermissibly weakened the broad protection Congress granted to small and rural telephone companies" (Iowa v FCC , at 761), does Midcontinent's waiver/foreclosure proposition pass the statutory interpretation tests of plain meaning and congressional intent? No, as the ruling in Iowa v. FCC explains:

> "The statute states that the requirements of § 251(c) 'shall not apply to a rural telephone company *until*' a request has been made 47 U.S.C. § 251(f)(1)(A) (emphasis added [by the court]). The use of the word 'until' suggests that the rural telephone companies have a continuing exemption that is only terminated once a bona fide request is made, provided the request is not unduly economically burdensome, is technically feasible, and is consistent with § 254. Iowa v FCC, at 762.

Lacking support such as "Chevron deference" that was insufficient to sustain the FCC's interpretation of § 251(f)(1)(A) that would have impermissibly weakened the broad protection Congress granted to rural telephone companies, Midcontinent's cramped proposition that Missouri Valley's exemption from interconnection disappeared in a resale agreement is untenable. The context and language and structure of §251(f) do not support Midcontinent's interpretation that the 2004 resale agreement constituted a waiver or foreclosure of Missouri Valley's exemption from interconnection when that was requested in 2007.

The other variation of the 2004 Waiver Theory is not based on a cramped interpretation of the Act, it is a claim based on more commonplace understanding of the word "waiver," as if Missouri Valley had unwittingly surrendered the exemption from interconnection when it made the resale agreement. "Midcontinent's conduct in executing a resale agreement with Midcontinent

constituted a waiver of any right Missouri Valley might have had to invoke the rural exemption as to Midcontinent." Complaint prayer ¶ 1.b; MB p.17.

There is not a scintilla of evidence in the record (the record that Midcontinent declares as providing ample basis to evaluate Midcontinent's claims) to support the waiver claim thus presented by Midcontinent. No evidence was offered and no evidence that was received is cited by Midcontinent in support of its statements about what Missouri Valley did or did not "assert" in negotiations or any other "conduct" that "constituted a waiver of any right Missouri Valley might have had...." A document titled "Resale Agreement" and identified as such on every page is part of Midcontinent's summary judgment package, marked exhibit I and inaccurately listed as "Interconnection Agreement."

The Resale Agreement, Midcontinent's motion exhibit I, is not part of the evidentiary record in the PSC Inquiry. Midcontinent's memorandum in support of its summary judgment motion declares "[t]he Court's review is based on the record developed before the NDPSC, and no additional factual development is necessary or appropriate." MB, p. 13. Violating its own principle, Midcontinent attempts additional factual development to support its waiver theory.

To what effect? The 2004 Resale Agreement, motion exhibit I, says nothing about interconnection. The agreement says nothing about the §251(f)(1)(A) rural exemption or waiver of the exemption. The agreement does not include any legally significant verbiage open to interpretation as an opportunity for Midcontinent to avoid or evade Missouri Valley's exemption from

interconnection under §251(f)(1)(A). The Resale Agreement includes (section 2.26) standard boilerplate verbiage that the document contains the entire agreement. If anything is foreclosed by the 2004 agreement – what is foreclosed is Midcontinent's opportunity to assert an implied waiver of Missouri Valley's statutory exemption from interconnection.

Midcontinent's 2002 Waiver Theory and its alternative 2004 Waiver/foreclosure Theory (Complaint ¶ 73 and Prayer par ¶ 1.a. & b.) "that Missouri Valley was not legally entitled to assert the Rural Exemption because Missouri Valley's conduct, on at least two separate occasions, constituted a waiver of any right Missouri Valley might have had to assert the rural exemption. . . ." are untenable. Where Midcontinent has moved for summary judgment claiming no disputed facts and relying on the Commission's record that Midcontinent regards as providing ample basis to evaluate Midcontinent's claims, its claim of waiver implied from conduct is out of place. The claim is untenable and out of place because what conduct occurred or what that conduct implied—if issues—are issues of fact subject to dispute. Midcontinent argues about what Missouri Valley intended. (MB p. 17) If intent were the argument in a court action where original jurisdiction is exercised, Missouri Valley would assert the argued implication is a disputed material issue of fact, one on which Midcontinent bears a burden of proof, and the court would make a determination after a trial. In this action where the court is called on to review the determination of the Commission, the court is not called on to decide any issue of fact, or the particular issue of fact asserted by Midcontinent, whether Missouri Valley's

"conduct ... constituted a waiver of any right Missouri Valley might have had to assert the rural exemption."

Missouri Valley acquired the Williston exchange in 2002, and Missouri Valley and Midcontinent made a resale agreement in 2004. Those are the facts that Midcontinent claims "on at least two separate occasions, constituted a waiver of any right Missouri Valley might have had to assert the rural exemption." There is no evidence of other facts. Midcontinent's implied waiver theory is an argument not supported by any evidence, not in the PSC Inquiry and not in the court action. The substantial evidence—and the substantial lack of any evidence of conduct that constituted a waiver—shows the Commission was neither arbitrary nor capricious in disregarding Midcontinent's implied waiver arguments. In the words of the summary judgment rule, Midcontinent's disputation about conduct constituting waiver is not an issue of material fact, not in this action for judicial review.

