

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

MIDCONTINENT COMMUNICATIONS,)
A SOUTH DAKOTA PARTNERSHIP,)
)
Plaintiff,)
v.)
)
NORTH DAKOTA PUBLIC SERVICE)
COMMISSION, KEVIN CRAMER,)
TONY CLARK, AND BRIAN KALK,)
in their official capacities as Commissioners)
of the North Dakota Public Service Commission)
)
and)
)
MISSOURI VALLEY COMMUNICATIONS)
INC.,)
)
Defendants.)

Case No.: 1:09-cv-017

**CONSOLIDATED REPLY TO OPPOSITIONS OF MISSOURI VALLEY AND THE
NORTH DAKOTA PUBLIC SERVICE COMMISSION TO MIDCONTINENT'S
MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO MISSOURI
VALLEY'S MOTION FOR SUMMARY JUDGMENT**

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**Reply to Oppositions to Midcontinent's Motion for
Sum. Jdgmt & Opposition to Missouri Valley's
Motion for Sum. Jdgmt.**
Midcontinent Communications
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**Reply to Oppositions to Midcontinent's Motion for
Sum. Jdgmt & Opposition to Missouri Valley's
Motion for Sum. Jdgmt.**
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Midcontinent Communications (“Midcontinent”) submits this consolidated brief in opposition to the summary judgment motion of Defendant Missouri Valley Communications, Inc. (“Missouri Valley”) and in reply to the oppositions of Defendants Missouri and the North Dakota Public Service Commission (the “NDPSC”) to Midcontinent’s motion for summary judgment.¹ Because the issues in the Defendants’ oppositions and motion for summary judgment are virtually identical, Midcontinent refers to the Defendants’ filings together as Defendants’ oppositions.

I. INTRODUCTION

There is no dispute that Missouri Valley is the monopoly telephone service provider in the Williston exchange, that Midcontinent is a bona fide competitor, and that Congress intended the Communications Act to ensure that competitors like Midcontinent could access incumbents’ telephone networks and provide competitive choices to consumers. There also is no dispute that the rural exemption under Section 251(f) of the Communications Act, 47 U.S.C. § 251(f)(1), if applicable, is Missouri Valley’s sole basis for denying that access.

It also is now clear from Defendants’ oppositions that the 2-1 majority of the NDPSC badly misapplied Section 251(f)(1) to deny Midcontinent facilities-based competitive entry into the Williston exchange. Defendants wish to rely on technicalities to preserve the status quo, but those technical arguments are fundamentally flawed and cannot stand.

As an initial matter, Defendants have entirely failed to provide any legal justification for ignoring Missouri Valley’s repeated waiver of the rural exemption as to Midcontinent. The NDPSC does not deny that it simply did not address that claim in the Rural Exemption Order. Midcontinent raised and argued the issue below, but only now, for the first time on appeal, the

¹ This consolidated filing complies with Local Rule 7.1 because it is 28 pages, well under the 40 pages allotted to oppose summary judgment motions and the additional 10 pages allotted to reply to the oppositions to summary judgment motions.

NDPSC and Missouri Valley attempt to justify it. Their only argument now is the post hoc rationale that Missouri Valley could not have waived the rural exemption because the exemption could be lifted only by order of the NDPSC. Even if the Court were to consider this belated explanation – and it should not – the argument is both illogical and contrary to law. It is faulty logic to argue that the NDPSC need not have given effect to the waiver because only the NDPSC could lift the exemption. That “I’m right because I say I’m right” argument does not explain why the NDPSC’s prior and repeated acceptance of Missouri Valley’s waiver did not lift the exemption.

In addition, nothing in Section 251(f)(1) suggests that the rural exemption cannot be (or was not) waived. Missouri Valley waived its rights under Section 251(f)(1) when it acquired the Williston exchange by committing to maintain existing facilities-based interconnection arrangements – including the one with Midcontinent. And Missouri Valley confirmed that waiver when it negotiated a Section 251(c) resale interconnection agreement, which the NDPSC approved. Missouri Valley does not deny its commitment – or that it enjoys the benefits of acquiring the Williston exchange – and it must honor that commitment now. Accordingly, the rural exemption should not be applied to Midcontinent’s requested interconnection, and the Court should reverse the Rural Exemption Order on that ground alone.

Even apart from the waiver issue, however, the oppositions demonstrate that the Rural Exemption Order misapplied Section 251(f)(1). First, the NDPSC majority applied the wrong standard in analyzing whether Midcontinent’s requested interconnection would be “unduly economically burdensome.” The statute requires the NDPSC to determine whether the costs of the requested interconnection would be unduly economically burdensome. Although the NDPSC concedes this is the proper standard, it actually applied a different test. The NDPSC determined

whether the costs of the requested interconnection would “impair” Missouri Valley’s ability to invest in its facilities. Of course, *any* competitive entry might, to some extent, “impair” Missouri Valley’s revenue and limit its ability to invest. If that were the standard, the exemption would apply to every competitive entry, which flatly contradicts the language of the statute.

Second, the Defendants’ oppositions utterly fail to justify the cost-and-revenue shell game that Missouri Valley is playing with its corporate parent, Montana-based Nemont Communications (“Nemont”). The NDPSC’s assessment of Missouri Valley’s overall financial situation – and whether interconnection would impose an undue economic burden or endanger universal service – is fundamentally flawed because the NDPSC refused to consider all the relevant facts. These include: that Nemont set up Missouri Valley specifically to hold and pay the debt incurred in purchasing the Williston exchange; that Nemont is siphoning off revenues for services provided over Missouri Valley’s network (yet ostensibly offered to customers by Nemont for long distance, DSL high-speed internet, wireless, and voice mail); that Nemont requires Missouri Valley to pay for some facilities and for many non-communications services Nemont provides to Missouri Valley that could be more cheaply purchased in Williston (e.g., expensive office space) and do not benefit Williston customers at all; and that the bulk of Missouri Valley’s income goes to servicing Nemont’s debt rather than investing in Williston facilities.

Defendants’ only argument is that the statute requires the NDPSC to limit its review to the finances of the specific company subject to the interconnection request and to ignore all affiliates. They do not deny the facts but claim the NDPSC and the Court cannot consider them. That is wrong as a matter of law, and this case shows why. Both Section 251(f) and the Eighth Circuit’s decision in Iowa Utilities Board v. FCC, 219 F.3d 744, 761 (8th Cir. 2000), required the

NDPSC to examine Missouri Valley's overall financial condition. Here, at the same time that the NDPSC focused on whether Missouri Valley would be able to invest in facilities in the future, the NDPSC majority ignored the enormous revenue drain from Williston customers through Missouri Valley to Nemont's Montana headquarters. This error of law invalidates the NDPSC's economic burden and universal service determinations and requires reversal.

