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PUBLIC SERVICE COMMISSION

November 17, 2008

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

**RE: *Midcontinent Communications, a South Dakota partnership v. Missouri Valley Communications, Inc. Case No. PU-08-61***

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

***Missouri Valley Communications, Inc. Response to Petition for Reconsideration or Rehearing; and***

***Affidavit of Mailing.***

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

Very Truly Yours,

  
David J. Hogue

DJH/klo

Enclosures

cc: Mr. John Olson  
Mr. Shawn Hanson

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

MIDCONTINENT COMMUNICATIONS, )  
A SOUTH DAKOTA PARTNERSHIP, )  
 )  
COMPLAINANT, )  
 )  
VS. )  
 )  
MISSOURI VALLEY COMMUNICATIONS )  
INC., )  
 )  
RESPONDENT. )

CASE NO. PU-08-61  
OAH NO. 20080079

MISSOURI VALLEY COMMUNICATIONS )  
INC. )  
 )  
APPLICATION FOR SUSPENSION OR )  
MODIFICATION PURSUANT TO )  
47 U.S.C. § 251 (F)(2) )

CASE NO. PU-08-176  
OAH NO. 20080079

Kristi L. Olson, being first duly sworn, deposes and says that she is of legal age, and that on the 17<sup>th</sup> day of November, 2008, she served the attached *Missouri Valley Communications, Inc. Response to Petition for Reconsideration or Rehearing* in this matter upon the following by placing a true and correct copy thereof in an envelope addressed as follows:

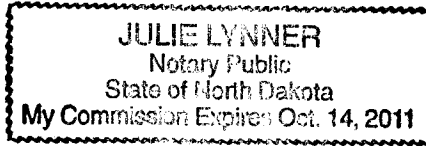
**Mr. John Olson**  
**418 East Broadway, Ste. 9**  
**Bismarck, ND 58501**

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

*Kristi Olson*  
Kristi L. Olson

Subscribed and sworn to before me  
this 17 day of November, 2008.

STATE OF NORTH DAKOTA )  
 )ss.  
COUNTY OF WARD )  
*Julie Lynner*  
Notary Public  
Ward County, State of North Dakota



**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**MIDCONTINENT COMMUNICATIONS,** )  
**A SOUTH DAKOTA PARTNERSHIP,** )  
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                                  **COMPLAINANT,** )  
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**MISSOURI VALLEY COMMUNICATIONS** )  
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**INC.** )  
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**APPLICATION FOR SUSPENSION OR** )  
**MODIFICATION PURSUANT TO** )  
**47 U.S.C. § 251 (F)(2)** )

**CASE NO. PU-08-176**  
**OAH NO. 20080079**

**Missouri Valley Communications, Inc.**  
**Response to Petition for Reconsideration or Rehearing**

Missouri Valley Communications Inc. (“Missouri Valley”) responds to Midcontinent Communication’s (“Midcontinent”) alternative Petition for Reconsideration or Rehearing. Missouri Valley opposes the motion in its entirety. Missouri Valley’s response follows the order of Midcontinent’s petition and its five stated reasons.

Midcontinent’s stated reasons for its petition share a common characteristic, so Missouri Valley’s five responses are substantially identical. Midcontinent’s stated reasons for reconsideration are repetitions of arguments made in its post-hearing briefs, arguments considered and rejected by the Commission. The petition for reconsideration presents nothing new; it is nothing more than a plea for the Commission to change its mind.

**Midcontinent's First Argument:**

“First, although the Order notes that Midcontinent based its initial Petition, in part, on a claim that Missouri Valley Communications (“Missouri Valley”) had waived its rural exemption, the Order fails to address that issue. For the reasons described in Midcontinent’s briefs and below, Missouri Valley has waived the exemption.” (Midcontinent’s petition, page 2.)

**Missouri Valley's Response:**

Midcontinent persists in making a claim of “waiver” of the rural exemption without any legal authority to support its waiver argument. It asks the Commission to infer a waiver from Missouri Valley’s predecessor’s conduct, or from an expired interconnection agreement, or from the existing agreement. Neither the old terminated agreements nor the existing agreement includes a waiver or some other sort of open-ended option for Midcontinent to demand an interconnection under Act § 251 (c), avoiding the rural exemption under § 251 (f).

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.” Obviously, if the Commission concluded 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 the alternative request for a determination of waiver was and is denied.

Congress provided one way for a rural telephone company to lose its exemption through conduct: a rural telephone company that provides video programming may lose its rural exemption if the party requesting interconnection is a cable company. Act § 251(f)(1)(C). That provision is not implicated here.

**Midcontinent’s Second Argument:**

“Second, the Order does not distinguish between impacts on Missouri Valley caused by facilities-based competition in general and those caused specifically by the interconnection requested by Midcontinent. Because Section 251(f)(1) requires consideration of the impact of the requested interconnection, the Order must be reconsidered.” (Midcontinent’s petition, page 2.)

