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PUBLIC SERVICE COMMISSION

November 21, 2011

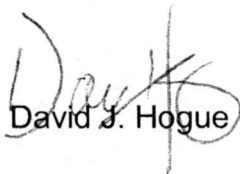
Darrell Nitschke
Executive Director
North Dakota Public Service Commission
State Capitol
600 E Blvd
Bismarck, ND 58505

**RE: Midcontinent Communications/Missouri Valley Communications, Inc.
ND PSC Case PU-11-543**

Dear Mr. Nitschke:

Enclosed for filing are the original and seven copies of Missouri Valley Communications, Inc.'s Motion to Dismiss the Petition for Arbitration and Brief in Support of Motion. Also enclosed are an original and seven copies of the Request for Oral Argument and Notice of Motion. These documents are also being transmitted electronically to your office. Also enclosed is an extra copy of the documents to be file stamped and returned in the self-addressed, stamped envelope.

Very truly yours,


David J. Hogue

DJH/lis

Enclosures

cc: Patrick W. Durick
Mike Kilgore

2 **PU-11-697** Filed: 11/21/2011 Pages: 88
Notice of Motion, Motion to Dismiss, Petition for Arbitration, Brief, Request for Oral Argument

Missouri Valley Communications, Inc.
David Hogue, Pringle & Herigstad, P.C.

11 **PU-11-543** Filed: 11/21/2011 Pages: 88
Notice of Motion, Motion to Dismiss, Petition for Arbitration, Brief, Request for Oral Argument

Missouri Valley Communications, Inc.
David Hogue, Pringle & Herigstad, P.C.

www.pringlelaw.net

FOR THE DISTRICT OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications,)
a South Dakota Partnership,)
)
Petitioner,)
)
v.)
)
Missouri Valley Communications, Inc.)
)
Respondent.)

NOTICE OF MOTION

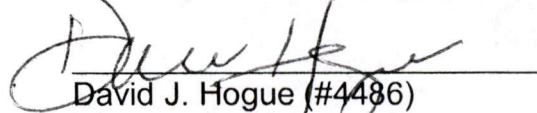
Case No: PU-11-543

TO: PETITIONER AND ITS ATTORNEY, PATRICK W. DURICK.

PLEASE TAKE NOTICE that the Respondent, Missouri Valley Communications, Inc., has filed a Motion with the North Dakota Public Service Commission seeking dismissal of the Petition for Arbitration filed by Midcontinent Communications. Pursuant to the North Dakota Rules of Civil Procedure, Midcontinent Communications has 30 days to file a responsive Brief to the Motion to Dismiss.

Dated this 21st day of November, 2011.

PRINGLE & HERIGSTAD, P.C.



David J. Hogue (#4486)
Attorneys for Respondent
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
701-852-0381

FOR THE DISTRICT OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications,)
a South Dakota Partnership,)
)
Petitioner,)
)
v.)
)
Missouri Valley Communications, Inc.)
)
Respondent.)

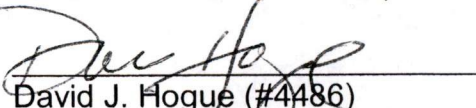
**REQUEST FOR
ORAL ARGUMENT**

Case No: PU-11-543

Respondent, Missouri Valley Communications, Inc., by and through their attorney, David J. Hogue of Pringle & Herigstad, P.C., were served with a Petition for Arbitration by Petitioner, Midcontinent Communications, in the above-captioned matter on or about the 14th day of November, 2011. The named Respondents' response to said motion is due on or about December 14, 2011. Said Respondents hereby request oral argument on this matter, at a date and time to be set by the Public Service Commission.

Dated this 21st day of November, 2011.

PRINGLE & HERIGSTAD, P.C.


David J. Hogue (#4486)
Attorneys for Respondent
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
701-852-0381

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)	
South Dakota Partnership,)	
)	Case No. PU-11-543
Petitioner,)	
vs.)	
)	
Missouri Valley Communications, Inc.,)	
)	
Respondent.)	

STATE OF NORTH DAKOTA)	
)	<u>AFFIDAVIT OF MAILING</u>
COUNTY OF WARD)	

MaLaura Sorensen being first duly sworn, deposes and states:

That she is a citizen of the United States of America, of legal age and is not a party to nor interested in the above entitled action; that on the 21st day of November, 2011, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following documents in this action:

1. *Notice of Motion*
2. *Request for Oral Argument*
3. *Motion to Dismiss Petition for Arbitration*
4. *Brief in Support of Motion*

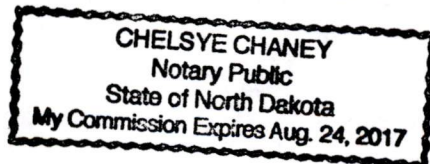
That said envelopes were addressed to the following persons at their known addresses by certified mail, restricted delivery, return receipt requested as follows:

Patrick W. Durick
Pearce & Durick
Attorneys at Law
P.O. Box 400
Bismarck, ND 58502-0400

The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


MaLaura Sorensen

Subscribed and sworn to before me this 21st day of November, 2011.




Notary Public
For the state of North Dakota 08/24/2011

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Case No. PU-11-543

Midcontinent Communications, a South Dakota Partnership,

Petitioner

v.

Missouri Valley Communications, Inc.,

Respondent

MOTION TO DISMISS PETITION FOR ARBITRATION
AND
BRIEF IN SUPPORT OF MOTION

David J. Hogue (#4486)
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2525 Elk Drive
P.O. Box 1000
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701-852-0381

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)	
South Dakota Partnership,)	
)	Case No. PU-11-543
Petitioner,)	
vs.)	
)	Motion to Dismiss
Missouri Valley Communications, Inc.,)	Petition for Arbitration
)	and
Respondent.)	Brief in Support of Motion

Missouri Valley Communications, Inc. moves to dismiss Midcontinent Communications' November 14, 2011 petition for arbitration of its request for interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange, on two grounds, both based on Missouri Valley's status as a rural telephone company exempt from duties of interconnection under the Communications Act.

1. Res judicata bars Midcontinent from relitigating in 2011 its request for interconnection in Missouri Valley's Williston exchange after litigation in 2008 in which the Commission ordered "The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." Order, PSC Case No. PU-08-61. The Commission's Order was affirmed in Midcontinent's action in Federal District Court for judicial review of the Order.

2. Midcontinent's 2011 petition for arbitration requests action from the North Dakota Public Service Commission that is not authorized under the Communications Act or related provisions of the North Dakota Century Code. Missouri Valley is not obliged under Act § 251 to interconnect with Midcontinent and interconnection may not be compelled under § 252(b) for the purpose of exchanging local telecommunications traffic in the Williston exchange.

Missouri Valley is exempt from § 251(c)(2) interconnection duties, under § 251(f)(1)(A). There is a statutory procedure, § 251(f)(1)(B), for a CLEC to obtain § 251(c)(2) interconnection with an exempt rural ILEC. There is no statutory procedure other than § 251(f)(1)(B) for Midcontinent to obtain interconnection in Missouri Valley's Williston exchange. Section 252(b) does not authorize the Commission to compel interconnection where there is no duty of interconnection. Where there is no duty to interconnect because of the exemption there is nothing to arbitrate. Arbitration is not authorized as a procedure for Midcontinent to obtain interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange.

This motion to dismiss raises issues of law that are not issues open to arbitration under Act § 251(b) and NDCC § 49-21-01.7.

The Parties

Midcontinent is a South Dakota general partnership registered with the Commission to provide local exchange telecommunications services. Midcontinent is a competitive local exchange company (CLEC) and is a reseller of telecommunications service in the Williston exchange. Midcontinent has a certificate of public convenience and necessity to provide facilities based competitive local exchange telecommunications services throughout North Dakota, subject to the rights of rural telephone companies under 47 U.S.C. § 251(f). (Orders, Cases No. PU-04-546 and PU-04-638.)

Missouri Valley is a North Dakota corporation authorized by the Commission under a certificate of public convenience and necessity to provide local exchange telecommunications services in the Williston North Dakota exchange. Missouri Valley is an incumbent local

exchange carrier (ILEC) and a rural telephone company. Missouri Valley offers the services that are supported by federal universal service support mechanisms and is designated as an eligible telecommunications carrier in the Williston exchange area. (Orders, Cases No. PU-2779-02-451 and 452.)

Preliminary Statement

On June 14, 2011, Midcontinent requested interconnection between Missouri Valley and Midcontinent in Williston, ND for the purpose of exchanging local telecommunications traffic in the Williston exchange. (Exhibit 1)

On July 6, 2011, Missouri Valley declined Midcontinent's request. Missouri Valley explained that it relied on its rural exemption under § 251(f)(1)(A) of the Act, exemption from the duty of interconnection under § 251(c)(2) that would oblige Missouri Valley if it were not exempt under § 251(f)(1)(A), and on the Commission's Order in Case No. PU-08-61. (Exhibit 2, herein the "Rural Exemption Order")

On July 12, 2011, Midcontinent sent another letter to Missouri Valley about the request for interconnection. (Exhibit 3)

On August 8, 2011, Midcontinent requested (by-e-mail) that the Commission mediate Midcontinent's request. With the assistance of mediator Steven Storslee, Midcontinent and Missouri Valley participated in mediation on September 26, 2011. The mediation did not lead to a resolution of Midcontinent's request for interconnection.

On November 14, 2011, Midcontinent filed a petition for the Commission to arbitrate its request and compel Missouri Valley to interconnect with Midcontinent, citing §§ 251(a) and 252(b) of the Act. (2011 Petition).

The 2011 Petition is not the first time Midcontinent petitioned the Commission to require Missouri Valley to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in Williston. In November, 2007 Midcontinent requested facilities based interconnection for the Williston, North Dakota exchange. Missouri Valley denied the request, relying on its rural exemption under § 251(f)(1)(A). In 2008 Midcontinent requested the Commission to conduct an inquiry under § 251(f)(1)(A) and (B) for the purpose of determining whether to terminate Missouri Valley's rural exemption from providing the interconnection requested by Midcontinent. (Exhibit 4) After a hearing the Commission ordered "The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." Rural Exemption Order, Case No. PU-08-61. Exhibit 2.

In 2009, Midcontinent commenced an action in Federal District Court for judicial review of the Commission's Order in Case No. PU-08-61. The Court dismissed Midcontinent's action, effectively affirming the Commission's decision and order. Order, United States District Court, DND, Case No. 1:09-cv-017, Apr. 15, 2010. (Exhibit 5)

Interconnection Duties under the Telecommunications Act

In 1996, Congress enacted the Telecommunications Act of 1996, amending the 1934 Communications Act and codified as 47 U.S.C. §§ 151 et. seq. (Sometimes referred to herein as the "Act" or the "federal act," as defined by N.D.C.C. § 49-21-01(5).) The amended Act includes provisions to develop competition in local telecommunications service by requiring interconnections and includes provisions to exempt rural telephone companies from some interconnection duties.

Under the Act, certain duties are imposed on all “telecommunications carriers” (Act § 153(44)) including “local exchange carriers” (LECs). “The term ‘local exchange carrier’ means any person that is engaged in the provision of telephone exchange service or exchange access.” Act § 153(26). “The term ‘telephone exchange service’ means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” Act § 153(47).

(“Exchange access” is the service that local exchange carriers provide to interexchange carriers/long distance companies in order that long distance calls can be originated by a subscriber in one local exchange and terminated at the location of a subscriber in a distant local exchange. Act § 153(16). Exchange access is not involved in this case.)

There are two kinds of LECs, incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). Section 251(h)(1) defines ILECs as LECs that provided local telephone exchange service before enactment of the 1996 amendments. CLEC is a common acronym for “competitive local exchange carrier (or company)”, a term not defined in federal statutes or regulations. It is defined in North Dakota’s Administrative Code. “‘Competitive local exchange company’ means any telecommunications company providing local exchange service, other than an incumbent local exchange carrier....” ND Admin. Code § 69-09-05-00.1.1. ILECs are sub-categorized between ILECS that are and are not “rural telephone companies.” Act § 153 (37). CLECs and rural ILECs are also sub-categorized between those that do and do

not provide video programming. § 251(f)(1)(C).

Missouri Valley and Midcontinent are both LECs. Midcontinent is a CLEC that provides video programming. Missouri Valley is an ILEC and is also a rural telephone company that does not provide video programming.

Act § 251 provides a graduated set of interconnection requirements. Section 251(a) sets forth general duties applicable to all telecommunications carriers, not only LECs, including the duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 47 CFR § 51.5 defines “interconnection” as the linking of two networks for the mutual exchange of traffic.

Under § 251(c) ILECs are subject to additional duties including CLEC/ILEC interconnection, “The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network - (A) for the transmission and routing of telephone exchange service and exchange access....” §251(c)(2). Under § 251(c)(1) an ILEC and a CLEC that requests interconnection are obliged to negotiate in good faith in accordance with § 252 the particular terms and conditions of interconnection agreements.

The Rural Exemption from Interconnection Duties

Section 251(f)(1)(A) (the “rural exemption”) provides “EXEMPTION - Subsection (c) of this section shall not apply to a rural telephone company until . . . (i) a CLEC makes a bona fide request for interconnection and (ii) the State commission determines under § 251(f)(1)(B) procedures and standards that the exemption should be terminated. ILECs that are rural telephone companies are exempt from all duties under §251(c), including the §251(c)(2) duty to

interconnect with CLECs for the transmission and routing of telephone exchange service.”