Third, Defendants fail to justify the NDPSC's determination that Midcontinent's requested interconnection would be inconsistent with the provision of universal service to the Williston exchange. Missouri Valley concedes that the NDPSC's universal service determination was intertwined with the economic burden analysis and that the two stand and fall together. Since the economic burden analysis fails as a matter of law and logic, the universal service determination must fall too. Moreover, the NDPSC majority inexplicably ignored its statutory authority to require new entrants, such as Midcontinent, to provide Lifeline service. There was no basis to use the rural exemption to bar competitive entry entirely based on concerns about Lifeline service when the NDPSC has the authority to make provision of that service a condition of lifting the exemption.

Finally, Defendants provide no legitimate defense for the NDPSC's erroneous conclusion that Missouri Valley is ineligible for safety valve financing to offset lost revenue from Midcontinent's projected customer gains. There is no dispute about the facts relevant to Missouri Valley's eligibility for safety valve funding. And the law is clear that if Missouri Valley realizes the line and revenue losses that it projects (which the NDPSC accepted), Missouri Valley will be eligible for safety valve funding. Of course, if Missouri Valley does not ultimately suffer sufficient losses to qualify for safety valve funding, then that means the expected economic burden of Midcontinent's requested interconnection will not have

materialized. Either way, this fact alone reduces the projected economic burden on Missouri Valley to less than 40% percent of the burden Missouri Valley calculated. The NDPSC's failure to account for safety valve funding when considering the economic burden and universal service issues is additional plain error that further undermines its conclusions.

Missouri Valley also seeks dismissal of Midcontinent's claim for damages. That, too, should be denied. Missouri Valley has refused to interconnect with Midcontinent after having waived the rural exemption and with no valid legal basis for refusing access to its competitor for telephone service. These claims against Missouri Valley, if sustained by the Court, impose liability on Missouri Valley to compensate Midcontinent for the significant loss of revenue Missouri Valley has caused.

Midcontinent's motion for partial summary judgment should be granted, and Missouri Valley's motion for summary judgment should be denied.

II. ARGUMENT

A. The NDPSC's Failure to Address Midcontinent's Waiver Claim Renders Its Decision Unenforceable as a Matter of Law.

Missouri Valley and the NDPSC concede that Midcontinent raised the waiver issue and that the Rural Exemption Order mentions but "did not specifically 'discuss'" and "did not make a specific finding" on the issue. Missouri Valley Opp. at 15; NDPSC Opp. at 3. As Midcontinent showed in its brief, the NDPSC's failure to explain its reasoning on this point requires reversal. Midcontinent Memo. at 15 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983); Menorah Medical Center, 768 F.2d at 295; Minnesota Milk Producers Ass'n v. Yeutter, 851 F. Supp. 1389, 1396 (D. Minn. 1994)).

The record before the NDPSC showed that Missouri Valley repeatedly assumed Section 251(c) interconnection obligations upon its acquisition of the Williston exchange in 2002 and

thereafter, without ever asserting or carving out the rural exemption. Midcontinent raised the issue multiple times below – including in its initial bona fide request for interconnection and in every brief it filed – and the NDPSC’s failure to address it is legal error. E.g., NDPSC 08-61, Docket #1 at 2; # 29 (Late-filed Exhibit C-8); #31 at 5-8; #35 at 3-6.²

Both Missouri Valley and the NDPSC offer a number of tortured arguments to show that the NDPSC actually did give adequate consideration to the waiver issue. After conceding that the NDPSC did not discuss the waiver claim, Missouri Valley nonetheless argues that the Court should find the NDPSC “did address the claim . . . and did resolve – and reject – the waiver claim,” sub silentio by considering the merits of the rural exemption issue. Missouri Valley Opp. at 15. But the law requires the NDPSC to do more than reject claims implicitly. It requires the NDPSC to provide a reasoned explanation for its rejection of the claim, see Motor Vehicle Mfrs., 463 U.S. at 43, which the NDPSC admittedly neglected to do.

The NDPSC also argues that it did not, in fact, “ignore” Midcontinent’s waiver argument, but instead considered and denied the waiver without comment. NDPSC Opp. at 3. Again, Motor Vehicles Mfrs. and its progeny require more; they require the NDPSC to provide a

² Missouri Valley’s claim that Midcontinent’s waiver theory was not framed in the record, Missouri Valley Opp. at 16, 17, is belied by the repeated argument of this point in the record before the NDPSC. Midcontinent’s submissions on this point include Late-filed Exhibit C-8 (NDPSC 08-61 Docket # 29), which sets forth the chronology of the Missouri Valley’s waiver and includes correspondence evidencing Missouri Valley’s asserted intent to continue offering facilities-based interconnection. Missouri Valley also complains that Midcontinent should have provided the full record rather than attaching only the documents cited in its memorandum in support of its motion for summary judgment. Missouri Valley Opp. at 8-9. Prior to filing its motion for summary judgment, counsel for Midcontinent sought to contact counsel for Missouri Valley to confer regarding joint submission of the administrative record. Receiving no response prior to the agreed-upon filing date for Midcontinent’s motion, Midcontinent attached the documents directly cited in its memorandum, in accordance with the Court’s rules. Citations to the record included herein are to the docket filing number reflected in the Read Me Documents Index.pdf file in the Certified Copy of the Record filed by Missouri Valley, and are in the form “NDPSC 08-61 Docket #__.” Where a single NDPSC docketing number includes multiple documents, Midcontinent parenthetically supplies the document to which it is citing.

reasoned explanation for rejecting Midcontinent's claims.³ The NDPSC also tries to provide the Court with a post hoc explanation for its purported rejection of Midcontinent's waiver theory. Essentially, the NDPSC merely repeats the argument that the rural exemption cannot be waived and must remain in effect until an NDPSC decision removes it. NDPSC Opp. at 2-3. It is well settled, however, that an agency cannot repair defective decisions by providing the missing legal argument in litigation reviewing the original decision. See American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 539 (1981) ("post hoc rationalizations of the agency . . . cannot serve as a sufficient predicate for agency action"); Camp v. Pitts, 411 U.S. 139, 142-43 (1973) ("The validity of the [agency's] action must . . . stand or fall on the propriety of [the contemporaneous explanation] . . ."). In addition, as shown below, the NDPSC's proffered justification for its decision is incorrect as a matter of law. Infra at Section II(B). The Court therefore, must reject the NDPSC's justification for ignoring the waiver issue.