**Missouri Valley’s Response:**

The Order, particularly findings 13-33, shows that the Commission carefully considered the issue of undue economic burden under Section 251 (f)(1). The Order specifically reviewed the testimony of witnesses Shawn Hanson, Scott Lundquist, and Timothy Gates. The Commission concluded that Midcontinent failed to meet its burden on the important issue of economic burden. Commission Order at ¶ 16( “migration timing adjustment”), ¶ 18 (“Resale Line Growth Factors”), ¶ 22(“Special Access Revenues” adjustment), ¶ 32 (“cumulative” net revenue loss). Midcontinent’s arguments in its petition, its theories about distinctions between impacts caused by competition in general and those caused specifically by the interconnection requested by Midcontinent, repeat the arguments of its post-hearing briefs. The Commission was not persuaded. The petition presents nothing new that should cause the Commission to change its decision.

**Midcontinent’s Third Argument:**

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

safety valve relief if the competitive impact of interconnection were as significant as Mr. Hanson claimed.” (Midcontinent’s petition, page 2.)

**Missouri Valley’s Response:**

The Order, particularly findings 23-26, shows that the Commission carefully considered Midcontinent’s safety valve arguments, including analysis of the specific legal requirements to qualify for safety valve relief. Midcontinent’s arguments in its petition, that Missouri Valley could qualify for safety valve relief to offset the economic burden that would be caused by Midcontinent’s requested interconnection, repeat the arguments of its post-hearing briefs. The Commission was not persuaded by Midcontinent’s safety valve arguments. The petition presents nothing new that should cause the Commission to change its decision.

**Midcontinent’s Fourth Argument:**

“Fourth, the Order does not consider significant evidence – and including evidence that was unchallenged – concerning the impact of the competition on Missouri Valley. This evidence goes directly to the core issues in this proceeding and must be addressed.” (Midcontinent’s petition, pages 2-3.)

**Missouri Valley’s Response:**

The Order, particularly findings 13-33, shows that the Commission carefully considered the issue of undue economic burden under § 251 (f)(1). Midcontinent’s arguments in its petition repeat the arguments of its post-hearing briefs, and add nothing. The argument about “evidence that was unchallenged” invites a particular response. Evidence that one party and counsel present, evidence that merits neither challenge by the other party nor comment by the Commission is not, by the absence of reaction, somehow elevated to persuasive status. The Commission was not persuaded that Midcontinent met its burden of proof. The petition presents nothing new that should cause the Commission to change its decision.

**Midcontinent’s Fifth Argument:**

“Finally, the Order misapplied the “unduly economically burdensome” test. If the test were applied correctly, the conclusions in the Order would be reversed.” (Midcontinent’s petition, page 3.)

**Missouri Valley’s Response:**

Again, Midcontinent’s repetition of arguments invites a repeated response: The Order, particularly findings 13-33, shows that the Commission carefully considered the issue of undue economic burden under Section 251 (f)(1). Midcontinent’s arguments in its petition repeat the arguments of its post-hearing briefs and add nothing new that should cause the Commission to change its decision.

**Missouri Valley’s Response to the Entire Petition**

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

The Order shows that the Commission thoughtfully considered whether Midcontinent’s requested interconnection is not unduly economically burdensome. Order, findings 13-33. The outcome of the Commission’s consideration of the evidence, the law and the arguments affecting the economic burden issue was its several findings that “Midcontinent has not met its burden of proof...,” and Midcontinent’s evidence and arguments are not persuasive (Order, findings 16, 22, 26, 32 & 33), all leading to the Commission’s conclusion 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.” (The Commission also found and 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. (Order, finding 42 and conclusion of law 3.)

Midcontinent's petition includes a veiled threat that it might appeal the Commission's decision. (" If the test were applied correctly, the conclusions in the Order would be reversed." Midcontinent's petition, page 3. A similar remark appears in a footnote on page 2. Surely the Commission is unmoved by the threat. The Commission's decision was unaffected by speculating about the possibility that "... the conclusions in the Order would be reversed." (Midcontinent's petition at 3). The Commission's confidence in its decision should not change in the context of a petition for reconsideration.

Midcontinent has appeal rights. NDCC § 28-32-42. Midcontinent is not obliged to petition the Commission to reconsider its decision as a pre-condition to filing a notice of appeal. NDCC § 28-32-40(1) 1. If and when Midcontinent appeals the Commission's decision, Midcontinent and Missouri Valley can argue about the Commission's decision. If Midcontinent were to appeal, the Commission would be a party to the appeal and would defend its decision as being in full accord with the federal Telecommunications Act, North Dakota's statutes affecting telecommunications, NDCC Chapter 49-21, and the Administrative Agencies Practices Act, NDCC Chapter 28-32. Likewise, the Commission's should not change its decision in response to Midcontinent's petition.

### **Summary and Conclusion**

Midcontinent's petition for reconsideration does not present any good reason for the Commission to change its decision. The Commission should deny Midcontinent's alternative petition for a re-hearing because the petition does not include "a statement of any further showing to be made in the proceeding." NDCC § 28-32-40(3). The Commission should sustain its decision

and deny Midcontinent's petition for reconsideration because the Commission's decision is in full accord with the federal Telecommunications Act, North Dakota's statutes affecting telecommunications, and the Administrative Agencies Practices Act.

Dated this 17 day of November, 2008.

Pringle & Herigstad P.C.

By: \_\_\_\_\_

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