The exemption does not apply with respect to a CLEC/ILEC interconnection request from a cable operator providing video programming that seeks interconnection with a rural telephone company that provides video programming. § 251(f)(1)(C).“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).” Rural Exemption Order, ¶ 11.

Midcontinent’s 2011 petition and Missouri Valley’s motion to dismiss involve all these principles and provisions of the Act, principally the § 251(a) and (c)(2) interconnection duties, the arbitration provisions of § 252(b) relied on by Midcontinent, and the rural exemption provisions of § 251(f)(1)(A) and (B).

Missouri Valley also relies on the 2008 Rural Exemption Order where the Commission ordered “The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley’s Williston exchange is not terminated.” (PSC Case No. PU-08-61) and on the Federal Court Order (DND, Case No. 1:09-cv-017, Apr. 15, 2010) that affirmed the Commission’s decision and order. Exhibits 2 and 5. Res judicata bars Midcontinent from relitigating its request for interconnection in Missouri Valley’s Williston exchange.

Procedure and Jurisdiction

Procedures for the Commission to address a CLEC’s request for interconnection are provided by a combination of federal and state law. The federal act provides for administration of Act §§ 251 and 252 by “State commissions” (Act § 153(41)) but does not directly delegate jurisdiction to the Commission because the Commission is a state agency that receives its jurisdiction only from the North Dakota Legislature. NDCC § 49-21-01.7, subsections 8, 9 and

11 empower the Commission to administer the provisions of Act sections §§ 251 and 252 that are involved in this case. The power is exercised under the Administrative Agencies Practices Act, NDCC Ch. 28-32 and the North Dakota Administrative Code. The Administrative Code includes provisions specific to arbitration proceedings under § 252 of the federal act, ND Admin. Code Ch. 69-02-10.

When a CLEC requests § 251(c)(2) CLEC/ILEC interconnection with a non-rural non-exempt ILEC, the Act provides for a State commission to mediate or arbitrate particular terms and conditions of an interconnection, under § 252(b). However achieved, by voluntary negotiation, mediation or arbitration, an interconnection agreement made in the absence of an exemption must be submitted to a State commission for approval. § 252(a), (b), (c) and (e).

Where a CLEC requests § 251(c)(2) CLEC/ILEC interconnection with a rural ILEC that is exempt under § 251(f)(1)(A), § 251(f)(1)(B) provides a procedure for the CLEC to request the State commission to terminate the rural ILEC's exemption from § 251(c)(2) interconnection. A rural ILEC's exemption from the § 251(c)(2) interconnection duty is in effect unless and until the State commission determines under statutory standards and procedures that the exemption should be terminated. If a rural ILEC's exemption is terminated under § 251(f)(1)(B), the State commission shall establish an implementation schedule for compliance with the request for interconnection.

§ 251(f)(1)(B) provides the only statutory procedure for Midcontinent, a CLEC, to obtain a § 251(c)(2) CLEC/ILEC interconnection with Missouri Valley, a rural ILEC exempt under § 251(f)(1)(A).

The issues

Missouri Valley understands Midcontinent asserts its June 14, 2011 request for interconnection is made under Act § 251(a), not under § 251(c), and asserts Missouri Valley's rural exemption under § 251(f)(1)(A) does not apply to § 251(a). Exhibits 1, 3, and 2011 Petition.

Missouri Valley asserts § 251(a) does not include a duty of direct interconnection for the exchange of telecommunications traffic.

Missouri Valley asserts Midcontinent's request for an interconnection is a request for CLEC/ILEC interconnection under § 251(c)(2), interconnection that Missouri Valley is exempt from providing under § 251 (f)(1)(A), the "rural exemption."

Midcontinent requested a "direct interconnection ...in the Williston exchange ... for the purpose of exchanging local telecommunications traffic." Midcontinent's request/letter of June 14, 2011, Exhibit 1. The words that Midcontinent used to describe its requested interconnection are equivalent to the words of § 251(c)(2): "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service." Therefore, Missouri Valley declined Midcontinent's request, relying on the rural exemption from § 251(c)(2) CLEC/ILEC interconnection.

Midcontinent describes the issue raised in exhibit A of its 2011 Petition for arbitration. Midcontinent seeks a "facilities based interconnection 'for the purpose of exchanging local traffic' under Section 251(a) of the Communications Act. . . ." Midcontinent petition at 2, quoting its June 14, 2011 letter request for interconnection. Midcontinent's statement of the issue is incomplete. The foundation of Midcontinent's petition for arbitration is its June 14 letter (Exhibit 1) that "constitutes a formal request for interconnection under Sections 251 (a), 251(b)

and 252 of the Communications Act...” “for the purpose of exchanging local telecommunications traffic...” in the Williston exchange. The complete statement of the issue is whether Missouri Valley is obligated under Act § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange. That is not the only issue. Midcontinent’s 2011 Petition also raises the issue whether its request for interconnection is an authorized subject of arbitration under Act § 252(b).

Midcontinent’s June 14, 2011 letter states: “In connection with the exchange of traffic and interconnection Midcontinent will also require number portability. It is our understanding that Missouri Valley already has implemented number portability....” Exhibit 1. It is true that Missouri Valley has implemented number portability. Number portability, a LEC duty under § 251(b)(2) is not an issue under the 2011 Petition. Midcontinent and Missouri Valley have a negotiated resale agreement with number portability under § 251(b)(2). Order, Case No. PU-04-638; see also Simmons testimony at 9 in Case No. PU-08-61. In addition to the resale agreement, Midcontinent’s and Missouri Valley’s facilities and equipment are interconnected indirectly, an alternate to direct interconnection under § 251(a).

The parties’ positions are based on differing legal interpretations of interconnection duties and procedures under §§ 251 and 252 of the Act. Whereas negotiations and arbitrations under Act §§ 251 and 252 address “the particular terms and conditions of agreements to fulfill [interconnection] duties...” (§ 251(c)(1)), the point in conflict arising from Midcontinent’s request for interconnection is a legal issue, whether Missouri Valley has a duty under Act § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange and whether interconnection may be compelled under § 252(b). These issues of law have no middle ground amenable to negotiation

or mediation or arbitration. These are matters of law that are not subject to arbitration under Act § 252(b) and NDCC § 49-21-01.7.

Midcontinent asserts Act § 252(b) and NDCC § 49-21-01.7 authorize the Commission to compel Missouri Valley to comply with Midcontinent's June 14, 2011 request for interconnection for the exchange of local telecommunications traffic in Missouri Valley's Williston exchange.

Midcontinent's business motivations for seeking interconnection, explained at pages 2-4 of its petition, are not issues for arbitration. Midcontinent's petition refers to delays in service connections as one reason for its arbitration request. Midcontinent's petition acknowledges it is a Missouri Valley customer, purchasing local telecommunications services at wholesale for resale to Midcontinent's cable TV customers. Timing of service connections under the existing resale agreement is not an issue in an arbitration proceeding for a new interconnection agreement, as indicated by its absence from Midcontinent's attachment A. Missouri Valley is in full compliance with its obligations to Midcontinent under the resale agreement. If Midcontinent has any complaints about the quality of service provided by Missouri Valley or if it believes it does not receive the same quality of service as Missouri Valley provides to its retail customers, it may file a complaint under NDCC §§ 49-21-07, 10.2 and 10.3. Missouri Valley cannot discriminate in favor of Midcontinent. As indicated by the record in case No. PU-08-61, Missouri Valley has responsibilities throughout the Williston exchange area including areas where Midcontinent chooses not to install its cable TV facilities.

Missouri Valley asserts the arbitration provisions under Act § 252(b) and NDCC § 49-21-01.7 do not authorize CLEC/ILEC interconnection to be compelled because Missouri Valley's § 251(f)(1)(A) rural exemption from § 251(c)(2) interconnection has not been terminated. Under §

251(f)(1)(A), Missouri Valley's rural exemption from § 251(c)(2) CLEC/ILEC interconnection is in effect "until" the State Commission were to determine under § 251(f)(1)(B) procedures that the exemption should be terminated. There is no statutory procedure other than § 251(f)(1)(B) for Midcontinent to obtain CLEC/ILEC interconnection with Missouri Valley.

All the more, arbitration under § 252(b) is not an available procedure for Midcontinent to obtain CLEC/ILEC interconnection in Missouri Valley's Williston exchange because Midcontinent's request for interconnection was denied in prior § 251(f)(1)(B) proceedings between the parties. The 2008 Rural Exemption Order bars Midcontinent from relitigating in 2011 its request for CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange, under res judicata.

Argument

1. Midcontinent is barred from relitigating its request for CLEC/ILEC interconnection with Missouri Valley

Under res judicata principles, Midcontinent is barred from relitigating in 2011 its previous request for CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange.

In November 2007, Midcontinent requested "a facilities based interconnection agreement with number portability for the Williston, North Dakota exchange" and in 2008 commenced proceedings under § 251(f)(1)(A) and (B) seeking termination of Missouri Valley's rural exemption from CLEC/ILEC § 251(c)(2) interconnection duties. Exhibit 4. The outcome was the Commission's Rural Exemption Order that "The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated."

Order, Case No. PU-08-61, Exhibit 2. The request for interconnection in 2008 is substantially identical to the request made in 2011, its June 14 letter that “constitutes a formal request for interconnection under Sections 251 (a), 251(b) and 252 of the Communications Act...” “for the purpose of exchanging local telecommunications traffic...” in the Williston exchange. Exhibit 1.

Res judicata, also known as claim preclusion or collateral estoppel, is a basic principle governing civil litigation. A claim once litigated cannot be relitigated. The principle’s rationale has two basic points. Parties to concluded litigation should be able to continue in their lives and enterprises, secure that past judgments will not be undone by repetitious litigation. Courts and agencies should be able to attend to resolution of current cases, free of burdens imposed by repetitious litigation, past cases being relitigated by losers. A disappointed litigant might appeal a decision, but after appeal rights have either expired or were exercised and the decision affirmed, the losing party’s loss is final. No rematch after a defeat fairly suffered. Astoria Federal Savings and Loan Association v Solimino, 501 US 104, at 107,111 S.Ct. 2116 (1991).

“Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. Thus, res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to [the] parties and their privies in all other actions. Res judicata applies even if subsequent claims are based upon a different legal theory.

‘Under res judicata principles, it is inappropriate to rehash issues which were tried or could have been tried by the court in prior proceedings.’ Res judicata or claim preclusion ‘bars courts from relitigating claims in order to promote finality of judgments, which

increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources.’

“‘[R]es judicata applies even though the subsequent claims may be based upon a different legal theory.’ ‘It matters not that the substantive issues were not directly decided in the prior action; the key is that they were capable of being, and should have been, raised as part of the [prior] proceeding.’” Missouri Breaks v Burns, 2010 ND 221, [¶¶ 10, 11], 791 NW2d 33, (2010) (citations omitted).

The common law doctrine of res judicata applies to decisions made by administrative agencies under both United States Supreme Court and North Dakota Supreme Court precedents. Legislatures may modify the application of res judicata to agencies’ decisions. Administrative res judicata is presumed in the absence of a legislative intent to the contrary.

“We have long favored application of the common law doctrines of collateral estoppel (as to issues) and *res judicata* (as to claims) to those determinations of administrative bodies that have attained finality.

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose....

Thus, where a common law principle is well established, as are the rules of preclusion, the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.” Astoria, 501 US at 107-108. (Citations omitted.)

The common law doctrine of res judicata applies to decisions made by North Dakota’s administrative agencies as well.

“The doctrine generally provides that [an agency’s] issuance of a final order after a formal adjudicative hearing bars [the agency] ‘from later raising issues in new proceedings which could have been resolved in the prior formal adjudicative proceeding that had become final.’ The doctrine is applied more ‘circumspectly’ than judicial res judicata, considering ‘(1) the subject matter decided by the administrative agency, (2) the purpose of the administrative proceeding, and (3) the reasons for the later proceeding.’ Administrative res judicata must be applied in light of N.D.C.C. § 65-05-04, which grants WSI continuing jurisdiction to review an award of benefits, and provides that WSI ‘at any time, on its own motion or on application, may review the award, and in accordance with the facts found on such review, may end, diminish, or increase the compensation previously awarded.’ Landrum v Workforce Safety and Insurance, 2011 ND 108, ¶¶ 12-13 798 N.W.2d 669 (ND 2011)(citations omitted); Baier v. North Dakota Workers Compensation Bureau , 2000 ND 78, ¶ 22, 609 N.W.2d 722 (agency’s right to consider award to injured worker at “any time” does not preclude application of res judicata to prevent agency from relitigating same issue).

Administrative res judicata is not only a common law doctrine, res judicata also applies to the Commission’s decisions as a matter of statutory law. NDCC § 49-05-08 provides: “In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.”

Under NDCC § 49-05-08 and common law res judicata, the 2008 Rural Exemption Order is conclusive, precluding relitigation of Midcontinent’s request for interconnection in the Williston exchange. NDCC § 49-05-09 is similar to NDCC § 65-05-04 affecting the WSI agency. NDCC § 49-05-09 authorizes the Commission to rescind, alter or amend any decision made by

it. Although the Commission has some discretionary authority under N.D.C.C. § 49-05-09 to review previous decisions, that statutory authority does not mean the Commission can or must relitigate issues that were or should have been decided in a prior formal adjudicative proceeding. The statute conferring authority on the Commission to review previous decisions does not entitle Midcontinent to request or demand the Commission to exercise that authority to relitigate issues that Midcontinent should have raised in the 2008 formal adjudicative hearing. Baier, supra.