B. The Record Establishes That Missouri Valley Waived Its Rural Exemption.

Missouri Valley concedes that the record is complete and that the waiver issue is ripe for Court decision. Missouri Valley Opp. at 16. The facts are undisputed, and they plainly satisfy the waiver standard because they show that Missouri Valley voluntarily relinquished its right to claim the rural exemption.

When it acquired the Williston exchange in 2002, Missouri Valley told the NDPSC and Midcontinent that it would honor its existing interconnection obligations. Compl., Exh. A at 3; NDPSC 08-61 Docket #29 (Late-Filed Exhibit C-8) at Attachment 4. Those obligations included

³ The one document the NDPSC now offers as proof that it considered Midcontinent's waiver claim is an internal memorandum that merely outlines the issues. See NDPSC Opp. at Exhibit PSC-3. The memorandum was not part of the record and was not provided to the parties, so it cannot be considered here. It also contains no analysis or recommended disposition of the matter that would suggest the NDPSC considered and resolved the waiver issue. It is merely a description of the issues and, in any event, was prepared by the NDPSC staff and not the commissioners who were supposed to decide the matter.

facilities-based interconnection with Midcontinent and plainly would have been inconsistent with assertion of the rural exemption. Missouri Valley made a commitment that it could not honor if it invoked the rural exemption. Later, Missouri Valley negotiated with Midcontinent and filed with the NDPSC a resale interconnection agreement that provided for wholesale rates pursuant Section 251(c)(4) of the Communications Act. Again, negotiating that agreement was inconsistent with claiming the rural exemption, because providing resale at wholesale rates is a Section 251(c) obligation that would not exist if the rural exemption were invoked. 47 U.S.C. § 251(c)(4). On both occasions, Missouri Valley voluntarily chose to undertake Section 251(c) interconnection obligations.⁴ As Missouri Valley admits, the structure of the Communications Act and the FCC's rules encourages competitive entry through resale with a gradual move to full facilities-based competition. Missouri Valley Opp. at 27.⁵ Now that Midcontinent wants to take the next step and provide full facilities-based service to its Williston customers, Missouri Valley wants to reverse course and evade its Section 251(c) obligations by claiming the rural exemption. None of these facts are in dispute.

Defendants' primary argument is that, notwithstanding Missouri Valley's prior commitments and the benefits it received under Section 251(c), it simply could not have waived its Section 251(f) rights because the statute does not include language discussing and permitting waiver explicitly. Missouri Valley Opp. at 21-22; NDPSC Opp. at 1-2. That puts the law

⁴ Missouri Valley complains that the parties' interconnection agreement was not part of the record below. Missouri Valley Opp. at 30. However, the agreement is a matter of public record and both Midcontinent and Missouri Valley referred to the terms of the agreement in their briefs. E.g., NDPSC 08-61 Docket #31 at 8-9; #32 at 35. Moreover, the interconnection agreement between Midcontinent and Missouri Valley (PU-04-638) also is publicly available through the NDPSC's Internet web site at http://www.psc.state.nd.us/jurisdiction/pud/telecom/PSC_Archive_Inteconnections.HTML.

⁵ Missouri Valley cites paragraph 907 of the FCC's Local Competition Order, 11 F.C.C.R. 15,499, 15,954, which begins: "Resale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities."

precisely backwards. Federal rights are presumed waivable unless Congress expressly states that the right cannot be waived. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-27 (1991). Congress made no provision that the rural exemption would be unwaivable, and Missouri Valley does not cite any.

Missouri Valley also argues that its public, enforceable, on-the-record promise to the NDPSC that it would fulfill its predecessors' interconnection commitments cannot be a waiver because it created no binding "third party beneficiary rights" in Midcontinent. Missouri Valley Opp. at 17. But federal waiver doctrine does not require a binding, written contract or enforceable contractual rights. In cases like this one, it can be inferred from repeated conduct inconsistent with the claim of right. See, e.g., Ackerberg v. Johnson, 892 F.2d 1328, 1331 (8th Cir. 1989) (finding that defendants waived any federal statutory right to arbitrate 1933 Securities Act claims by litigating claims); Frontiervision Operating Partners v. Town of Naples, No. 01-16-PDMC, 2001 WL 220192 *4-5 (D. Me. March 7, 2001) (cable operator waived the right to enforce time limitations on franchise negotiations contained in the Communications Act by continuing to negotiate beyond the deadline). Moreover, Missouri Valley entirely ignores that it told Midcontinent directly in early 2003 that it would continue fulfilling the interconnection obligations of its predecessors, creating a reasonable expectation that Missouri Valley would continue to adhere to its Section 251(c) obligations without invoking the rural exemption. NDPSC 08-61 Docket #29 (Late-Filed Exhibit C-8) at Attachment 4. And Missouri Valley reconfirmed that expectation in 2004 when it entered into the Section 251(c)(4) resale interconnection agreement with Midcontinent.⁶

⁶ Missouri Valley also argues that neither its representations to the NDPSC in 2002 nor its assumption of Section 251(c) resale obligations are sufficient to show its "intent" to voluntarily waive the rural exemption. Missouri Valley Opp. at 31-32. Missouri Valley does not claim,

Missouri Valley claims the Eighth Circuit's Iowa Utilities Board decision supports its theory that the rural exemption is unwaivable. Missouri Valley Opp. at 29 (citing Iowa Utilities Board, 219 F.3d at 761). That case had nothing to do with the question of waiver. Instead, it addressed and reversed FCC rules that placed on rural carriers the burden of proof in sustaining the exemption in a Section 251(f)(1) proceeding. Neither the 8th Circuit nor any other Court has ever held that the rural exemption cannot be waived.

Indeed, Defendants' theory that the rural exemption cannot be waived makes no sense. Under Missouri Valley's theory, it could explicitly "waive" the rural exemption as part of a agreement under Section 251 of the Act, but that waiver would be unenforceable because it would not have been the result of a state commission determination that the exemption be lifted. Congress intended parties to negotiate their own agreements to the extent possible. 47 U.S.C. § 252(a)(1). Yet if Missouri Valley's interpretation of Section 251(f) were correct, voluntary negotiations with rural carriers would never happen, because they would always retain the rural exemption as a defense to regulatory enforcement of any agreement that contained Section 251(c) obligations. The Court should not read a Missouri Valley loophole into the Act.