Midcontinent's waiver/foreclosure theory is like the myth of the Trojan Horse. The resale agreement is a secret weapon in a sneak attack to defeat Missouri Valley's statutory rural exemption from interconnection. The waiver/foreclosure argument was hidden for three years, hidden inside the 2004 resale agreement, waiting until Midcontinent decided in 2007 it wanted interconnection with Missouri Valley.

Missouri Valley's exemption from interconnection exists and continues by legislative fiat, until terminated under procedures specified in §251 (f)(1)(A) and (B). Iowa v FCC. Section 251(f)(1) imposes burdens on Midcontinent's

endeavors to obtain an interconnection with Missouri Valley or any rural telephone company. These burdens require Midcontinent to: (1) make a bona fide request for interconnection; (2) file a notice with the Commission to initiate an inquiry whether the exemption should be terminated; (3) prove the exemption should be terminated by proving interconnection would be not unduly economically burdensome on Missouri Valley; and (4) prove interconnection would be consistent with §254, regarding universal service. Midcontinent took no action to terminate Missouri Valley's exemption in 2004. Midcontinent made its first and only bona fide request for interconnection in 2007, and in 2008 it filed notice of the request and made its first request for the Commission to conduct an inquiry whether to terminate Missouri Valley's exemption.

There is no basis in the statute supporting Midcontinent's proposition that all of its burdens and pre-requisites to obtaining an interconnection in 2007 and 2008 are conditioned on Missouri Valley's assuming a burden of pleading its exemption in 2004, before any of Midcontinent's burdens were operative with respect to its 2007 request for interconnection. There is no basis in the statute supporting Midcontinent's proposition Missouri Valley should have pleaded its exemption from interconnection in 2004 in the context of negotiating a resale agreement that did not include Midcontinent's bona fide request for interconnection. There is no basis in the statute supporting Midcontinent's proposition that the 2004 resale agreement that was filed but not subjected to hearing processes foreclosed an inquiry whether the exemption should be

terminated as to interconnection when Midcontinent made its first and only bona fide request for interconnection in 2007.

As matters of the plain meaning of the statute, of Congressional intent and court precedent, the structure of 251(f)(1) places all the procedural burdens on Midcontinent.

Missouri Valley's attention to Midcontinent's selective waiver theory is a lengthy but necessary and appropriate defense against Midcontinent's endeavor to "foreclose" Missouri Valley from relying on its statutory exemption from interconnection. There is nothing in §251(f)(1) or elsewhere in the Act to support the waiver claim as a matter of law. Considered as an issue of fact, the claim is unsupported in the record of the PSC Inquiry

As pleaded by Midcontinent and admitted by Missouri Valley, (complaint ¶ 37 and MVC's Answer ¶9), "the new [2004 resale] agreement did not foreclose Midcontinent from seeking interconnection services pursuant to section 251." Likewise, the 2004 agreement did not foreclose Missouri Valley's §251(f)(1)(A) exemption if Midcontinent were to request interconnection pursuant to §251(c)(2) and 251 (f)(1)(A) - as later happened in 2007. The 2004 resale agreement did not relieve Midcontinent of its burden of proof under §251(f)(1)(B) when Midcontinent requested interconnection in 2007.

There is no genuine issue of material fact as to Midcontinent's claim that Missouri Valley waived its rural exemption under 47 USC § 251(f)(1)(A). As a matter of law under the undisputed facts, Missouri Valley's §251(f)(1)(A) exemption was not waived or foreclosed in 2002 or in 2004. The exemption

continued, subject to the possibility it might be terminated after an inquiry under §251(f)(1)(B) when Midcontinent requested an interconnection in 2007. The possibility was not realized, because Midcontinent failed to prove what it needed to prove "to justify the termination of the otherwise continuing rural exemption," (Iowa v FCC, at 762).

B. The *Rural Exemption Order* is in accordance with the law under which the order was made and under which the complaint is filed, 47 USC § 251. The *Rural Exemption Order* is not arbitrary or capricious. Midcontinent's complaint about the *Rural Exemption Order* should be dismissed under the applicable standard of review.

Missouri Valley separately addressed Midcontinent's first issue, its waiver claim, because one aspect of that claim is an issue of law subject to *de novo* review. Other aspects of the waiver claim, relating to Missouri Valley's "conduct," and all of Midcontinent's second through fifth listed issues of law are not subject to *de novo* review, despite Midcontinent's complaint that "The Rural Exemption Order contains erroneous legal determinations in the interpretation of federal law under 47 U.S.C. § 252(f) for applying the rural exemption." Complaint prayer par ¶ 1.c. (Similar words are used throughout the Complaint, ¶¶ 53-60, 74-77 and 82.) All these issues are not issues of law subject to *de novo* review. All these issues of fact or mixed issues of law and fact, issues that are subject to the arbitrary and capricious/substantial evidence standard of review. WWC License, L.L.C. v Boyle, 459 F.3d 880, (8th Cir. 2006); Qwest Corp. v Koppendrayer, 436 F.3d 859, 863 (8th Cir. 2006); Ace Telephone Association v Koppendrayer, 432

F.3d 876, 878 (8th Cir. 2005); (8th Cir.2006); Qwest Corp. v Minnesota Public Utilities Comm'n. 427 F.3d 1061, 1064 (8th Cir. 2005); 5 U.S.C. § 706.