These recent decisions of the United States and North Dakota Supreme Courts show that res judicata applies in both jurisdictions to the Commission's decisions under the federal act. Nothing in the Act or in North Dakota's statutes provides or implies that the Commission's decisions under the Act should not have res judicata effect to preclude relitigation. Under state and federal law common law and North Dakota statutes, res judicata bars Midcontinent from raising issues in its 2011 Petition that were or could have been resolved in 2008 in Case No. PU-08-61.

A litigant's claim is barred by res judicata if four "elements" connect the first and second actions.

1. A final decision on the merits in the first action by a court or agency of competent jurisdiction;
2. The second action involves the same parties, or their privies, as the first;
3. The second action raises an issue actually litigated or which should have been litigated in the first action;
4. An identity of the causes of action.

Where all four elements are present, res judicata applies to prevent relitigation of claims made or that could have been made in the first action. Missouri Breaks, supra, ¶ 12.

All these elements are present, connecting the first action, Case PU-08-61, and the second action, Case No. PU-11-543, so that the 2011 Petition is barred.

1. The first action was finally decided by an agency and by a court of competent jurisdiction. The Commission's jurisdiction is not in doubt. Act § 251(f)(1)(A) and (B), and NDCC § 49-21-01.7 subd. 11. Exhibit 5 shows the Rural Exemption Order's finality in an administrative adjudicative proceeding. § NDCC 28-32-21, 28-32-39. Midcontinent did not exercise its statutory right under NDCC § 28-32-42 to appeal the Rural Exemption Order for judicial review in North Dakota's courts. Instead, Midcontinent commenced an action in federal district court for judicial review of the Rural Exemption Order. The federal court's jurisdiction is not in doubt.

If finality can be made more final, that happened to the Rural Exemption Order in the first action. Midcontinent's federal court action was dismissed, affirming the PSC's Order. Exhibit 5. Midcontinent did not exercise its federal statutory right to appeal to a higher federal court, so the Federal District Court's Order is final. The Rural Exemption Order is not "only" an agency decision. The Commission's Order in the first action case has acquired and is reinforced by judicial res judicata.

2. The parties in both actions are the same, Midcontinent Communications as petitioner and Missouri Valley Communications, Inc. as respondent.

3. The second action in 2011 raises an issue actually litigated or which could have been litigated in the first action in 2008, whether Missouri Valley has a duty under Act § 251(a) to interconnect with Midcontinent for the exchange of local telecommunications traffic in the Williston exchange.

4. The claims are identical in both actions. In both actions Midcontinent's claimed rights under § 251 of the Act, rights to interconnection with Missouri Valley in the Williston exchange for the exchange of local traffic.

Midcontinent describes the issue raised in the second action in its 2011 Petition. Midcontinent's statement of the issue is partially accurate, but incomplete. The foundation of Midcontinent's petition for arbitration is its June 14 letter that "constitutes a formal request for interconnection under Sections 251 (a), 251(b) and 252 of the Communications Act..." "for the purpose of exchanging local telecommunications traffic..." in the Williston exchange. Exhibit 1. The complete statement of the issue raised in the second action is whether Missouri Valley is obligated under Act § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange. This issue raised in the second action is a legal theory that Midcontinent could have and should have raised in the first action.

The foundation of the first action was Midcontinent's November 14, 2007 request for facilities based interconnection for the Williston, North Dakota exchange. Missouri Valley declined the request, relying on the rural exemption under Act § 251(f)(1)(A). Midcontinent commenced proceedings under Act § 251(f)(A) and (B) in 2008, asserting two alternative theories: that the Commission should find that Missouri Valley had waived its rural exemption from interconnection or that the Commission should terminate Missouri Valley's exemption from interconnection. Exhibit 4.

Midcontinent had another alternative theory available in 2008. Midcontinent could have claimed that its November 14, 2007 request served not only as the foundation of proceedings under § 251(f)(1)(A) and (B), it might also have asserted in 2008 – as it does now in 2011 – that its letter requesting interconnection "constitutes a formal request for interconnection under §§

251(a), 251(b) and 252 of the Communications Act....” Exhibit 1. Midcontinent made no claim under § 251(a) in the 2008 first action when it was an available claim.

“‘[R]es judicata applies even though the subsequent claims may be based upon a different legal theory.’ ‘It matters not that the substantive issues were not directly decided in the prior action; the key is that they were capable of being, and should have been, raised as part of the [prior] proceeding.’” Missouri Breaks v Burns, 2010 ND 221, [¶ 11], 791 NW2d 33 (2010).

Protests from Midcontinent are predictable. Midcontinent might argue about the key point – that its 2011 claim under § 251(a) was capable of being raised in the prior proceeding. Midcontinent might protest its § 251(a) claim could not have been raised in 2008, it could be raised only after the FCC’s 2011 Declaratory Ruling, FCC 11-83 (herein Ruling) that clarified the availability of arbitration procedures under § 252(b) to enforce rural ILECs’ duties under § 251(a).

The essence of the predicted protest is: the idea of requesting interconnection for the purpose of exchanging local telecommunications traffic and claiming the request is made under § 251(a) instead of under § 251(c)(2) and invoking arbitration proceedings under § 252(b) to litigate the request is an idea did not occur to Midcontinent in 2008; the idea is a new theory inspired by the Ruling, an idea that Midcontinent could not conceive in 2008.

The § 251(a) + § 252(b) idea is not a new creation given birth by the FCC Ruling in May of 2011. The FCC did not create new duties affecting rural ILECs or new procedures for their enforcement. Sections 251(a) and 252(b) of the Act have not been amended from 2008 to 2011. No new regulations affecting either section were issued or old ones amended by the Ruling. The 2011 Ruling was an order declaring rights of parties to on-going litigation in other states,

explained in an opinion that clarified statutory procedures and provided guidance regarding the scope of sections §§ 251 and 252. See Ruling ¶¶ 1, 2 and 28. The Ruling may be a precedent for future cases where there are issues about the interaction of §§ 251 and 252, but the Ruling does not justify or authorize relitigation of past finalized cases.

The § 251(a) + § 252(b) idea occurred to CRC Communications and Time-Warner in their endeavors to obtain interconnections with rural ILECs in Maine dating back to 2008, before the July 2008 hearing in Case No. PU-08-61. See Ruling ¶ 8. The § 251(a) + § 252(b) idea was alive and active in other States' commissions' proceedings and in some federal court actions before Midcontinent commenced proceedings in 2008. See Ruling ¶¶ 10 and 18 and notes 33 and 63.

Midcontinent had the opportunity to make a claim for interconnection under §§ 251(a) and 252(b) in its 2008 action to obtain interconnection with Missouri Valley in Williston. The record in the first action in 2008 shows Midcontinent was not inattentive to § 251(a). Midcontinent specifically addressed a potential alternative claim for interconnection under § 251(a). See Midcontinent's August 1, 2008 brief in case No. PU-08-61, footnote 29, page 14. See also the text at pages 5-7 of its November 4, 2008 Petition for Reconsideration of the Rural Exemption Order in Case No. PU-08-61 and Midcontinent's October 9, 2009 brief in its federal court action, pp. 15-16, where Midcontinent repeated arguments that § 251(a) affected issues under § 251(f)(1)(B). Midcontinent did not pursue the § 251(a) claim in 2008 with the same zeal as did CRC and TWC in the Maine cases, but Midcontinent certainly had the opportunity to assert a claim under § 251(a) in its first action seeking interconnection in Williston. It is not credible in 2011 that Midcontinent could not have made the § 251(a) claim in 2008.

Midcontinent's July 12, 2011 letter (Exhibit 3) explaining its June 24 request asserts that the first action "addressed only the rural exemption" from § 251(c) interconnection and is "not relevant" to the second action where Midcontinent seeks interconnection under § 251(a). That posturing is Midcontinent's way of denying that Midcontinent could have asserted a claim for interconnection under § 251(a) as another alternative theory in support of its request for interconnection in 2008, each theory independent of the other two. Midcontinent could have argued three theories in 2008.

1. Waiver of the rural exemption under § 251(f)(1)(A).
2. Terminate Missouri Valley's rural exemption under § 251(f)(1)(A) and (B) because interconnection is not unduly economically burdensome.
3. Compel interconnection under § 251(a) because that is a duty under the Act without regard to Missouri Valley's rural exemption or issues under § 251(f)(1)(B).

Midcontinent asserted two theories in 2008. Midcontinent, not Missouri Valley or the Commission, limited Case No. PU-08-61 to "address only the rural exemption." Midcontinent did not assert the § 251(a) theory that was as much available to it as it was to CRC and TWC in the Maine cases. Issues under § 251(f)(1)(B) might or might not be relevant to an alternative claim under § 251(a), but Midcontinent seems to miss the truly relevant point. The truly relevant point is that Midcontinent did not make the § 251(a) claim that was available to it in 2008. The § 251(a) claim could have been made in 2008, was not made, and is barred from being resurrected in 2011.

The third element is the heart of res judicata, subjecting litigants to a use it or lose it discipline. It matters not why issues belatedly asserted in the second action were not raised in the first. Issues that could have been raised in the first action but were not used are lost.

Element 3 of the res judicata doctrine is similar to “waiver” concepts argued by Midcontinent in Case No. PU-08-61. Midcontinent had the opportunity to assert a claim under § 251(a) in Case No. PU-08-61, did not make that claim, and it is barred from relitigation in 2011.

Had Midcontinent claimed in 2008 that Missouri Valley was obliged under § 251(a) to interconnect for the purpose of exchanging of local telecommunications traffic, the claim would have been resisted by Missouri Valley, litigated and argued with the same energy as the parties actually expended on the two issues that Midcontinent raised in the first action. Missouri Valley would have asserted in 2008 that the claim under § 251(a) lacks merit for the same reasons it asserts in 2011 under the second ground for dismissal of Midcontinent’s 2011 Petition. But whether or not Midcontinent’s 2011 claim under § 251(a) has merit is irrelevant to the res judicata defense. It matters not. The claim could have been made in 2008, was not made, and is barred from being relitigated in 2011.

Res judicata element 4 is present; the claims are identical in both actions. In both actions Midcontinent’s claims rights under § 251 of the Act, rights for interconnection with Missouri Valley for the exchange of local traffic in the Williston exchange.

The first action commenced with Midcontinent’s November 7, 2007 letter requesting “a facilities based interconnection agreement” for the Williston exchange.” Exhibit 4. Throughout the proceedings, Midcontinent testified and argued about facilities based interconnection. See, e.g. written testimony of its senior vice president Simmons at pp. 3, 5 and 9-11, of its expert witness/advocate Gates at p.11-13, and its entire August 1, 2008 post hearing brief in Case No. PU-08-61. The findings in the Rural Exemption Order included ¶10, “Midcontinent has specifically requested facilities-based interconnection with local number portability.” and findings ¶¶ 34 and 35 that interconnection is technically feasible.

In the second action, Midcontinent requested interconnection “for the purpose of exchanging local telecommunications traffic.” Midcontinent proposed “that the parties interconnect at Williston using two-way direct interconnection ... using either electrical facilities ... or via optical facilities.” (Midcontinent’s request/letter of June 14, 2011, Exhibit 1.)

The words of Midcontinent’s requests in the first and second actions show the two actions present identical claims for interconnection with Missouri Valley’s local exchange network in Williston. Not only are the two claims identical with each other, they are also connected by the words of the Act. Both of Midcontinent’s requests for interconnection are the equivalent of a request for § 251(c)(2) “interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service.”

Midcontinent’s 2011 request for interconnection masquerades as a request for interconnection under § 251(a) where it is in reality a request for § 251(c)(2) CLEC/ILEC interconnection. The interconnection requested by Midcontinent in 2011 is not a new claim. The 2011 request uses a few different words to repeat the old claim. The interconnection that Midcontinent requests in 2011 is the same as its 2007 request litigated in 2008. This reality shows it is true not only that the two actions present identical claims (element 4), it is also true that the interconnection that Midcontinent requests in 2011 was actually litigated in 2008 (element 3), litigated for what it was, a request for § 251(c)(2): “interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service.” It was a claim made in 2008 that cannot be relitigated in 2011.

Re-litigation is barred not only by the common law doctrine of administrative res judicata and by the conclusive statutory rule of NDCC § 49-05-08, but also because Midcontinent sought

review of the 2008 Rural Commission Order in federal district court. Because that court issued the more final order in the first action (Exhibit 5), judicial res judicata bars relitigation.

When the four element analysis is completed, the bottom line question is whether the second action might conceivably have any effect to alter the outcome of the first action. If the answer is yes, then res judicata applies. Missouri Breaks, supra. That is obviously the purpose of Midcontinent's 2011 Petition, to alter the outcome of the first action in 2008 where the Commission ordered "The rural exemption under 47 USC § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." Rural Exemption Order, Exhibit 2. In its second action in 2011, Midcontinent seeks an interconnection in Missouri Valley's Williston exchange for the purpose of exchanging local telecommunications traffic, asserting rights under Act § 251; it seeks the interconnection that was denied in the first action in 2008, also under Act § 251.

Midcontinent's 2011 Petition seeks a rematch after a defeat fairly suffered in 2008.

A more apt case of res judicata is difficult to imagine.

2. Arbitration is not an authorized procedure for Midcontinent to obtain CLEC/ILEC interconnection with Missouri Valley.

Assuming arguendo that Midcontinent's 2011 Petition is not barred by res judicata, arbitration is not an authorized procedure for Midcontinent to obtain interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange.