Missouri Valley further argues that because universal service is a consumer protection that implicates the public interest, Missouri Valley was powerless to waive it by entering into a

however, that it was unaware of the rural exemption when it promised the NDPSC and Midcontinent that it would continue to carry out its interconnection obligations or when it entered into a Section 251(c)(4) resale agreement with Midcontinent. (Such a claim would be implausible given that the company is owned by Nemont, a sophisticated multi-state service provider.) And there is no dispute that when Missouri Valley engaged in its previous agreements, it chose not to assert its right to use the rural exemption to avoid the obligations they entailed. Both these incidents involved affirmative, voluntary acts by Missouri Valley. First it represented it would continue existing interconnection arrangements, then it voluntarily entered into the resale interconnection agreement. Missouri Valley's knowing past relinquishment of its rural exemption, as evidenced by its conduct, is sufficient to find waiver here. See Ackerberg; Frontiervision, supra.

resale interconnection agreement. Missouri Valley Opp. at 48. Courts can reject waiver arguments where waiver would be contrary to congressionally-announced public policy. See Gilmer, 500 U.S. at 26-27. That exception is inapplicable here, however, because even if the Court determines that a waiver would impair universal service, the proper remedy for that would not be to uphold the rural exemption and bar facilities-based competition; it would be to require the NDPSC to act under Sections 214(e) and 253(f) of the Communications Act to require Midcontinent to become an eligible telecommunications carrier in Williston, which would require Midcontinent to provide service to all customers. 47 U.S.C. §§ 214(e), 253(f); Midcontinent Memo. at 38; see also Rural Exemption Order (dissenting statement of Commissioner Susan Wefald).

Missouri Valley next argues that the Court cannot find that it waived the rural exemption as to Section 251(c)(2) physical interconnection based on the resale agreement because the statutory language of Section 251(f) treats resale differently from “interconnection.” Missouri Valley Opp. at 22-23. This is simply false. Section 251(f)(1) makes no distinction between resale and the other Section 251(c) obligations. 47 U.S.C. § 251(f)(1). Either a carrier is exempt from all those obligations or it is subject to all of them. Id. Partial relief from individual Section 251(c) obligations is available under Section 251(f)(2), but it is not available as an incident to the rural exemption under Section 251(f)(1). 47 U.S.C. § 251(f)(2).

Missouri Valley seeks to fabricate a distinction between resale and interconnection by noting that the FCC has separate subparts of its rules devoted to resale interconnection and facilities-based interconnection. Missouri Valley Opp. at 23-24. But Section 251(f)(1) by its express terms is an exemption from all of Section 251(c), including the resale provisions of Section 251(c)(4), not just some parts. Missouri Valley does not contest that it voluntarily

undertook the duty to provide resale consistent with Section 251(c)(4). By doing so, it waived its right to claim Section 251(f) as a basis for avoiding its other Section 251(c) obligations. What the Defendants fail to note is that, if Missouri Valley really intended or wished to avoid its other Section 251(c) obligations, the Act provides a mechanism for it to do so – a petition for suspension under Section 251(f)(2). 47 U.S.C. § 251(f)(2).

Both the NDPSC and Missouri Valley also argue that existing NDPSC precedent “prevents Midcontinent from claiming a resale agreement as a vehicle to evade rural telephone companies’ exemption from facilities based interconnection.” NDPSC Opp. at 2; see also Missouri Valley Opp. at 25-26. Fundamentally, NDPSC precedent is irrelevant to the question whether Missouri Valley waived its rural exemption in this case. Waiver of federal rights is governed by federal law, not state regulatory law. See Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, 369 (1952).

In any event, the cited cases do not address the waiver issue.⁷ In Case No. PU-05-451, the NDPSC’s June 7, 2006 Order lifted the rural exemption for resale only. It did so based on concern that an earlier order in that docket, terminating the rural exemption entirely could have violated the rural carrier’s right to notice and hearing because Midcontinent’s request for interconnection had mentioned only resale.⁸ In Case No. PU-06-400, Midcontinent entered into a stipulation with a rural carrier that asked the NDPSC to terminate the carrier’s rural exemption

⁷ See Midcontinent Communications v. North Dakota Telephone Co., Findings of Fact, Conclusions of Law, and Order, NDPSC Case No. PU-05-451 (June 7, 2006) (limiting removal of rural exemption to resale only); Midcontinent Communications/Consolidated Telecom, Order Approving Stipulation, NDPSC Case No. PU-06-400 (Nov. 8, 2006) (adopting stipulation removing rural exemption with respect to resale).

⁸ Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation, Findings of Fact, Conclusions of Law, and Order, Case No. PU-05-451 (Apr. 26, 2006) at 4. As Missouri Valley correctly points out, ¶ 27 of Midcontinent’s Complaint inadvertently misattributed this point to the Rural Exemption Order. Missouri Valley Opp. at 21.

for resale only. The stipulation was designed to avoid litigation over the rural exemption issue in a market where Midcontinent intended to provide resold services only, and it expressly stated that the stipulation was not intended to have precedential value in future proceedings. Far from demonstrating that Midcontinent endorses the idea of selective waiver (or selective termination), the stipulation expressly preserved Midcontinent's right to argue the position it is taking before this Court.⁹ In any case, the NDPSC's view of these matters is on de novo review in this Court. It is neither binding nor persuasive authority.¹⁰

Ultimately Defendants provide no basis for this Court to uphold the NDPSC's refusal to recognize Missouri Valley's waiver of its rural exemption. All parties agree that the record regarding Missouri Valley's conduct is undisputed. Federal law regarding waiver of federal rights is equally clear that Missouri Valley's conduct constituted a waiver of its rural exemption rights. And the NDPSC's position that the rural exemption cannot be waived is plainly erroneous. The Court should end this matter by finding that Missouri Valley has waived its rural exemption and remand the case to the NDPSC to enter an order in accord with that decision.

⁹ Whether Section 251(f)(1) gives state commissions the authority to selectively remove the rural exemption is not before this Court. The question is academic in these cases, however, because a state commission does have the authority to lift a rural exemption and then suspend any Section 251(c) obligations other than resale in a Section 251(f)(2) proceeding, which is essentially the result that the cited cases accomplished.

¹⁰ A third case, cited by the NDPSC at 2, involves the NDPSC removing the rural exemption entirely for a rural carrier that began offering video service. *Midcontinent Communications v. North Dakota Telephone Co.*, Findings of Fact, Conclusions of Law, and Order on Stipulation Addressing Request For Section 251(c) Interconnection, NDPSC Case No PU-06-345 (Sept. 6, 2006). That case is irrelevant because it involves neither selective waiver nor selective removal and because 47 U.S.C. § 251(f)(1)(C), which removes the rural exemption from rural carriers that provide video service, is not an issue here.