The substantial evidence rule is not only a standard of judicial review of agency action. The substantial evidence rule applies to agencies' decision making that might be challenged and subjected to judicial review. The substantial evidence rule requires an agency to not act where there is no substantial evidence to support an action. Where an agency has declined to act because of the absence of substantial evidence, the arbitrary and capricious/substantial evidence standard of review requires the agency be affirmed on judicial review.

Midcontinent claims its second through fifth issues are issues of law, a tactic described in a North Dakota Supreme Court appeal from a PSC decision:

> "We believe that NSP's third argument concerning the PSC's order is, in reality, a thinly veiled attempt to have this Court reweigh and reevaluate the evidence regarding wasteful duplication which was presented to the PSC during its hearings. Accordingly, we are unwilling to function as a 'super board' and second-guess the PSC's determinations." Northern States Power Co. v. North Dakota Public Service Commission, 452 N.W.2d 340, 345 (ND 1990).

The Commission's *Rural Exemption Order* addressed all the arguments about the interconnection and exemption provisions of 47 U.S.C. § 251 and all the evidentiary arguments made by Midcontinent in the PSC Inquiry. The Commission gave careful attention to the parties' evidence and arguments. *REO* ¶¶ 13 through 41. Analysis of the evidence on the economic burden and universal service (§ 254) prerequisites led the Commission to find that Midcontinent failed to prove what it needed to prove "to justify the termination of

the otherwise continuing rural exemption," (Iowa v FCC, at 762) and that Midcontinent's evidence was not more persuasive than Missouri Valley's evidence. *REO* ¶¶ 16, 18, 22, 26, 32, 33, 40 and 42. The substantial evidence and these findings led the Commission to conclude reasonably and with articulate explanation—not arbitrarily or capriciously—that Midcontinent failed to prove its requested interconnection with Missouri Valley is not unduly economically burdensome or is consistent with 47 U.S.C. §254. *REO*, p. 10.

Midcontinent's second issue is "the appropriate standard for satisfying the statutory requirement that Midcontinent's requested interconnection was `not unduly economically burdensome.'" Midcontinent's Consolidated Opposition to Motions to Dismiss, p. 8. Addressing this second issue as an issue of law, it is an issue that has been answered.

The case before the Commission and now before federal district court does not involve a new, novel or unsettled issue of law. There is no arguing whether an economic burden would result from implementation of Midcontinent's requested interconnection with Missouri Valley. That is settled as a matter of law.

> "There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in §251(b) or §251(c)." Iowa v FCC at 761.
> "The plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." Iowa v FCC, at 762.

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

§ 251 (f)(1).

Midcontinent claims that "The NDPSC erred in ruling that lifting the rural exemption would place an undue economic burden on Missouri Valley." Complaint, ¶ 56; MB p. 12. That is not what the Commission decided. What the Commission decided is that Midcontinent failed to prove what it needed to prove to justify the termination of the otherwise continuing rural exemption. (Iowa v FCC, at 762):

> "**Conclusions of Law**
> "2. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome."
> *REO*, page 10.

Addressing this second issue as it should be, this central issue in the PSC Inquiry was not a legal issue, it was the factual issue whether Midcontinent's requested interconnection would be *not unduly* economically burdensome on Missouri Valley. *REO,* ¶¶ 12-33. The Commission's consideration of the issue was guided by the decision and opinion in Iowa v FCC. *REO* ¶¶ 29 and 30. On the facts as found by the Commission, the *Rural Exemption Order* is in accordance with the law, 47 USC § 251(f)(1)(B), "the statute [that] requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." Iowa v FCC, at 762.

Midcontinent's quarrel with the Commission is not a legal issue. What Midcontinent wants is for the Court to adopt Midcontinent's view of the evidence

and to substitute that point of view for the Commission's findings on an issue of fact.

The evidence about economic burdens of interconnection focused on projections over a 4 year test period. Missouri Valley presented 1) factual evidence 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, a 31% reduction of annual net revenues in 2009 and a 56% reduction of annual net revenues in 2012, and 2) opinion evidence that such a loss of revenues would be unduly economically burdensome. *REO* ¶ 13. PIX MV1.

Midcontinent, the party with the burden of proof, presented no factual evidence on the economic issues! Midcontinent's only evidence was opinion evidence based on Missouri Valley's factual evidence, opinions critical of Missouri Valley's evidence.

One Midcontinent witness (Lundquist) proposed four "adjustments" to Missouri Valley's economic impact evidence. He opined that the economic impact from the requested interconnection would be a cumulative net revenue loss over the 2009-2012 timeframe of $888,577. Lundquist did not opine whether that amount of economic burden was undue. *REO*, ¶ 14. PIX M2.