Midcontinent's 2011 Petition requests the Commission to compel CLEC/ILEC interconnection under § 252(b), despite the Commission's Rural Exemption Order (Exhibit 2) in

2008 “The rural exemption under 47 USC § 251(f)(1)(A) for interconnection in Missouri Valley’s Williston exchange is not terminated.” Midcontinent apparently believes it has discovered an alternative procedure - the §251(a) + § 252(b) theory - to obtain a CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic – and it cites the FCC’s recent Declaratory Ruling, FCC 11-83 (herein Ruling) in support of its 2011 Petition. Midcontinent’s 2011 Petition is addressed first by review of statutory provisions and second by review of the Ruling.

A. Arbitration is not an authorized procedure under the Act for Midcontinent to obtain CLEC/ILEC interconnection with Missouri Valley.

Act § 251 provides a graduated set of interconnection requirements. Section 251(a) sets forth general duties applicable to all telecommunications carriers, not only LECs, including the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. § 251(b) provides duties affecting only LECs. § 251(b) duties do not include interconnection but may affect terms and conditions of interconnections.

Under § 251(c) ILECs are subject to additional duties including CLEC/ILEC interconnection, “The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network - (A) for the transmission and routing of telephone exchange service and exchange access....” § 251(c)(2).

Under § 251(c)(1) an ILEC and a CLEC that requests interconnection are obliged to negotiate in good faith in accordance with § 252 the particular terms and conditions of interconnection agreements. Section 252 provides for voluntary negotiation, mediation and

compulsory arbitration to resolve open issues that are unresolved. Section 252(b)(4)(B) empowers State commissions to impose “appropriate conditions.”

Under § 251(f)(1)(A) (the “rural exemption”), ILECs that are rural telephone companies are exempt from all duties under §251(c). Section 251(f)(1)(A) provides “EXEMPTION - Subsection (c) of this section shall not apply to a rural telephone company until...” (i) a CLEC makes a bona fide request for interconnection and (ii) the State commission determines under § 251(f)(1)(B) procedures and standards that the exemption should be terminated. ILECs that are rural telephone companies are exempt from the §251(c)(2) duty to interconnect with CLECs for the transmission and routing of telephone exchange service and are also exempt from the duty to negotiate terms and conditions of interconnection agreements. The rural exemption from the §251(c)(2) CLEC/ILEC interconnection duty is reinforced by exemption from the duty to negotiate interconnection agreements where a CLEC requests interconnection for the purpose of exchanging local telecommunications traffic.

The rural exemption from CLEC/ILEC interconnection is subject to termination. Under § 251(f)(1)(A) “Subsection (c) of this section shall not apply to a rural telephone company until...” (i) a CLEC makes a bona fide request for interconnection and (ii) the State Commission determines under § 251(f)(1)(B) procedures that the exemption should be terminated. “Until” a rural telephone company’s exemption is terminated under § 251(f)(1)(B) the rural exemption from § 251(c)(2) interconnection is in effect, as a matter of statutory law.

Midcontinent requests a “direct interconnection ... for the purpose of exchanging local telecommunications traffic” with Missouri Valley in Williston. Midcontinent’s request/letter of June 14, 2011, Exhibit 1; Midcontinent petition at 7. Midcontinent’s claim (Exhibits 1 and 3) that its request is made under § 251(a) and (b) and not under § 251(c) is disingenuous. The

interconnection requested by Midcontinent (Exhibit 1) “for the purpose of exchanging local telecommunications traffic” is really a request for CLEC/ILEC interconnection under § 251(c)(2) “for the transmission and routing of telephone exchange service....” Missouri Valley is exempt from providing § 251(c)(2) CLEC/ILEC interconnection, under § 251 (f)(1)(A), the “rural exemption.”

Midcontinent’s claim that the interconnection it requests in 2011 is made under § 251(a) and (b) and not under § 251(c) would move CLEC/ILEC interconnection from the § 251(f)(1)(A) rural exemption section to the § 251(a) duty section and transform the rural exemption from interconnection “for the transmission and routing of telephone exchange service....” into a duty. Midcontinent’s “cramped reading” of the statute would not merely weaken, it would destroy the rural exemption, “the broad protection Congress granted to rural telephone companies” under § 251(f)(1)(A). Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, (8th Cir. 2000). To weaken or destroy the rural exemption is Midcontinent’s goal, but that goal is contrary to Congressional intent. If Congress had wanted rural telephone companies to be subject to a duty of interconnection for the purpose of exchanging local telecommunications traffic, it could easily have said so. That is not what Congress wanted and not what it said. What Congress wanted and what the statute says is rural telephone companies are not subject to a duty of interconnection for the purpose of exchanging local telecommunications traffic. The plain meaning of the chosen language of §§ 251(a), 251(c)(2) and 251(f)(1)(A) is rural telephone companies are exempt from providing CLEC/ILEC interconnections for the purpose of exchanging local telecommunications traffic. Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, (8th Cir. 2000).

Considered as a request for interconnection under § 251(a) and (b) and not as a disguised § 251(c)(2) request, Midcontinent's 2011 request is unavailing because § 251(a) does not include a duty of direct interconnection for the exchange of telecommunications traffic. See AT&T Corp v Atlas, 317 F.3d 227 (D.C. Cir. 2003), where the court affirmed an FCC Order that a telecommunications carrier's § 251(a) "duty to 'interconnect' [refers] 'solely to the physical linking of two networks, and *not* to the exchange of traffic between networks.'" A carrier's duty of direct or indirect connection is fulfilled by indirect connection. Direct interconnection is not required and the exchange of traffic is not required under § 251(a). The court's opinion emphasized there is no ambiguity about the limits of § 251(a). "As the Commission points out, both the text of § 251(a)(1) and the structure of § 252 strongly indicate that to 'interconnect' and to exchange traffic have distinct meanings. Id.

Under AT&T v Atlas, the existing § 251(a) indirect connection between Midcontinent's and Missouri Valley's facilities fulfills Missouri Valley's duties under § 251(a). That section does not include additional duties to provide direct interconnection to exchange local telecommunications traffic in the Williston exchange. Those additional duties are duties under § 251(c)(2), duties from which Midcontinent is exempt under § 251(f)(1)(A) unless and until the exemption were terminated under § 251(f)(1)(B). See also the Order in Midcontinent's federal court action that affirmed the 2008 Rural Exemption Order, where the Court recognized interconnection duties under § 251(c)(2) are duties additional to general duties under § 251(a). Exhibit 5, 4-5; See also Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation, Case No. PU-05-451. The statutory language "must have some purpose." Id. ¶ 17.

Midcontinent's request for interconnection expressed willingness to negotiate

interconnection at any location in the Williston exchange (Midcontinent's June 14 and July 12 letters, Exhibits 1 and 3) as if that somehow converted the requested interconnection from non-duty status or exempt status into a duty. Where there is a duty to interconnect, a CLEC and a non-rural non-exempt ILEC might negotiate about the location of the link between their networks. Where Missouri Valley is not obliged to interconnect under either § 251(a) or § 251(c), Midcontinent's gratuitous offer to negotiate the location or any other terms of a requested interconnection with Missouri Valley does not avoid or evade Missouri Valley's rural exemption from interconnection. Where there is no duty to interconnect because of the exemption, there is nothing to negotiate or to arbitrate. Whatever terms Midcontinent might be willing to negotiate, its request is what it is, a request for "interconnection with the local exchange carrier's network-- (A) for the transmission and routing of telephone exchange service," the § 251(c)(2) CLEC/ILEC interconnection" from which Missouri Valley is exempt under § 251(f)(1)(A).

CLEC/ILEC interconnection is not a duty under § 251(a) and is never an "open issue" to be resolved by arbitration under § 252(b). CLEC/ILEC interconnection is always a non-issue in arbitration. Whether an ILEC is obliged to provide interconnection with a CLEC's network is a legal question, not an issue for arbitration, and the answer is straightforward. There is either a duty of interconnection under § 251(c)(2) or there is not a duty of interconnection under § 251(f)(1)(A), the rural exemption. Where a CLEC requests interconnection with a rural ILEC for the transmission and routing of telephone exchange service, the rural ILEC is not obliged to provide interconnection. There is no duty of CLEC/ILEC interconnection under § 251(c)(2) because of the § 251(f)(1)(A) rural exemption.

The 2011 Petition is Midcontinent's second effort to obtain CLEC/ILEC interconnection for the exchange of local telecommunications traffic with Missouri Valley in the Williston

exchange. The petition does not present any open issue for resolution by arbitration. Whether Missouri is obliged to provide the requested interconnection under § 251(c)(2) was an issue resolved in the first action. Missouri Valley's rural exemption from § 251(c)(2) CLEC/ILEC interconnection duties is a closed issue under § 251(f)(1)(A) and under the 2008 Rural Exemption Order.

At the end of the statutory analysis, it is fair comment say it is simply absurd for Midcontinent to assert that the Commission is empowered under § 252(b)(4)(B) to impose on Missouri Valley an interconnection agreement for the purpose of exchanging local telecommunications traffic. The Commission has that power under § 251(f)(1)(B), a power to be exercised only after the Commission were to find (on Midcontinent's burden of proof) that Missouri Valley's § 251(f)(1)(A) exemption from § 251(c)(2) CLEC/ILEC interconnection should be terminated.

Missouri Valley's position that § 252(b) does not authorize the Commission to compel CLEC/ILEC interconnection where there is no duty of interconnection because of the rural exemption is also supported by Iowa v FCC, where the court enforced the clear Congressional intent that the rural telephone company § 251(f)(1)(A) exemption from CLEC/ILEC interconnection remains in effect unless and until terminated under § 251(f)(1)(B). Missouri Valley's position that § 252(b) does not authorize the Commission to compel interconnection is also supported by AT&T v Atlas, where the court included § 252 in its analysis leading to the conclusion that the § 251(a) duty to interconnect does not include the duty to exchange traffic.

B. The FCC's 2011 Ruling does not support Midcontinent's Petition for arbitration to obtain CLEC/ILEC interconnection with Missouri Valley.

Midcontinent's 2011 Petition requests the Commission to compel CLEC/ILEC interconnection under § 252(b), despite the Commission's Rural Exemption Order (Exhibit 2) in

2008. Midcontinent apparently believes it has discovered an alternative procedure - the §251(a) + § 252(b) theory - to obtain a CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic – and it cites the FCC’s recent Declaratory Ruling, FCC 11-83 (herein Ruling) in support of its 2011 Petition.

Section 252(b) is not an authorized procedure for a CLEC to obtain CLEC/ILEC interconnection with a rural ILEC, not under the Act and not under the Ruling. Missouri Valley’s position that arbitration under § 252(b) is not an authorized procedure for Midcontinent to obtain CLEC/ILEC interconnection for the purpose of exchanging local telecommunications traffic in the Williston exchange is supported by the May 2011 FCC Ruling that Midcontinent mistakenly relies on in support of its petition for arbitration.

The Ruling did not “create de facto a new regulation” under the guise of interpretation. Christensen v Harris County, 529 U.S. 576, 588 (2000). As a precedent, the Ruling provides guidance regarding the scope of sections §§ 251 and 252. See Ruling ¶¶ 1, 2, 4, 5, 14, 15, 17, 19, 25 and 28. In formulating its guidance, the FCC made it clear that the Ruling addresses only duties under Act § 251 (a) and (b) as subjects of arbitration under § 252(b) and “allows the rural incumbent LEC to retain its exemption from the more rigorous section 251(c)(2) obligations.... We find that this reading of the statute better preserves the protections that Congress intended for the rural LECs.” (Ruling ¶ 25.)

Of course Midcontinent has read the Ruling and recognizes it does not support a petition for arbitration of Midcontinent’s request for a § 251(c)(2) interconnection with Missouri Valley’s network. So, Midcontinent describes its request as made under § 251(a) and (b). See Midcontinent’s letters of June 14 and July 12, 2011, Exhibits 1 and 3 Problem solved? No. Midcontinent’s description of its 2011 request for interconnection as made under § 251(a)

disregards the FCC's interpretation of the 251(a) "duty to 'interconnect' as referring 'solely to the physical linking of two networks, and *not* to the exchange of traffic between networks.'"

AT&T v Atlas.

The CLEC/ILEC interconnection that Midcontinent requested is a "direct interconnection ...in the Williston exchange ... for the purpose of exchanging local telecommunications traffic." Midcontinent's request/letter of June 14, 2011, Exhibit 1. Local traffic is referred to 3 more times in Midcontinent's request. See also Petition at 2, and exhibit A of petition.

The words that Midcontinent uses to describe its requested interconnection are equivalent to the words of § 251(c)(2), "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service."

Figures of speech are useful tools of analysis. A wolf wearing a sheepskin coat or Grandma's nightgown is still a wolf. If a thing looks like a duck or smells like a rose, it is what it is. Midcontinent's request is what it is. The interconnection that Midcontinent requests in the 2011 Petition is not a basic or moderate interconnection under § 251(a) and (b) that might be subject to arbitration under § 252(b) and the Ruling. It matters not that Midcontinent's crams its request under § 251(a) and (b); the interconnection it requests is the "rigorous section 251(c)(2) interconnection" that is the subject of the rural exemption under § 251(f)(1)(A), the exemption that is retained under the plain words of the Ruling. Midcontinent's cramped reading of Act § 251 and of the Ruling are impermissible. Iowa v FCC; AT&T v Atlas.