C. The Record Establishes That Midcontinent’s Requested Interconnection Satisfies Section 251(f)(1).

Defendants also fail to refute Midcontinent’s demonstration that legal errors led the NDPSC majority to uphold Missouri Valley’s rural exemption in the Rural Exemption Order. Each of these errors standing alone is sufficient to require reversal.

1. The NDPSC Employed an Unlawful Standard for Determining That Midcontinent’s Requested Interconnection Would Be Unduly Economically Burdensome.

The Defendants did not directly respond to Midcontinent’s showing that the NDPSC applied the wrong legal standard to its economic burden inquiry. See Midcontinent Memo. at 21-24. Missouri Valley claims that Midcontinent’s challenge to the NDPSC’s economic burden determination presents no issues of law and merely asks the Court to reweigh the factual evidence evaluated by the NDPSC. Missouri Valley Opp. at 38-39.¹¹ For its part, the NDPSC simply repeats the standard it applied in the Rural Exemption Order: Midcontinent’s requested interconnection was unduly economically burdensome because it would reduce Missouri Valley’s efficiency in providing service and reduce the amount it could invest in its Williston facilities in the future. NDPSC Opp. at 4-5. In the Rural Exemption Order, the NDPSC went further, stating that Midcontinent had also failed to show “that a smaller financial impact is not unduly economically burdensome.” Rural Exemption Order ¶ 32. In other words, the rural exemption could not have been lifted because Midcontinent purportedly failed to show that Missouri Valley could withstand any financial burden at all from interconnection with Midcontinent. Missouri Valley argues similarly that Midcontinent failed to carry its burden of

¹¹ Later Missouri Valley devotes two pages of its opposition to a semantic discussion of the number of times Midcontinent used the statutory phrase “unduly economically burdensome” without including the term “not.” Missouri Valley Opp. at 55-57. Missouri Valley fails to explain how Midcontinent’s syntax affects the statutory standard or, more specifically, the interpretation of the phrase “unduly economically burdensome.” In fact, there is no difference in meaning between Midcontinent’s formulation and the statutory formulation.

proof because it did not show that Missouri Valley would suffer no economic burden from competitive entry. Missouri Valley Opp. at 41-42.

The Defendants are applying the wrong standard and are misinterpreting Section 251(f)(1). Their interpretation is erroneous because it reads the word “unduly” out of the statute. All competition creates some economic burden, and any economic burden necessarily would have “some effect” on Missouri Valley’s ability to invest in its facilities. Midcontinent Memo. at 24-25. Section 251(f)(1) does not insulate rural carriers from all burdens, only undue burdens, so a mere showing of some possible loss of potential revenue cannot be enough. Wireless World, L.L.C. v. Virgin Islands Public Services Comm’n, 2005 U.S. Dist. LEXIS 15061 at *16.

Congress mandated that incumbent LECs, both urban and rural, open their markets to competitors through interconnection. Congress knew that competition would cause economic burdens, but it still subjected all carriers to the duties to interconnect and provide related services under Section 251(a) and (b). As a matter of logic, Congress could not have believed that the economic burdens required by those sections were undue, or it would have used Section 251(f)(1) to shield rural carriers from those burdens as well.¹² Therefore, to satisfy the unduly economically burdensome standard, the NDPSC was required to find, at a minimum, that Midcontinent’s requested interconnection would impose costs greater than those that would be entailed by competitive entry under Sections 251(a) and (b), from which the rural exemption

¹² These obligations under Sections 251(a) and (b) are real – they are used repeatedly by wireless carriers, for example, to obtain interconnection agreements with rural carriers like Missouri Valley. Missouri Valley’s witness Mr. Hanson admitted before the NDPSC that Missouri Valley has entered into such interconnection agreements with other carriers, including wireless carriers. NDPSC 08-61 Docket #64. See also Midcontinent Memo. at Exh. D (transcript of hearing) at 120-121. Although Missouri Valley objects to Midcontinent’s submission of its transcript of the hearing, Missouri Valley Opp. at 9, Missouri Valley fails to identify any inconsistency between Midcontinent’s transcript and the hearings themselves. Sound recordings of the hearing are available in the NDPSC record, and Midcontinent is providing cross references to the transcript for the Court’s convenience.

plainly does not protect Missouri Valley. Midcontinent Memo. at 21-23. The NDPSC failed to ask the right question, and the Rural Exemption Order must be reversed as a result.

Missouri Valley relies heavily on the semantic argument that the Rural Exemption Order satisfies the statute because all Section 251(f) requires the NDPSC to find is that a competitive entrant failed to show its requested interconnection would not be unduly economically burdensome. Missouri Valley Opp. at 37-38. Missouri Valley thus argues that the NDPSC's determinations regarding economic burden are unreviewable because they represent no more than the NDPSC's judgment about which side had provided more "persuasive" evidence. *Id.* at 38-42. This misconceives both the NDPSC's actions and Midcontinent's argument. The issue, simply put, is that the NDPSC based its conclusions on erroneous legal analysis – that any burden of competition, no matter how slight and even if unrelated to Section 251(c) interconnection, can be "undue." Any conclusion based on that erroneous legal standard is irretrievably flawed. Thus, the Rural Exemption Order fails as a matter of law because the NDPSC applied the wrong standard, regardless of the words it used to describe its findings or its judgment in the evaluation of the evidence.

Moreover, despite Missouri Valley's spirited defense of the NDPSC's factual findings, the reality is that the record shows the Rural Exemption Order's economic burden conclusions to be without foundation and therefore arbitrary and capricious. As Midcontinent showed, if the NDPSC had conducted the proper analysis, it would have found that Missouri Valley's witness could not identify a single difference in the costs that would be caused by competitive entry under Section 251(a) and (b) and those costs that would be caused by competitive entry under Section 251(c). Midcontinent Memo. at 25-27 (quoting testimony of Shawn Hanson, General Manager of Missouri Valley). Without evidence of additional costs caused by competitive entry

under Section 251(c), Midcontinent's requested interconnection cannot be considered "unduly economically burdensome" within the meaning of Section 251(f)(1), even if it might affect Missouri Valley's bottom line.