A different Midcontinent witness (Gates) opined a cumulative net revenue loss over the 2009-2012 timeframe of $888, 577 would not be "unduly economically burdensome" as he defined that statutory term. In a sort of tag-team exercise, Lundquist produced a number, $888,577, that was uncritically

adopted by Gates. Gates acknowledged that amount is not "trivial" but "does not rise to an 'unduly economically burdensome' level," in Gates' opinion. (PIX M3; prefiled written direct testimony of Timothy Gates, pp. 5, 32, 37.) Gates' opinion about the economic burden of interconnection was specifically addressed and rejected by the Commission, following Iowa v FCC. *REO*,¶ 27-30.

The $2.69 million difference between the parties' economic impact analyses is due to four "adjustments" Midcontinent's witness Lundquist proposed to Missouri Valley's impact analysis.

> "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." *REO* ¶ 14.

The Commission considered all the evidence and the four proposed adjustments and concluded as to each that Midcontinent's evidence was not

persuasive, not more persuasive than Missouri Valley's evidence, that Midcontinent had not met its burden of proof. See *REO* ¶¶ 12-33, particularly 32 and 33:

> "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."

Midcontinent's major proposed adjustment in monetary terms was its argument to the Commission that interconnection-related economic burdens that would be suffered by Missouri Valley could be offset by federal universal service funding obtained via the "safety valve" provisions of 47 CFR 54.305. The proposed adjustment was $2.234 million, over 80% of Midcontinent's total of proposed adjustments to and over 60% of the $3.58 million economic impact shown by Missouri Valley's evidence. Midcontinent listed this proposed adjustment as its separate fifth issue, so Missouri Valley addresses this proposed adjustment separately, below.

Even if Midcontinent's safety valve theory were accepted by the Commission or by the Court, its proposed $2.234 "offset" to the economic burden interconnection with Midcontinent would impose on Missouri Valley would not repair Midcontinent's failure to carry its entire burden of proof, for two reasons.

First, Midcontinent admits an economic burden of at least $888,577. PIX M2, prefiled written direct testimony of Scott Lundquist pp. 4, 27, 28 and 29. PIX M3, Gates testimony, pp. 4, 32 and 37. *REO* ¶¶ 14 and 27.

Second, Midcontinent's 3 proposed adjustments other than the safety vale adjustment were also not proven. *REO* ¶¶16, 18, 21 and 22. None of the other 3 proposed adjustments is included in Midcontinent's list of issues for judicial review. So, momentarily setting aside the safety valve argument, the economic burden of interconnection is at least $888,577, and more.

> "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." *REO* ¶ 32. (Underscoring added.)

As noted, the 3 proposed adjustments other than the safety valve claim were not included in Midcontinent's list of issues claimed as federal questions. These three items were mentioned in Midcontinent's memorandum in support of its motion for summary judgment at pages 33-35, complaining that "the NDPSC failed to provide even a cursory explanation of its refusal to accept Midcontinent's cost adjustment." MB p. 33. The Commission's *Rural Exemption Order* most certainly did explain its "refusal to accept Midcontinent's cost adjustment." The Commission analyzed the proposed adjustments. The Commission explained that Midcontinent's evidence was not persuasive, not more persuasive than Missouri Valley's, and that Midcontinent did not meet its burden of proof on these three proposed adjustments. *REO* ¶¶ 14-22, What more explanation is due to a

party with a burden of proof than its evidence was not persuasive, not more persuasive than the evidence of the other party who had nothing to prove?

Midcontinent had the burden to prove that its requested interconnection "meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." Iowa v FCC, at 762. This was not a case where the credibility of witnesses was weighed as they testified about the facts of historical occurrences. This was a case where the Commission weighed the persuasive quality of witnesses' testimony about matters of opinion.

The Commission specifically commented about the persuasive quality of the witnesses' testimony (*REO* ¶¶ 16, 18, 26, 33, 40 and 42) as it evaluated the evidence and came to the conclusion—based on all the evidence offered by both parties—that Midcontinent failed to prove its requested interconnection with Missouri Valley is not unduly economically burdensome. *REO*, p. 10. Midcontinent's opinion evidence does not support an appellate court's reversal of the Commission's judgment about the persuasive quality of the witnesses' opinions. See Qwest Corp. v Koppendrayer, 436 F.3d 859 (8th Cir. 2006):

> "Qwest provided no evidence to the contrary. . . . Even assuming the HAI Model contains flaws, Qwest provided the ALJ with no satisfactory alternative. As a result, MPUC was not arbitrary and capricious ... based upon the evidence presented." Qwest at 870.

Midcontinent's third issue is "the `unduly economically burdensome' standard required the NDPSC to consider Missouri Valley's overall financial condition, including an examination of the relationship between Missouri Valley and its Montana-based parent company, Nemont Communications (`Nemont')."

Midcontinent's Consolidated Opposition to Motions to Dismiss, p. 8; MB 28-30.

The Commission did consider this issue:

> "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." *REO* ¶ 31. (Referring to Gates testimony, PIX M3, pp.34-37.)