The FCC's Ruling's "approach [that] allows the rural incumbent LEC to retain its exemption from more rigorous section 251(c)(2) interconnection" is consistent with Iowa v FCC where the court vacated rules that impermissibly weakened the rural exemption. The Ruling does not weaken the rural exemption or contradict the Iowa v FCC decision. The Ruling is

precise in emphasizing that rural ILECs are not exempt from § 251(a) and (b) duties, declaring that those duties are enforceable via § 252(b) arbitration proceedings, and equally precise that the Ruling does not weaken rural ILECs' "exemption from more rigorous section 251(c)(2) interconnection." The Ruling does not change the FCC's interpretation of § 251(a) affirmed in AT&T v Atlas that the § 251(a) interconnection duty does not include a duty to exchange traffic.

The Ruling does not enable CLECs to evade rural ILECs' § 251(f)(1)(A) exemption from § 251(c)(2) interconnection duties or to avoid the specific procedures under § 251(f)(1)(B), the only statutory procedure for a CLEC to obtain CLEC/ILEC interconnection with an exempt rural ILEC for the transmission and routing of telephone exchange service.

The Ruling is not a device for Midcontinent to obtain a § 251(c)(2) CLEC/ILEC interconnection with Missouri Valley under § 252(b) procedures. The Ruling did not weaken the rural exemption from the "rigorous section 251(c)(2) interconnection." The Ruling did not create a loophole that allows Midcontinent to avoid, evade, dodge, or otherwise bypass the specific provisions of § 251(f)(1)(A) and (B). The Ruling did not award Midcontinent a rematch where it might undo the outcome of the Commission's Rural Exemption Order in Case No. PU-08-61. Nothing in the Ruling supports Midcontinent's 2011 Petition for Missouri Valley's rural exemption from the "rigorous section 251(c)(2) interconnection" to be wrested away in compulsory arbitration proceedings under § 252(b).

Midcontinent's 2011 Petition should be dismissed, consistent with the conclusive decision in the 2008 Midcontinent/Missouri Valley case No. PU-08-61, consistent with the Midcontinent/North Dakota Telephone precedent, Case No. PU-05-451, consistent with Iowa v FCC and AT&T v Atlas, consistent with Act §§ 251 and 252 and consistent with the FCC's 2011 Ruling.

Summary and Conclusion

Missouri Valley is a rural ILEC serving the Williston, North Dakota exchange. Midcontinent is a CLEC that has, for the second time, requested interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange. Missouri Valley declined the second request, relying on its rural exemption from interconnection that was not terminated the first time Midcontinent requested CLEC/ILEC interconnection. 2008 Rural Exemption Order, Exhibit 2.

The words that Midcontinent uses in 2011 to describe its requested interconnection are equivalent to the words it used when it requested facilities based interconnection in 2007 that resulted in the 2008 Rural Exemption Order that “The rural exemption under 47 USC § 251(f)(1)(A) for interconnection in Missouri Valley’s Williston exchange is not terminated.” Exhibit 2. Missouri Valley remains exempt under the 2008 Rural Exemption Order. Under res judicata, the 2008 order bars Midcontinent’s 2011 Petition and request for interconnection under §§ 251(a) and 252(b) theories that Midcontinent might have asserted but did not assert in Case No. PU-08-61.

The words of Midcontinent’s 2007 request, of its 2011 Petition and request and the words of § 251(c)(2) are a trifecta of synonyms, alternate ways of describing CLEC/ILEC interconnection. No matter what verbal maneuvers Midcontinent might practice, the interconnection its request in 2011 is the “rigorous section 251(c)(2) interconnection” “for the transmission and routing of telephone exchange service,” the kind of interconnection that Missouri Valley is exempt from providing under § 251(f)(1)(A), under the 2008 Rural Exemption Order and under the FCC’s 2011 Ruling.

When it is recognized that Midcontinent’s 2011 request only masquerades as a § 251(a)

request where it is in reality a request for § 251(c)(2) CLEC/ILEC interconnection, it follows that the two grounds for dismissal are consistent, each supporting the other. Midcontinent had the opportunity to assert a claim under § 251(a) in its first action in 2008 seeking interconnection in Williston. The interconnection that Midcontinent requests in 2011 was litigated in 2008, litigated for what it was, a request for § 251(c)(2): “interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service.” It was a claim that could have been made and was made in 2008, a claim that cannot be relitigated in 2011 under *res judicata*.

Midcontinent’s habits of litigation in interconnection cases routinely confuse the issues by arguing about competition. See, e.g. Midcontinent’s August 1, 2008 post hearing brief in Case No. PU-08-61 that routinely refers to “facilities based competition” in its effort to obtain facilities based interconnection. A rehash might occur in this case.

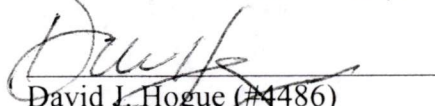
Midcontinent’s description of its 2011 request for interconnection as made under § 251(a) and (b) is futile, because § 251(a) does not include a duty of direct interconnection for the exchange of telecommunications traffic. AT&T v Atlas. There is no statutory procedure other than § 251(f)(1)(B) for a CLEC to obtain CLEC/ILEC interconnection with an exempt rural ILEC. “The language in this Section 251(f)(1)(B) concerning implementation must have some purpose. ... If Congress wanted to require the parties to go through the entire Section 252 process ..., Congress would have said so.” Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation,. Case No. PU-05-451 Order, June 7, 2006, ¶ 17. Midcontinent’s 2011 Petition for arbitration of its request for a “direct interconnection ... for the purpose of exchanging local telecommunications traffic” mistakenly relies on a 2011 Ruling issued by the FCC. The FCC Ruling clarified that arbitration under § 252(b) is an

authorized procedure for a CLEC to obtain § 251(a) interconnection with an exempt rural ILEC. The FCC Ruling “allows the rural incumbent LEC to retain its exemption from more rigorous section 251(c)(2) interconnection.”

For all these reasons, Midcontinent’s 2011 Petition should be dismissed.

Dated this 21st day of November, 2011.

PRINGLE & HERIGSTAD, P.C.



David J. Hogue (#4486)
Attorneys for Respondent
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
701-852-0381



3901 North Louise Avenue
Sioux Falls, South Dakota 57107

June 14, 2011

Mr. Mike Kilgore, General Manager
Missouri Valley Communications, Inc.
PO Box 600
61 Hwy 13 S
Scobey, MT 59263-0600

Dear Mr. Kilgore:

I am writing on behalf of Midcontinent Communications ("Midcontinent"), and in accordance with Sections 251(a), 251(b) and 252 of the federal Communications Act of 1934, as amended, 47 U.S.C. § § 251(a) (b), 252, to request interconnection between Missouri Valley Communications (doing business as Nemont) and Midcontinent in Williston, ND.

Section 251(a) requires all telecommunications carriers to provide direct or indirect interconnection to all other telecommunications carriers, and Section 251(b) imposes other obligations related to reciprocal compensation, number portability and other interconnection-related issues. These obligations apply regardless of whether a carrier is subject to the Section 251(f)(1) rural exemption.

Midcontinent makes this request, in part, because we have determined that we are unable to provide our customers the level of service they expect under the current resale arrangements, both as a matter of the quality of service received and our ability to respond to customer inquiries and complaints. For instance, while Midcontinent's goal is to respond to all customer requests for service within one business day, in recent months it has been our experience that it can take three business days or more for Missouri Valley to respond to a service request from Midcontinent.

Midcontinent proposes that the parties interconnect at Williston using two-way direct interconnection between Missouri Valley's Williston End Office Switch (WLSTNDBCDSO) and the Midcontinent head end, with a point of interconnection at a mutually-agreed meet point between the two locations. Midcontinent is willing to interconnect using either electrical facilities (at a DS1 or DS3 level) or via optical facilities. Midcontinent also is willing to interconnect at any other location in the Williston exchange where Missouri Valley interconnects with other carriers, if such a location would be more convenient for Missouri Valley.

Over Fifty Years of Service

Mr. Mike Kilgore
June 14, 2011
Page 2

The interconnection will be for the purpose of exchanging local telecommunications traffic. The local traffic would be exchanged under the terms of Section 251(b)(5), which governs reciprocal compensation for local traffic. Midcontinent proposes that the parties exchange local traffic using bill and keep, which we understand is the same compensation methodology used by Missouri Valley when it exchanges traffic with wireless providers. Midcontinent proposes that the parties continue to exchange intrastate toll traffic under the same arrangements they use today.


In connection with the exchange of traffic and interconnection, Midcontinent also will require number portability. It is our understanding that Missouri Valley already has implemented number portability, so please provide us with information on your procedures for port requests. Midcontinent anticipates that the parties would follow the procedures and practices set forth in their resale agreement for transfer of customers, directory listings and other related matters.

In accordance with the Federal Communications Commission's May 25, 2011 *Declaratory Ruling* concerning Section 251(a) and (b) interconnection, this letter constitutes a formal request for interconnection under Sections 251(a), 251(b) and 252 of the Communications Act, and begins the period for negotiation and arbitration under Section 252.¹ If Midcontinent and Missouri Valley are unable to reach an agreement prior to the close of the period to initiate arbitration under Section 252, Midcontinent intends to seek arbitration for a final agreement on these matters.

Please inform me by June 30, 2011 if Missouri Valley will agree to interconnect at the location described above or if it prefers an alternative location. A response by this date will assist Midcontinent in planning our deployment of fiber facilities to serve the Williston area. Also please inform me if Missouri Valley accepts the financial terms described above or has an alternative proposal. If you have any questions about Midcontinent's technical proposal, please contact me at (605) 357-5485 or email nancy_vogel@mimi.net.

Thank you for your attention to this matter.

Sincerely,


Nancy Vogel
Director of Revenue Assurance

Cc: Patrick Durick – Pearce & Durick

¹ See Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, *Declaratory Ruling*, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92 (rel. May 25, 2011), ¶¶ 18-24.

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

Case No. PU-08-61

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

Case No. PU-08-176

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

October 8, 2008

Appearances

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

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

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

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

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

Preliminary Statement

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

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

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Order

Public Service Commission

43 **PU-08-61** Filed: 10/22/2008 Pages: 11
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Order

Public Service Commission

under the provisions of 47 USC § 251(f)(1)(A) for the purpose of determining whether to terminate Missouri Valley's exemption from providing its services as requested by Midcontinent.

On April 9, 2008, Missouri Valley filed an Application for Suspension under 47 USC § 251(f)(2), Case No. PU-08-176. Missouri Valley requests that the Commission grant to Missouri Valley a suspension of the requirements of subsections (b) and (c) of section 251 for Missouri Valley's telephone exchange service facilities in the Williston exchange area for such duration as the Commission determines.

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

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

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

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

Findings of Fact

The Commission finds:

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

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

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

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

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

Bona Fide Request

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

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

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

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

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

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

Rural Exemption

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

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

Undue Economic Burden

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Technical Feasibility

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

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

Consistent with Section 254

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

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

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

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

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

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

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

Implementation Schedule

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

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

Suspension of Interconnection Requirements

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

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

Conclusions of Law

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

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

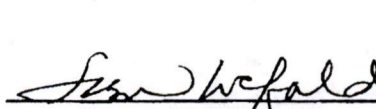
Order

The Commission Orders:

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

PUBLIC SERVICE COMMISSION


Tony Clark
Commissioner


Susan E. Wefald
President


Kevin Cramer
Commissioner

DISSENT
Commissioner Susan Wefald

October 8, 2008

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

Case No. PU-08-61

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

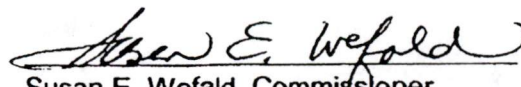
Case No. PU-08-176

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

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

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

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


Susan E. Wefald, Commissioner



3901 North Louise Avenue
Sioux Falls, South Dakota 57107

July 12, 2011

Mike Kilgore
General Manager
Missouri Valley Communications, Inc.
Highway 13 South
P.O. Box 600
Scobey, Montana 59623-0600

Dear Mr. Kilgore:

I am writing on behalf of Midcontinent Communications ("Midcontinent"), and in response to your July 6 letter (received yesterday) concerning Midcontinent's request for interconnection with Missouri Valley in accordance with Sections 251(a), 251(b) and 252 of the federal Communications Act of 1934, as amended, 47 U.S.C. § § 251(a) (b), 252. It appears from your letter that Missouri Valley may have misunderstood Midcontinent's request.

First, my June 14 letter specified that Midcontinent's request was made under Sections 251(a) and Section 251(b) of the federal Communications Act of 1934, not under Section 251(c). As the FCC has held, Missouri Valley's rural exemption affects only requests made under Section 251(c), and has no effect on requests made under Sections 251(a) and 251(b). Consequently, the North Dakota Public Service Commission's earlier decision, which addressed only the rural exemption, is not relevant to this request.

Second, as a factual matter, Midcontinent is not seeking Section 251(c)(2) interconnection. In particular, Midcontinent is not demanding interconnection at any technically feasible point of Midcontinent's choosing within Missouri Valley's service area. As my June 14 letter explained, Midcontinent's suggestion of interconnection at a meet point was simply a proposal, and Midcontinent was and remains open to other interconnection arrangements. For instance, the June 14 letter stated that "Midcontinent also is willing to interconnect at any other location in the Williston exchange where Missouri Valley interconnects with other carriers, if such a location would be more convenient for Missouri Valley." The letter also specifically invited Missouri Valley to propose "an alternative location" and to make "an alternative proposal" if it did not wish to agree to any of Midcontinent's suggestions. That invitation remains open.