Equally important, there was no evidence to support the NDPSC's key finding that Missouri Valley's future ability to invest in its facilities would be compromised. To the contrary, Missouri Valley's own submissions showed that even after making the most dire revenue projections possible, Missouri Valley would recognize net operating margins that would be 20% greater than its average facilities investment over the three years prior to the proceeding below. Compare NDPSC 08-61 Docket #17 (Shawn Hanson's prefiled direct testimony), Exh. 1 at 2 (showing worst case scenario of \$930,000 free cash flow after four years of competing with Midcontinent) with NDPSC 08-61 Docket #35 at 7-8 and Exh. 1 at 2-4 (tabulating Missouri Valley's evidence to show average annual investment of approximately \$770,000 in two previous years). See also Rural Exemption Order, Dissent of Commissioner Susan Wefald (noting that "Missouri Valley did not invest most, or even one-third of their cash flow in 2007 . . . in its plant and network).¹³ This evidence, which was provided by Missouri Valley, showed no burden, let alone an undue burden, on Missouri Valley's ability to invest in its network.

Missouri Valley claims that Midcontinent cannot prevail by attacking the conclusions the NDPSC drew from the evidence Missouri Valley provided because Midcontinent had the burden of proof. Missouri Valley Opp. at 39, 42-43. This is false because Motor Vehicles Mfrs, supra, requires the NDPSC's decision to correspond to all material facts in the record, not just to the facts offered by the party with the burden of proof. This is not a case like Qwest Corp. v.

¹³ These figures are based on the revenues reported by Missouri Valley. Thus, they do not take into account the revenues DSL high-speed Internet, long-distance, wireless service, and voice mail that Nemont drains out of Williston.

Koppendray, 436 F.3d 859 (8th Cir. 2006), which is cited by Missouri Valley, where one party provided evidence and the other side merely attacked it without providing any alternative data. The Rural Exemption Order shows that Midcontinent provided contrary evidence to Missouri Valley's economic studies on many issues, and the record further reflects that Midcontinent specifically showed that the conclusions the NDPSC drew from the facts in the record were erroneous.¹⁴ Under Motor Vehicles Mfrs., the NDPSC is required to base its decision on the facts before it. Instead it found that Missouri Valley's ability to invest would be impaired even though the evidence showed the opposite.

Applying the correct standard to the uncontested evidence leads inevitably to the conclusion that Midcontinent's requested interconnection is not unduly economically burdensome, and the rural exemption should have been lifted.

2. The NDPSC Erred as a Matter of Law in Failing to Evaluate Missouri Valley's Overall Financial Condition.

The NDPSC's second overriding error of law in upholding the rural exemption was its failure to consider Missouri Valley's overall financial condition in light of its peculiar relationship with its parent company, Nemont. Midcontinent Memo. at 28-30. Missouri Valley and the NDPSC argue that Section 251(f)(1) precluded the NDPSC from even considering evidence about the relationship between Nemont and Missouri Valley in making its undue burden determination because the statute mentions only the economic impact on the rural carrier, not its affiliates. Missouri Valley Opp at 43-46; NDPSC Opp. at 5-6. If that were the law, any

¹⁴ Midcontinent provided evidence on the economic burden issue from three separate witnesses. NDPSC 08-61 Docket #23 (prefiled direct testimony of Mr. Gates, Mr. Simmons, and Mr. Lundquist). Missouri Valley also fails to note that its study was based on a model created by Midcontinent's expert witnesses in a previous North Dakota proceeding. Id. at Docket #64 (testimony of Mr. Lundquist), see also Midcontinent Memo., Exhibit D at 39. Missouri Valley apparently believes that Midcontinent's experts should have created a new model from scratch rather than correcting the errors Missouri Valley made in adopting the experts' original model.

rural telephone company could foreclose competitive entry in its service territories by structuring its operations – much as Missouri Valley has in Williston – so that the parent company realizes the revenues while the subsidiary is saddled with the costs of doing business.

The undisputed record in this case shows that looking at Missouri Valley without considering Nemont grossly exaggerates the burdens of interconnection. Missouri Valley does not dispute that Nemont draws revenue directly from customers in the Williston exchange for services like DSL high speed Internet, long distance, wireless service, and voicemail, which are provided mainly over Missouri Valley's facilities and which cost Nemont almost nothing to provide. NDPSC 08-61 Docket #23 (Testimony of Mr. Gates) at 33-34, 34; #27 (Exhibit C1); #64 (testimony of Mr. Hanson), also Midcontinent Memo., Exhibit D at 97-98, 99-102. The record shows that Nemont also draws revenues from Missouri Valley by charging it for real estate and services Nemont "provides" in Montana that might be purchased more cheaply in Williston. NDPSC 08-61 Docket #64 (testimony of Mr. Hanson), see also Midcontinent Memo., Exhibit D at 93-97. The record also shows that, on the other hand, all debt service obligations stemming from Nemont's acquisition of the Williston exchange are paid for by Missouri Valley from what remains of the revenues that Nemont lets Missouri Valley keep. NDPSC Docket #27 (Exhibit C1); #64 (testimony of Mr. Hanson), also Midcontinent Memo., Exh. D at 150-152 and (testimony of Mr. Gates); also Midcontinent memo. Exh. D. at 57.

With a balance sheet that reflects all the liabilities but only a fraction of the revenues generated by the Williston exchange, it would be no wonder that Midcontinent's requested interconnection might appear burdensome. By maintaining that the NDPSC was not permitted to consider Missouri Valley's relationship with Nemont, Missouri Valley essentially argues that it

has outsmarted the statute by playing a shell game with the revenues and liabilities of the Williston exchange. Competition suffers as a result.

The NDPSC simply refused to consider the evidence regarding Nemont. This was particularly harmful here because the NDPSC's decision rested on the putative impact of interconnection on Missouri Valley's ability to invest in facilities in the future. Rural Exemption Order at 7; NDPSC Opp. at 4-5. But the record shows that such impairment, if it existed at all, came not from Midcontinent's requested interconnection, but rather from Missouri Valley's corporate structure, which drains revenues from Missouri Valley while assigning to Missouri Valley all the costs of Nemont's acquisition of the Williston exchange – debt service costs that were twice, and in some years nearly three times, the amount spent by Missouri Valley on facilities investments. NDPSC 08-61 Docket #27 (Exhibit C1); #31 at 34; #35 at 7-8, 28 and Exh. 1; #64 (testimony of Mr. Hanson), see also Midcontinent Memo., Exh. D at 150-152 and (testimony of Mr. Gates); see also Midcontinent Memo., Exh. D. at 57.