Midcontinent's request for interconnection was addressed to Missouri Valley, not to Nemont. The notice of bona fide request that Midcontinent filed with the Commission to initiate the inquiry whether Missouri Valley's rural exemption should be terminated made no mention of Nemont. PIR 1.

Section 251 (f)(1) refers to a request to "a rural telephone company," a singular term defined term under the Act. § 153(37). The Act also defines an "affiliate." An "affiliate" is an entity or person "that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person." Act § 153(1). "Own" under this definition means an equity position of ten (10%). Id. Clearly Congress understood that a "rural telephone company," or any entity regulated under the Act, may have an "affiliate." Nemont Telephone Cooperative, Inc. is an "affiliate" of Missouri Valley.

Section 251(f)(1)(B) does not direct the Commission to consider whether a requested interconnection is not unduly economically burdensome on the "rural telephone company" and its "affiliate." Midcontinent argues the Commission and the court should ignore the plain language of § 251(f)(1)(B). Midcontinent

suggests the Commission should consider a requested interconnection's economic burden on a rural telephone company and its affiliate. An affiliate's economic status is not part of the analysis under Act § 251(f)(1)(B). (Consider by stark contrast the 2% rule of section § 251(f)(2) that is administered "at the holding company level" (47 CFR 51.403), negating by implication Midcontinent's proposal that § 251(f)(1) obliges Missouri Valley's corporate affiliate, Nemont, to assume any part of the economic burden of Midcontinent's requested interconnection under § 251(f)(1).)

When Mr. Gates opined that "The impact on Nemont in total should be the relevant benchmark," he cited some information about Nemont Telephone Cooperative that Missouri Valley provided in pre-hearing discovery. PIX M3, Gates testimony, pp.34-37. Neither Section 251(f)(1), nor any FCC regulations, nor the FCC's Local Competition Order often cited by Gates supports his opinion that the impact on the Nemont group of companies in total should be the relevant benchmark.

Here we have a ploy in litigation where a professional witness, not a lawyer or public official, expresses a personal opinion about what public policy and the law should be and what evidence should be relevant in an agency's deliberations. Then the party who retained the professional witness asserts the witness's opinion is an issue of law. MB 28-30. Even if it were provisionally conceded for purposes of argument that the Commission might have considered evidence about the relationship between Missouri Valley and Nemont as an aspect of its consideration whether Midcontinent proved that its requested

interconnection was not unduly economically burdensome, Midcontinent's assertion that the Commission was "required" to do so as a matter of law is supported only by Gates' opinion, not any legal authority. The Commission's finding 31 is in accordance with the law. Because the Commission was not required to consider evidence about the relationship between Missouri Valley and Nemont, its declining to do so was neither arbitrary nor capricious.

Fourth, Midcontinent argues about universal service. Complaint ¶¶ 52, 58 and 75; Midcontinent's Consolidated Opposition to Motions to Dismiss, p. 9. MB pp. 36-38.

The Commission addressed universal service issues in the *Rural Exemption Order*, ¶¶ 36-42, finding that "Midcontinent has not met its burden of proof that the interconnection would be consistent with 47 U.S.C. § 254 regarding universal service." (¶ 42). The Commission concluded that "Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is consistent with 47 U.S.C. §254, regarding universal service." *REO*, Conclusion of Law 3.

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

income consumers. Act § § 214 (e) and 254.

The rural exemption protects not only rural telephone companies from undue economic burdens, the exemption also protects consumers by imposing as a pre-requisite that termination of the exemption must be consistent with universal service policy under section 254. Act § 251(f)(1)(B).

Midcontinent's only evidence on the universal service issue was Gates' opinion that the economic burdens of interconnection "will not harm MVC's ability to maintain its universal service obligations." PIX M3, Gates testimony, pp. 4 and 31 (underscoring added). Midcontinent offered no evidence about what it might do for universal service. Gates testified about his opinion (PIX M3, pp. 22-24 - unsupported by any facts) that competition would somehow offset impairment of Missouri Valley's ability to perform its universal service obligations. The Commission particularly noted that Missouri Valley was and Midcontinent was not a participant in the universal service programs for low income consumers. *REO* ¶ 41.

The Commission's consideration of the opinion evidence about universal service included consideration of Midcontinent's "safety valve" arguments as affecting universal service. The Commission was not persuaded. *REO* ¶¶ 40 and 42.

Midcontinent's universal service arguments to the court ignore its own evidence, Gates testimony "that the '...key issue" of 'unduly economically burdensome' also affects '... whether interconnection will harm Missouri Valley's ability to meet its universal service requirements.' " *REO* ¶ 37, referring to Gates

testimony, PIX M3, p. 4. Missouri Valley's evidence included similar testimony "that economic burdens of the interconnection would impair Missouri Valley's performance of its universal service obligations. "*REO* ¶ 38. The parties were in basic agreement that the resolution of the economic burden issue would influence the outcome of the issue about universal service under section 254. The Commission's finding and concluding that Midcontinent failed to prove that interconnection in the Williston exchange is consistent with 47 U.S.C. §254, regarding universal service, is a finding and conclusion consistent with and supported by its similar finding that Midcontinent failed to prove interconnection in the Williston exchange is not unduly economically burdensome. The findings and conclusion about universal service are supported by the substantial evidence.