Midcontinent recognizes that Missouri Valley is not subject to the Section 251(c)(1) obligation to negotiate in good faith following a bona fide request for interconnection. However, even if Missouri Valley chooses not to negotiate,

Over Fifty Years of Service

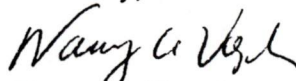
Mr. Mike Kilgore
July 12, 2011
Page 2

Midcontinent will retain its rights to obtain an interconnection agreement through arbitration, as outlined by the FCC in its May 25 *Declaratory Ruling* on Section 251(a) interconnection.¹ Midcontinent also intends to request mediation from the North Dakota Public Service Commission pursuant to Section 252(a)(2) if it does not appear that the parties can negotiate an agreement.² While we believe that a negotiated agreement is a better alternative for both parties, Midcontinent will exercise its mediation and arbitration rights if necessary.

So that we may make arrangements for negotiations or consider the appropriate next steps, Midcontinent requests that you provide a response to this letter no later than July 26, 2011.

Thank you for your attention to this matter.

Sincerely,



Nancy A. Vogel
Director of Revenue Assurance

cc: Patrick Fahn

¹ As described in my June 14 letter, the beginning of the period for negotiation and arbitration under Section 252 of the Communications Act was triggered by Midcontinent's initial request.

² I am providing a copy of this letter to Patrick Fahn of the North Dakota Public Service Commission staff to alert the Commission to the possibility that Midcontinent may request mediation.

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Case No. _____

Midcontinent Communications, a)
South Dakota Partnership,)
)
Complainant,)
)
vs.)
)
Missouri Valley Communications, Inc.,)
)
Respondent.)

**NOTICE OF BONA FIDE REQUEST FOR SERVICES AND
INTERCONNECTION AND PETITION TO FIND RURAL EXEMPTION WAIVED**

Pursuant to 47 U.S.C. §251(f)(1)(B) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), Midcontinent Communications ("Midcontinent") hereby provides notice that by letter dated November 14, 2007, a copy of which is marked as Exhibit "A" and attached hereto, it made a bona fide request to Missouri Valley Communications, Inc. d/b/a Nemont ("MVC") under the provisions of 47 U.S.C. §251(c) of the Act for a facilities based interconnection agreement with number portability for the Williston, North Dakota, exchange. By letter dated January 30, 2008, marked as Exhibit "B" and attached hereto, MVC by its attorney, David Houge, advised Midcontinent that it was relying on the rural exemption under 47 U.S.C. §251(f)(1)(A) of the Act, and denied Midcontinent's request.

Midcontinent respectfully avers 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. Midcontinent's request for a facilities based interconnection agreement hereunder is merely a request for an amendment to the existing interconnection agreement now in force between the parties.

WHEREFORE, Midcontinent respectfully requests:

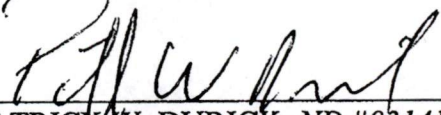
1. That the Commission find that by previously entering into an interconnection agreement with Midcontinent for the purpose of resale, MVC has waived its right to claim the rural exemption under the Act with respect to a request by Midcontinent for a facilities based interconnection agreement; or in the alternative,

2. That pursuant to the provisions of 47 U.S.C. §251(f)(1)(A) of the Act, the Public Service Commission conduct an inquiry for the purpose of determining whether Midcontinent's request for a facilities based interconnection agreement with number portability from MVC under 47 U.S.C. §251(c) of the Act is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of Title 47 U.S.C. (other than subsections (b)(7) and (c)(1)(D) of Section 254 of that Title), and

3. That the Commission establish an implementation schedule for compliance with Midcontinent's request for facilities based interconnection with number portability for the Williston exchange.

Dated this 8th day of February, 2008.

PEARCE & DURICK



PATRICK W. DURICK ND #03141
Individually and as a Member of the Firm
314 E. Thayer Avenue
P. O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Attorneys for Midcontinent Communications, Inc.



ATTORNEYS AT LAW

314 EAST THAYER AVENUE • P.O. BOX 400 • BISMARCK, ND 58502
TELEPHONE (701) 223-2890 • FAX (701) 223-7865 • www.pearce-durick.com

PATRICK W. DURICK
pwd@pearce-durick.com

November 14, 2007

VIA EXPRESS MAIL - RETURN RECEIPT REQUESTED

Mr. Ben Boreson, President
Missouri Valley Communications, Inc.
d/b/a Nemont
P.O. Box 600
61 HWY 13 S.
Scoby, MT 59263-0600

Re: Midcontinent Communications Request for Section 251(c)(2) Facilities
Based Interconnection Agreement

Dear Mr. Boreson:

I am writing on behalf of Midcontinent Communications (Midcontinent). The purpose of this letter is to request from Missouri Valley Communications, Inc. d/b/a Nemont ("MVC") a facilities based interconnection agreement, with LNP, for the Williston exchange.

This request is made under the provisions of Section 251(c)(2) of the Act, 47 U.S.C. § 251(c)(2), and is intended to trigger the time periods for negotiation and arbitration under Section 252 of the Act.

To facilitate discussions, I have enclosed a proposed agreement. We look forward to negotiating and reaching an acceptable agreement with MVC for the Williston exchange.

Sincerely,

PEARCE & DURICK


PATRICK W. DURICK

PWD/ak
Enclosure

cc: Nancy Vogel
Mary Lohnes
Matthew Knierim, Esq.

EXHIBIT A

DONALD A. NEGAARD
JAMES E. NOSTDAHL
CAROL K. LARSON
DAVID J. HOGUE
REED A. SODERSTROM
BRENT M. OLSON
DEBRA L. HOFFARTH
SCOTT M. KNUDSVIG
RYAN D. SANDBERG
MATTHEW H. OLSON
OF COUNSEL
HERBERT L. MESCHKE

PH
LAW OFFICES OF
PRINGLE & HERIGSTAD, P.C.

2525 ELK DRIVE
POST OFFICE BOX 1000
MINOT, NORTH DAKOTA 58702
(701) 852-0381
FAX (701) 857-1361
E-mail: pringle@srt.com

RETIRED
THOMAS A. WENTZ
MARK F. PURDY
JAN M. SEBBY

KENNETH G. PRINGLE
(1914-1983)
MITCHELL H. MAHONEY
(1929-1996)
ROGER O. HERIGSTAD
(1919-2003)

January 30, 2008

Patrick W. Durick
Pearce & Durick
314 East Thayer Avenue
P.O. Box 400
Bismarck, ND 58502-0400

RE: Midcontinent Communications request for Section 251(c)(2) Facilities-Based Interconnection Agreement

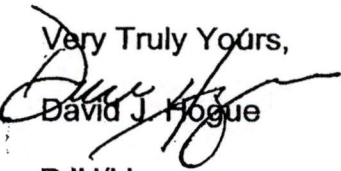
Dear Mr. Durick:

As attorney Matthew Knierim indicated by electronic mail, I am assisting Missouri Valley Communications, Inc. ("Missouri Valley") with Midcontinent Communications' ("Midcontinent") request for a facilities-based interconnection agreement based on 47 U.S.C. Section 251(c)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act").

Missouri Valley is a "rural telephone company" as that term is used in § 251(f) of the Act. See also 47 U.S.C. § 153(37). As provided in the Act, Missouri Valley is statutorily exempt from negotiating and executing a § 251(c) interconnection agreement as Midcontinent requests. Accordingly, Missouri Valley denies the request for interconnection as made by Midcontinent.

If you have any questions regarding this matter, please contact me.

Very Truly Yours,


David J. Hogue

DJH/klo

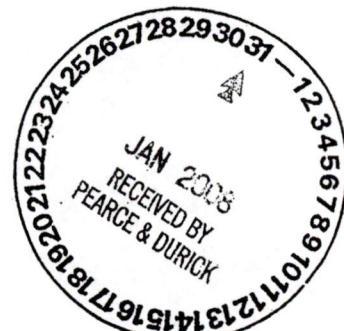


EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

Midcontinent Communications,)
a South Dakota Partnership,)
))
Plaintiff,)
))
vs.)
))
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.)

**ORDER DENYING PLAINTIFF'S
MOTIONS AND GRANTING
DEFENDANT MISSOURI
VALLEY COMMUNICATION'S
MOTION FOR SUMMARY
JUDGMENT**

Case No. 1:09-cv-017

Before the Court are the Plaintiff's motion for partial summary judgment and motion for permanent injunction filed on July 31, 2009, and Defendant Missouri Valley Communications, Inc.'s motion for summary judgment filed on August 31, 2009. See Docket Nos. 29, 33, and 36. Defendant North Dakota Public Service Commission filed a response to the Plaintiff's motion on August 31, 2009. See Docket No. 34. On October 5, 2009, the Plaintiff filed a consolidated reply brief and response to Defendant Missouri Valley Communications, Inc.'s motion. See Docket No. 48. On October 15, 2009, Defendant North Dakota Public Service Commission filed a consolidated "Reply to Missouri Valley's Motion for Summary Judgment and Response to Midcontinent's Opposition to Missouri Valley's Motion for Summary Judgment." See Docket No. 49. Defendant Missouri Valley Communications, Inc. filed a reply brief on October 16, 2009. See Docket No. 52. For the reasons set forth below, the Court denies the Plaintiff's motions for partial summary judgment and permanent injunction, and the Court grants Defendant Missouri Valley Communications, Inc.'s motion for summary judgment.

I. BACKGROUND

The plaintiff, Midcontinent Communications (Midcontinent), is a South Dakota partnership with its principal place of business in Sioux Falls, South Dakota. Defendant North Dakota Public Service Commission (PSC) is a governmental body organized under the laws of North Dakota. Defendants Kevin Cramer, Tony Clark, and Brian Kalk are the three present commissioners of the PSC and reside in North Dakota. Defendant Missouri Valley Communications, Inc. (Missouri Valley) is a North Dakota corporation with its principal place of business in Scobey, Montana.

Midcontinent and Missouri Valley are telecommunications companies. Midcontinent claims rights to an interconnection with Missouri Valley's facilities under the Telecommunications Act of 1996, 47 U.S.C. § 151, et seq. Missouri Valley claims it is exempt from interconnection obligations pursuant to the rural exemption under the Telecommunications Act.¹ On February 8, 2008, Midcontinent commenced a proceeding before the PSC seeking a determination that Missouri Valley had waived its rural exemption or, in the alternative, that Missouri Valley's rural exemption should be terminated. On April 9, 2008, Missouri Valley filed an application with the PSC that requested a suspension of the requirements under the Telecommunications Act.

An administrative hearing was held before the PSC on July 9-10, 2008. On October 8, 2008, the PSC issued an order denying Midcontinent's request for the termination of Missouri Valley's rural exemption and finding Missouri Valley's application moot. See Docket No. 34-4. In a 2-1 decision, the PSC concluded that Midcontinent had failed to prove the prerequisites for termination of Missouri Valley's rural exemption. See Docket No. 34-4.

¹A more in-depth background of the case and the Telecommunications Act of 1996 can be found in the "Report and Recommendation re Motions to Dismiss." See Docket No. 46; see also Midcontinent Commc'ns v. N.D. Pub. Serv. Comm'n, No. 1:09-cv-17, 2009 WL 3722898 (D.N.D. Nov. 3, 2009).

On December 3, 2008, the PSC denied Midcontinent's petition for rehearing. On April 8, 2009, Midcontinent brought this action in federal court claiming the Defendants violated 47 U.S.C. § 251 by not making interconnection available to Midcontinent. See Docket No. 1. Midcontinent requests that the Court enter a declaratory judgment finding that the PSC's Order is invalid and unenforceable as a matter of federal law, order the PSC and individual commissioners to suspend Missouri Valley's rural exemption as to Midcontinent immediately, issue a permanent injunction to prohibit the Defendants from taking any action to enforce the PSC's Order, order Missouri Valley to conclude an interconnection agreement with Midcontinent, and award Midcontinent damages, attorney's fees, and interest.

Missouri Valley and the PSC each filed a motion to dismiss claiming the federal court lacks subject matter jurisdiction and that Midcontinent failed to state a claim for which relief can be granted. On September 30, 2009, Magistrate Judge Charles S. Miller, Jr. issued a Report and Recommendation and recommended the motions be denied. See Docket No. 46. Judge Miller found that Midcontinent carried its burden of proving there is federal question jurisdiction over the claims for declaratory and injunctive relief to the extent they allege the PSC misapplied the Telecommunications Act and regulations promulgated pursuant thereto. Judge Miller further found that Midcontinent's claims for injunctive and declaratory relief are not barred by administrative res judicata. On November 3, 2009, the Court adopted the Report and Recommendation in its entirety and denied the motions to dismiss. See Docket No. 53.

II. STANDARD OF REVIEW

When reviewing an agency's order, the district court applies the same standard of review as does the appellate court. Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd., 563 F.3d 743, 748 (8th Cir. 2009) (citing WWC License, L.L.C. v. Boyle, 459 F.3d 880, 889 (8th Cir. 2006)). The district court owes "no deference to the Commission's interpretations of federal law," and the review is *de novo*. WWC License, L.L.C., 459 F.3d at 889-90.