Missouri Valley's only argument is that Section 251(f)(1) governs only the rural telephone company, not the rural telephone company's affiliates. Missouri Valley Opp. at 44-45. This argument is based on the assumption that this provision contains language requiring state commissioners to consider only the impact of the request on the rural telephone company itself. In fact, nothing in Section 251(f)(1)(A) or (B) includes such a limitation; instead, they simply require consideration of whether the "request is not unduly economically burdensome," without a specific reference to the rural carrier that has received the request. Thus, Missouri Valley's

interpretation would require the Court to rewrite and insert limiting language into two different parts of Section 251(f)(1).¹⁵

Midcontinent does not argue that a rural telephone company's parent company must be considered in every case; nor does it argue that the focus of the inquiry should be the economic impact on Nemont. But Section 251(f)(1) and the Eighth Circuit's Iowa Utilities Board decision require the NDPSC to determine whether the requested interconnection will be unduly economically burdensome for Missouri Valley. 219 F.3d at 761. Where, as here, undisputed evidence in the record demonstrates that the true economic burden on the rural telephone company is affected by its relationship with its parent company, the NDPSC was required by Section 251(f) to consider that evidence. The NDPSC's failure to consider the relationship between Missouri Valley and Nemont therefore was an error of law requiring reversal of the Rural Exemption Order.

3. The NDPSC's Universal Service Determination Also Was Erroneous as a Matter of Law.

Missouri Valley concedes that the NDPSC's determination of whether Midcontinent's requested interconnection impairs universal service stands or falls with its undue economic burden determination. Missouri Valley Opp. at 48. The NDPSC's brief also confirms that its determination was based solely on supposed reduced net revenues, the entire basis for its undue economic burden finding. NDPSC Opp. at 5. As shown above, the NDPSC's finding was contrary to law; therefore, its universal service finding must fall as well.

¹⁵ Missouri Valley's additional citation to Section 251(f)(2), which is triggered by the number of lines a carrier serves "at the holding company level" is irrelevant. Missouri Valley Opp. at 45. The two percent threshold in Section 251(f)(2) sets the maximum size of companies eligible for relief and does not affect the analysis once a company is determined to be eligible. Thus, it has no impact on the question of whether parent companies can be considered in the unduly economically burdensome analysis.

The NDPSC's brief also confirms that its sole universal service concern was Missouri Valley's ongoing ability to provide Lifeline services throughout the Williston exchange, because Missouri Valley is the only provider that does so. NDPSC Opp. at 5. As noted in Midcontinent's brief, and in Commissioner Wefald's dissent below, the NDPSC had the authority to require Midcontinent to become an eligible telecommunications carrier with the responsibility to provide Lifeline universal service as a condition to lifting the rural exemption. 47 U.S.C. §§ 214(e), 253(f)(1). Defendants do not rebut this argument. Further, there is no evidence of record to support the conclusion that Missouri Valley's ability to provide Lifeline service would be impaired by Midcontinent's competitive entry. The only evidence on the issue supported the opposite conclusion.¹⁶ Therefore, the NDPSC majority erred by finding Midcontinent's requested interconnection to be a threat to universal service based solely on concerns about Missouri Valley's ongoing ability to provide Lifeline universal service.

4. The NDPSC Erred in Finding Missouri Valley Is Ineligible for Safety Valve Universal Service Funding.

Another clear error of law that invalidates the NDPSC's economic burden and universal service determinations is its conclusion that Missouri Valley is ineligible for safety valve funding from the federal universal service program. Missouri Valley and the NDPSC maintain in their oppositions that the NDPSC correctly excluded safety valve funding from its analysis of Missouri Valley's economic condition and ability to provide Lifeline universal service. Missouri Valley Opp. at 51-53; NDPSC Opp. at 6-7. Neither Defendant, however, identifies a single requirement that Missouri Valley would fail to satisfy if, as the NDPSC speculated, Missouri Valley were to suffer significant revenue loss due to Midcontinent's entry into the market.

¹⁶ In particular, Missouri Valley's sole witness stated repeatedly that the lost income would not prevent Missouri Valley from providing its present level of service. See NDPSC 08-61 Docket #17 (prefiled direct testimony of Mr. Hanson) at 26; #64 (oral testimony of Mr. Hanson), see also Midcontinent Memo, Exh. D at 130.

As the Defendants acknowledge, 47 C.F.R. § 54.305 allows purchasers like Missouri Valley of high-cost rural exchanges like Williston to recoup a portion of their post-acquisition investment in the facilities serving that exchange. Midcontinent Memo. at 31; 47 C.F.R. § 54.305(b). What Missouri Valley and the NDPSC fail to acknowledge, however, is that the availability of safety valve funding is based on per-line costs of investment. 47 C.F.R. § 54.305(d). Once the per-line investment cost increases beyond what was spent by the prior carrier, the acquiring carrier becomes eligible to recoup a percentage of the additional investment. *Id.* The funding is determined on a per-line basis, so even if Missouri Valley maintains its current level of investment in the Williston exchange, its per-line investment cost inevitably will increase if it loses customers to Midcontinent at the rate Missouri Valley argued it would.¹⁷ If the NDPSC is going to consider projected customer losses as a basis for finding impairment of Missouri Valley's ability to invest in facilities, then it also must consider available safety valve financing as a way for Missouri Valley to recoup those costs. The NDPSC's decision (a) to credit Missouri Valley's line-loss predictions and (b) to find that Missouri Valley would be ineligible for the safety valve funding (which would be available if it were to realize those losses) is an error of law that must be reversed.

Missouri Valley argues that the availability of safety valve funding should not be considered because it is irrelevant to the burden that competition would impose. Missouri Valley at 51, 52, 53. This makes no sense. If funds are available to Missouri Valley to offset lost revenue from its projected line losses, then the economic burden will be lessened. It is irrelevant that Midcontinent or the Court cannot provide that funding directly to Missouri Valley. Since Missouri Valley would be eligible for the funding if its projected revenue losses materialize, the

¹⁷ Midcontinent did not and does not concede that Missouri Valley's projected line losses were correct.