Universal service and public interest considerations also undermine Midcontinent's' variously expressed waiver theories. Even if the Commission had determined or if the court were to decide that Missouri Valley relinquished its exemption from interconnection because it was willing to endure the economic burdens of interconnection, Missouri Valley has no power or status to waive the public interest pre-requisite that universal service be maintained. Under the plain words of §251(f)(1)(B), the exemption cannot be terminated unless to do so is both not unduly economically burdensome and consistent with §254. The Commission's finding that Midcontinent failed to prove that interconnection in the Williston exchange is consistent with 47 U.S.C. §254, regarding universal service, is an adequate independent alternative basis for Midcontinent's

complaint to be dismissed, regardless of the other four issues asserted by Midcontinent.

Midcontinent's fifth issue is "the NDPSC's `unduly economically burdensome' and universal service analyses must incorporate Missouri Valley's eligibility for federal `safety valve' funding ...." Midcontinent's Consolidated Opposition to Motions to Dismiss, p. 9; MB 30-33; Complaint ¶¶ 51, 58 & 75 c.

Midcontinent's major argument in monetary terms is its argument that interconnection-related economic burdens that would be suffered by Missouri Valley could be offset by federal universal service funding obtained via the "safety valve" provisions of 47 CFR 54.305. The proposed adjustment was $2.234 million, over 80% of Midcontinent's total of proposed adjustments to and over 60% of the $3.58 million economic impact shown by Missouri Valley's evidence.

Considered under economic burden analysis, the Commission found

"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."

Considered under universal service analysis, the PSC found

"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. [Referring to Lundquist testimony, p. 24.] The Commission is not

persuaded that Missouri Valley would be able to receive additional USF subsidies under the safety valve mechanism.

"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. "

Rural Exemption Order, pp. 7-9

Midcontinent did not deny that Missouri Valley would suffer an economic burden from interconnection. It disputed the amount of economic burden. Midcontinent did not deny that Missouri Valley would suffer an economic burden of at least $3.12 million. (Midcontinent's admitted $888,577 of economic burden plus the $2.234 million of revenue loss arguably recouped via the safety valve subsidy.) Midcontinent did not deny that $2.234 million is included in the total economic burden of interconnection. Instead, Midcontinent claims that Missouri is "entitled" to recoup part of the total loss of revenue from a subsidy program. Scarcely pausing for a figurative breath, Midcontinent makes a leap of logic to assert Midcontinent is entitled to claim Missouri Valley's entitlement as if the speculative entitlement were real and really Midcontinent's.

Midcontinent's safety valve offset argument that did not persuade the Commission is also a major part of its complaint in court. "Whether Missouri Valley is eligible for safety valve funding is a question of law, not a question of fact, and Missouri Valley is entitled to such funding as a matter of law." Complaint ¶¶ 58, 51 and 75 c. Midcontinent's safety valve argument presented "as a matter

of law" is wrong, for a number of reasons.

First, whether Missouri Valley would be entitled to safety valve subsidies was not a question of law before the Commission and is not a question of law before the Court in this case. At best, whether Missouri Valley might be entitled to safety valve funding was a matter of a witness's opinions in the PSC Inquiry. (Again, Missouri Valley is challenged by Midcontinent to respond to a witness's fantasy as if it were a substantial issue of law. Complaint ¶¶ 51,58 and75 c.; MB 30-33.) Neither the Commission had nor does the Court have it within its present power to award Missouri Valley safety valve subsidies to offset its future losses that would be caused by interconnection with Midcontinent.

Second, if Midcontinent's effort to claim safety valve funds as an offset to Missouri Valley's economic burdens were addressed as a matter of law, the Court will conclude the Commission was correct in rejecting the argument. The Commission's conclusion is supported by the Federal Communication Commission's Order that created the safety valve subsidy. *REO* 23-26.

> "24. 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) ¶¶ 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.)" *Rural Exemption Order*, p. 6.

Safety valve subsidies do not replace lost revenue. Safety valve funding is not available to offset revenue losses resulting from interconnection or any other cause. Interconnection with Midcontinent will not make Missouri Valley "entitled" to safety valve subsidies, so there is no basis for the claimed offset, as a matter of law.

Third, the *Universal Service Order* shows not only that safety valve subsidies are not available to offset the economic burdens of interconnection. That Order also shows Midcontinent errs to argue Missouri Valley is "entitled" to any safety valve subsidies in any future year. If Missouri Valley is not "entitled," then certainly safety valve subsidies are not a future collateral source possibly available for Midcontinent to presently claim as a partial offset to the economic burden that its requested interconnection would inflict on Missouri Valley. (Having mentioned "collateral source," it is pertinent to note that Missouri Valley does not claim that the safety valve is a source of revenue available to it but not available for Midcontinent to claim as an offset. "Hanson testified that Missouri Valley does not qualify for support from the safety valve mechanism." *REO* ¶ 24.)