"Recognizing the state commission's 'superior technical expertise,' however, 'we review its factual determinations under the arbitrary and capricious standard.'" Qwest Corp. v. Boyle, 589 F.3d 985, 991 (8th Cir. 2009) (quoting Ace Tel. Ass'n v. Koppendraye, 432 F.3d 876, 878 (8th Cir. 2005)). Mixed questions of law and fact are determined under the arbitrary and capricious standard as well. WWC License, L.L.C., 459 F.3d at 889. "The scope of review under the arbitrary and capricious standard is 'narrow'; the standard does not permit 'a court . . . to substitute its judgment for that of the agency.'" Qwest Corp., 589 F.3d at 991 (quoting Connect Commc'ns Corp. v. Sw. Bell Tel., L.P., 467 F.3d 703, 711 (8th Cir. 2006)). This standard is the same as the substantial evidence standard. Ace Tel. Ass'n, 432 F.3d at 880. "As long as the [Commission's] factual findings are supported by substantial evidence in the record as a whole, [the Court] will uphold those findings and the reasonable inferences that the [Commission] drew from them." Id.

III. LEGAL DISCUSSION

Under the Telecommunications Act of 1996, telecommunications carriers must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). One additional duty imposed on a local exchange carrier is that it must offer its

services to competitors for resale and not impose unreasonable or discriminatory conditions or limitations. Id. § 251(b)(1). Under the Telecommunications Act, Missouri Valley is an incumbent local exchange carrier and Midcontinent is a competitive local exchange carrier. An incumbent local exchange carrier has several obligations in addition to the duties imposed on all local exchange carriers. These additional duties are as follows:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of

this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

47 U.S.C. § 251(c).

W. Thomas Simmons, Midcontinent's Senior Vice President of Public Policy, testified that Midcontinent's request to Missouri Valley included negotiation in good faith, interconnection at any technically feasible point, collocation, and notices of network changes. See Docket No. 43

(Testimony of W. Thomas Simmons on Behalf of Midcontinent Communications, July 2, 2008, p. 7). The request did not include access to unbundled network elements or wholesale resale. Simmons testified there is no need for access to unbundled network elements because Midcontinent intends to serve its customers using its own network facilities, and Midcontinent has obtained wholesale resale from Missouri Valley. See Docket No. 43 (Testimony of W. Thomas Simmons on Behalf of Midcontinent Communications, July 2, 2008, pp. 7-8).

In recognizing that some incumbent local exchange carriers serving rural areas face special economic and technical challenges due to the smaller and more dispersed populations they serve, Congress included a rural exemption under the Telecommunications Act. The exemption states, in part:

Subsection (c) of this section shall not apply to a rural telephone company until (I) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title

47 U.S.C. § 251(f)(1)(A). The Act also allows for suspension and modifications of duties for rural telephone companies:

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification --

(A) is necessary --

(I) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

....

47 U.S.C. § 251(f)(2).

It is undisputed that Missouri Valley is a rural telephone company as defined under the Telecommunications Act and applicable Federal Communications Commission (FCC) rules, and that Midcontinent made a bona fide request for interconnection. The PSC denied Midcontinent's petition to terminate Missouri Valley's rural exemption because it found the request for interconnection would unduly economically burden Missouri Valley and impair its universal service efforts. See Docket No. 34-4.

A. WAIVER OF RURAL EXEMPTION

Midcontinent contends the PSC violated federal law by not providing a reasoned explanation for rejecting Midcontinent's argument that Missouri Valley had waived its rural exemption under the Telecommunications Act. Missouri Valley argues that while the PSC's Order did not specifically discuss the waiver claim, the PSC did address and reject the position taken by Midcontinent and, more important, there is no evidence in the record to support Midcontinent's claim. The PSC argues that it considered the waiver of rural exemption theory before conducting its primary inquiry of determining whether to terminate Missouri Valley's rural exemption.

“If the agency itself has not provided a reasoned basis for its action, the court may not supply one.” Sw. Bell Tel. Co. v. FCC, 153 F.3d 523, 549 (8th Cir. 1998) (quoting Downer v.

United States, 97 F.3d 999, 1002 (8th Cir. 1996)). “The agency must ‘examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” Qwest Corp., 589 F.3d at 998 (quoting Connect Commc’ns Corp., 467 F.3d at 711). Courts cannot accept an agency’s “‘post hoc rationalizations for [its] action.’” However, there is no requirement that every detail of the agency’s decision be stated expressly in the [order].” In re Operation of Mo. River Sys. Litig., 421 F.3d 618, 634 (8th Cir. 2005) (quoting Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983)). All that is required is that the rationale be present in the administrative record. In re Operation of Mo. River Sys. Litig., 421 F.3d at 634; see South Dakota v. U.S. Dep’t of the Interior, 423 F.3d 790, 801 (8th Cir. 2005) (precise explanations that respond to every contention are not required).

The Court finds that the PSC did consider the waiver of rural exemption argument propounded by Midcontinent. The preliminary statement of the PSC’s Order acknowledged Midcontinent’s rural exemption argument. See Docket No. 34-4. The issue was briefed to the PSC in depth and addressed at the administrative hearing. Following the hearing, the commissioners were provided a memorandum prepared by a PSC staff member that summarized each of the parties’ arguments concerning the waiver of the rural exemption. See Docket No. 34-3. The record reveals that the parties submitted extensive post-hearing briefs, and proposed findings of fact and conclusions of law, which specifically addressed the issue. See Docket No’s. 10-1, 10-2, 10-3, and 10-4. A careful review of the entire administrative record clearly reveals that the subject of whether Missouri Valley had waived its rural exemption was addressed at length at the PSC level. The Court finds that the PSC addressed the subject of whether Missouri Valley had waived its rural exemption, and the rationale for the decision of the PSC is present in the administrative record. Although the

PSC's Order is largely silent on the topic, it is obvious from a review of the entire record that the "waiver of rural exemption" theory or argument was considered and rejected by the PSC. There is no requirement that every detail of the agency's decision be expressly stated in the order. The PSC obviously rejected Midcontinent's theory that Missouri Valley had waived its rural exemption.

Having determined that the PSC considered the "waiver of rural exemption" argument, the Court must determine whether the PSC acted arbitrarily or capriciously in denying Midcontinent's request for a determination of waiver. See Renfro v. Swift Echrick, Inc., 53 F.3d 1460, 1464 (8th Cir. 1995) Midcontinent contends that Missouri Valley waived the right to rely on the rural exemption on two different occasions: (1) when Missouri Valley first acquired the Williston exchange in 2002-2003, and (2) in 2004 when Missouri Valley entered into a resale agreement with Midcontinent.

In March 1999, Midcontinent and US West executed an interconnection agreement which provided for facilities-based interconnection in the Williston exchange. See Docket No. 30-8. US West sold the Williston exchange to Citizens Communications and it agreed to assume obligations under the existing agreements. A letter from Citizens Communications, dated February 3, 2003, stated it was selling the Williston exchange to Missouri Valley. The letter went on to state, in part:

The Buyers(s) [including Missouri Valley] have been made aware of existing Interconnection Agreement(s) and have agreed to negotiate new agreements with carriers that have ongoing interconnection activities related to the exchanges they purchase. If the Buyer(s) have not completed negotiations or the North Dakota Public Service Commission has not approved the new negotiated agreement at the time of purchase, the Buyer(s) will offer to provide interconnection under the existing agreement until new agreements can be completed.

See Docket No. 30-8, p. 14.

In a letter from Missouri Valley to Midcontinent dated March 27, 2003, Missouri Valley writes that it “will honor the current Interconnection Agreement that is in place between Citizens and Midcontinent Communications until a new Agreement can be negotiated.” See Docket No. 30-8, p. 18. Missouri Valley’s counsel sent another letter to Midcontinent, dated November 4, 2003, that states, in part:

This letter constitutes formal notice of the exercise of [Missouri Valley] of Section 3.1 termination provisions of the interconnection agreement between Citizens and [Midcontinent]. Missouri Valley agreed to honor the terms of this agreement in correspondence to you dated March 27, 2003.

The terms of Section 3.1 provide that either Party to the agreement may provide written notice to the other Party at least 90 days in advance of the specified date of termination. Missouri Valley hereby specifies a date of termination of February 6, 2004.

...

Missouri Valley will be preparing a standard interconnection agreement as soon as practicable and will forward that agreement to Midcontinent to serve as a starting point for negotiations.

See Docket No. 30-8, pp. 20-21. Midcontinent argues that since the letter failed to indicate that Missouri Valley would not continue to make § 251(c) interconnection available to Midcontinent or that it objected to § 251(c) interconnection, Missouri Valley waived its rural exemption.

In November 2004, Midcontinent and Missouri Valley entered into a “Resale Agreement.” See Docket No. 30-9.² The agreement states, “This Agreement constitutes the entire agreement

² The document titled “Resale Agreement,” but referred to as “Interconnection Agreement” by Midcontinent, was filed as an attachment to Midcontinent’s memorandum in support of its motion for partial summary judgment. See Docket No. 30-9. Missouri Valley contends this was not part of the evidentiary record before the PSC. Midcontinent argues that while it was not part of the record, it is a matter of public record and both Midcontinent and Missouri Valley referred to the terms of the agreement in their briefs. The Eighth Circuit Court of Appeals has held that courts may rely on matters within the public record. See Elnashar v. U.S. Dep’t of Justice, 446 F.3d 792 (8th Cir. 2006) (holding that the district court may look to public records that are not contradictory to the complaint in deciding a motion for judgment on the pleadings).

between [Missouri Valley] and Midcontinent and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals and undertakings with respect to the subject matter hereof.” See Docket No. 30-9, p. 13. Simmons testified the resale agreement “was a replacement for the agreement that had been in place between Midcontinent and Citizens Telephone prior to the sale of the Williston exchange to Missouri Valley’s current parent, Nemont.” See Docket No. 43 (Testimony of W. Thomas Simmons on Behalf of Midcontinent Communications, July 2, 2008, p. 8).

Midcontinent argues that by entering into the resale agreement, Missouri Valley waived the rural exemption for all 47 U.S.C. § 251(c) obligations, including interconnection. Missouri Valley contends that Midcontinent’s waiver arguments are not recognized by the Telecommunications Act, federal case law, or PSC precedent construing the Act. The Court agrees.

The Telecommunications Act states that § 251(c) “shall not apply to a rural telephone company until (I) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title . . .” 47 U.S.C. § 251(f)(1)(A) (emphasis added). While the resale agreement subjects Missouri Valley to the duty of resale under § 251(c) of the Act, it does not mention interconnection. The Telecommunications Act does not state that once a rural company subjects itself to one of the obligations under § 251(c), it has waived the rural exemption for all § 251(c) obligations.

The Court finds the PSC’s rejection of Midcontinent’s waiver of rural exemption claim was neither arbitrary nor capricious. When Missouri Valley first acquired the Williston exchange, it assumed the interconnection agreement Midcontinent had in place with Citizens Communications

until a new agreement could be negotiated. See Docket No. 30-8, pp. 14, 18. A new agreement was negotiated in 2004, titled “Resale Agreement” which “supersede[d] all prior oral or written agreements.” See Docket No. 30-9, p. 13. The PSC was not arbitrary or capricious in its determination based on the evidence presented.

B. FACTORS FOR CONSIDERATION TO TERMINATE THE RURAL EXEMPTION

Midcontinent contends that even if Missouri Valley did not waive the rural exemption, the exemption as to Missouri Valley must be lifted/terminated under federal law. Under 47 U.S.C. § 251(f) of the Telecommunications Act, Missouri Valley is exempt from the requirement to provide services requested under § 251(c) until the PSC determines that Midcontinent’s bona fide request 1) is not unduly economically burdensome, 2) is technically feasible, and 3) is consistent with the provisions of § 254 regarding universal service. The parties agree that interconnection would be technically feasible. Midcontinent bears the burden of proving that interconnection would not be unduly economically burdensome or harmful to universal service in the market to justify the termination of the otherwise continuing rural exemption. Iowa Utils. Bd. v. FCC, 219 F.3d 744, 762 (8th Cir. 2000), *vacated in part on other grounds by Iowa Utils Bd. v. FCC*, 301 F.3d 957 (8th Cir. 2002).

In a 2-1 decision, the PSC concluded that Midcontinent had failed to sustain its burden to prove that its request for interconnection was not unduly economically burdensome and consistent with the provisions of § 254 regarding universal service. See Docket No. 34-4. The PSC ordered that the rural exemption for interconnection in Missouri Valley’s Williston exchange not be terminated. See Docket No. 34-4. In a dissent, Commissioner Susan E. Wefald said she disagreed

with a number of the factual findings regarding the economic impact that would be imposed upon Missouri Valley if the rural exemption was terminated. Commissioner Wefald's preference was to terminate the rural exemption and require a suspension until such time as Midcontinent met the requirements of a designated eligible communications carrier, which she said would then require Midcontinent to serve the entire service area and not just the city of Williston, just as Missouri Valley does now. See Docket No. 34-4, p. 11.

1) **UNDUE ECONOMIC BURDEN**

Midcontinent contends the PSC fundamentally erred in interpreting and applying the "unduly economically burdensome" standard. The PSC's Rural Exemption Order states, in part:

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.

...

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

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

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

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

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

See Docket No. 34-4.

Shawn Hanson, the general manager for Missouri Valley and its parent company, Nemont, testified that facilities-based interconnection between Midcontinent and Missouri Valley would be unduly economically burdensome. Missouri Valley contends that if Midcontinent's request for interconnection is granted, Missouri Valley's cumulative net revenue loss is estimated at \$3.58 million over the 2009-2012 time period. Hanson testified that part of the revenue loss would be from Midcontinent no longer buying lines from Missouri Valley for resale to Midcontinent's customers. See Docket No. 30-2, p. 15. Hanson determined that if interconnection is ordered, Missouri Valley's present and future revenues would be reduced without a material reduction in operating costs. See Docket No. 30-2, pp. 23, 26. Hanson said this would result in an increase of Missouri Valley's costs per customer. While the loss of revenue would not damage Missouri Valley's ability to continue to offer service in the near future, Missouri Valley's efficiency in offering those services would be damaged. Missouri Valley's ability to invest in new facilities would also be immediately curtailed and damaged. See Docket No. 30-2, p. 28.