NDPSC was required to include it in its analysis. The evidence showed that safety valve funding would offset 62% of Missouri Valley's projected revenue loss. NDPSC 08-61 Docket #23 (prefiled direct testimony of Mr. Lundquist) at 22-26. The safety valve offset therefore would unquestionably lead to a reduced economic burden.¹⁸

Missouri Valley next argues that the NDPSC was right to reject Missouri Valley's eligibility for safety valve funding because it found Midcontinent's witness testimony on the issue was unpersuasive. Missouri Valley Opp. at 54. This is wrong because Missouri Valley's eligibility for safety valve funding is not a matter of opinion susceptible to witness credibility determinations, but is a matter of law established by FCC rules. Midcontinent raised the issue and claimed that Missouri Valley would be eligible if its projected revenue losses materialized. NDPSC 08-61 Docket #23 (prefiled direct testimony of Mr. Lundquist) at 22, 26; #31 at 20-22; #35 at 22-23. That claim is correct under the law, regardless of whether the NDPSC found Midcontinent's witnesses persuasive. Moreover, as the passages quoted by Missouri Valley in its Opposition at 53-54 show, the only thing conditional about Midcontinent's safety valve testimony was that Missouri Valley's eligibility would occur only if Missouri Valley actually loses customers and the telephone lines that go with them. If Missouri Valley does not lose lines, it will not be eligible for safety valve funding, but it also will not need that funding because it will not have lost revenues. Moreover, because eligibility is a legal issue, the NDPSC erred by considering the safety valve question to be a witness credibility issue.

¹⁸ Missouri Valley quotes passages from the Rural Exemption Order that paraphrase the FCC's reasons for adopting the safety valve rule, claiming that those passages demonstrate that its interpretation of the rule is correct. Missouri Valley Opp. at 51-52. However, the issue is not the FCC's reason for adopting the rule, but how the rule actually works. As demonstrated in Midcontinent's initial memorandum and above, the rule is a mechanical calculation that grants relief if specific mathematical conditions are met, and there is no discretion for the FCC to reject funding based on its intent in adopting the rule.

Missouri Valley also is wrong that the safety valve question is a mixed issue of fact and law. Missouri Valley Opp. at 56-57. The level of safety valve funding Missouri Valley would receive in the future may be a mixed question of fact and law, but the question of whether Missouri Valley would be eligible under a defined set of circumstances is a question of law that can be determined with certainty by reference to the FCC's rules. Since the NDPSC decided Missouri Valley would not be eligible for safety valve funding, it never determined how much safety valve support Missouri Valley might receive.¹⁹ The NDPSC's eligibility decision was a clear error of law that must be reversed.²⁰

D. Midcontinent's Claim for Damages Should Not Be Dismissed.

Missouri Valley separately requests that the Court dismiss Midcontinent's claim for damages. Missouri Valley provides no legal justification, however, for dismissal of that claim. Because Missouri Valley waived its rural exemption as described above, its refusal to negotiate to provide Midcontinent with facilities-based interconnection violates Section 251 and 252 of the Communications Act. 47 U.S.C. §§ 251, 252. As Missouri Valley admits, Sections 206 and 207 of the Act, *id.* at §§ 206, 207, make such claims actionable in federal district court. Missouri

¹⁹ Moreover, Missouri Valley never disputed the safety value calculation, which was based on Missouri Valley's own estimates of line loss. Thus the only question was whether to include the adjustment for safety value funding in the calculations, not whether the calculation amount was correct.

²⁰ Missouri Valley's argument that potential safety valve financing is too speculative to consider because the FCC's rules might change cannot excuse the NDPSC's error. Missouri Valley Opp. at 52-53. The NDPSC is required to apply the Act and the FCC's rules as they stand at the time of its decision. The NDPSC already has committed error by presuming that Missouri Valley's universal service obligations will become more onerous in the future. Midcontinent Memo. at 37-38; Rural Exemption Order at 8-9; NDPSC at 6. The NDPSC cannot ignore the safety valve rule merely because a future FCC rule might eliminate it, any more than it could have granted Midcontinent's petition because it believed Congress might someday eliminate the rural exemption.

Valley's own evidence before the NDPSC shows that its denial of interconnection is leading to millions of dollars in damage to Midcontinent in defiance of the statute.²¹

Missouri Valley's argument against Midcontinent's damages claim recycles its argument against waiver, *i.e.*, that its rural exemption must remain in effect until terminated by the NDPSC. Missouri Valley Opp. at 58. That argument fails in response to Midcontinent's damages claim for the same reason it fails against the waiver claim. Thus, Missouri Valley's argument that it is entitled to an NDPSC-mandated transition period also fails, Missouri Valley Opp. at 58-59, because that right springs from the same statutory provision Missouri Valley waived by engaging in a now 7-year interconnection relationship with Midcontinent.

Given the waiver of its rural exemption, Missouri Valley's only lawful alternative to compliance with Sections 251 and 252 was to file a request with the NDPSC for suspension of its Section 251(c) obligations. But Missouri Valley did not take that course. Instead, after Midcontinent requested negotiation in November of 2007, Missouri Valley stonewalled for several months and forced Midcontinent to file a petition at the NDPSC. Only then, in opposition to Midcontinent's petition, did Missouri Valley file a request for suspension of its statutory obligations.²² It has now been more than 18 months since Midcontinent made a lawful request for interconnection from Missouri Valley, but instead of serving customers, Midcontinent is forced to fight in this Court for its competitive rights.

Excusing Missouri Valley from the damage it has done to Midcontinent by refusing to negotiate and provide facilities-based interconnection would send exactly the wrong message to

²¹ Missouri Valley estimated that Midcontinent would have more than 3,600 customer lines in Williston after four years, each one of which would represent hundreds of dollars of annual revenues for Midcontinent. Rural Exemption Order at 5.

²² Even after filing a Section 251(f)(2) petition, Missouri Valley's obligation to provide interconnection remains effective until such time as the petition is granted.

rural carriers and create the potential for mischief in rural telephone markets. As described above, if entering into and obtaining state commission approval of Section 251(c) agreements does not waive the rural exemption, rural carriers could claim the rural exemption at the expiration of any existing interconnection agreement, effectively evicting established competitors from the market. Indeed, rural carriers could refuse to comply with interconnection agreements lacking an explicit rural exemption waiver on the same grounds. Their defense to any action for enforcement of the agreement would be – as Missouri Valley argues here – that the rural exemption relieves them from Section 251(c) duties, that it cannot be waived and that it can be exercised at any time until a state commission lifts it expressly in a proceeding.

Midcontinent has suffered and continues to suffer significant damage from Missouri Valley's refusal to negotiate and provide its requested facilities-based interconnection. Upon the finding of waiver, the Court should move forward on Midcontinent's claim and determine liability for Missouri Valley in accordance with Missouri Valley's own estimates of Midcontinent's lost revenue from Missouri Valley's refusal to interconnect.

III. CONCLUSION

For the reasons stated above, Defendants respectfully request that Plaintiff's Motion for Partial Summary Judgment and the relief requested therein be granted and that Defendant Missouri Valley's Motion for Summary Judgment be denied.

Respectfully submitted,

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