Safety valve subsidies are not a statutory entitlement program. The safety valve provisions of 47 CFR 54.305(d) are part of a temporary five year universal service plan created by the FCC exercising its delegated authority that includes

the authority to develop a long term universal service plan. *Universal Service Order,* ¶¶ 1, 8, 11, 24, 25, 30 and 167-177. More than 5 years have passed since the *Universal Service Order* was made in 2001. The regulations installed by the Order do not include a self-executing "sunset clause" and remain in place. The future of universal service support in general and safety valve subsidies in particular is written neither on the wall nor between any lines. The *Universal Service Order* plainly states the universal service regulations , including 47 CFR 54.305 and the safety valve provisions of subsection (d), are "transitional in nature" (*Order,* ¶ 167), subject to the FCC's continuing jurisdiction under the 1996 Act and its declared intention to reform the rules regarding universal service subsidies. *Universal Service Order,* ¶¶ 1-30. See also WWC, where the court stated "in our interpretation of the Act, we owe deference to the Federal Communications Commission ("FCC") based on the fact that Congress expressly charged the FCC with the duty to promulgate regulations to interpret and carry out the Act." 459 F.3d at 890.

Whether Missouri Valley might be "entitled" to safety valve subsidies in the future is not a legal issue in this case. Neither is it a matter of fact; it is a matter of opinion about which the Commission was not persuaded by Midcontinent. Nor was Midcontinent entirely persuaded by its own argument that Missouri Valley "*may* be eligible for safety valve support for investments in the acquired lines." See Midcontinent brief in the PSC Inquiry, PIR 31, p. 21, a statement consistent with its expert witness's equivocal testimony.

Though his opinion was offered to carry a burden of proof, Lundquist's

testimony exudes uncertainty and built in deniability of responsibility for anticipated possible future failure of his advice:

"*Potential* changes to MVC's subsidies from the Universal Service Fund ("USF")" ...

(Lundquist testimony, PIX M2, p. *18)*

"To summarize, despite the 'parent trap' rule, MVC *may be able* to receive significant additional USF subsidies for its "Citizens" lines, via the Safety Valve mechanism.

....

"This *would happen if* the per line cost associated with MVC's 'Citizens' lines increases above 115% of the national benchmark, *which is likely to happen if* MVC loses lines in the case of Midcontinent's entry."

....

"MVC would receive this support under the Safety Valve mechanism which .... *could be a significant offset* to the revenue losses MVC is claiming in its Interconnect Model scenario."

(Lundquist testimony, PIX M2, p. 24-25) (Underscoring and italics added.)

An opinion witness's words connoting possibility rather than probability or certainty do not rise to the level of opinion evidence sufficient to carry a burden of proof. Midcontinent's opinion evidence does not support an appellate court's reversal of the Commission's judgment about the persuasive quality of the witnesses' opinions. See Qwest Corp. v Koppendrayer, 436 F.3d 859 (8th Cir.

2006).

Lundquist's outright errors and the quality of his opinions that safety valve subsidies might be claimed to offset the economic burdens of interconnection or to repair impairment of universal service amply demonstrate the Commission made no errors of law and was neither arbitrary nor capricious in its findings and conclusions that "Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome" and "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." *Rural Exemption Order*, p. 10, Conclusions of Law 2. and 3.

Missouri Valley has responded point by point to Midcontinent's claimed errors. There is more to be said about Midcontinent's errors infecting its arguments considered individually and comprehensively.

Throughout this memorandum, Missouri Valley has emphasized the statutory word *unduly* regarding economic burdensome. There is another statutory word to be emphasized: *not unduly* economically burdensome. The plain words of §251(1)(B) made even more plain by Iowa v FCC impose on Midcontinent the burden to prove that its requested interconnection is "*not unduly* economically burdensome."

Midcontinent claims that "The NDPSC erred in ruling that lifting the rural exemption would place an undue economic burden on Missouri Valley." Complaint, ¶ 56; MB p. 12.. That is not what the Commission decided! What the

Commission decided is that Midcontinent failed to prove what it needed to prove to justify the termination of the otherwise continuing rural exemption. (Iowa v FCC, at 762):

"**Conclusions of Law**

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

Rural Exemption Order, page 10. [Underscoring added.]

Throughout its summary judgment memorandum, Midcontinent evades the statutory word "*not.*" E.g. where the words "unduly economically burdensome" are quoted six times on page 21 of its memorandum, six times the word "not" is omitted. Page 21 is only an example. Word searching discloses 20 other instances of the words "unduly economically burdensome" being quoted without the "not." There are many other times where the word unduly is used by Midcontinent, not in quotes, and also without the "not." For Midcontinent to ignore the statutory word "not" will not make it go away. The word "not" is the word installed in section 251(f)(1)()B) by Congress that plainly imposes on any CLEC that requests interconnection with a rural telephone company the burden to prove that the requested interconnection - undoubtedly economically burdensome - is "*not unduly* economically burdensome. Iowa v FCC, at 762.