In estimating the net revenue losses, Hanson testified that Missouri Valley used known historical facts to project the losses into the future. Hanson said this is the same basic approach Midcontinent used when it sought interconnection with the North Dakota Telephone Company a few years prior. See Docket No. 30-2, p. 25. Hanson said Missouri Valley's plans beyond 2009 "have

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basically been put on hold by the magnitude of the impact that this interconnection request would have on [Missouri Valley]. In that respect it is already beginning to have the detrimental impact of reliability, sufficiency, and adequacy of allowing us to plan for meeting our universal service compliance obligations.” See Docket No. 30-2, p. 29. Hanson said interconnection with Midcontinent would also cause loss of revenues to support facilities upgrades and replacements. See Docket No. 30-2, p. 30.

Scott C. Lundquist, a consultant and expert witness for Midcontinent, provided testimony which assessed and refuted the economic impact analysis supplied by Shawn Hanson. Lundquist made several adjustments to Hanson’s analysis in the areas of migration timing, annual line growth factors, special access revenues, and universal service fund revenues. See Docket No. 30-13, p. 5. Lundquist found Hanson’s analysis for migration timing was over-represented by \$154,300. Lundquist testified that Hanson’s analysis applies unreasonably high annual line growth factors for Midcontinent’s resold local exchange services, and that Hanson used over-simplified formulas instead of the standard formula appropriate for those determinations. See Docket No. 30-13, p. 14. Lundquist estimated the difference to be \$572,600 for annual line growth factors. See Docket No. 30-13, p. 18. Lundquist said special access revenues are completely irrelevant to whether or not Midcontinent obtains its requested § 251(c) interconnection with Missouri Valley because Midcontinent could choose to offer special access services now in competition with Missouri Valley, which is a difference of \$367,600. See Docket No. 30-13, p. 20.

The biggest estimated difference Lundquist found in his economic analysis as compared to Missouri Valley’s expert (Shawn Hanson) is that Lundquist believed Missouri Valley may be eligible for federal “safety valve” financing from the universal service fund while Hanson did not

hold that same opinion. “Safety valve” financing is the term used when a company will receive an increase in federal universal service fund subsidies if its per line cost increases. Lundquist had calculated this cost difference to be \$2.23 million. See Docket No. 30-13, p. 28. Lundquist projected the cumulative net revenue loss to Missouri Valley over the 2009-2012 time frame to be \$888,577 which is a reduction of 75% of Hanson’s estimated loss of \$3.58 million. See Docket No. 30-13, pp. 6, 31.

Midcontinent contends the PSC incorrectly determined that Missouri Valley would not be eligible for federal “safety valve” financing from the universal service fund. Lundquist testified that Missouri Valley could receive additional federal universal service fund revenues if it would experience revenue losses because of interconnection. On the other hand, general manager Shawn Hanson said Missouri Valley is not eligible for “safety valve” financing because of the “parent trap” rule, which limits a rural telephone company’s receipt of universal service fund revenues for an acquired exchange that was not historically qualified under the rules. See Docket No. 30-2, p. 5. Since Citizens Communications was not qualified for “safety valve” support in the Williston exchange, Missouri Valley is limited to receive it only for new investments made after Midcontinent would come into the area, not to replace lost revenues. Whether Missouri Valley would be entitled to “safety valve” subsidies is arguably a mixed question of fact and law which essentially becomes an issue of witness credibility. See Chen v. Mukasey, 510 F.3d 797, 801 (8th Cir. 2007) (“Credibility determinations are considered to be the special province of the finder of fact”).

Timothy J. Gates, senior vice president of a consulting firm and another expert witness retained by Midcontinent, testified that “unduly economically burdensome” refers to costs that would impose an excessively heavy burden on the incumbent local exchange carrier, compared to

the costs that it would experience if the request for interconnection were not granted. See Docket No. 30-5, p. 40. Gates testified that Midcontinent intends to pay for the services it obtains from Missouri Valley and will pay for and maintain the interconnection facilities on its side of the interconnection point. Gates testified that Lundquist's estimated cumulative net revenue loss of \$888,577 would not be unduly economically burdensome. Gates did not testify as to whether any larger amounts would be unduly economically burdensome.

Midcontinent argues that Shawn Hanson's economic analysis does not show an undue economic burden because it relied on the costs of competition Missouri Valley would be required to shoulder regardless of whether it provided interconnection with Midcontinent. However, the Eighth Circuit Court of Appeals has held that economic burdens ordinarily associated with competitive entry may be considered when determining whether the request was unduly economically burdensome:

If Congress had wanted the state commissions to consider only that economic burden which is in excess of the burden ordinarily imposed on a small or rural [incumbent local exchange carrier] by a competitor's requested efficient entry, it could easily have said so. Instead, its chosen language looks to the whole of the economic burden the request imposes, not just a discrete part.

Iowa Utils. Bd. v. FCC, 219 F.3d 744, 761 (8th Cir. 2000), *vacated in part on other grounds by Iowa Utils Bd. v. FCC*, 301 F.3d 957 (8th Cir. 2002); see Wireless World, L.L.C. v. Virgin Islands Pub. Servs. Comm'n, No. Civ.A.02-0061STT, 2008 WL 5635107, at *5 (D.V.I. Feb. 28, 2008) (unpublished) (finding that competition costs can be used in determining whether interconnection would be unduly economically burdensome).

Midcontinent also argues the PSC should have considered Missouri Valley's parent company, Nemont, in determining whether an undue economic burden exists. Expert Timothy Gates

for Midcontinent testified it is misleading to suggest that Missouri Valley is a stand-alone entity. See Docket No. 30-5, p. 34. Missouri Valley is a wholly-owned subsidiary of Nemont, and Shawn Hanson is the general manager for all of the Nemont companies. Nemont and Missouri Valley share many operating resources and employees and present a unified face to the public. All services through Missouri Valley are offered under the Nemont name and they share a website. Missouri Valley files consolidated income tax returns with Nemont, and Nemont holds all the outstanding common stock of Missouri Valley. See Docket No. 30-6, pp. 9, 13. Nemont provides management and employee services for Missouri Valley which Missouri Valley pays for on a monthly basis, and Missouri Valley does business with its Nemont affiliates. See Docket No. 30-6, p. 14.

Missouri Valley contends that Nemont should not be included in the economic analysis and the PSC agreed. Midcontinent's request for interconnection is addressed to Missouri Valley, not Nemont. Missouri Valley contends that Nemont is its "affiliate," and argues the Telecommunications Act does not direct the PSC to consider whether the proposed interconnection would be unduly economically burdensome on the rural telephone company and its affiliate.

The Court notes that nothing in the Telecommunications Act of 1996, or the applicable FCC regulations, requires the PSC to include a rural telephone company's parent or affiliate in determining whether the request for interconnection is unduly economically burdensome. The PSC found that Midcontinent had not met its burden of proof concerning its proposed adjustments to the economic impact on Missouri Valley. A review of the entire record reveals the PSC provided a reasoned basis for determining that interconnection would cause Missouri Valley to suffer an undue economic burden. This Court may not substitute its judgment for that of the agency, and it must give substantial deference to the agency's technical expertise and factual determinations. See Downer,

97 F.3d at 1002 (citing Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43). The Court finds, as a matter of law, that the PSC's finding that interconnection would cause Missouri Valley to suffer an undue economic burden is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. That finding is supported by substantial evidence in the record as a whole. Midcontinent bears the burden of proving that interconnection would not be unduly economically burdensome. There is substantial evidence in the record to support the PSC's decision that Midcontinent had failed to sustain the burden of proof on this issue.

2) UNIVERSAL SERVICE

In order to terminate Missouri Valley's rural exemption, Midcontinent is required to show that its requested interconnection is consistent with 47 U.S.C. § 254. Section 254 lists seven "universal service principles" to serve as guideposts for regulatory efforts under the Telecommunications Act:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

47 U.S.C. § 254(b). The PSC found that Midcontinent had not sustained its burden of proof that its requested interconnection would be consistent with 47 U.S.C. § 254 regarding universal service.

See Docket No. 34-4.

General manager Shawn Hanson testified that Missouri Valley's revenues would be decreased with interconnection which would impair Missouri Valley's ability to perform its universal service obligations. See Docket No. 30-2, p. 33. Hanson believes that universal service obligations are going to expand to include broadband speed access to the internet which would require Missouri Valley to invest additional funds and make it more difficult for Missouri Valley if interconnection is allowed. See Docket No. 30-2, p. 37.

Missouri Valley currently receives support from revenues received from the federal Lifeline and Link-up programs. See Docket No. 30-2, p. 34. Lifeline and Link-up are programs that subsidize low income telephone consumers so that consumers pay reduced charges for basic telephone service, and the federal universal service program reimburses Missouri Valley for the Lifeline discounts. Hanson testified that interconnection would negatively impact Missouri Valley's ability to continue to offer the \$3.50 monthly discount it currently offers to Lifeline consumers. See Docket No. 30-2, p. 36. The federal program would then not pay the matching \$1.75 amount, which could result in low income consumers' monthly bills increasing by \$5.25. According to Hanson, Midcontinent does not yet qualify to participate in the Lifeline program. However, in its answers to interrogatories dated May 8, 2008, Midcontinent stated that it serves twenty-one low income, Lifeline, and Link-Up customers in Williston. See Docket No. 43. Hanson also testified that Midcontinent's facilities and its target market area are in Williston only, while Missouri Valley has the responsibility to provide service to all consumers in the Williston exchange area. See Docket No. 30-2, pp. 38-39.

Timothy Gates testified that Midcontinent's facilities-based entry into the Williston area will not harm the availability or quality of services, including access to advanced telecommunications services. Instead, Midcontinent's entry will likely result in healthy competition which should ultimately reduce rates and increase quality and diversity of service for consumers in Williston. See Docket No. 30-5, pp. 25-26. Gates also testified that Missouri Valley can consider and perhaps deploy new offerings, improve quality of service, engage in cost-reduction activities, and plan for long-run network improvement in the time it will take for negotiations with Midcontinent and

Midcontinent to begin moving customers from resale to its own facilities. See Docket No. 30-5, p. 27.

Midcontinent contends the PSC misapplied the standard for determining whether a requested interconnection agreement would impair universal service. Midcontinent partially bases its argument regarding universal service on the same arguments it made regarding the unduly economically burdensome standard – that Missouri Valley would be eligible for “safety valve” financing and the PSC should have considered Nemont’s financial status in its decision. Those arguments fail for the same reasons stated above.

Midcontinent contends that even if interconnection would be unduly economically burdensome, that is insufficient to find that Missouri Valley’s ability to provide Lifeline service to remote rural areas around Williston would be threatened as a result of interconnection. Midcontinent argues the PSC erred by accepting Hanson’s speculation that regulatory changes to the universal service fund rules may require Missouri Valley to invest additional funds to satisfy new broadband requirements. Midcontinent argues the most current FCC proposal for broadband services merely creates funding to support broadband and does not include mandatory deployment. Midcontinent asserts the PSC has the authority to require Midcontinent to become an eligible telecommunications carrier, with the specific obligation to provide Lifeline services, prior to authorizing interconnection. See 47 U.S.C. § 253(f).

The Court finds, as a matter of law, that the PSC’s determination that interconnection would adversely affect Missouri Valley’s ability to provide universal service is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The Court finds the PSC’s factual findings are supported by substantial evidence in the record as a whole. Midcontinent bears the burden of proof

and there is substantial evidence in the record to support the PSC's decision that Midcontinent failed to sustain that burden on the issue of whether interconnection would be harmful to universal service in the market. The Court upholds the PSC's denial of Midcontinent's request to terminate Missouri Valley's rural exemption.

Midcontinent's complaint also seeks damages and attorney's fees from Missouri Valley caused by Missouri Valley's denial of Midcontinent's request for interconnection. Missouri Valley seeks a dismissal of Midcontinent's claim for damages as a matter of law. The Telecommunications Act authorizes an action for damages and attorney's fees:

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequences of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee

47 U.S.C. § 206. A rural telephone company is exempt from § 251(c) obligations "until" the PSC orders the rural exemption be terminated. The PSC ordered that the exemption not be terminated, so Missouri Valley was exempt from § 251(c) obligations. Since the Court has upheld the PSC's decision not to terminate the rural exemption, the Court finds as a matter of law that Midcontinent's claim for damages and attorney's fees pursuant to 47 U.S.C. § 206 is moot.

IV. CONCLUSION

The Court finds that the PSC's Order of October 8, 2008, is neither arbitrary, capricious, an abuse of discretion, nor otherwise contrary to law. The scope of review in this proceeding is narrow and deference is to be given to the agency's technical expertise. The PSC's factual findings, and the reasonable inferences to be drawn from such findings, are supported by substantial evidence in

the entire record. Accordingly, the Court **DENIES** Midcontinent's motions for partial summary judgment (Docket No. 29) and permanent injunction (Docket No. 33), and **GRANTS** Missouri Valley's motion for summary judgment (Docket No. 36).

IT IS SO ORDERED.

Dated this 15th day of April, 2010.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge
United States District Court