Midcontinent's arguments in this action for judicial review do not solve its problem. Midcontinent's problem is its evidence, its evidence that failed to persuade the Commission that the undoubted economic burden of

interconnection was "*not unduly* economically burdensome." The Commission said it plainly in the *Rural Exemption Order*, findings ¶¶ 16, 18, 22, 26, 32, 33, 40 and 42, and conclusions 2 and 3. Midcontinent's evidence was not persuasive; Midcontinent failed to prove what it needed to prove as a pre-requisite to termination of Missouri Valley's otherwise continuing exemption from interconnection.

In this case Midcontinent makes the extreme argument that the Court should be persuaded by Midcontinent's opinion evidence and Midcontinent's arguments and the Court should impose those opinions on the Commission. In this case Midcontinent's arguments are in reality a thinly veiled attempt to have the Court reweigh and reevaluate the evidence and to second guess the PSC's determinations. That is not what federal district courts do when reviewing State commissions' determinations under the Telecommunications Act. WWC License, L.L.C. v Boyle, 459 F.3d 880 (8th Cir. 2006); Qwest Corp. v Koppendrayer, 436 F.3d 859 (8th Cir. 2006); Ace Telephone Association v Koppendrayer, 432 F.3d 876 (8th Cir. 2005); (8th Cir.2006); Qwest Corp. v Minnesota Public Utilities Comm'n. 427 F.3d 1061 (8th Cir. 2005).

C. Midcontinent's claim for damages should be dismissed as a claim for which relief cannot be granted.

Sections 206 and 207 of the Act (cited in complaint ¶ 79) authorize an action for damages in Federal district court, "In case any common carrier shall do... or omit to do any act, matter or thing in this Act required to be done...." 47

USC § 206.

Midcontinent's complaint alleges a claim for damages, in complaint ¶¶ 62-67, 78 & 79 and prayer for relief No. 5, summarized in ¶ 78: "As a direct, foreseeable, and proximate result of Missouri Valley's failure to comply with its obligations under Section 251 of the Act, Midcontinent has suffered damages in an amount to be proven at trial."

Section 251 is the alleged legal basis of the Missouri Valley's alleged obligation to Midcontinent. Specifically, Midcontinent complains that its request for interconnection with Missouri Valley under § 251 (c)(2) of the Act was declined by Missouri Valley in reliance on the exemption under § 251(f)(1)(A). Complaint, ¶¶ 39 and 40.

Nothing in § 251 required any act, matter or thing to be done by Missouri Valley regarding Midcontinent's request for an interconnection. As iterated and reiterated, not only in this memorandum but also in all the materials on file, Missouri Valley is a rural telephone company exempt from the interconnection obligations under § 251(c) of the Act. "Subsection (c) of this section shall not apply to a rural telephone company...." § 251(f)(1)(A). The exemption is "continuing" and remains "until" terminated by the PSC after an inquiry. (Iowa v FCC at 762); §§251(f)(1)(A)&(B). "Upon termination of the exemption, the State commission shall establish an implementation schedule...." § 251(f)(1)(B). All this is recognized by Midcontinent in its complaint, ¶¶ 18, 19, 22, 24 and 25.

Absent an inquiry, termination of the exemption, and establishment of an implementation schedule, there are no "obligations under Section 251 of the Act"

(complaint ¶ 78) borne by Missouri Valley to form the legal basis of Midcontinent's claim for damages. Even if the court were to reverse the determination of the North Dakota Public Service Commission, effectively deciding that Missouri Valley's § 251(f)(1) exemption from § 251(c) interconnection duties should be terminated, an implementation schedule would remain to be established by the Commission.

Unless and until Missouri Valley's § 251(f)(1)(A) exemption from the interconnection duties under § 251 (c) were terminated, it cannot be charged with having done or omitted to do any act, matter or thing required under the Act to be done. The claim for damages should be dismissed, as a matter of law.

V. CONCLUSION

Midcontinent initiated an inquiry for the North Dakota Public Service Commission's determination whether Missouri Valley's § 251(f)(1)(A) exemption from § 251 (c) interconnection duties should be terminated under §251(f)(1)(B). Midcontinent had the burden to prove that its requested interconnection meets the prerequisites under §251(f)(1)(B) to justify the termination of the otherwise continuing exemption. The NDPSC determined that Midcontinent "failed to prove" what it needed to prove. *Rural Exemption Order*, conclusions of law 2 and 3.

As a matter of law under the undisputed facts, Missouri Valley's § 251(f)(1)(A) exemption from interconnection was not waived or foreclosed before Midcontinent requested an interconnection.

Applying the principles under which courts review the actions of administrative agencies, the Court should summarily dismiss the complaint - effectively affirming the *Rural Exemption Order*. The *Rural Exemption Order* is in accordance with the law under which the complaint is filed, 47 USC § 251. The *Rural Exemption Order* is not arbitrary or capricious. It is supported by the evidence, and by the lack of persuasive evidence presented by the party with the burden of proof.

Unless and until Missouri Valley's exemption from the interconnection duties under § 251 (c) were terminated, it cannot be charged with having done or omitted to any act, matter or thing required under the Act to be done. The claim for damages should be dismissed, as a matter of law.

For all these reasons, the complaint should be entirely dismissed, with prejudice.

Dated this 31st day of August, 2009.

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